

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
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**CASE NAME: William Evans, Trustee v. Town of Pembroke
CASE No.: BSA-2021-02**

ORDER

The matter before the Housing Appeals Board is the Town of Pembroke (“Town”) Board of Selectmen’s 19 January 2021 denial of the Applicant’s (William Evans, Trustee of the William Evans Irrevocable Trust and the Mary Lou Evans Irrevocable Trust) request to reclassify or return a portion of Beacon Hill Road from Class VI status to its former Class V status to allow for the development of the Applicant’s abutting, 45-acre property.

FACTS:

On 26 March 2019, the Applicant, William Evans, Trustee, along with Steve Lewis had a conceptual review¹ with the Town of Pembroke Planning Board regarding a 96-unit, multi-family affordable housing proposal to be located on 45 acres of land in the Town’s Medium-Density Residential (R-1) zone² and the Wetland Protection District. (Certified Record (CR) at 3). Although the size and scope of the project was discussed, there was no specific discussion of the need to reclassify a portion of Beacon Hill Road from Class VI status to Class V status to meet the Town’s road-frontage requirements for development on the parcel.

Several months later on 02 October 2019, the Applicant met with the Town of Pembroke Technical Review Committee (“TRC”) to further discuss the multi-family affordable housing proposal to be located on Beacon Hill Road. (CR at 17). At the TRC meeting, the issue of improving 250 feet of Beacon Hill Road was briefly discussed. The Applicant indicated he would be meeting with the Selectmen regarding improvements to a portion of Beacon Hill

¹ Conceptual discussions are allowed under RSA 676:4, II (a).

² Multi-family dwellings are allowed in this zoning district.

Road using the 4th Range Road as the access point. Comments from the Pembroke Department of Public Works and Ambulance services proposed the opening of the “lower section” of Beacon Hill Road to connect with Pembroke Street since emergency response time would be reduced from that point rather than the 4th Range Road. All participants agreed that the road reclassification would need to “go before the Selectmen.” (CR at 19).³

Prior to filing a formal request with the Town of Pembroke Board of Selectmen to layout/reclassify a portion of Beacon Hill Road, on 21 October 2019 the Applicant met with the Town of Pembroke Board of Selectmen to discuss the possibility of reopening approximately 250 feet of Beacon Hill Class VI Road. (CR at 26). Although Beacon Hill Road was discussed, a significant part of the comments were directed to the proposed project. (CR at 26-27). However, there was brief discussion about the portion of Beacon Hill Road to reclassify, specifically Upper Beacon versus Lower Beacon; also discussed was the fact that government funding for the project might require opening the entire Class VI portion, about 1,100 feet as calculated from the later plans submitted to the Housing Appeals Board. Likely, because of Board of Selectmen comments made on 05 November 2019, the Town of Pembroke Roads Committee again reviewed the Beacon Hill Road layout/reclassification issue. At that meeting, the proposed project was discussed along with the prior TRC comments regarding the opening of Beacon Hill Road. (CR at 35).

On 07 November 2019, the Applicant submitted a formal request for the layout of a portion of Beacon Hill Road for project access. No specific length was specified, but the application directed the Selectmen’s attention to a conceptual plan indicating the proposed location for access to the site. (CR at 37). At the Board of Selectmen meeting on 18 November 2019, the petition to reopen was discussed under “New Business.” The Town of Pembroke Town Administrator, David Jodoin, echoed thoughts advanced by the Town of Pembroke TRC; “...they would like to see the entire [Class VI portion] of the road opened.” Mr. Jodoin then

³ The day before the TRC meeting, the Town of Pembroke Roads Committee met and recommended “...that traffic access should include Lower Beacon hill Road to Pembroke Street and necessary upgrades be made.” (CR at 23).

indicated the property was marked for the Selectmen to see if they visited the site. No further action was taken at that meeting by the Board of Selectmen. (CR at 46).

On 02 December 2019, the Board of Selectmen again discussed the Applicant's reopening request. At that meeting, the Applicant shared with the Board of Selectmen that when he purchased the parcel in 1985, Beacon Hill Road was a Class V town road and that a portion of the road, including his road frontage, was reclassified to Class VI in 1990. No one clearly recalled the rationale for this town action. The Selectmen also discussed entering the parcel from a different road, specifically the "3rd Range Road," but all agreed that a portion of Beacon Hill Road would still need to be opened, and the alternate access point could impact the proposed conservation area. In addition, there was discussion by Selectman Bean about creating a "double driveway" 140 feet from existing pavement in order to reduce the length of the reclassification request. The Applicant agreed to "look at that." No vote was taken. (CR at 52).

At the 16 December 2019 Board of Selectmen meeting, and after further discussion about the proposed length to be reclassified, a motion was made by Selectman Bean to deny the Applicant's petition. After the motion was seconded there was discussion about opening the "whole road." Selectman Bond questioned whether the Applicant would be willing to open the "whole road." Mr. Jodoin responded by saying he thought that was the case but was not certain. Interestingly, at that point, Selectman Bean withdrew his motion to deny the petition and the matter was tabled to get an answer to the question regarding the opening of the entire Class VI portion of Beacon Hill Road. (CR at 60).

At the 06 January 2020 Board of Selectmen meeting, Beacon Hill Road was again on the agenda. Further discussion ensued over the length of the proposed Beacon Hill Road reclassification. Although not categorically stated, the minutes reflect that the Applicant would dedicate any of his land needed for Beacon Hill Road reopening and would meet any federal or state requirements for the road. Although the submitted plans seem to indicate 1,100 feet of Beacon Hill Road would need to be reclassified to connect it to existing Class V roads, a length

of 600-700 feet was advanced at the meeting. The matter was again tabled without a vote. (CR at 67).

At the 23 January 2020 Board of Selectmen meeting, the Applicant stated his willingness to wait for a road-reclassification vote until after the upcoming Town elections. (CR at 7). Then, on 30 July 2020, an application for road layout/reclassification identical in substance⁴ to the prior 07 November 2019 application (CR at 37) was filed with the Town of Pembroke Board of Selectmen. (CR at 72).

Prior to the Board of Selectmen hearing on 16 November 2020, the Board of Selectmen noticed a scheduled site walk (Public Hearing) for 14 November 2020 at 10:00 AM. This notice in the Certified Record on page 73 is important because it focuses on the proposed “age restricted housing,” including the proposed development plan. The Board of Selectmen’s focus was to “...merely do a site walk and listen to the project.” Then, at the 14 November 2020 site walk, the minutes reflect the purpose “...is to hear a presentation from Mr. Evans on his proposed elderly housing project.” (CR at 74).

At the 16 November 2020 Board of Selectmen meeting, the proposal starts with a 300-foot reopening discussion. Interested citizens provided input, but most of the concerns were project related—not road related—to be heard in the future by the Town of Pembroke Planning Board. At that meeting, the Applicant’s representative again commented on road reopening length and appeared to concede that, if required, the entire Class VI portion would be upgraded by the Applicant. To wit: “The opening of the road all the way is not something Bill Evans is requesting but is something the Fire Department will likely require but that isn’t Bill Evans making the argument to open it.” No vote was taken. (CR at 79-80).

The Town of Pembroke Selectmen met on 04 January 2021. Again, the Public Hearing Notice not only included the Beacon Hill Road reclassification request but also the notice of the project, “...to construct approximately 101 units of phased age and income restricted housing on the property in conjunction with New Hampshire Housing Finance.” (CR at 108).

⁴ Only the word “recent” was omitted.

Interestingly, this notice includes 250 feet to be reclassified, not the 300 feet prior mentioned. After further citizen and Applicant discussion, the matter was again tabled with the Chair looking for a full board in attendance prior to voting.⁵ (CR at 113).

At the 19 January 2021 Board of Selectmen meeting, the Selectmen were provided a checklist for their use in determining if “occasion” existed to reopen/reclassify a portion of Beacon Hill Road. The Vice-Chair, Selectman Goulet, read a proposed statement to the other Selectmen highlighting the fact that many concerns are zoning and planning related, and should not be the focus of the Board of Selectmen. “In other words, our job is to be laser focused on only the question of whether to make this part of Beacon Hill Road Class V.”

Each of the four (4) members present at the meeting itemized the factors in an effort to support their respective positions. (CR at 117). After this review upon motion duly made and seconded to approve the Beacon Hill Road motion, the motion was denied on a 2-2 vote. (CR at 122). This appeal followed.

LEGAL STANDARDS:

As both parties are aware, the Housing Appeals Board does not sit as a substitute for the Board of Selectmen and ordinarily may not substitute its judgment in rendering a decision in the case. *Wolfeboro Neck Prop. Owners Ass’n v. Town of Wolfeboro*, 146 N.H. 449 (2001). The Board of Selectmen’s factual findings are to be treated as prima facie, lawful, and reasonable in reviewing any appeal, unless there are “...errors of law or if the [housing appeals] board is persuaded by a balance of the probabilities, on the evidence before it, that said decision is unreasonable.” RSA 679:9, II.

DISCUSSION:

In accordance with RSA 231:8: “[t]he Selectmen of a town, upon petition, may lay out any new...class V or VI highway or alter any such existing highway within their town for which there shall be occasion.” Unfortunately, “occasion” is not a defined statutory term but has been

⁵ A theme throughout the many Selectmen meetings was to wait in order to have a full board (five (5) members) for voting. That never occurred as the 19 January 2021 vote reflects.

judicially interpreted. The New Hampshire Supreme Court in *Green Crow Corp. v. New Ipswich*, 157 N.H. 344 (2008) provided standards in evaluating whether “occasion” exists in road layout requests. *Green Crow* provides guidance in evaluating “occasion,” especially since *Green Crow*’s genesis was an interlocutory appeal from the Superior Court requesting rulings on two questions:

“(1) Does RSA 231:28 require a petitioner requesting permission from the Selectmen to upgrade and reclassify an existing Class VI road to Class V standards to show occasion exists for the layout?”

The answer of the Supreme Court was “yes.”

“(2) If the Court finds that the occasion analysis applies to the upgrade and reclassification under RSA 231:28, may the Selectmen consider as part of the occasion analysis the anticipated impact associated with the development that may result from the upgrade of the Class VI road to Class V status?”

The answer of the Supreme Court was “no.”⁶

Therefore, in reviewing and considering the *Green Crow* factors itemized by the Supreme Court, the project itself is not a material criteria or condition and should play no role in evaluating “occasion.” However, the Certified Record is at odds with this directive. At every turn, starting with the Planning Board discussions in March of 2019 through the final vote on 19 January 2021, the project was front and center.

⁶ While *Green Crow*’s statutory premise was RSA 231:28, RSA 231:8 is the proper procedural statute in this case since all highway improvements were to be paid by the Applicant. Like RSA 231:8, RSA 231:28 allows the Town Selectmen to layout a Class V highway over a Class VI highway subject to betterment assessment. RSA 231:28 does not state whether “occasion” is required for a conditional highway layout. *Green Crow* applied the “occasion” requirement of RSA 231:8 to RSA 231:28 and created criteria to assist with the “occasion” analysis.

This likely is not an unusual occurrence since if one is appearing before any municipal board with a road reclassification request that board will likely ask the question: *for what purpose do you need a road layout?* It would be illogical to think the requesting party would say: *"I'm not going to tell you, since it isn't relevant, nor should it be considered when reviewing my request."* Obviously, there must be a middle ground, and that requires all Board members to focus on the facts—and the law—in making a decision. As most judges will point out: "this is not easy." Vice-Chair, Selectman Goulet, was on target when she opined: "In other words, our job is to be laser focused on only the question of whether to make this part of Beacon Hill Road Class V." (CR at 122).

Deliberations regarding the requested layout occurred at the 19 January 2021 Board of Selectmen meeting. (CR at 118-122). That meeting reveals thoughtful discussion by the four (4) Selectmen who participated in layout discussion. Each gave their opinions regarding the "occasion" criteria they had been provided.

While three (3) Selectmen generally adhered to the proper "occasion" standards, one did not. Selectmen Bean, in his review of the "public interest factors," specifically points 3, 4, and 8, clearly brought the proposed multi-family residential use into the mix. This is not consistent with *Green Crow*.⁷ While parenthetical, collateral reference to the project might not be considered fatal to Selectman Bean's analysis,⁸ there are three (3) distinct references to the proposed use which likely influenced his consideration and negative vote. In addition to the foregoing issue, the Selectmen's discussion and motion refers to opening "300 feet of Beacon Hill Road." (CR at 122). Prior to the 19 January 2021 vote, the Certified Record references in no particular order:

- 1) 140 feet; (CR at 52)
- 2) 200 feet; (CR at 46)
- 3) 250 feet; (CR at 18, 35)

⁷ Points 3, 4, and 8 were project-related: 3)...number of people who will be in the development; 4) no one in the complex will have a child; 8) up to two people in each apartment....(CR at 121).

⁸ See, *Oakley Merriam v. Town of Salem*, 112 N.H. 267 (1972). While a Zoning Board of Adjustment case, the Supreme Court felt that the subjective comments of one member is not relevant to the question of whether the Board's decision is one that could be reached by reasonable people given the evidence presented.

- 4) The entire Class VI portion of Beacon Hill Road that differed from the plan by an estimated 600-700 feet, which scaled it at 1,100 feet.⁹ (CR at 46, 67, 79, 87).

As an example, at the 16 December 2020 Board of Selectmen meeting, (CR at 60), the following exchange occurred:

“David stated that it is his understanding that if it was decided that the whole road needed to be opened, the petitioner would do that. Selectman Bond asked if he has said at any point that he would definitely be willing to open the whole road and assume all the costs associated if he was asked to. David said he it was his understanding that he would but he can’t say for certain.”

This caused Selectman Bean to withdraw his motion to deny the layout petition, which was then tabled until the next Board of Selectmen meeting.

Layout road-length likely was on the minds of some, if not all, the Selectmen.¹⁰ The final motion was to reclassify 300 feet of Beacon Hill Road, but there was apparently little additional discussion regarding layout road-length options. This is problematic since the Town of Pembroke Roads Committee recommended traffic access include Lower Beacon Hill Road to Pembroke Street. (CR at 23). Later, the Certified Record reflects that the Applicant would improve that portion of Beacon Hill Road as well. (CR at 79).

This raises the question of how much, if at all, the layout road-length and location impacted each Selectman’s layout “occasion” analysis. The Certified Record reveals the Selectboard’s collective comments indicating this may have been an issue. As an example, one factor was improved accessibility to the business district and employment centers, in

⁹ This distance was confirmed by the Applicant’s counsel during oral argument. In fact, the Applicant’s request filed with the Selectboard on 30 July 2019 and 07 November 2019, (CR at 37, 72), refers to an attached plan for length guidance. Various plans do not carefully define the requested layout length.

¹⁰ At the 02 December 2019 Board of Selectmen meeting, Selectman Bean referenced a possible reclassification length of 140 feet. (CR at 52).

addition to improved accessibility for fire and police services. Contrast one of Selectman Goulet's reasons, specifically number three (3), "[t]here is no improvement to convenience of travel," (CR at 121), with her belief that the reclassification will "improve accessibility for fire, emergency, and police." On the other hand, Selectman Yeaton and Selectman Bean felt this factor was not applicable to the project. (CR at 121). Again, while the focus appears to be on a 300-foot road opening based on the motion, the separate findings by each Selectman is problematic.

The road layout length gives pause regarding the focus of each Selectman in arriving at their individual analysis. The Housing Appeals Board chooses not to attempt "to read the minds" of each Selectman. Each approached the layout issue with diligence at the time of the final vote, but road-length and the possible weight Selectman Bean may have placed on the actual project itself is a violation of *Green Crow*. Each Selectman's clear expectation of layout road length is unknown, and deserves clarification to fairly determine the Applicant's request in light of the *Green Crow* criteria.¹¹

Selectman Bean's vote caused the failure of the motion to reclassify. While Selectman Bean had his own rationale for his no-vote, were those reasons by a balance of the probabilities influenced solely by the road layout petition requested by the Applicant, or were they influenced by the Applicant's proposed project?

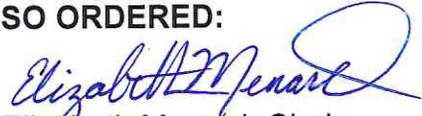
The Housing Appeals Board VACATES the Board of Selectmen's decision to deny the Applicant's request, and REMANDS the case back to the Board of Selectmen who shall conduct a public hearing within 45 days of this order for further review and determination of:

- 1) The road length being considered for reclassification to ensure clear application of the "occasion" criteria; and

¹¹ In addition to road length, the scope of the project was highlighted by the public notices of the 14 November 2020 site walk meeting, (CR at 73), and the 04 January 2021 Board of Selectmen meeting. (CR at 108). This set the stage for a discussion of the project at various meetings, culminating in the 21 January 2021 vote.

- 2) A review of the “occasion” factors consistent with *Green Crow*, which factors shall not include any consideration of the proposed residential project.¹²

**HOUSING APPEALS BOARD
SO ORDERED:**


Elizabeth Menard, Clerk

Date: June 30, 2021

¹² Of course, this entire discussion still has an unanswered issue: if only 300 feet of Upper Beacon Hill Road is reclassified, what happens if the Town of Pembroke Planning Board reviews the plan and, in considering the TRC comments, wants all of Beacon Hill Road reclassified to allow a through-road? Clearly, the project would need to return to the Board of Selectmen for a revised road layout starting the RSA 231:8 process anew.