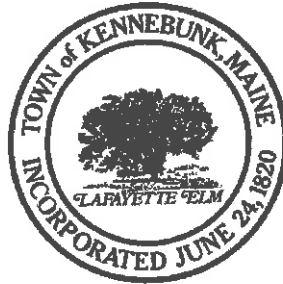


# Town of Kennebunk, Maine



## Zoning Board of Appeals

### HEARING MINUTES

April 18, 2023

In-Person Meeting, Town Hall, Kennebunk

This meeting was held in person at Town Hall, Room 301, 3<sup>rd</sup> Floor, 1 Summer St., Kennebunk. It was televised live on Cable TV Channel 5 and streamed on *TownHallStreams.com*, where it is available for viewing at any time.

- 1. Call to Order:** Chair and presiding officer Leah Rachin called the meeting to order at 6:31pm. The session took place in person at Town Hall. There were five Board members in attendance:

**Present:** Leah Rachin [Chair], Stephen Sayers [Vice Chair], Wayne Berry [Member], Jon Sevigny [Member], and James Atwood [Member];

**Absent:** None;

**Also Present:** Christopher Osterrieder [Director, Community Development], Karen Winton [Deputy Director, Community Development], Frank Kunkel [Code Enforcement Officer], Benjamin T. McCall [Jensen Baird], James Katsiaficas [Perkins Thomson], Scott Minor [Kennebunk, Kennebunkport & Wells Water District], Justin Richardson [Kennebunk, Kennebunkport & Wells Water District], and Wayne Brockway [Kennebunk, Kennebunkport & Wells Water District].

The meeting was televised live on Cable TV Channel 5 and is available for public viewing at any time at [www.TownHallStreams.com](http://www.TownHallStreams.com).

- 2. Continued Applications**

There were none.

- 3. New Applications**

**Type of Appeal:** Administrative Appeal – Article 6 Section 2.A.

**Applicant:** Kennebunk, Kennebunkport, and Wells Water District  
**Address:** 135 York Street  
**Nature of Appeal:** Administrative appeal of the Code Enforcement Officer's ruling that the KKW District's proposed project at 135 York Street, Map 061 Lot 001, does not fall within the definition of "public utility"

L. Rachin formally opened a Public Hearing and introduced the administrative appeal of the Kennebunk, Kennebunkport & Wells Water District [the "District" or "Water District"] concerning the determination of a Code Enforcement Officer that a structure which the District proposed to build at 135 York Street did not meet the use criteria as a "public utility."

W. Berry recused himself from the hearing as he had a family member working for the District.

**Motion:** Move to accept the recusal of Mr. Wayne Berry.  
**Moved:** S. Sayers  
**Second:** J. Sevigny  
**Vote:** Show-of-hands vote. 4 votes in favor, none opposed, 1 abstention [W. Berry]; the motion carried.

Rachin then explained the procedural sequence of the hearing and stated that all threshold requirements had been met – i.e. (1) notices had been posted, (2) the Water District had standing, and (3) the District had submitted its appeal within the stipulated time period following the Code Officer's ruling.

Scott Minor, Superintendent for the Water District, then addressed the Board, disputing the Code Officer's ruling. He acknowledged that the property on which the new facility was to be built was located in the Branch Brook Aquifer Protection "A" District ["BBA"], which was Kennebunk's primary source of public drinking water. Because of the Code Enforcement Officer's use determination, Minor said, the District was prevented from moving forward with the plans to permit and construct a building on its land though the District had already incurred planning expenses of more than \$200,000 for architectural and engineering plans.

S. Minor responded verbally and in writing to a letter dated April 6, 2023, from attorney B. McCall, who represented the Code Enforcement Officer. Minor handed out written comments citing McCall's specific remarks and setting forth the District's rebuttal. The written commentary and S. Minor, himself, spoke to four points:

1. **The Facts:** Many of the so-called "facts" cited by Mr. McCall, the District alleged, were inaccurate, incomplete, or in dispute.
2. **Primary Objective:** All parties and the Water District in particular, Minor said, recognize that "protecting Branch Brook's water quality is paramount." The Branch Brook aquifer, Minor said, accounted for 60% of the area's total water

supply. The proposed new building “would have no detrimental impact” on water quality, but would, Minor professed, actually improve water quality because, in order to construct the proposed “Administration and Operations Facility”, the District would remove an existing leach field located in the BBA and move effluent to the public sewer system instead. It would mean less risk to the BBA water supply.

3. **“Public Utility”:** The fundamental dispute, Minor ventured, is whether the new facility meets the definition of “public utility”. A “public utility” providing essential services is permitted to operate in the BBA zone. Attorney McCall and the Code Enforcement Officer argued that an administrative building does not have to be adjacent to the District’s main plant. S. Minor disputed that assertion. The proposed new building, Minor said, is “not just an ‘office building’” as the Code Officer had determined.” The District’s Facilities Department would be housed in the new building, and it oversees 4 groundwater well sites, 8 water storage tanks, and 11 booster pump stations. The District’s Distribution Department, also to be housed in the new building, maintains the District’s distribution and transmission piping network as well as customer service connections. These were “essential functions”, Minor said. Proximity to the main plant, Minor added, was important in order to deal with emergencies.
4. **Past History:** S. Minor then remarked that the Town had issued a previous building permit on December 18, 2018 for the Water District’s “Vehicle and Equipment Storage Facility”. Code Enforcement, Minor said, was of the view that the 2018 permit had been granted because the 2018 building’s use “comported with the definition of ‘public utility’,” while the building now proposed does not. The Water District, Minor countered, believes this past precedent, in itself, was an important consideration.

S. Minor concluded that, in the District’s view, Code Enforcement Officer F. Kunkel had made an improper judgement. Minor then rested his case.

J. Sevigny asked whether the Water District had looked at building sites outside of the BBA zone. S. Minor responded in the negative, stating that (1) there were long-standing District buildings already located in the BBA; (2) there was a significant financial consideration as the District already owned the land on which it proposed to build; and (3) proximity to the District’s existing buildings was important.

L. Rachin asked whether if prior building authorizations had been granted to the District as “exceptions”, and S. Minor answered in the affirmative. L. Rachin also inquired whether the existing buildings were “accessory buildings” used for a public utility. S. Minor responded that some existing buildings had been approved as “public utilities” and others as “essential services.”

J. Sevigny again asked if the proposed building could be located elsewhere. S. Minor responded that other sites on the land owned by the District were still in the protected zone and were “substantially wetlands.”

S. Minor agreed that the fundamental issue was whether the Water District was a "public utility" or not. He argued that the Water District was most certainly a public utility.

S. Sayers cited an email from Justin Richardson, a Water District employee, who described the proposed new building as an "office building." Was that the case? S. Minor insisted the term was a misnomer. The proposed building would have operational as well as administrative functions, he said.

S. Sayers went on to note that the BBA zone constitutes only 1% of Kennebunk's land. He questioned the District's insistence on locating the new building on BBA property. "Couldn't you just as well locate the building just across the street on York Street which is a different, unprotected zone," Sayers asked. S. Minor responded in the negative, saying that would not be financially or logistically expedient.

S. Sayers came back to the same question. "You brought before us that it would be convenient for the building to be located there [in the BBA zone]," Sayers said to Minor, "but have not justified why it could not, in fact, be located elsewhere." S. Minor replied that if emergency repairs were required, a different location could be prejudicial.

L. Rachin agreed that the fundamental issue before the Board was whether the use of the proposed new building was part and parcel of a "public utility." J. Katsiaficas, an attorney assisting the Zoning Board of Appeals, cited different examples of "permitted uses." The attorney suggested that the Board consult the definition of "public utility" in the Town's Ordinance.

B. McCall, the attorney representing the Code Enforcement Officer, interjected that staff from the Town's Community Development Office had met with District personnel to discuss the new building and had advised the District that the proposed building site was problematic. According to McCall as well: "The question to decide is simple: Does the proposed building qualify as a 'public utility'?"

B. McCall argued that Article 2 of the Town's Ordinance makes clear that a public utility must provide services that are "necessary" and "essential". L. Rachin proceeded to read excerpts (here and in a later part of the hearing) of the specific language set forth in the Town's Ordinance:

Article 8, Section 2, page 9 permits "essential services" and "utility uses" in both Branch Brook Protection District one A and Zone B. [Article 8 Section 2C.5-1]

Article 2, Section 2, page 7 defines "essential services" and specifies: "*Such systems may include poles, wires, mains, drains, pipes, conduits, cables, fire alarms and police call boxes, traffic signals, hydrants, pumping stations, and similar accessories, but shall not include telecommunications facilities or buildings which are necessary for the furnishing of such services.*"

Article 2, Section 2, page 15 specifically identifies public water service as a “public utility” and states:

*“This term [public utility] also includes buildings other than those housing pumping stations, which are necessary for the furnishing of essential services...whether local or greater in scope.”*

B. McCall opined that the *use* and *location* of the proposed new building were not “necessary”. The proposed building, he said could be built on any number of other sites. The departments to be housed in the new building, McCall said, “are, in fact, currently operating in other parts of the Town.” “That,” McCall ventured, “might not be efficient”, but there is nothing “necessary” about locating the proposed building in a protected zone or about the building’s use as defined by Town Ordinance.

S. Sayers countered that, if built in the BBA, the proposed building would necessitate the removal of the leach field and would likely improve, rather than endanger, the protected zone. Sayers opined that the intent of the Town’s Ordinance as regards the BBA zone was to protect water quality. B. McCall interpreted the intent somewhat differently. Kennebunk’s Ordinance, McCall countered, specifically endeavors to protect water quality by limiting the number of structures put on protected lands.

L. Rachin cited the definition of “accessory use” in Article 2. She noted that the District currently has some 35,000 sq. ft. of existing buildings and was now proposing a building only 12,000 sq. in size — hence, an “accessory” building rather than a principal one. B. McCall responded that he did not believe the proposed building was an “accessory” facility.

J. Sevigny asked B. McCall if the Code Enforcement Officer had reached out to the District to discuss the use and location of the building. B. McCall answered that the Community Development staff had met with the District and had discussed the problematic nature of the proposed location.

In response to questions from S. Sayers, B. McCall then said that the proposed building would not provide essential services such as pumping or water purification. Those functions, he stated, take place in other buildings.

Discussion ensued among Board members about the meaning of “essential services” and whether a broader definition was acceptable. B. McCall interjected that “essential services” in this case meant pumps, pipes, water filtration equipment, and so on.

S. Minor rebutted McCall’s remarks. In 2006, Minor said, the Town deemed the existing pumping treatment building to be a structure providing “essential services”, and the proposed new building was integral for providing essential services, as well.

Echoing S. Sayers, L. Rachin remarked that it was still not clear to her why the new building had to be located on District-owned BBA land. Why not elsewhere? “It’s really for emergency response,” S. Minor answered.

L. Rachin then invited public comments and questions. C. Osterrieder, the Director of Community Development, addressed the Board next. He offered a brief history of the District's interaction with the Town, and confirmed that the Town had found fault with the proposed location of this new building. Osterrieder explained that the Town's approval of a Water District building in 2018 — which the District cited as a precedent — was actually for a building that housed "necessary" equipment. "This [new building] is more of an office building," Osterrieder said. He opined that the use of the proposed building was not "essential."

There being no other public comment or question, L. Rachin called for a motion.

**Motion: Move to close the Public Hearing.**

**Moved: S. Sayers**

**Second: J. Sevigny**

**Vote: Show-of-hands vote. 4 votes in favor, none opposed, 1 abstention [W. Berry]; the motion carried.**

L. Rachin then re-read the Ordinance definition of "public utility" which included buildings providing essential services [see above]. J. Atwood opined that administration was a "necessary aspect" of the essential service of providing water. J. Sevigny concurred, stating that some of the individuals to be housed in the new building would fix pipes and make repairs. S. Sayers stated that he saw the proposed building as "a facility necessary for delivering water."

J. Atwood broached the question of location once again. Was it necessary to have this building located in the BBA zone? After a brief exchange with other Board members, Atwood expressed the view that the BBA location was, indeed, necessary.

After further discussion as well, J. Atwood, J. Sevigny, and S. Sayers expressed similar views: An administrative facility or an office, they concluded, could be essential for this public utility service.

L. Rachin called on Town attorney J. Katsiaficas to draft Findings of Facts which the Board could review, approve or amend at a future meeting. There was no motion or vote, but Board members and the applicant agreed to continue the meeting until Monday, May 1, 2023 at 6:30pm.

#### **4. Recess**

At 8:19pm, L. Rachin called for a brief recess. After a brief intermission, the meeting resumed at 8:29pm.

#### **5. Old Business**

**Request for Reconsideration: Administrative Appeal – Jon Sevigny – 17 & 21 Longwood Drive**

W. Berry rejoined the Board. Jon Sevigny recused himself for the purpose of this session and addressed the Board as appellant.

L. Rachin opened the public hearing and explained that people have the right to request a reconsideration of a ZBA decision within ten [10] days of it. Mr. Sevigny, she said, had submitted his request within the authorized time frame. However, Rachin cautioned that a “reconsideration appeal” was meant to consider new information, omissions, or errors — not reopen debate about information which the Board had already reviewed.

J. Sevigny addressed the Board next, asking it to reconsider its decision of March 30, 2023 to decline his petition to overturn or rescind the Certificates of Occupancy issued for 17 and 21 Longwood. He stated that the deadlines for appealing the underlying building permits had never been communicated to him and that he had likewise been given false information by the Town that it would enforce the drainage and grading requirements for the two lots.

The building permits issued for these dwellings, J. Sevigny said, had to respect the conditions of approval imposed by the Planning Board. One of those conditions was that grading and drainage plans for both houses had to be submitted. “But only one *driveway* grading plan for only one lot was ever submitted,” Mr. Sevigny said. The Findings of Fact are therefore incorrect. Moreover, the single driveway plan submitted was, according to Sevigny, deemed adequate by the Code Enforcement Officer for two lots.

J. Sevigny called on the Board to “correct the wrongs that have been done.” He specifically called on the Board to revoke the Certificates of Occupancy and require the developer to submit complete grading and drainage plans for both lots. Mr. Sevigny likewise called on the Board to “make the Findings of Fact truthful.”

L. Rachin responded that the Board could not give the appellant the remedy he sought [overturning the Certificates of Occupancy] as the appeal period for objecting to the building permits had lapsed. J. Katsiaficas affirmed that the ZBA did not have the authority to extend or ignore the appeal deadline.

J. Katsiaficas re-iterated that it had been the Planning Board which first stipulated the grading and drainage plan as a condition of approval. The building permits merely echoed that requirement.

J. Sevigny interjected that he had no issue with the Planning Board’s decision or terms. However, he did object to Certificates of Occupancy having been issued when the Planning Board’s conditions had not been met.

The Board then took up Mr. Sevigny’s allegation that the Findings of Fact were false as they state that a grading and drainage plan had been submitted when, in fact, a *driveway* grading and drainage plan had been submitted instead. Board members asked Sevigny if modifying the Findings of Fact to add the word “driveway” [to specifically state “driveway grading and drainage plan”] would be suitable, and J. Sevigny concurred. So did attorney B. McCall.

B. McCall then suggested that Findings of Fact #5 also be revised to state that the Town Engineer “reviewed” (rather than “approved”) the submitted plan. Board members concurred.

Later in the hearing, K. Winton suggested that the Findings of Facts be amended as well to show the correct Map and Lot numbers as “Map 39 Lots 62 and 63,” after having discovered a clerical error in the records between Assessing and Code Enforcement.

L. Rachin solicited public comments or questions, but there were none. The Board then moved to close the Public Hearing.

**Motion: Move that the Zoning Board of Appeals close the Public Hearing.**  
**Moved: S. Sayers**  
**Second: W. Berry**  
**Vote: Show-of-hands vote. 4 votes in favor, none opposed, 1 abstention [J. Sevigny]; the motion carried.**

J. Katsiaficas volunteered to redraft the Findings of Fact for the Board’s review at its May 1, 2023 meeting. Discussion ensued as to whether these modifications should be made as “corrections of clerical errors” or whether the Board should outright “reconsider” the Findings of Fact as well as its prior ruling. S. Sayers favored the “error-correction” route. J. Katsiaficas and W. Berry favored “reconsideration” with two caveats -- one, the limited intent of the reconsideration would be to modify Findings of Fact # 5 and the Map/Lot numbers [J. Katsiaficas]; and two, reconsideration would likewise require the re-notification of abutters [W. Berry].

B. McCall stated that the “reviewed” versus “approved” language change in the Findings of Fact might not have to take place as the correct language was already contained in the Board’s written decision.

J. Sevigny suggested a change of the “conclusion” language in the Findings of Fact. However, L. Rachin declined to amend the latter, stating that it was satisfactory “as is”.

Members reached informal consensus that they would reconsider the Findings of Fact and their ruling. J. Katsiaficas agreed to draft the revised Findings of Fact for reconsideration. K. Winton said she would ensure that abutters’ notices were re-sent.

**Motion: Move to continue this Public Hearing until May 1, 2023.**  
**Moved: L. Rachin**  
**Second: S. Sayers**  
**Vote: Show-of-hands vote. 4 votes in favor, none opposed, 1 abstention [J. Sevigny]; the motion carried.**



**6. Minutes of Prior Meetings**

After the above vote, J. Sevigny rejoined the Board. The number of voting members became five. L. Rachin then led members in a review of the minutes of the Board’s August 24, 2022 and March 30, 2023 meetings. Several errors were identified and corrected.

**Motion:** Move to approve the minutes of the Board’s meetings of August 24, 2022 and as amended.

**Moved:** L. Rachin

**Second:** S. Sayers

**Vote:** Show-of-hands vote. 4 votes in favor, none opposed, 1 abstention [J. Atwood had not attended the meeting]; the motion carried.

**Motion:** Move to approve the minutes of the Board’s meetings of March 30, 2023 as amended.

**Moved:** L. Rachin

**Second:** S. Sayers

**Vote:** Show-of-hands vote. 3 votes in favor [W. Berry, L. Rachin, S. Sayers], none opposed, 2 abstentions [J. Atwood had not attended the meeting; J. Sevigny had recused himself]; the motion carried.

**7. Adjournment**

There being no other business, L. Rachin adjourned the meeting at 9:27pm.

**Motion:** Move to adjourn the meeting.

**Moved:** S. Sayers


**Second:** L. Rachin

**Vote:** Show-of-hands vote. 5 votes in favor, none opposed; the motion carried.

Respectfully submitted by,  
J. Schlagheck

Adopted by the Board on \_\_\_\_\_  
DATE

Signed by:

  
\_\_\_\_\_  
ZONING BOARD OF APPEALS