

THE STATE OF NEW HAMPSHIRE

Rockingham Superior Court

PO Box 1258
Kingston, NH 03848 1258
603 642-5256

NOTICE OF DECISION

JOHN TEAGUE
UPTON & HATFIELD LLP
PO BOX 1090
CONCORD NH 03302-1109

04-E-0121 Seth Peters, et al vs. Town of Nottingham

Enclosed please find a copy of the Court's Order dated 8/10/2004
relative to:

Order on Merits

08/16/2004

Raymond Taylor
Clerk of Court

cc: Malcolm R McNeill

AUG 17 2004

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Seth Peters and The Madeline R. McCooey Trust,
John J. McCooey, Trustee

v.

Town of Nottingham

04-E-0121

ORDER

Seth Peters and the Madeline R. McCooey Trust, John J. McCooey, Trustee (collectively, "the petitioners") appeal a decision of the Town of Nottingham Zoning Board of Adjustment ("the ZBA") denying their application for a variance from Article VI, Section A(1) of the Town of Nottingham Zoning Ordinance ("Ordinance") to allow them to construct a single-family residence on property that lacks the required 200 feet of frontage. The petitioners also appeal the ZBA's denial of their administrative appeal from the Town Code Enforcement Officer's decision to deny their building permit application. The petitioners claim the ZBA's decision was unlawful and unreasonable. The court heard the merits of the petitioners' appeal on July 23, 2004. Based on the parties' arguments and submissions, the ZBA's certified record, and the pertinent case law, the court finds and rules as follows.

On or about September 23, 2003, the petitioner Seth Peters ("Peters") entered into a purchase and sales agreement with the Madeline R. McCooey Trust ("the Trust"), the owner of approximately 25 acres of land located off of Friar Tuck Lane in Nottingham, New Hampshire. The property does not actually abut Friar Tuck Lane. Rather, the property is

landlocked and its only access is via a right-of-way from Friar Tuck Lane over an abutter's property.

The property's original owner, Willie B. Mitchell, sold the property in question, known as the "Robert Thompson Land," to Forest C. Peters in 1956. (Pet'r Ex. 2.) Mr. Mitchell granted Forest Peters "the privilege of using the right of way over other land of [Mitchell's] to and from" the Robert Thompson Land. (Id.) Said right-of-way came to be known as the "woods road." In 1959, Forest Peters conveyed the property to John J. and Madeline R. McCooey. (Pet'r Ex. 1.) Mitchell's adjacent parcel, which contained the woods road, was subsequently developed and is now known as the Sherwood Forest Subdivision.

In 1988, the McCooeys entered into an agreement with the developer of the Sherwood Forest Subdivision to abandon the woods road in exchange for a twenty-foot easement to their property. (C.R. at tab 6, the 1988 Plan, notes 11 & 17.) In 1993, during a revised subdivision of Sherwood Forest, the parties apparently were free to renegotiate the access to the McCooey property. However, as is depicted in the 1993 Revised Subdivision Plan, the same twenty-foot right-of-way was maintained and is now situated between Lots 3 and 4 of the Sherwood Forest Subdivision. (C.R. at tab 6, the 1993 Plan.) The right-of-way is neither a private road nor a public highway.

Shortly after entering into the purchase and sales agreement with the Trust, Peters applied for a building permit to construct a single-family residence on the property. The Town Code Enforcement Officer denied the permit, citing the property's failure to meet the Ordinance's two hundred foot frontage requirement. On or about December 13, 2003, Peters applied to the ZBA for a variance from the minimum frontage requirements under

Article VI, Section A(1). (C.R. at tab 1.) Peters also appealed the decision of the Code Enforcement Officer to the ZBA pursuant to RSA 674:41, II (Supp. 2003). (C.R. at tab 1.)

The ZBA held a public hearing on the variance application and appeal on January 6, 2004. (C.R. at tab 4.) After review, the ZBA voted (4-0, with 1 abstention) to deny the application for a variance and the concomitant appeal from the Code Enforcement Officer's decision. (C.R. at tabs 4-5.) Peters filed a timely request for a rehearing, (C.R. at tab 6), which the ZBA denied. (C.R. at tabs 7-8.)

Appeals of ZBA decisions receive very limited judicial review. The Court will only determine "whether, on the balance of the probabilities, the decision was unlawful or unreasonable." Peabody v. Town of Windham, 142 N.H. 488, 492 (1997); RSA 677:6 (1996). The ZBA's factual findings are considered to be prima facie lawful and reasonable, and the party appealing the ZBA decision bears the burden of proving that it is unlawful or unreasonable. See 677:6. The standard of review is not whether the Court would find as the ZBA did, but whether the evidence reasonably supports the finding. See Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992).

On appeal, the petitioners argue the ZBA's decision was unlawful and unreasonable because: (1) the property is grandfathered and therefore no variance is needed; (2) the property meets the frontage requirements of RSA 674:41; and, (3) even if a variance is required, they presented sufficient evidence to the ZBA to meet all five factors necessary for the granting of the requested variance. The court addresses the petitioners' arguments in turn.

The petitioners argue their property is grandfathered from compliance with the frontage provision of the Ordinance. According to the petitioners, from the time of its

creation and/or acquisition in 1959, the property has been a buildable lot. More specifically, the petitioners allege that because the property, in its present form, predates the first zoning ordinances enacted in the Town, it must be deemed a grandfathered lot exempt from the provisions of the Ordinance. (C.R. at tab 5.)

“Construction of the terms of a zoning ordinance is a question of law upon which this court is not bound by the interpretation of the zoning board” or Code Enforcement Officer. Cosseboom v. Town of Epsom, 146 N.H. 311, 314 (2001) (quotations and citation omitted). Article XII, Section A, states: “Any nonconforming use which was legal prior to adoption of the Zoning Ordinance or of an amendment thereto may continue, except as provided herein.” (Emphasis added).

Unlike the nonconforming use ordinances at issue in prior cases, see, e.g., Cosseboom, 146 N.H. at 312-14; Copp v. Town of Fremont, Rockingham Cty. Super. Ct., Docket No. 03-E-0580 and 03-E-0581 (Apr. 2, 2004) (Order, Nadeau, J.), which specifically exempted any preexisting lot from their requirements, the nonconforming use ordinance in this case is not designed to assist owners with preexisting substandard lots in avoiding the strict and literal enforcement of the Ordinance. Rather, having considered the language of the nonconforming use ordinance in its entirety, the court construes it as only affording relief to owners of lots with preexisting nonconforming uses, not owners of lots that are simply substandard preexisting lots of record. Thus, the court rules the petitioners’ property is not grandfathered under the Ordinance.

Nevertheless, even assuming the petitioners’ property is grandfathered under the Ordinance, the court is not persuaded that the nonconforming use ordinance provides an exemption from the Town’s frontage requirements. To construe the nonconforming use

ordinance in such a manner would lead to an illogical result. See Cosseboom, 146 N.H. at 315 (citation omitted). Indeed, if the court were to interpret the nonconforming use ordinance as exempting preexisting lots of record from the Town's frontage requirements, then landowners, such as the petitioners herein, could be allowed to build on a completely landlocked parcel. Id. at 316. "Such a result could not have reasonably been intended by the drafters of the ordinance when it was promulgated." Id.

In applying the Town's frontage requirements to the petitioners' property, it is clear that the property does not have 200 feet of road frontage. See Ordinance, Art. VI, § A(1). Moreover, the right-of-way from Friar Tuck Lane is not a public right-of-way, which is a zoning requirement. See Ordinance, Art. XV (18) (defining "frontage" as "the length of the lot bordering on public right-of-way"). Thus, the petitioners' property fails to meet the Ordinance's frontage requirements.

Furthermore, even if the court assumes the petitioners' property is exempt from the Town's frontage requirements, the petitioners' entitlement to a building permit is still governed by RSA 674:41. See Vachon v. Town of New Durham Z.B.A., 131 N.H. 623, 629 (1989) (RSA 674:41 applicable to all building permit applications). RSA 674:41, I provides, in pertinent part, that:

From and after the time when a planning board shall expressly have been granted the authority to approve or disapprove plats by a municipality, as described in RSA 674:35, no building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building unless the street giving access to the lot upon which such building is proposed to be placed:

- (a) Shall have been accepted or opened as, or shall otherwise have received the legal status of, a class V or better highway prior to that time; or
- (b) Corresponds in its location and lines with:

- (1) A street shown on the official map; or
- (2) A street on a subdivision plat approved by the planning board; or
- (3) A street on a street plat made by and adopted by the planning board; or
- (4) A street located and accepted by the local legislative body of the municipality, after submission to the planning board, and, in case of the planning board's disapproval, by the favorable vote required in RSA 674:40; or

(c) Is a class VI highway . . . ; or

(d) Is a private road

(Supp. 2003). Because the petitioners' property does not have frontage on Friar Tuck Lane, but rather must be reached from Friar Tuck Lane via a right-of-way across an abutter's property, the petitioners are not entitled to a building permit.

To that end, the legislature specifically addressed the issue of frontage on right-of-ways when it amended RSA 674:41 during its 1995 session by adding paragraph III, which reads:

III. This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this section. For purposes of paragraph I, "the street giving access to the lot" means a street or way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraph I(a), (b) and (c).

Laws 1995, ch. 291 (eff. Aug. 20, 1995) (emphasis added). The petitioners maintain that the right-of-way meets the criteria of subparagraph I(b)(2). In other words, the petitioners assert the right-of-way "[c]orresponds in its location and lines with . . . [a] street on a subdivision plat approved by the planning board." RSA 674:41, I(b)(2) (emphasis added).

The court disagrees.

"In any statutory interpretation case, this court's task is to determine legislative

intent.” Silva v. Botsch, 120 N.H. 600, 601 (1980) (citations omitted). The first step in making that determination is turning to the language of the statute itself. Id. (citation omitted). “When that language is plain and unambiguous, [the court] need not look beyond the statute for further indications of legislative intent.” Id. Unless the statute suggests otherwise, the court “ascribes to statutory words and phrases their usual and common meaning.” Id. Here, the key word, “corresponds”, bears a meaning that is easily understood.

The word “corresponds” is clear and concise. It means to “match or compare closely, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 511 (1961), or to conform.” Id. at 602 (quotation and citation omitted). The statute is plain on its face that the right-of-way must conform in its location and lines with “[a] street on a subdivision plat approved by the planning board.” RSA 674:41, I(b)(2) (emphasis added). Significantly, no street depicted on either the 1988 Subdivision Plan or the 1993 Subdivision Plan matches the location of the right-of-way in question. Because RSA 674:41, I(b)(2) requires that a right-of-way match, as closely as possible, a “street” on an approved subdivision plat, the court concludes that mere depiction of the right-of-way on the 1988 and 1993 Subdivision Plans, without more, is insufficient to satisfy the requirements of the statute.

The court next addresses whether the ZBA unreasonably or unlawfully denied the petitioners’ request for relief under RSA 674:41, II, which states, in relevant part:

Whenever the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship, and when the circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets, the applicant for such permit may appeal from the decision of the administrative office having charge of the issuance of permits to the zoning board of adjustment In passing on such an appeal or application, the board of adjustment . . . may make any reasonable exception and shall have the power to authorize or

issue a permit, subject to such conditions as it may impose, if the issuance of the permit or erection of the building would not tend to distort the official map or increase the difficulty of carrying out the master plan upon which it is based, and if erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.

(Supp. 2003) (emphasis added).

Based on the record before it, the court cannot rule that the ZBA erred by denying the relief sought by the petitioners under RSA 674:41, II. Even assuming, *arguendo*, that the enforcement of RSA 674:41 on the petitioners' property entails practical difficulty and unnecessary hardship, it is without question that the circumstances of this case require "the building, structure or part thereof to be related to existing or proposed streets." RSA 674:41, II. Unlike, for example, a chicken coup, a goat barn, a storage shed or even a hunting camp, which would not necessarily relate to Friar Tuck Lane, the petitioners' proposed building is a residence, which shall have a definitive connection or relation to Friar Tuck Lane, for, *inter alia*, access and utilities. As such, the petitioners have not met their burden to prove that the ZBA's decision denying the petitioners' appeal was either unreasonable or unlawful.

Finally, because the petitioners are not entitled to a permit under RSA 674:41, which supersedes any less stringent local ordinance, the ZBA had no authority to grant the petitioners' request for a variance from the Ordinance's frontage requirements. See RSA 674:41, III ("[t]his section shall supersede any less stringent local ordinance . . . and no existing lot or tract of land shall be exempted from the provisions of this section"). Therefore, contrary to the petitioners' position, the ZBA's denial of the petitioners' variance application was not improper.

In sum, the court finds and rules that the ZBA's decision denying the petitioners'


appeal of the Code Enforcement Officer's decision and the petitioners' variance application was neither unlawful nor unreasonable. Accordingly, the ZBA's decision is **AFFIRMED** and the petitioners' petition for appeal is **DISMISSED**.

The petitioners have submitted requests for findings of fact and rulings of law. However, the court's rulings upon the relevant requests are contained in its detailed narrative order. Therefore, the requests are **GRANTED** to the extent they are consistent with this order; otherwise, they are **DENIED**. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **ORDERED**.

8-10-04

DATE



ROBERT E.K. MORRILL
Presiding Justice