

# THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



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**Case Name:** Ellen Campbell and Ronald Campbell v. Town of Pelham  
**Case Number:** ZBA-2022-30

## ORDER

This appeal follows a decision by the Town of Pelham (“Town”) Zoning Board of Adjustment (“ZBA”) denying an appeal filed by Ellen Campbell and Ronald Campbell (together, the “Applicant”) under RSA 674:41 to allow for the issuance of a building permit to construct a single-family dwelling on South Shore Drive.

### FACTS

This matter concerns certain property located in Pelham and situated at 80 South Shore Drive, which is also referred to on the Town’s assessing records as Map 31, Lot 11-269 (“Property”). The Property is located in the vicinity of Little Island Pond and is currently vacant. Certified Record (“CR”) at pp. 12-13, 32. It contains 6,680 square feet and 50 feet of frontage on South Shore Drive, near the northerly terminus of such way. CR 12. The lot comprising the Property was created as part of a 1925 subdivision. CR 13, 15. The Property is surrounded to the north, east, and south by a single lot (lot 11-270), the title being held by the Little Island Pond Realty Corporation, which is protected from development as it is open space common land with a charter to keep it in current use. CR 39.

South Shore Drive is a private road with numerous residential structures existing along such way. CR 32. A year-round shorefront property located at 81 South Shore Drive (lot 11-268) is situated immediately across South Shore Drive from the Property. CR 13, 78. Another year-round shorefront property located at 79 South Shore Drive (lot 11-267) is situated diagonally across South Shore Drive from the Property. CR 13. The premises on 79 South Shore Drive were fully reconstructed in 2002. CR 98.

On January 24, 2022, the Applicant filed a variance application with the ZBA containing three requests for relief from Article III, Section 307-12, Table 1 (dimensional provisions) of the

Town's Zoning Ordinance ("Ordinance"). Specifically, the Applicant sought dimensional variances to allow construction on a lot with:

1. A lot size of 6,680 square feet where 43,560 square feet is required.
2. Frontage of 50 feet where a minimum of 200 feet is required on a Class V road.
3. Side setbacks of 8 feet where 15 feet is required.

CR 1. In connection with the ZBA's hearing on the Applicant's variance requests, the Town's zoning administrator commented that the application would be subject to RSA 674:41. CR 15. The ZBA held public hearings on the variance requests on February 14 and March 14, 2022, and held a site walk on March 5, 2022. CR 17-18, 62-63, and 66-67. At the conclusion of the March 14, 2022 hearing, the ZBA voted to approve the variances by a 5-0 margin with certain conditions. CR 67, 71. The ZBA's notice of decision dated March 14, 2022 noted that: "[i]n accordance with RSA 674:41, [the Town's] Planning Board [(\"Planning Board\")] to review and provide comment to the [Town's] Board of Selectmen [(\"BOS\")] and applicant to seek [BOS] approval to allow a building permit on a Private Road." CR 71.<sup>1</sup> The approved variances were not appealed.<sup>2</sup>

On March 30, 2022, the Town's Highway Safety Committee met to review the Applicant's project in order to provide an opinion to the Planning Board. CR 75. Those present included the Town's police chief, fire chief, interim road agent, planning director, and planning assistant. CR 75. The fire chief stated that the Town's fire department "had no issues as long as the driveway is constructed as shown on the plan provided," and the police chief "also saw no issues." CR 75. The road agent "stated that he had no concerns as the driveway appears to be flat." CR 75. On April 4, 2022, the Planning Board met to review the Applicant's proposed project and to provide their comments in accordance with RSA 674:41, I(d)(1). At the conclusion of the public hearing, the Planning Board voted 7-0 to not recommend the issuance of a building permit. CR 81. The meeting minutes reflect that the Planning Board members and members of the public focused on concerns related to water drainage issues and wetland quality. See CR 76-81.

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<sup>1</sup> On April 6, 2022, the Applicant received a Shoreland Impact Permit, CR 83, and septic approval, CR 85, from the New Hampshire Department of Environmental Services concerning the Applicant's proposed development of the Property.

<sup>2</sup> That said, on April 13, 2022, the BOS submitted a request for a rehearing to the ZBA regarding their March 14, 2022, decision, stating in part that "[t]he BOS has concerns that the proposed construction at 80 South Shore Drive will present a public nuisance in that it may have significant negative environmental effects on the surrounding area and watershed." CR 88. On May 9, 2022, the ZBA denied the rehearing request, CR 95-96, but the BOS did not ultimately appeal the variances.

The Applicant subsequently applied for a building permit with the Town's planning department, CR 103-129, which was denied until such time as approval was obtained from the BOS to build on this portion of the private road. CR 130. On September 19, 2022, the BOS conducted a site walk on the Property, after which the BOS voted "[t]o not grant a building permit at the reviewed site based upon safety concerns and the recommendation of the Pelham Planning Board." CR 132.

On September 23, 2022, the Applicant appealed the BOS's denial to the ZBA under RSA 674:41, II. CR 134. The ZBA held a public hearing on such request at its meeting on October 17, 2022. CR 163. At such meeting, the Applicant began by addressing the substantive criteria found within RSA 674:41, II. CR 164. Public comments made at the October 17th meeting concerned: vernal pools, soil saturation and septic system loading, land conservation, wetlands, tree cutting, ecological functions of the vacant lot, health of the nearby lake, and the alleged lack of an easement for the Applicant to access their well. CR 165-66. With respect to ZBA discussion on the application, the following is a relevant excerpt from the October 17, 2022 minutes containing the ZBA member colloquy immediately preceding their vote.

Mr. Hennessey explained that the Board would be voting on whether they approve the decision of the Selectmen or not.

Mr. Hamilton stated that they need to close the door on nonconforming lots sooner or later, especially as they've shown evidence that it impacts the lake.

Mr. Westwood stated he is comfortable with their previous votes on this case. He stated that this vote was not common sense for him. He stated that he believed he would uphold the appeal to overturn the decision of the Selectmen.

Mr. Bergeron stated that he is leery of overturning the decision of the Selectmen, as they may have more information and a more overarching view of the situation compared to the Zoning Board. He agreed that he wished a representative from the Selectmen was in attendance.

Mr. Wing stated that there was compelling testimony for both sides of the argument. He stated that, in his opinion, the Planning Board and the Selectmen typically get a lot more information than the Zoning Board does; as more information is gathered, the further the process goes. He stated that he would vote not to overturn the Selectmen's decision.

Mr. Caira stated that he agreed with what other members had stated, especially since the Selectmen did not give much information to them regarding their decision. He stated he would also vote not to overturn the decision of the Selectmen.

Mr. Stanvick stated that while he could not vote on the case, he agreed that he would vote not to overturn the decision of the Selectmen.

Mr. Hennessey stated that he believed the Board was correct in granting the variance and turning down the appeals on the variance. He continued that he would defer to the Selectmen's decision, as they operate under a different set of criteria and rules than the Zoning Board.

CR 167. At the close of deliberations, the ZBA voted to deny the appeal with a 5-0 margin. CR 167. All but one of the ZBA member's voting slips are absent with respect to specific findings that explain their votes. CR 168-69. The one exception refers to "defer[ence] to selectmen based on testimony[.]" CR 168. The written notice of decision dated October 17, 2022 states that the appeal was denied because "[t]he Board felt that there may be additional facts about the case that they are not aware of therefore, did not support the appeal." CR 170. On October 28, 2022, the Applicant filed a motion for rehearing, claiming that the ZBA had erred by applying an incorrect standard of review, CR 171-78, which was denied by the ZBA at its meeting on November 14, 2022. CR 181-82.

On November 29, 2022, the Applicant filed this appeal with the Housing Appeals Board ("Board"). A prehearing was held on February 9, 2023, and a hearing on the merits was held on February 24, 2023. This decision follows.

### **LEGAL STANDARD OF REVIEW**

The Housing Appeals Board's review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. See RSA 679:9. See also, Lone Pine Hunters Club v. Town of Hollis, 149 N.H. 668 (2003) and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

## **DISCUSSION**

RSA 674:41, I imposes a state-level requirement for certain minimum road access that must be satisfied prior to a municipality's issuance of a building permit. The purpose behind this requirement relates to the adequacy or sufficiency of streets as they relate to the issuance of building permits. See Vachon v. New Durham Zoning Bd. of Adjustment, 131 N.H. 623, 629 (1989). RSA 674:41, II ("Section II") establishes a relief valve for lots that cannot comply with the frontage requirement imposed by RSA 674:41, I. A variance from local zoning is a separate and distinct form of relief compared to an exception from the state-imposed frontage requirement. See Merriam Farm, Inc v. Town of Surry, 168 N.H. 197, 201 (2015) (recognizing the statutory scheme's separation between exceptions to building permit requirements and variances). Section II allows the ZBA to grant a reasonable exception from the frontage requirement of RSA 674:41, I upon satisfaction of the following criteria:

- 1) The enforcement of RSA 674:41, I would entail practical difficulty or unnecessary hardship.
- 2) The circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets.
- 3) The issuance of the permit or erection of the building would not tend to distort the official map.
- 4) The issuance of the permit would not increase the difficulty of carrying out the master plan upon which it is based.
- 5) Erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.

Here, the record is clear that the Applicant sought relief from the ZBA under Section II, seeking a reasonable exception from the road frontage requirement imposed under RSA 674:41, I. This is evident in the Applicant's initial appeal application from the BOS to the ZBA, CR 136-38, and in the Applicant's discussion with the ZBA at the meeting on October 17, 2022. CR 164. What is also evident from the record is that, throughout the process, the ZBA framed the Applicant's request as a traditional administrative appeal, which would require the Applicant to show error by the BOS in order to prevail. See CR 137 (noting that the Town does not have a standard form for Section II appeals); CR 162 (referring to the standard of review as "the burden of the applicant to demonstrate to the satisfaction of the Board that the Board of Selectmen erred in their decision not to grant approval of a building permit on a private road."); CR 164 (ZBA chair explaining that this was an appeal from an administrative decision); CR 167

(prior to the vote, explaining that the ZBA would be voting on whether the ZBA approves the decision of the BOS or not); CR 168-69 (voting slips). A review of the minutes from the ZBA meeting on October 17, 2022, reinforces that the Applicant's request under Section II was not addressed by the ZBA. CR 166-67 (containing no discussion of Section II factors).<sup>3</sup> In light of the above, the Board concludes that the ZBA erred as a matter of law in failing to consider the merits of the Applicant's request for a frontage exception under Section II.

Having found that the ZBA misconstrued the Applicant's request in an unlawful manner, the Board must next determine whether it may address the substance of the Applicant's request under Section II or if remand to the ZBA is required. "Where the ZBA has not addressed a factual issue, the trial court ordinarily must remand the issue to the ZBA. However, remand is unnecessary when the record reveals that a reasonable fact finder necessarily would have reached a certain conclusion." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007) (citations omitted). Upon a finding that a zoning board applied the wrong legal standard, the trial court (or in this case, the Housing Appeals Board) is obligated to remand to the zoning board to reconsider the evidence against the correct legal standard. Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 583 (2005). The only exception to this remand requirement is if the Board determines, as a matter of law, that the correct legal standard was met. Id.

To this point, it is notable that during the merits hearing, both parties were in agreement that if the Board found adequate facts that support a particular position, there was no obligation to remand the matter to the ZBA. And, while not dispositive, it is worth noting that the Applicant has already appeared before the ZBA twice, the Planning Board, and the BOS with respect to their proposed development of the Property. Mindful of the above, and as explained below, the Board concludes that, based on the facts of this particular case as contained within the certified record, the Applicant has satisfied the legal standard articulated in RSA 674:41, II.

1. The enforcement of RSA 674:41, I would entail practical difficulty or unnecessary hardship.

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<sup>3</sup> To the extent that environmental concerns were raised at the October 17th meeting, such concerns fall outside of the criteria contained in Section II and do not relate to the adequacy of South Shore Drive for the purposes of issuing a building permit.

The ZBA already granted a variance from the Town's minimum frontage requirement for the Applicant's proposed use of the Property. CR 71. In doing so, the ZBA determined that strict application of the Ordinance's 200-foot minimum frontage requirement would result in unnecessary hardship.<sup>4</sup> Id.

2. The circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets.

With respect to existing streets, the only street in the vicinity of the Property is South Shore Drive, which the Property abuts. CR 32. The Property was created in connection with a 1925 subdivision plan. CR 13, 15. The proposed house on the Property respects front setbacks. CR 13. The proposed use of the Property is consistent with existing use of various other lots on South Shore Drive. CR 13 (site plan), 32 (tax map), 78 (meeting minutes describing the property across the street), CR 98 (portion of building permit application discussing history of permits issued to nearby properties). There is no evidence in the record indicating that South Shore Drive might be realigned in the future.

With respect to proposed streets, the Property is surrounded by a single lot (owned by the Little Island Pond Realty Corporation) that is protected from development as it is open space common land with a charter to keep it in current use. CR 39. There is nothing in the record to indicate that the proposed house on the Property would impact any proposed streets.

3. The issuance of the permit or erection of the building would not tend to distort the official map.

An "official map" refers to a specific statutorily-defined map that shows the location of streets (and, sometimes, parks). See 15 P. Loughlin, *New Hampshire Practice: Land Use Planning and Zoning*, § 31.03 at 562 (4th Ed.) (citing RSA 674:9-10). The Town does not have an official map, as such term is used here.

4. The issuance of the permit would not increase the difficulty of carrying out the master plan upon which it is based.

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<sup>4</sup> The Applicant also contends that the ZBA is bound to find practical difficulty or unnecessary hardship in this case under a theory of estoppel, based on the ZBA approval of the Applicant's variance request. Because the Board concludes that the record establishes that enforcement of RSA 674:41, I would entail practical difficulty or unnecessary hardship, the Board does not consider the Applicant's estoppel argument.

The ZBA previously granted a variance for the proposal which includes the finding that the frontage variance would not be contrary to the public interest and would observe the spirit of the ordinance. CR 71. See RSA 674:33, I(a)(2)(A)-(B). The Applicant testified that there are no specific provisions in the Town's Master Plan that address this situation. CR 138. This area is residential in nature and not suitable for rezoning. CR 138. Nothing in the record indicates otherwise. The lot located at 79 South Shore Drive (located diagonally across the street) was issued a building permit for a new residence in 2002. CR 98.

5. Erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.

The record indicates that South Shore Road provides adequate access to the Property, in the same way that it provides access to other nearby lots. The Town's fire chief, police chief, and road agent reviewed the proposal and did not raise any safety concerns that may cause hardship to future buyers of the Property or on the Town. CR 75. The owners of the Property will contribute to the neighborhood road association for road maintenance purposes, which will ensure that there is no undue financial impact on the Town. CR 138. See also RSA 231:81-a (regarding the repair of roads not maintained by a municipality). Finally, in granting prior variances, the ZBA has already found that the proposed frontage would result in substantial justice. CR 71. In doing so, the ZBA effectively employed a balancing test by which it weighed the loss to the individual against the gain to the general public and concluded in favor of allowing the frontage variance request. See Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007).

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**CONCLUSION**

Based on the foregoing, upon a balancing of the probabilities, the Housing Appeals Board ORDERS as follows:

1. The decision of the Town of Pelham Zoning Board of Adjustment denying the Applicant's appeal filed under RSA 674:41, II is REVERSED and such request is GRANTED, consistent with this Order.
2. The Town's requests for findings and rulings which are consistent with this Order are GRANTED; the balance are DENIED.

**HOUSING APPEALS BOARD  
ALL MEMBERS CONCURRED  
SO ORDERED:**

*Elizabeth Menard*

Elizabeth Menard, Clerk

Date: April 24, 2023