

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

Meeting Minutes Monday, April 3, 2017

**Call to Order:** Chair Matt Morton called the April 3, 2017 meeting at 6:30 p.m.

**Present:** Chair Matt Morton, Brandon Arsenault; Ralph Estes; John Frink; Jim Weiner; Planner, Gerald Coogan and Jane Kendall, Recorder

**Public Guests:** Attorney Bernie Pelech; Michael Berounsky; Katherine and Josh Blaisdell; Joe Coronati with Jones and Beach Engineering; Constantine Routetski; Chris and Laura Rogers; Attorney Keen

**Public Hearing:** A request by Roberta E. Berounsky Revocable Trust for a use variance from Article II, Section 2 to allow the subdivision of two lots with frontage of 200 feet frontage on a Town right-of-way regarding property at 30 Swan Island Lane, Tax Map 53, Lot 9.

The applicant's counsel, Attorney Bernie Pelech appeared before the Board and stated that the Board had previously denied a request for a variance to put two dwellings on a single lot and another request to allow the subdivision of a separate lot with less than 200 feet of frontage.

Attorney Pelech stated that the applicant had been before the Planning Board with his request for a subdivision and the Planning Board had requested several revisions of their proposal over the course of five different hearings to find a plan that wouldn't impact the abutters. He said this proposal had been the most recent proposal that was least objectionable to the abutters and was not unheard of in other towns in the State.

Attorney Pelech said Joe Coronati with Jones and Beach engineering did the plan to extend the cul-de-sac to create an additional 200 feet of frontage for the second lot in the Town right-of-way. He said the applicant was proposing to deed the necessary portion of his property as an extension of Swan Island to the Town for the right-of-way to create the necessary frontage.

Attorney Pelech read the definition of frontage from the Town Ordinance as being 200 feet of a lot bordering on the public right-of-way, with the frontage of a corner lot being determined by the Planning Board, which was not the case here. He went on to say that the public right-of-way was defined as bordering town, State, Federal byways and highways and private rights-of-way as covered by statute.

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Attorney Pelech added that they didn't want to seek relief, but they also didn't want to pave the right-of-way in deference to the abutters and the Town that didn't want the maintenance of additional pavement. He added that they would not need a variance if the Planning Board determined that they needed to pave the extension, but if not, he believed they met the criteria to grant a variance.

Attorney Pelech read through the five criteria, noting that the proposal would not alter the essential character of the neighborhood nor threaten the health, safety or welfare of the general public because the road access would not change and it would not be contrary to the spirit of the Ordinance.

Attorney Pelech stated regarding the substantial justice test, there would be no gain to the general public that would counterbalance the hardship to the applicant if it were not allowed and granting the variance would benefit the public because they would be leaving green space.

Attorney Pelech commented that the proposal would not diminish the value of surrounding properties as there had been no objections to the proposal and the abutters supported it.

Attorney Pelech stated that there would be no fair and substantial relationship between the general purposes of the Ordinance provision for lot coverage and the specific application to this property as the lots would be conforming and more than the minimum lot size requirement, and the proposal would create the required frontage. He said the use was reasonable and depriving the applicant would result in a hardship. He stated that the special condition was that the property was large enough to be subdivided, but it didn't have adequate frontage without this proposal.

Chair Morton commented that both he and the Board of Selectmen agreed that frontage needed to be on an accepted and paved Town road, not a field; and although they were proposing to deed the right-of-way to the Town, such a proposal had never been accepted before. Attorney Pelech replied that he understood that was the common belief, but the Ordinance didn't make that clear. He added that they could pave the cul-de-sac extension, but the abutters didn't want that and it would require more maintenance for the Town.

Town Planner, Gerald Coogan commented that a paved public road was the traditional view of road frontage for New Hampshire towns. Attorney Pelech commented that was true except for Epping and New Castle. Mr. Coronati agreed that he had done driveways across unpaved right-of-ways on cul-de-sacs in those towns because they didn't want additional pavement and maintenance of cul-de-sacs on small subdivisions.

Chair Morton commented that they were asking the Board to change the interpretation of the Town's Ordinance. Attorney Pelech replied that they were not asking to change the law, but were asking for a variance that was supported by abutters. He added that they would not be setting a precedence by granting because the Board could deny a similar request for lack of merit if abutters disagreed.

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Chair Morton asked who would be liable in the case of an accident and Attorney Pelech replied that the Town could require an indemnification agreement to release them from liability.

Board member, Jim Weiner commented that the proposal was creative, but because the Town had never accepted frontage off a public road, it would nullify the town's residential character and set a precedent for the Boards to accept similar proposals on lots that did not meet subdivision and Ordinance requirements. Attorney Pelech replied that it would not set a precedent because every request before the ZBA had to be considered for their own circumstances.

The applicant's engineer, Joe Coronati with Jones and Beach Engineering pointed out that most towns owned a 50' right-of-way and all driveways crossed them.

Mr. Coronati stated that they had appeared before the Planning Board with plans that created frontage with different configurations of the cul-de-sacs and the Planning Board said they would preferred the plan that required deeding property to the Rogers to extend the cul-de-sac away from the Routetski's, but they wanted all the abutters to approve the plans and the Rogers did not approve of that plan.

Board member, John Frink said he agreed with Mr. Coronati that driveways crossed Town right-of-way's, but also agreed that a right-of-way was defined as on a public road and not on grassy field so it was clear that the applicant needed a variance. Attorney Pelech replied that the applicant met the criteria for granting the variance.

Attorney Pelech went on to say that the Board had never seen a proposal like this because they were proposing to create a larger frontage, not to create frontage where none existed. He added that it did not set a precedent because the ZBA was required to look at each proposal based on merit.

Board member, Ralph Estes replied in disagreement, stating that the Board had seen several variance requests to approve lots without 200 feet of frontage and they had never been approved because it was the Board's understanding that frontage was always on a public road, not on the right-of-way. He went on to say if the Board approved this request, anyone with landlocked property could make a similar request.

Chair Morton agreed that the request was to approve frontage on the right-of-way and not on a public road. He added that the original cul-de-sac should have been made larger when the original lot was subdivided, but he thought the abutter's father hadn't wanted to subdivide outside of the family. Mr. Berounsky agreed that was the original intention, but then his sister sold the property to Routetski's without notification to him or the abutters, Leonard Thomas or Denis Wyman.

Mr. Berounsky stated that they had plans that met the subdivision requirements except either the Routetski's or the Rogers objected to one or the other of them and this plan didn't impact the abutters.

Attorney Tom Keen, Counsel for abutters, Chris and Laura Rogers commented that the Planning Board expressed a preference for the plan to expand the existing cul-de-sac in his clients' direction to avoid impacting the Routetski's on the other side, but that

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plan would require the applicant to deed property to the Rogers and have them extend their newly built drive over the Town right-of-way. Attorney Keen said that proposal was similar except to this proposal where the applicant would deed property to the Town to extend the right-of-way and the Berounsky's would cross the Town property instead. He added that this plan was preferred by his clients because it didn't require the Rogers to alter their driveway.

Attorney Keen also agreed with Attorney Pelech that this was an unusual situation and that the purpose of the ZBA was to determine that the request was not immediately harmful to the abutters and would not impact their property values.

Attorney Keen went on to say that he agreed with Attorney Pelech's definition of frontage and right-of-way whether it was paved or not, and there being no need for variance.

The applicant's abutter, Chris Rogers of Swan Island Lane agreed that he and his wife, Laura supported the proposal. Laura Rogers added that the ZBA should keep in mind that the alternate proposal for the applicant to deed property to them in order to extend the cul-de-sac would require them to extend their driveway. She said their driveway would then cross the Town right-of-way, which would be additional maintenance and a hardship on them and would be the same as this proposal that the Board didn't appear to be favoring, even though it would have less impact on everyone.

Chair Morton asked who would maintain the Town property and Attorney Keen replied the applicant agreed to maintain, insure and indemnify the property. Attorney Pelech agreed and added that Mr. Berounsky had maintained the Town cul-de-sac since it had been built and he would agree to do the same with the right-of-way.

Attorney Keen added that maintenance of the proposed right-of-way would be no different than the maintenance that the Rogers objected to if the Berounsky's moved the cul-de-sac, requiring them to extend their driveway.

Mr. Frink commented that other property owners had large lots with limited frontage, which didn't meet subdivision requirements either and that was the reason those lots remained large so the applicant would have to provide a better explanation of their hardship. Attorney Pelech replied that the applicant's lot was nearly 6.5 acres, 150% larger than the requirement for two lots, but it had limited frontage because of the unexpected subdivision that was not planned for during the development of the original cul-de-sac. He added that there was no fair and substantial connection between denying their request and the intent of the Ordinance to make sure each lot had enough frontage on a public right-of-way for adequate access for public safety vehicles as applied to the property.

Alternate Board member, Brandon Arsenault commented that it didn't sound as if their hardship was unique compared to other property owners that had to follow the Ordinance. He said deeding a sliver of property to expand the right-of-way on the cul-de-sac to create the required frontage was still for private use with no public benefit even if it was an agreeable plan for the abutters and the applicant. Attorney Pelech

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replied that the benefit to the Town was that they would not have to maintain or plow additional pavement.

Attorney Keen said the applicant was asking for relief from paving the right-of-way that they wanted to deed to the Town. Mr. Frink replied that a variance goes with property and they couldn't have conditions that melt away when the property changes hands. He added that they were asking the Board to grant relief from the Ordinance just for them, which they couldn't do as it wouldn't be fair to ask the next owners to pave at the objection of the neighbors. Attorney Keen agreed and suggested that there be a stipulation that the Berounsky's had to pave the right-of-way before either lot be sold. Mr. Estes pointed out that if approved, the right-of-way would then be Town property, which they couldn't be expected to pave after the fact.

Mr. Estes asked what would have to happen for the Town to accept property for the extended right-of-way and frontage and Attorney Pelech said the Board of Selectmen would have to agree to accept the property.

Mr. Berounsky expressed frustration that he had requested a shared drive for a subdivision request years before. He said the Planning Board denied his request even though his neighbors on either side had shared drives, but he was told that their drives had been grandfathered. He went on to say that a few years ago another developer's attorney challenged the Planning Board because there was no regulation on the books and they were allowed to put in a shared driveway so he believed his request had been unjustly denied.

Mr. Berounsky said he had gone through five or six legal plans, but the Rogers objected so that was their reason for requested variance to build one house on one lot.

Mr. Frink commented that the Board was only able to consider one plan at a time and this was the one presented, not the plan that the Planning Board was in favor of. Chair Morton agreed that boards were not hired engineers for applicants.

Chair Morton said he was sorry to hear he had been given the run around, but none of those plans came before the ZBA and they could only decide on this request.

Attorney Pelech suggested that the ZBA could also consider placing a condition that the right-of-way would need to be paved, but it seemed preferable to leave it as green space and reduce the amount of maintenance on impervious pavement. Attorney Keen added that paving the extended right-of-way would require the Board of Selectmen to approve it as a public road.

Chair Morton asked Mr. Berounsky if he would consider paving the right-of-way and Mr. Berounsky reiterated that he didn't think the Town would want additional pavement to maintain so that was another reason for requesting a variance. He added that he had always mowed and maintained the cul-de-sac himself because the Town had never mowed it and he would do the same for the grassy right-of-way that they were proposing. Mr. Berounsky commented that it made no sense to spend \$60,000 to pave the right-of-way and have the Town chew it up with plows. Chair Morton commented that plow damage was part of the nature of living in New England.

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Mr. Weiner agreed that their intent was good, but the Board was still concerned with setting a precedent for larger developers. Chair Morton added that there had been previous requests to grant a variance for 194' frontage and the Board had consistently denied such requests in order to uphold the Ordinance.

Mr. Frink commented that there had to be a special condition that distinguished the property from others in the town and not just in Swan Island Lane.

Chair Morton asked Mr. Weiner if he had voted on this issue in his capacity as a Planning Board member and Mr. Weiner said he had not. Mr. Coogan added that the Planning Board had continued Mr. Berounsky's subdivision request so there had been no vote.

*Ralph Estes moved to grant the request by Roberta E. Berounsky Revocable Trust for a use variance from Article II, Section 2 to allow the subdivision of two lots with frontage of 200 feet frontage on a Town right-of-way regarding property at 30 Swan Island Lane, Tax Map 53, Lot 9. Jim Weiner seconded the motion.*

Mr. Estes commented that he felt bad for the applicant and his family, but he was concerned that granting the request would set a bad precedent that would cause others to insist the same.

Mr. Arsenault added that he had compassion for the Berounsky's desire to continue their family footprint on Swan Island Lane, but he agreed with Mr. Estes.

Mr. Weiner read through the five criteria, stating that granting the variance would not serve the public interest of fairness for the town even though it would serve the interest of the applicant and abutters.

Mr. Weiner stated that granting the request would not follow the spirit of the Ordinance that required 200 feet of frontage on a public road and would alter the essential character of uniformity in current subdivisions. Mr. Weiner added that denying the request would therefore support the substantial justice test.

Mr. Weiner stated that although it appeared the proposal would not diminish surrounding properties at this time, granting the request would require that the Town owned right-of-way be paved eventually, which would be objectionable to the abutter.

Mr. Weiner stated that the applicant's claims of hardship were self-imposed as a result of not creating the necessary frontage for another lot since the subdivision requirements were established in the late 1980's.

*The motion did not pass with a vote of 0-4 and the request was denied.*

**Minutes:**

Board members said they had not received the minutes by mail to review.

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*Ralph Estes moved to table approval of the March 6, 2017 Minutes until the next meeting. Jim Weiner seconded the motion and all were in favor.*

**Correspondence and Discussions:**

Mr. Frink asked if Board meetings could be moved so they would not coincide with the Board of Selectmen's meetings so they could have a Selectmen's representative attend. Chair Morton said the Planning Board usually met on the opposing second Monday of the month, but he would speak with Town Administrator, Martha Roy to see if they could meet on a different Monday or a Wednesday night.

**Adjournment:** *Matt Morton moved to adjourn. Jim Weiner seconded the motion and the meeting adjourned at 8 p.m.*

**Next Meeting:** TBD

**Respectfully  
Submitted by:** Jane K. Kendall, Recording Secretary

*These Minutes were approved and adopted at the May 15, 2017 Zoning Board of Adjustment Meeting.*