

**THE STATE OF NEW HAMPSHIRE  
HOUSING APPEALS BOARD  
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**CASE NAME: Ronald A. Shattuck, Jr., et al. v. Town of Frankestown  
CASE NO.: PBA-2021-01**

## **ORDER**

The matter before the Housing Appeals Board is the Frankestown Planning Board's 5 January 2021 denial of the Applicants' (Ronald A. Shattuck, Jr. and Melissa D. Shattuck) request to subdivide (after a minor lot line adjustment<sup>1</sup>) a 36-acre parcel of residential/agricultural land into four (4) lots for single family home construction on each lot.

### **FACTS:**

In 2015, the Applicants purchased a 6.436-acre parcel of land in Frankestown which is referred to as "Lot 17" and in 2019, an additional 33.409 acres referred to as "Lot 18" was purchased.<sup>2</sup>

In September of 2020, the Applicants filed an application with the Frankestown Planning Board to:

- a) adjust the lot line between lots 17 and 18;
- b) and to subdivide lot 18 into five (5) lots; four (4) new residential lots and one (1) remainder lot with the riding arena structure.<sup>3</sup>

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<sup>1</sup> The lot line adjustment request is not directly addressed in this appeal. However, to comply with the proposed subdivision plan it is required and it was part of the subdivision application. CR at 1-11. A review of the lot line adjustment proposal discloses no zoning violations.

<sup>2</sup> The lot line adjustment would add approximately three (3) acres to lot 18 enlarging it to approximately 36 acres. The acreage of lots 17 and 18 are not consistently reflected in the Applicants' memorandum nor the Certified Record but this is not material since the actual survey data controls.

<sup>3</sup> In 2019, the Applicants applied for, and received, a building permit to construct an indoor "equestrian arena," and constructed same on lot 18. CR at 243.

After filing the lot line adjustment and subdivision application, on 20 October 2020, the Planning Board conducted a site walk at the property. Certified Record (CR) at 29. And in the evening on that same day, the first of many hearings was held.<sup>4</sup> The Planning Board continued this hearing until 17 November 2020. Between 20 October and 17 November, items requested by the Planning Board at the 20 October meeting were added by Meridian Land Services (“Meridian”) to the Subdivision Plan. (Subdivision Plan Concept 2, CR, Volume II.)<sup>5</sup>

At the 17 November 2020 Planning Board meeting, the Planning Board reviewed the revised Subdivision Plan. While one of the Planning Board members remarked that “[y]our original plan as presented is exactly what the voters have approved in the Town of Francestown.” (Recorded meeting at: 1 hour 27 minutes.) other Planning Board members wished to have more information added to the plan and the meeting was continued to 1 December 2020.

Before the 1 December 2020 meeting additional information was again added to the Plan. (Subdivision Plan Concept 3, CR, Volume II.) At the Planning Board meeting on 1 December 2020, the application was continued until 15 December 2020 with the Planning Board again requesting additional plan information and changes were made. (Subdivision Plan Concept 4, CR, Volume II.)

As it had done at prior meetings, on 15 December 2020 the Planning Board yet again requested plan adjustments and the meeting was continued to 5 January 2021.<sup>6</sup> After the 15 December 2020 Planning Board meeting, Meridian again added additional information to the

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<sup>4</sup> The Planning Board “accepted the plan as complete” at the 20 October 2020 hearing, in compliance with RSA 676:4. CR at 29.

<sup>5</sup> Between 20 October 2020 and 25 October 2020, the Francestown Conservation Commission conducted a site walk of the Applicant’s property. CR at 49-50. The Conservation Commission comments and recommendations were considered by the Applicants. Meridian Land Services added all known physical features, wetlands, streams, and slopes to ensure compliance with subdivision regulations and zoning requirements. This includes setbacks from physical boundaries, wetlands and existing historic or man-made structures to be left in place. While the Conservation Commission references the prior tree cutting and, like the Planning Board, suggests a violation of RSA 227 (the “Timber Harvesting” statute), the Certified Record discloses no such violation was ever advanced by State or local authorities.

<sup>6</sup> Because of a further delay in a final vote, the Planning Board requested, and the Applicants agreed, to extend the 65 day time limit within RSA 676:4, I, (c)(1).

Plan set. (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

On 5 January 2021, the Planning Board again met to review the Applicants latest plan. At that meeting, upon motion duly made, the board voted to deny the plan.<sup>7</sup> The minutes in the Certified Record at pages 14-16 reflect the plan denial but do not mirror the written 11 January 2021 “Notice of Decision.” CR at 43.

### **LEGAL STANDARDS:**

The Housing Appeals Board review of Planning Board decisions is limited and it must treat the Planning Boards factual findings as “prima facie,” lawful and reasonable. Further, it cannot reverse the Planning Board decision unless it is unreasonable or there are identified errors of law. *Prop. Portfolio Group v. Town of Derry*, 163 N.H. 754 (2012); *see also*, *Motorsports Holdings v. Town of Tamworth*, 160 N.H. 95 (2010).

As held in *Summa Humma Enterprises v. Town of Tilton*, 151 N.H. 75 (2004), the appealing party bears the burden of persuading the Housing Appeals Board that the Planning Board’s decision was unreasonable. Thus, the Housing Appeals Board’s role, like Superior court, is “...not to determine whether it agrees with the planning board’s findings, but to determine whether there is evidence upon which they could have been reasonably based.” *Id.* at 79.

Thus the Planning Board decision will be upheld unless it is unsupported by the record or is legally erroneous as viewed by a reasonable person based on the same evidence. *Prop. Portfolio Group* at 757.

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<sup>7</sup> As noted in FN 1 since there was no separate motion, this motion constitutes a denial of both the lot line adjustment request as well as the requested subdivision since both requests were contained in a single planning board application.

## **DISCUSSION:**

Turning to the “Notice of Decision” dated 11 January 2021; the Planning Board provides five reasons for its denial. In addition it contains a preliminary statement that “...the overall plan as presented by the Applicant does not conform to the Francestown Subdivision Regulations as expressed in Section I. ‘PURPOSE’ and is not consistent with the general intent and spirit of the Town’s Zoning Ordinance as expressed in Article 1, ‘PREAMBLE.’”

Section I, “Purpose” of the Subdivision Regulations and the Zoning Ordinance “Preamble” are helpful in providing an overview of the itemized regulations and ordinances. However, they are not specific regulatory provisions but are designed to provide guidance to the Planning Board, Zoning Board and applicants in preparing land use requests. The Town in adopting a zoning ordinance and planning regulations must provide an understandable regulatory scheme to allow property owners the ability to clearly understand, with specificity, what is required when requesting a permit, or, just as important, relief to be requested from the Zoning Board of Adjustment or Planning Board if full compliance with the regulations or ordinance is difficult or impossible.

Applying this basic concept to Applicants’ plan, one must ask what “relief” would be requested from the Zoning Board if a zoning “Preamble” violation exists. The Certified Record and the zoning ordinance disclose no objective zoning violations for this requested subdivision. Thus, the Housing Appeals Board finds that the Planning Board’s findings that there is a zoning violation is both unreasonable and not in accordance with the actual, objective provisions of the Town of Francestown’s zoning ordinance. Likewise, requesting a “waiver” of the Subdivision Regulation “Purpose” statement is inappropriate. All of the areas highlighted in the “Purpose” statement are the subject of specific planning regulations. If needed, those sections, not the “Purpose” statement, would be subject to a waiver request as allowed under RSA 674:36, II (n).

When asked about the specific zoning violation the Town opined that Article V, A.4 of the zoning ordinance was being violated along with “Table 2 on page 44.” However, Article V,

A.4 is a Planning regulation—not a zoning provision, dealing with “Preservation of EXISTING Features.” While “Table 2 on page 44” is part of the zoning ordinance which outlines “permitted uses,” there is no evidence that the Applicants’ proposal violates those provisions.<sup>8</sup>

The next reason for denial expressly focuses on Section V, A.4 of the Town’s Subdivision Regulations which states as follows: “The subdivider shall identify and give due regard to the preservation and protection of existing features such as trees, scenic points, brooks, stone walls, streams, rock outcroppings, water bodies, aquifers, public areas, historic landmarks and other natural resources.” (Emphasis supplied).

This provision was discussed at length by the parties during the many referenced hearings. Reviewing this regulatory provision in a light most favorable to the Town does not disclose a violation. The plans identify and give due regard for the protection of existing features as required. In contrast, the Town wishes to review the proposal in the context of how the land existed prior to the legal cutting of trees on the property.<sup>9</sup> The minutes reflect the Planning Board’s desire that the Applicants somehow restore the property to its “pre-cut” status as a condition for subdivision. CR at 15. In fact, the Certified Record at 15 clearly points to this issue when Planning Board member Sarah Pyle stated:

*“With the clearing and grubbing of this property, protections that would have naturally been in place (and I would argue should have been) for both the historical character of the neighborhood and the environment – slopes and wetlands, have been stripped from this property. I believe that this work was done outside of the guidelines of both state and town laws (RSA 227 and Sub. Div. Regs. Sec. V).”* CR at 15.

This statement reflects some of the Planning Board members’ thinking—specifically that the legal tree cutting triggered a violation of some sort. In fact, there is a suggested violation of

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<sup>8</sup> Article V of the zoning ordinance itemizes necessary criteria for “Open Space Development.” The Applicants have not proposed an “open space development.”

<sup>9</sup> When queried during oral argument, neither side pointed to evidence of any tree cutting violations. This included no citations at the State or local level and the record contains evidence of a proper “notice of intent to cut and payment of stumpage fees.” CR at 235-242.

RSA 227 and Section V of the Town Subdivision violations. However, a close examination of both, together with the “notice of intent to cut,” (CR at 235-242), discloses no violations and certainly does not prohibit the creation of four (4) new lots each with an average size of 3 or more acres.<sup>10</sup> CR, Volume II.<sup>11</sup> In addition, the above statement suggests that land with “significant slopes and wetlands” should not be developed. Standing alone that statement may be correct. However, in this instance the proposed lots conform to the Town’s zoning requirements, including slopes and wetlands, which were carefully considered by Meridian in establishing the proposed lot boundaries. While the Town argues that the proposed “narrow buffer and planting plan, [falls] far short of restoring the existing features that have been removed,” the Housing Appeals Board finds that this is not a violation of the Town’s subdivision regulations since no buffer is required<sup>12</sup> and, in fact, “buffer” is not defined in the Subdivision Regulations. (See, Subdivision Regulation, Section III, “Definitions.”) CR at 315.<sup>13</sup>

Next, the Town points to the Applicants’ failure to provide “building envelopes” as discussed in Subdivision Regulation, Section V (A)(5)(i). Upon review of the entire Certified Record, the Housing Appeals Board finds that while the Planning Board may designate a “building envelope” (CR at 329) no such designation was made.<sup>14</sup> That fact notwithstanding, the prepared subdivision plans do show the limits of construction on each of the new lots. Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II. Specifically, these limits reflect the required zoning setbacks from lot lines and other

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<sup>10</sup> Paragraph N.1 in Section V of the Subdivision Regulations confirms that no RSA 356-A registration is required for a four (4) lot subdivision. However, the threshold for a subdivision registration under RSA 356-A:3, I(a) is more than 15 lots—not “50 or more lots.”

<sup>11</sup> Although not in the Town’s “Notice of Decision” the minutes and testimony reflect a continuing focus on the “national and historic neighborhood district” recognition this area received in 1980. The problem with the Town’s position is that this “recognition” is not a Town regulation nor does it prohibit subdivision of land within it. Also, there is no evidence that any of the roadways abutting the Applicants’ property have been designated “Scenic Roads” under RSA 231:157-158.

<sup>12</sup> Buffers are required for “Open Space” subdivisions. See, Article V, 5.7(f) of the Town Zoning Ordinance. (CR at 289.) See also, Subdivision Regulation, Article V. (CR at 327.) There is no reference to buffers in this article which itemizes “Subdivision Plan Requirements.”

<sup>13</sup> Although the applicant initially objected to the Planning Board’s request, Meridian did, in fact, add buffering to the later plan concept. (Compare Subdivision Plan Concept 1 with Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

<sup>14</sup> When Building Envelopes were stated as a basis for denial, (CR at 16) the Planning Board minutes reflect: “Board states plan failed to provide building envelopes as requested by the board per Sub. Div. Regs. V (A)(A.5)(j) Lots. Agent states revised plan shows building in different areas. Board states revised plan continues to show buildable acreage but shows no building envelopes.” At that juncture, the board should have designated the building envelopes they desired.

possible impediments such as wetland buffers. The Housing Appeals Board finds this reason for denial unreasonable and not consistent with the actual facts. While the Planning Board may have requested “building envelopes” they never designated them. The Town’s Planning Regulations do not shift that burden to the Applicants.

In addition to referencing Subdivision Regulation V, A.4, Section 1(a) of the “Notice of Decision” also points to the definition of “buffer” in the Town’s Zoning Ordinance: “A landscaped buffer no less than 100 feet deep from public roads, 75 feet deep from adjacent properties shall be provided where appropriate to screen the development. The natural vegetation shall be retained whenever possible. If the natural vegetation is not sufficient to serve as an effective visual screen, landscaping may be required to provide such a screen. This buffer are shall be part of the open space, and shall be subject to the same restrictions that apply to the open space.” CR at 289.

As noted, although desired by the Planning Board, no “buffer” is required for a four (4) lot, non-open space subdivision, thus, there is no “buffer” violation. Section 1(a) of the “Notice of Decision” also suggests that the Applicants’ tree cutting was a violation of the “Wetland and Vernal Pool Conservation Overlay District.” See, Article II-A, 2-A.2 of the Town’s Zoning Ordinance. CR at 268-269. Proper timber cutting notices were filed and no violations have been brought forward. In addition, an examination of the submitted subdivision plans disclose no violation of the restrictions imposed on areas within the actual boundaries of the “Wetland and Vernal Pool Conservation Overlay District.”<sup>15</sup>

Next, the Town relies on the failure of the Applicants to “provide a sufficient sediment and erosion control plan” as per Section V, H.2 of the Subdivision Regulations. CR at 343. At the outset, the Certified Record provides no Town engineering report indicating violations of these provisions. The cited provisions are required to be met when:

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<sup>15</sup> Care must be taken in reviewing Article II-A, 2-A.2 of the ordinance. The “overlay district” is confined to the specific areas defined in Article II-A, 2-A.2.2. An examination of the Subdivision Plans discloses areas which are impacted by this overlay district. The building areas shown on the plan are not within the Overlay District.

- (a) there will be any environmental disturbance on slopes in excess of 15% or within 75 feet of wetland areas, drainage ways or open water and/or;
- (b) there will be earthmoving of an area of 1 acre or more and/or
- (c) there will be any road construction. CR at 343.

Meridian's plan shows no such conditions or encroachments and, as stated, there was no evidence from any Town consulting engineer pointing to a need for these control measures in accordance with the cited regulations. In addition, after subdivision should it be determined at the time of any construction that these regulations impact the proposed development, the Applicants would need to submit amended plans for review, and likely approval, by Town Officials or the Planning Board. Also, if an Alteration Of Terrain permit (AOT) is needed, those same issues would need to be addressed to the State's satisfaction prior to permit issuance. Based on the plans as submitted there are no violations of that subdivision regulation in conjunction with the proposed subdivision plan.

The Town's next reason for denial (number 4 in its 11 January 2021 "Notice of Decision") cites necessary compliance with the Town's zoning regulations, subdivision regulations, the Town's Master Plan, New Hampshire Statutes and any applicable Federal laws.

As previously discussed, the Town has not identified any specific zoning violations applicable to the proposed plan. Beyond the broad statement of RSA 674:36(b) and reference to the Town's Master Plan there are no specific regulatory impediments to approval. In fact, this area is identified for residential development on the Town's Master Plan and though it is not an "open space development" under Article V of the Town's zoning ordinance (CR at 285), the proposal creates four (4) lots each over three (3) acres in size. CR, Volume II. Even after construction of four (4) single family homes the undeveloped area on each lot is significant and each lot abuts the balance of the open space on the remainder of lot 18. CR, Volume II.



The Town also argues the “viewshed” and “character” of the neighborhood will not be protected.<sup>16</sup> To suggest that single family residential construction on four (4) conforming lots realistically impacts “viewshed and character” of the neighborhood is not supported by any objective facts. This zone allows for possible residential subdivision and to deny a property owner’s subdivision request where the owner is in compliance with the regulations is unreasonable and inconsistent with the owners’ property rights. See, *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001).<sup>17</sup> In addition, the Housing Appeals Board disagrees with the Town’s decision that the “character of the neighborhood” is violated when the ultimate use proposed is consistent with the Town’s Master Plan and Zoning.<sup>18</sup> As held in *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005), when the use proposed is allowed by the Town’s zoning ordinance it is presumed reasonable. Again, there is no evidence in the Certified Record supporting a contrary conclusion.

The Town’s last reason for denial is also untenable. It states that “[n]o ‘substantial public benefit’ would result if the board were to grant a waiver or exception to the above regulations or concerns.” In the first instance, the Certified Record is devoid of any applicant requests for “waivers or exceptions.” Second, compliance with Town Subdivision regulations does not require an applicant to show a “substantial public benefit.”<sup>19</sup> The Town cites Subdivision

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<sup>16</sup> Interestingly, development of the four (4) subdivided lots will start the process of buffer restoration and landscaping. Subdivision denial will likely delay that process. (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II.)

<sup>17</sup> Although a zoning case, in *Simplex*, the Supreme Court clearly articulated the importance of weighing rules restricting a person’s use of his or her property against the New Hampshire constitutional guarantee of a person’s property rights.

<sup>18</sup> It must be remembered that the application before the Town Planning Board was for a lot line adjustment and subdivision—not construction. Any construction on the subdivided lots will require review, approval and issuance of Building Permits.

<sup>19</sup> The actual words “substantial public benefit” do not appear in the Subdivision Regulations nor are the words referenced in the questions posed to the Applicants in the Town’s ‘Final Subdivision Application.’ See, paragraph 6 of Appendix B of the Town’s Subdivision Regulations. CR at 362. Despite the wording of Subdivision Regulation, Section V, A.2, the Housing Appeals Board does not choose to speculate that this requirement is part of the Frankestown Subdivision regulations and that it should be imposed on the Applicants. As an aside, prior to *Gray v. Seidel*, 143 N.H. 327 (1999), many zoning boards used “benefit to the public interest” as one of the five required zoning criteria. The Supreme Court in *Gray* reminded practitioners and zoning boards that the correct criteria was “not contrary to the public interest.” While this application is not a zoning case, the Town continues to advance zoning violations as a basis for denial—including, apparently, the requirement of a “substantial public benefit.” Like the Supreme Court in *Gray*, the Housing Appeals Board rejects this requirement since it is not part of the Town’s regulatory scheme.

Regulation (V)(A)(I)<sup>20</sup> as support for this reason for denial. However, that regulation and Section 5 in the “Notice of Decision” are not exactly the same. Nor is there any basis to deny the Applicants’ request based on “community future needs” and the “current and future fitness of the land for development purposes.” Subdivision Regulations, Section V, A.1 (CR at 327). Neither of these broad statements are well defined, factually supported, nor were they meaningfully communicated to the Applicants. It must be remembered that all municipalities have a duty to provide reasonable assistance to landowners seeking approvals. See, *Carbonneau v. Town of Rye*, 120 N.H. 96, 99 (1980). In the context of this case, the Town Planning Board repeatedly suggested zoning violations existed with no clear identification of the specific, applicable zoning provisions. In fact, before denying the Applicants’ subdivision plan on 5 January 2021, the Planning Board through one member represented that “suggestions” had been made to the Applicants for “...ways in which we might approve a subdivision plan that met our rules and regulations and guidelines and while effort was made by the applicant to hear Board’s expressed concerns, responses have not met those concerns and requests.” (CR at 16.)

Generalized concerns of noncompliance which are not specifically itemized in the Town’s zoning ordinance or Planning Regulations do not constitute a viable and reasonable basis for plan denial. Also contrary to the above statement, Meridian and the Applicants endeavored after each meeting continuance to amend and update the proposed plans to address valid suggestions requested by the Planning Board.

Instead of clearly “designating building envelopes,” specifically stating what “public benefits” they felt important in conjunction with a four (4) lot subdivision in this location, defining specific zoning and subdivision violations, clearly outlining how the subdivision is problematic or unfit “for current and future development and the community’s future needs,”

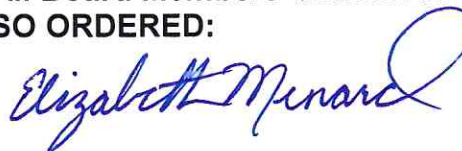
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<sup>20</sup> Section V.A.1 of the Town’s Subdivision Regulations states that while zoning compliance is required it also allows the Planning Board to “...look beyond the issue of zoning compliance and consider other issues, including, but not limited to, the community’s future needs and the current and future fitness of the land for development purposes.” CR at 327.

the Planning Board relied on opinions and concerns which were subjective, legally undefined, or unreasonable in denying this subdivision.<sup>21</sup>

As discussed herein, all the reasons articulated by the Planning Board resulting in denial are, by a balance of the probabilities<sup>22</sup>, either unreasonable or legally deficient. Thus, the decision of the Town of Frankestown Planning Board is reversed. The final subdivision/lot line adjustment plan submitted for review (Subdivision Plan Concept 5, dated 18 September 2020, last revised 23 December 2020, CR, Volume II) shall constitute the approved plan. As to the Applicants proposed "Findings" those consistent with this order are approved, all others are denied.

**HOUSING APPEALS BOARD  
All Board Members Concurred  
SO ORDERED:**



Elizabeth Menard, Clerk

Date: May 7, 2021

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<sup>21</sup> As the Certified Record shows, some Planning Board members inserted their subjective personal feelings about this subdivision to support denial. The Supreme Court in *Trustees of Dartmouth College v. Town of Hanover*, 198 A. 3rd 911 (2018) cautioned Planning Boards against using unsupported, "subjective feelings."

<sup>22</sup> See, RSA 679:9, II.