

**TOWN OF PELHAM
ZONING BOARD OF ADJUSTMENT
October 16th, 2023**

Chairman David Wing called the meeting to order at approximately 7:00 PM.

PLEDGE OF ALLEGIANCE

Mr. Wing welcomed the newest Alternate member, Nicole Pigeon. Mr. Wing said they now have a full Board and would nominate a Vice Chair.

ROLL CALL

PRESENT ROLL CALL: David Wing
Danielle Masse-Quinn
Ken Stanvick
John Westwood
Matthew Welch
Alternate Nicole Pigeon
Alternate Shaun Hamilton
Planning Assistant Kerry Karalekas
Recording Secretary Heidi Zagorski

ABSENT: Planning Director/Zoning Administrator Jennifer Beauregard

MOTION: (Masse-Quinn/Welch) To nominate Mr. Ken Stanvick to Vice Chairman of the Board of Adjustment.

ROLL-CALL VOTE: Mr. Westwood – “YES”
Mr. Stanvick – “YES”
Ms. Masse-Quinn – “YES”
Mr. Welch – “YES”
Mr. Wing – “YES”

(5-0-0) The motion passed.

Mr. Wing announced Mr. Ken Stanvick as Vice Chairman.

Mr. John Westwood recused himself.

Mr. Wing asked if the Board members had read the comments from the Town Attorney, Mr. John Rattigan. Mr. Wing said if the members wish to read them or discuss them in private, he will entertain a motion for a non-public meeting, adding that comments from the Town Attorney are attorney-client privilege. Mr. Wing confirmed with the Board members that they did not need to discuss the comments further and therefore would not need to enter a non-public session.

MINUTES REVIEW

MOTION: (Masse-Quinn/Hamilton) To approve the September 18th, 2023 meeting minutes.

VOTE: (5-0-0) The motion carried.

CONTINUED HEARINGS

Mr. Wing appointed Alternate Mr. Shaun Hamilton to sit in place of Mr. John Westwood for Case #ZO2023-00015 and Case #ZO2023-00016.

ZO2023-00015

Map 31 Lot 11-20

PAGE, Andrea & BILAPKA Bruce – 37 Woekel Circle – APPEAL OF AN ADMINISTRATIVE DECISION concerning Article III, Section 307-8, Article VII, Section(s) 307-38, 307-41, and Article VIII-I, Section 307-48-1-1 of the Zoning Ordinance and the Administrative Decision made by the (Alternate) Health Officer regarding the approval of an individual sewage disposal system, NHDES Work #202000255. Approval for construction #eCA2023062223 on 6/22/2023.

ZO2023-00016

Map 31 Lot 11-20

PAGE, Andrea & BILAPKA Bruce – 37 Woekel Circle – APPEAL OF AN ADMINISTRATIVE DECISION concerning Article III, Section 307-8, Article VII, Section(s) 307-38, 307-41, and Article VIII-I, Section 307-48-1-1 of the Zoning Ordinance and the Administrative Decision made by the Selectmen, and the Town Attorney regarding the reversal of the decision made by the Superior Court Docket #226-2023-CV-00182 to deny the Well Radius Waiver, which led to the approval of an individual sewage disposal system, NHDES Work #202000255. Approval for construction #eCA2023062223 on 6/22/2023.

Mr. Wing opened the floor to the public for anyone who would like to speak in favor of the applicant.

Ms. Laura Gandia approached the Board and introduced herself as an attorney at Divine & Millimet representing the applicants. Ms. Gandia presented to the Zoning Board a packet of exhibits. Ms. Gandia said last time they had a public hearing; Attorney Muller was offered the opportunity to submit written comments. She said Mr. Muller did do this and she has a response to some of his comments. Ms. Gandia said some of the information that he presented in this letter was not information that was presented at the public hearing. Ms. Gandia said she thinks they beat to death at the last hearing whether or not this was an administrative decision. Ms. Gandia said she did not want to repeat her previous comments, however, she did include these comments in her response letter which includes the statute, the definitions for an administrative decision and official, and what can be appealed. Ms. Gandia said she wanted to note his response, more particularly his lack of response. Ms. Gandia said in Mr. Muller's six-page letter to the Zoning Board, the owners did not indicate any mention of the wetlands, any mention of the interpretation of the zoning ordinance, and any information or analysis as to why our appeal of administrative decision should not be granted. Ms. Gandia said they went through at length various portions of the town zoning ordinance that came into play and she found it very curious that the owners' response contained no information regarding why that was inaccurate, not applicable, or wrong, and why their appeal should not be granted. Ms. Gandia said she found the site walk to be more interesting. She stated this Zoning Board is aware they were denied an opportunity to enter onto the site. She said there was no reason given except that the Zoning Board lacked subject matter jurisdiction, and some other superfluous arguments as to why they couldn't enter. Ms. Gandia said this calls into question why they weren't allowed to enter. Ms. Gandia asked what was on that property that made it so the town officials who were trying to protect groundwater, protect its citizens, and protect the residents weren't allowed to enter that property to conduct a

site walk. Ms. Gandia asked why the Conservation Commission couldn't go onto the property to conduct a site walk. Ms. Gandia asked why the town residents weren't allowed to go onto the property to conduct a site walk. Ms. Gandia said after seeing the property, the answer was clear. Ms. Gandia said if you were to step onto that property you would have sunk because there was so much water on that property.

Ms. Gandia said the question becomes now do we have an administrative decision that can be appealable. Ms. Gandia said they do. She said the town zoning ordinance speaks of what can be appealed and the town zoning Section 307-85: Appeals states: *any person aggrieved by decision of the Zoning Administrator or other officer of the town charged with administering or interpreting this Ordinance may appeal to the Zoning Board of Adjustment. Such an appeal must be made within thirty (30) days from the date of the order or decision complained of in writing, addressed to the clerk of the Zoning Board of Adjustment.* Ms. Gandia said here they have the Health Official, the Health Officer who is in charge of interpreting the town's zoning. Ms. Gandia said when he is deciding to issue a local permit for an ISDS, he has to look at the town's zoning. Ms. Gandia said if the town were to take the owners' reasoning, they would be saying that Section 295-1 is all that he can use when he is trying to figure out whether or not that should be approved. Ms. Gandia said that there is no way that the Health Official's interpretation or decision to grant that permit can be based on this document. Ms. Gandia said that Section 295-4: Greater restriction or higher standard to govern in the Waste Disposal System Regulations, states: *Whenever the regulations made under the authority hereof differ from those prescribed by any statute, ordinance, or other regulations, that provision which imposes the greater restriction or other restrictions, or the higher standard shall govern.* Ms. Gandia said that means he has to look at other statutes, other ordinances, and other local regulations in making his decision. Ms. Gandia said the town's zoning ordinance for wetlands has a greater provision. She said Section 307-44 states: *Where any provision of this ordinance is in conflict with State law or other local ordinance, the more stringent provision shall apply.* Ms. Gandia said the town has decided that when there are competing laws, rules, and regulations, the more stringent will apply. Ms. Gandia said Section 307-44 for the Wetlands speaks of the setback distances from septic tanks, leach beds, and sewer lines. She said it talks about what is needed and so does Section 295. Ms. Gandia said Section 295 allows for a reduction, stating it says it may be reduced 50' with an SDR pipe or better. Ms. Gandia said the town's zoning ordinance for the wetland does not allow for that reduction so here you have a perfect example where a Health Officer is now in charge of interpreting the zoning. Ms. Gandia said Section 307-41 states: *Residential and commercial septic leach fields must be setback from Wetland Conservation District areas the following distances.* Ms. Gandia added there is no application for any type of reduction. Ms. Gandia said the town zoning ordinance is the more stringent.

Ms. Gandia stated last time they spoke there was a discrepancy with the delineation of the wetlands and how that section of the town zoning kicks in if it is alleged that wetlands are improperly delineated. Ms. Gandia directed attention to the Tables of Contents that she handed out. She said exhibit two in her packet is an SHI total location plan dated 2/15/2021. Ms. Gandia said it states "existing gravel drive" at the top. She said the picture behind it was taken at the site walk and you can see where that existing pavement would be. Ms. Gandia said there is no existing gravel pavement there, adding there is grass and water. Ms. Gandia said this picture is from 2023 and the plan was in 2021. She showed another picture from when the property was for sale in 2016. She said again there is no existing gravel drive. She said the material submitted to the town and the state has numerous discrepancies. Ms. Gandia stated exhibit three is a 2016 plan that delineates wetlands. She said the next picture from the site walk outlines where the wetlands are according to the plan. Ms. Gandia said there was discussion about whether or not any construction by her client may have contributed to groundwater or flooding to the property at 37 Woekel Circle.

Ms. Gandia said Exhibit 4 shows a picture from 2015 before any construction noting that there is no new house in the photo and that there is a lot of water there. She said the other picture shows that there is no retaining wall that they saw at the site walk, adding that there is significant standing groundwater shown. Ms. Gandia said the last item shows the court order. She said this matter has been litigated. She highlighted important points to this decision and read those as follows: *"Many properties in the area experienced springtime flooding relevant here. The property has*

consistently experienced more flooding than the surrounding lots and water primarily pooling around the cottage in the front lawn. (page 6) Over the past few years, the amount of standing water on the property has increased in depth and the water remains on the property for a longer duration of time. Nearly a dozen witnesses testified that while the property is always flooded during this spring thaw prior to 2016 it always dried out by summer, however, it now experiences standing water throughout the entire spring and almost summer making it nearly impossible to mow the grass or access the front door without rain boots. (page 11) Here based on the evidence presented at trial, the court does not find that the defendants have made improvements to 35 or 49 Woekel Circle in an unreasonable manner such that said improvements result in a diversion of surface water on the property. There were nearly four full days of testimony in this case and over a dozen individuals testified concerning the amount of standing water the property historically experienced, how long typically it lasted, and whether the flooding on the property has worsened since 2016. Several facts are clear. In light of the foregoing, the plaintiff's emphasis on photos from 2016 is unpersuasive. When those photos were taken, water was still being pumped off the property. It was not until December 2016 that the agreement with 39 Woekel Circle was terminated, and the pumping of the water ceased to continue. It is not surprising that after the water can no longer be pumped away from the property water levels increased dramatically and the property failed to dry out properly by the summer. Indeed, the testimony presented at trial supports the conclusion that the plaintiff's current water issues are attributable to the absence of a pumping system rather than any improvements made by the defendants. (page 13) The court understands that the amount of standing water on the property undoubtedly interferes with the plaintiff's ability to use and maintain their land." Ms. Gandia stated that you have content from a court stating the amount of standing water on the property and how it makes the property uninhabitable, and you have Pelham town officials saying this lot is not buildable.

Ms. Gandia said Exhibit 5 is a septic plan dated 2020 that was placed in front of the town official and shows what the current owners want to do. She said they want the existing structure to be moved and raised and they want to do a proposed addition. Ms. Gandia said the town's zoning is very clear with what can and cannot be done with nonconforming land, buildings, or use. She said this needed to be looked at by the Health Official before he issued a decision. She said it appears it was not and that was an error.

Ms. Gandia said Exhibit 6 has the septic plan and details dated November 2, 2020, by ASI (Aeration Septic). She said in this septic system's notes it says *"No known surface water or very poorly drained soils within 75' of the proposed sewerage disposal system unless otherwise shown. No known poorly drained soils within 50' of the proposed sewerage disposal system unless otherwise shown."* She said there are poorly drained soils, standing ground water, soils that are not draining, and significant ground cover of water.

Ms. Gandia said Exhibit 7 is a letter about Little Island Pond and the contamination that already exists. She said part of the town zoning ordinance is to protect the health and safety of the residents and that means protecting the health and safety of the groundwater as well.

Ms. Gandia discussed why they feel the Zoning Board should grant their two appeals. She explained the first appeal is the appeal based on the Board of Selectmen's decision to enter into the agreement. She explained that the Zoning Board is being asked to look at the Board of Selectmen's decision when it entered into the settlement agreement. She said when the Board of Selectmen agreed to enter into the settlement, that decision to do that was an error. Ms. Gandia said the second appeal after the settlement agreement was done, the settlement agreement said the Health Official will now issue an approval. She said they are now appealing the Health Official's decision to enter that approval. Ms. Gandia explained the town has now fulfilled every obligation under the court order. She said now you have a citizen who is a direct abutter who has said when the Health Officer issued that decision, he interpreted the zoning. She explained why this decision was an error. She said when the Board of Selectmen made the decision to enter into the settlement agreement, that decision was an error based on the lack of proper construction and interpretation by the Board of Selectmen to enter into that agreement. Ms. Gandia said the Health Officer was not bound just by Section 295. She said that would make no logical sense. She said he has to look at setbacks, zoning for

the town, and the property that exists. Ms. Gandia said the decisions that were made by the Health Officer and the Board of Selectmen were an error and this Board has the authority to overturn that decision. She said they are asking the Zoning Board to grant their appeal of the administrative decision and to overturn the Health Officer and Board of Selectmen's decision in granting the approval for the benefit of the town and its residents.

Mr. Wing said it is obvious that those decisions were made before it went to the Superior Court. Mr. Wing said to Ms. Gandia if they did as she asked, what would she expect the Zoning Board to tell the Superior Court? Ms. Gandia said if the Zoning Board grants the appeal for the Health Officer, then nothing has to be done with the Superior Court because the town has already complied with the court's decision. She said that the settlement agreement told the town to issue this approval and the town did this. Mr. Wing asked what Ms. Gandia expected the homeowner to do then. Ms. Gandia said she is expecting the homeowner to recognize that now they are in a position where the information that was submitted wasn't accurate, and it didn't display the whole picture. She said she is expecting them to regroup and figure out where to go, adding that the owners knew when they bought this property in 2016 that it wasn't buildable.

Ms. Masse-Quinn said under Chapter 295 if you look at the document there is no section on how to appeal the document. Ms. Masse-Quinn said she is not sure how the opposing counsel could appeal to the Superior Court. Ms. Gandia said if the Board grants the first appeal for the decision of the Health Officer, the Zoning Board will do nothing with the Court. Ms. Gandia said if the Zoning Board granted the appeal for the Board of Selectmen, the Zoning Board would go back to the Superior Court and ask for that settlement agreement to be vacated based on the Zoning Board's decision.

Mr. Wing opened the floor to the public for anyone who would like to speak in opposition to the applicant.

Mr. Daniel Muller from Cronin, Bisson, & Zalinsky P.C. approached the Zoning Board on behalf of the owners of 37 Woekel Circle. Mr. Muller stated that the Zoning Board has his letter, and he will not be repeating everything in it. He said that he is at a slight disadvantage, stating that he provided his letter to the other side, and he did not get a copy of their response.

Mr. Muller discussed how to appeal the decision under ordinance 295. Mr. Muller said the answer is a writ of certiorari. He said the writ of certiorari is an extraordinary writ to the Superior Court that is used when you do not have other remedies from governmental agencies.

Mr. Muller said the notion that the court-ordered agreement is not in play. He said they argued that the decision to enter into that agreement was unlawful, so the agreement itself was unlawful.

He said he also had an issue that was not addressed by the applicants. He said as stated in this letter, the town signed off on that on June 6th, 2023. He said their appeal was not filed within the statutory requirement which would override anything in the ordinance. He said the ordinance says you have thirty days. Once the thirty days go by you lack subject matter jurisdiction.

Mr. Muller said town Health Officers and town Deputy Health Officers have duties that are set forth by statute. He said administrating zoning ordinances is not one of them. He said the zoning ordinance says who administers the zoning ordinances. He said that the Health Officer is not among those people who do that.

Mr. Muller said he heard a lot of discussion about plans and permits that were either for septic approval at the state level or for the Health Officer. He said he heard about some shoreline protection approvals. He said no one has pointed out any provisions statutory or otherwise. He said it gives this Zoning Board the authority to review decisions relative to state shoreline permits, state septic permits, and permits under the health regulations. He said he

has not seen any provisions in the zoning ordinance that say the Zoning Board can review decisions made under Chapter 295.

Mr. Muller said when the subject matter of jurisdiction is made, the notion is that you resolve that issue first. He said the reason is it keeps people from mixing arguments on the merits with arguments relative to jurisdiction. He said if you had no jurisdiction, you shouldn't be discussing the merits at all.

Mr. Muller explained the difference between a collateral appeal and a direct appeal. He said the applicant is looking to force the town to go back to the Board and say we want to renege on the agreement now. He said this would be a collateral attack. He said a direct appeal in this case would have been to the New Hampshire Supreme Court. He explained if you didn't like the court order, you would have intervened in the case and appealed it to the New Hampshire Supreme Court. Mr. Muller said no one appealed the court order within thirty days so the order has become final, adding that it is a final unappealable order. Mr. Muller said the applicant is trying to have the Board go back to the town and say we do not want to live by that order anymore and we want to renege. Mr. Muller said if someone had an issue with that court order, they had thirty days. He said no one has jurisdiction at this point to challenge that order. He said this is why he is not focusing on the merits.

Mr. Muller said when the wetlands matter was before the Health Officer, he had a delineation relative to wetlands on their property by a certified wetlands scientist and there were no wetlands, so the setbacks did not apply. Mr. Muller asked the Zoning Board to find that there is no subject matter jurisdiction concerning either appeal because even the Health Officer's decision, even though it was made after the fact was made pursuant to that earlier court order.

Mr. Welch said when Mr. Muller's clients brought the case against the appellants, the case was that the runoff from their property had made this property so inundated with water that it was unusable and unbuildable. Mr. Welch said it was the allegation in that lawsuit. Mr. Muller said that is how they attempt to categorize it. Mr. Muller said there are a couple of issues. Mr. Muller said one was a boundary issue which was the common boundary between 37 and 49 Woekel Circle. Mr. Muller said the other complaint was whether they had reasonably altered the drainage. He said the unbuildable language is their language. He said they claimed that they interfered with their property. Mr. Muller referenced the plan from 2016 that shows the wetlands. He said when the person who showed them went to testify to that, he was not allowed to because he wasn't qualified to delineate wetlands.

Ms. Masse-Quinn said that Chapter 295 does not govern itself. She said it is under the authority of RSA 147. Mr. Muller said it was adopted according to RSA 147:1. Ms. Masse-Quinn said under RSA 147 the rules of a Health Officer are to define a nuisance and to use local codes or local regulations such as zoning and subdivision regulations. Mr. Muller said he does not think that is correct. He said you are talking about the adoption of regulations pursuant to that statute. Mr. Muller said that is what 295 says. Ms. Masse-Quinn said according to the document, 295-1 is under the authority of RSA 147 and that is where the authority to this document is controlled. Mr. Muller said 147 is the authority for adopting 295. Ms. Masse-Quinn said correct, and under 147 the Health Officer can define what a nuisance is and can also refer to local codes and local regulations. Mr. Muller said that is debatable and said it is sort of like site plan regulations. He said they are not self-executing. He said what you build to adopt, you adopt. He said you are ignoring that the statutory duties of Health Officers and Deputy Health Officers are defined in 128. He said their authority rises there and it has to be connected to that. Ms. Masse-Quinn said Chapter 295 is under the authority of 147. She said it is her understanding that the Health Officer can refer to local regulations meaning the subdivision regulations.

Ms. Masse-Quinn referenced the letter from Mr. Muller's engineer Mr. Paul Carideo. Ms. Masse-Quinn said the letter is asking for waivers under the 295-16 setback distances. Ms. Masse-Quinn said one waiver is about the leach bed to well that requires 75'. She said the second waiver request is about the separation of wells to septic tanks for the 50'. Ms. Masse-Quinn said when you refer to Chapter 295-16 Setback Distances which is also in accordance with zoning

under 307-41A and the land use regulations under Special Provisions and Subdivision Regulations 203-1B:4, however, anything with an asterisk on this document can be waived by the Health Officer or the Board of Selectmen acting as the Board of Health. Ms. Masse-Quinn said you can get a waiver for the 50' reduction, however, if you look at the section under leach beds and private wells for 75', there is no asterisk there. She said the Health Officer or the Board of Selectmen cannot grant a waiver to reduce the 75' setback distances from the leach bed to the well. Mr. Muller asked if the Zoning Board had jurisdiction to review those regulations. Mr. Muller said Ms. Masse-Quinn is trying to interpret 295. Mr. Muller asked Ms. Masse-Quinn to show him something in the zoning ordinance that says this Zoning Board has the authority to review decisions under Chapter 295. Ms. Masse-Quinn said as a result of the asterisk not being under the 75' setback that means Mr. Muller's client still needs to meet the setback requirements of the Zoning. She said the only way for his client to do this is to come before this Zoning Board for a variance. Mr. Muller said the only zoning ordinances deal with wetlands setbacks from leach fields to wetlands. He said there is a lineation done by a certified wetlands scientist stating no wetlands. Ms. Masse-Quinn repeated that Mr. Muller's client cannot be granted the 75' setback waiver.

Ms. Masse-Quinn said as a result of a settlement agreement with Mr. Muller's client she said it appears the Board of Selectmen granted zoning relief and had no authority to do so. Mr. Muller asked what zoning relief they granted. Ms. Masse-Quinn said the Board of Selectmen granted relief to a shortage of 75' from the leach field to the private well. Ms. Masse-Quinn said they do not have the authority to do that under Chapter 295, adding that the Health Officer and the Board of Selectmen have every opportunity to refer back to the zoning and subdivision regulations.

Ms. Masse-Quinn said under 295-4 which is zoning 307-44 conflicts with other regulations. Ms. Masse-Quinn said this means the town zoning accompanied by the subdivision regulations is stricter than this document. Mr. Muller said he did not agree. Ms. Masse-Quinn said under 295-6 Authority to Enforce is zoning 307-34 under Enforcement. Ms. Masse-Quinn said Section 295-14 Leach field locations; alternate leach field capacity is in accordance with zoning 307-37 Article VII Wetlands and 307-41A Special Provisions. Ms. Masse-Quinn said under 295-15 Minimum land areas is interesting because this document was never designed for non-confirming lots, which is what Mr. Muller's applicant has. Ms. Masse-Quinn said the minimum land requirement is a 1-acre lot. She said the only reason why Mr. Muller's client was able to utilize Chapter 295 was because, under 295-15:B1, it says existing residential structures. Mr. Muller said that Ms. Masse-Quinn skipped over 295-12B, which talks about waivers. Mr. Muller said that all otherwise applicable design standards can be done by the Health Agent or by the majority vote of the Pelham Board of Health. Ms. Masse-Quinn said the town is stricter than the ordinance.

Ms. Masse-Quinn said under 295 there is no section on how to appeal this. Ms. Masse-Quinn asked wouldn't it have to go under the RSA 677-15 which states the appeal to the Zoning Board should come first if a dual track appeal is brought to the Superior Court before the Zoning Board proceedings have concluded, then the Superior Court matter would be abated. Mr. Muller said no because the writ of certiorari is not under a statute, it is a common law writ. Ms. Masse-Quinn referred to the meeting minutes from the November 1, 2022, Board of Selectmen meeting. She read: "*Ms. Charlene Takesian asked if the Board of Selectmen has approved any other waivers like this one. Mr. Colburn stated that the Board of Health has not convened in twelve years, so they probably have not approved one before.*" Ms. Masse-Quinn said this has never happened before in the history of Pelham. Mr. Muller said that is not true. Mr. Muller said he had provided a specific plan for where that waiver was granted in this town for the lot next door. Mr. Muller said Ms. Masse-Quinn is failing to distinguish between the Board of Health, who do not always hear them, and the Health Agent. He said they were specifically referring to the Board of Health and not the Health Agent.

Ms. Masse-Quinn said under RSA 147 it says: "*When a residential septic system is under failure creating a nuisance and a health hazard, the Health Officer has the authority to order the system be replaced in accordance with the New Hampshire administrative rules under 1003.10. These requirements apply to both rental units and privately owned homes.*" Ms. Masse-Quinn said the New Hampshire Code of Administrative rules are also in accordance with our

zoning under 307-25-4:1. Ms. Masse-Quinn said under the New Hampshire Administrative Code of Rules 1003.10 it states: *“Any lot of less than 5 acres in size that does not have subdivision approval or meet one of the exceptions listed in New Hampshire Administrative Code of Rules 1003.11(a) shall not be considered for ISDS approval without meeting the requirements of New Hampshire Administrative Code of Rules 1000 for subdivision approval.”* Ms. Masse-Quinn said in our zoning under 307-25-4:1 Conditional Use Requirements states: *“Within the district, lot uses, lot size, density, and setbacks are more flexible than are allowed in the underlying Residential Zoning District or within Pelham Zoning Article III, Chapter 307-12, Dimensional Requirements. With an increase in the density or mix of permitted uses of the lot is proposed, or when a relaxation of lot size or setbacks is proposed, the applicant shall submit a site plan and conditional use permit application. The Application and site plan shall demonstrate that:*
1. The land can support the proposed uses and development in full compliance with the New Hampshire Department of Environmental Services’ Env-Wq 1000 Subdivision and Individual Sewage Disposal System Design Rules and subsequent revisions.” Mr. Muller said he did not agree. Mr. Muller said when reference by incorporation a standard like it has to satisfy the rules, that means like DES which they have done here grants approval, there is a presumption that it satisfies everything. Mr. Muller said different powers are separate from the zoning ordinances, adding that just because something arises under public health, safety, or welfare, doesn’t mean it is a zoning ordinance. Mr. Muller said this is a public health ordinance adopted under a separate police power statutory authority.

Ms. Laura Gandia from Divine & Millimet approached the Board. Ms. Gandia stated that the appeals were timely filed within thirty days, and they are date stamped by the town. Ms. Gandia said Case #ZO2023-00015 was filed on July 3, 2023, within thirty days, and Case #ZO2023-00016 on July 21, 2023, within thirty days. Mr. Ken Stanvick said it appears to be in direct conflict with what we just heard in terms of those appeal dates being outside of the thirty days.

Mr. Muller said the date he had was July 21st and the other point is it requires more than simply filing with the Zoning Board by statute. Mr. Muller said you have to file with the officer or the person you are taken from and there has been no evidence of that. Mr. Muller said in terms of timeliness, they still have not complied with what the statute requires under 676-5.

Ms. Gandia said she disagrees. She said they have an appeal of administrative decision and there is nothing anywhere in the town zoning ordinance that says they have to go anywhere other than to this Board. She said this is what they did, and they were both filed within the thirty days according to state statute.

Ms. Gandia said it has been represented that only the Board of Selectmen and the Zoning Administrator are the only two people who can administer the health ordinance. Ms. Gandia said this is not true. Ms. Gandia said the town zoning 307-6 specifically references that the Health Officer is charged with administering and interpreting the ordinance adding that there is nowhere in there that says the appeals have to be based on decisions from the Board of Selectmen or the Zoning Administrator.

Mr. Daniel Muller of Cronin, Bisson, & Zalinsky P.C. approached the Board. Mr. Muller said the appeal from the Planning Board is done by statute 676-5 III. He said this is in the state statute and there is nothing in the state statute discussing appeals from Health Officers to this Zoning Board.

Mr. Wing closed the floor to the public.

Mr. Wing asked the Board who thinks they have subject matter jurisdiction. Mr. Wing said no and went directly to the two-page settlement agreement and read the following from the bottom of the document: *“Approved and so ordered, the Honorable Jacalyn Colburn.”* Mr. Wing said this is a Superior Court order. He said nowhere in the powers of the Zoning Board of Adjustment does it allow the Board to approve the appeal. Mr. Wing said he does not see how this can be done without vacating the court order. Mr. Wing said to appeal a decision of the Superior Court,

you go to a higher court, and in this case, the Supreme Court. Mr. Welch agreed with Mr. Wing. Ms. Masse-Quinn said the only reason why it was settled in court was because it was settled before any proceedings were heard in front of a judge in the Superior Court. She said the Board of Selectmen initially denied this request. Ms. Masse-Quinn said then Mr. Muller filed the paperwork with the Superior Court. Ms. Masse-Quinn said as a result of that we are going to settle. Mr. Wing said the judge has ruled. Mr. Wing said the court order says the town approves the installation of the petitioners' redesigned septic system prepared by Hayner/Swanson subject to approval by NHDES and subject to the approval of the same setback waivers that the town's health officer had previously approved. Mr. Wing said there was no zoning waiver requested. Mr. Wing said if there was a decision by the Health Officer, then the appeal process should go to the Health Officer's supervisor or the Board who is in charge of the Health Officer, and in this case that would be the Board of Selectmen. Mr. Wing added they are not in charge of enforcement.

Mr. Stanvick said he would be in favor of the fact that this is definitely under their jurisdiction to be able to interpret and review what has come before them and make their own decisions independently based on the zoning regulations. Mr. Stanvick said maybe this is more of a technical legal issue but from what he can see it certainly falls within their purview to review this. Mr. Stanvick said if the court made a decision based on faulty evidence, then that is also grounds for the Zoning Board to take a look at it.

Mr. Welch said there are a lot of grey areas and a lot of information for and against. He said he disapproved of the Selectmen's decision. Mr. Welch said the attorney for the appellants mentioned that they are seeking to overturn the Selectmen's decision to enter the agreement. Mr. Welch said the letter from the Planning Director said they are seeking to overturn the decision made at the 11/1 and the 11/15 meeting dates. Mr. Welch said if they were seeking to appeal that decision, they would have had to apply to appeal that within thirty days of the decision, adding that would have been in December. Mr. Welch said yes, they applied within thirty days of the court order, but they aren't asking them to vacate the court order, they are asking them to overturn the decision which was in November. Mr. Welch said the position they are in today to review the decisions, he does not think they have the jurisdiction because they are either outside the appeal window or they are asking them to overturn the court order. Ms. Masse-Quinn questioned the dates and expressed that the dates were different. Mr. Welch said on Case #2023-00016 in the original packet they received from the August meeting, there is a page from the Planning Director that she sent to Mr. Bilapka and Ms. Page which included the dates he mentioned. Ms. Masse-Quinn said the Planning Director was not present to ask where the dates came from. Mr. Stanvick agreed with this. Mr. Stanvick said there seems to be some confusion about when the thirty-day window is. Mr. Stanvick recommended going back to confirm what the dates were.

Mr. Wing repeated that the floor was closed to the public.

Ms. Masse-Quinn stated that an abutter has the right to exhaust all remedies to appeal and the first way to do so is under 677-15 with this Zoning Board before it goes to Superior Court. Mr. Wing said but this is after. He said it had already gone to Superior Court.

Mr. Stanvick said the thirty days is a critical number and would like to make sure they go back and confirm when the clock starts. He said he would like to table the discussion until they can get an answer on this.

Mr. Wing spoke to Mr. Welch regarding the two criteria Mr. Welch had issues with. Mr. Wing said if he wanted to second this motion, they would table this adding they would have ninety days. Ms. Masse-Quinn said the next day for the Zoning Board meeting would be November 13, 2023. Mr. Wing said he did not have to have another meeting. Mr. Stanvick said he thought it was important to take a little more time and get clarification on the dates, adding that if it is outside the thirty days then they don't have a choice and if it is inside the thirty days then they do have a choice. Mr. Welch said he would like clarification on the dates because it is partially what he is basing his decision on adding that it appears one of the appeals is outside of the thirty-day window. Mr. Welch said the other is that if you

want to appeal a court decision, you have to appeal to the court. He said he agrees that they have the right to appeal, he just does not think the Zoning Board is in the position to grant the appeal. Mr. Stanvick said that both parties mutually agreed on the settlement but one of the parties did not have the total picture. Mr. Wing questioned the Board and asked if they had the authority to go back to the court and say the court was wrong. Ms. Masse-Quinn said yes when it involves the interpretation of their zoning. She said that is why the cases get remanded back to the Zoning Board. Mr. Wing said this was not remanded back to them. Ms. Masse-Quinn said they have an abutter who needs to exhaust all of his rights by statute in an appeal process under the 677-15. Ms. Masse-Quinn said the abutter needs to come before the Zoning Board to allow the Zoning Board to interpret the zoning to see if it involves their zoning and then if it doesn't he goes to the Superior Court. Mr. Stanvick said correct, and he thinks this is the stage they are at.

Mr. Shaun Hamilton asked how the other properties around the pond that are nonconforming lots have been approved for septic design. Mr. Hamilton confirmed with Mr. Wing that they had to adjust the setbacks. Ms. Masse-Quinn said that the Zoning Board is the only Board that can authorize those setbacks adding that the Board of Selectmen cannot.

Mr. Wing said there is a motion on the table to delay until they can get confirmation of the dates.

MOTION: (Stanvick/Hamilton) To delay the discussion until the appeal dates have been confirmed for Case #2023-00015.

ROLL-CALL VOTE: Mr. Hamilton – “YES”
Ms. Masse-Quinn – “NO”
Mr. Stanvick – “YES”
Mr. Welch – “YES”
Mr. Wing – “NO”

(3-2-0) The motion carried.

Mr. Wing said they would seek clarification on the November 1 and the November 15 date and continue Case #2023-00015 to the next Zoning Board of Adjustment meeting.

Mr. Wing said he is going to press forward with his motion that the Zoning Board lacks subject jurisdiction because this is a Superior Court order that they are being asked to overturn. Mr. Wing said he sees no power granted to the Zoning Board under the 674-33 and he said he sees no power that grants the person the right to file an appeal from the Superior Court to the Zoning Board of Adjustment.

MOTION: (Wing/Welch) To deny the appeal of an administrative decision for Case# 2023-00016 based on lack of jurisdiction by the Zoning Board of Adjustment.

ROLL-CALL VOTE: Mr. Hamilton – “YES”
Ms. Masse-Quinn – “NO”
Mr. Stanvick – “NO”
Mr. Welch – “YES”
Mr. Wing – “YES”

(3-2-0) The motion carried.

The request for appeal was DENIED.

Mr. Wing read his facts of findings into the record. Mr. Wing read: *"There is a Superior Court settlement agreement lawfully entered into by the Town of Pelham and the property owner. There is a two-page decision approved and so ordered by the Honorable Jacalyn Colburn. Note, that the approved and so ordered makes it a court order; nowhere in the powers of the Zoning Board of Adjustment under 674-33 does it list the power to set aside a Superior Court order. Thirdly, nor is there any statute that grants a person the right to file an appeal of the Superior Court order with the Zoning Board of Adjustment. Appeals should be filed with a higher court."*

Mr. Wing announced a five-minute recess. The Board returned from recess at 8:49 PM.

Mr. Wing stated that he wanted to clarify the motion about the settlement agreement. Mr. Wing said his findings of facts were related to both appeals Case #2023-00015 and Case #2023-00016. Mr. Wing said he wanted to clarify that the Zoning Board members agreed with this as well and the motion to deny applies to both.

Mr. Welch said the Superior Court decision only relates to Case #2023-00016. Mr. Wing agreed that the Superior Court decision only relates to Case #2023-00016 and that they have tabled Case #2023-00015 to the next meeting. Mr. Wing and Mr. Hamilton said they would accept that. Mr. Stanvick said if Case #2023-00016 is the overarching decision then the discussion of time is an irrelevant point. The Board continued to discuss whether they should combine the original motion to include both cases. Mr. Wing said if they have other issues that warrant denial then that would supersede the date issues. Mr. Wing said as long as the date is not the controlling factor. He said if the date does seem to be the controlling factor, then they can certainly hold off until that information is before them adding he sees no reason to delay this discussion.

Ms. Nicole Pigeon reiterated that the Health Officer did grant the variance and if the Zoning Board does not agree with that decision to grant that variance, then the Board has to do something so it doesn't happen in the future.

Mr. Hamilton said whether the Health Officer can or cannot grant the variance, a Superior Court Judge higher than the Zoning Board of Adjustment has already ruled on this and made a decision. Mr. Hamilton said the applicant's appeal has to go to a higher court. Ms. Masse-Quinn disagreed and said this is a reference to the zoning and the setback distance is zoning 3037-4:1A adding that the Health Officer did not have the authority to grant that waiver. Mr. Welch clarified that the court decision only applies to Case #2023-00016. Mr. Welch said Case #2023-00015 is related to the Health Officer's decision and isn't bound by the court order. Mr. Welch said there is an opportunity to overturn the Health Agent's ruling because that case is not bound by a court order. Mr. Wing read the court settlement agreement stating: *"The town approves the installation of the town's redesigned septic system prepared by Hayner/Swanson subject to approval by NHDES and subject to the same setback waivers that had been previously approved. The town shall issue a permit consistent with this settlement agreement."* Mr. Wing said the Health Officer did what was in the agreement of what was in the order. Mr. Wing said if you have a matter that is outside that court decision, then if you are the Deputy Health Officer, it should be appealed to the Health Officer or the next higher authority which would be the Board of Selectmen. Mr. Wing said enforcement does not lie with the Zoning Board of Adjustment. He said they are here to grant waivers and disposition. Mr. Wing said town statutes 307-78 and 307-79 specifically provide the authority to the Board of Selectmen to enforce the zoning ordinances. Mr. Wing read 307-83A Powers of the Zoning Board of Adjustment 'Appeals' *"The power to hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by an administrative official in the enforcement of this Zoning Chapter."* Mr. Wing said no one has enforced this zoning chapter.

Mr. Wing said he would make a motion to deny based on the fact that the approved and so-ordered court order says the town approves the installation of the petitioner's redesigned septic system prepared by Hayner/Swanson subject to approval by NHDES and subject to the same setback waivers that the town's Health Officer had previously

approved. Mr. Wing said it also says the town shall issue a permit consistent with this settlement agreement upon submittal of an application for the septic system that NHDES has or will approve. Mr. Wing said he would make a motion on his findings of facts that the Health Officer was following the court order. Ms. Masse-Quinn said she would like to make a motion that the Health Officer did make an error about Chapter 295-16 because the Health Officer does not have the authority to grant a waiver for the reduction of the 75' well to the leach field. Mr. Stanvick asked if she would include the Board of Selectmen. Ms. Masse-Quinn said yes. Mr. Stanvick said he would support that motion so on the record going forward this is not going to set a precedence.

MOTION: (Masse-Quinn/Stanvick): To place on record that the Health Officer and the Board of Selectmen made an error about Chapter 295-16 to grant a waiver for a reduction of a 75' private well to leach field setback.

ROLL-CALL VOTE: Mr. Hamilton – “NO”
 Ms. Masse-Quinn – “YES”
 Mr. Stanvick – “YES”
 Mr. Welch – “YES”
 Mr. Wing – “NO”

(3-2-0) The motion carried.

MOTION: (Wing/Hamilton): To deny the appeal of an administrative decision for Case #2023-00015 based on the facts of findings.

ROLL-CALL VOTE: Mr. Hamilton – “YES”
 Ms. Masse-Quinn – “NO”
 Mr. Stanvick – “NO”
 Mr. Welch – “YES”
 Mr. Wing – “YES”

(3-2-0) The motion carried.

The request for appeal was DENIED.

Mr. Wing stated there is a thirty-day right of appeal.

REHEARING

ZO2023-00017

MAP 27 Lot 2-102

HUNT, Judy & COOK, Bill (Owners), Cronin, Bisson, & Zalinsky, PC (Applicant) – 50 Hinds Lane – Rehearing of a Variance concerning Article Section 102-12 Table 1 of the Zoning Ordinance to permit construction of a single-family residential dwelling on an existing non-conforming lot, where the lot does not meet the minimum requirements of 43,560 sq. ft. or 200' of frontage. This parcel was recently before the Planning Board as part of a lot line adjustment, Case #PL2023-00009, where approval was granted on April 17th, 2023, to add 0.19 acres from Map 27 Lot 2-101 resulting in a total of 0.32 acres.

Ms. Masse-Quinn read the list of abutters.

Mr. Shawn Dunphy approached the Board and introduced himself as an attorney from Cronin, Bisson & Zalinsky. Mr. Dunphy said he was here on behalf of Bill and Judy Cook to request a variance for their property at 50 Hinds Lane. Mr. Dunphy said they are requesting a variance from Article III, Section 307-12 Table 1 of the Pelham Zoning Ordinance. Mr. Dunphy said the Cooks purchased the property 50 Hinds Lane when it was a .13-acre lot and acquired another .19 acres from an abutter to make this property .32 acres. Mr. Dunphy said the lot line adjustment for that purchase was approved on April 17, 2023, and they are now looking to construct a two-bedroom single-family colonial home that will fit within the property and meet all setback requirements. Mr. Dunphy said they are here for the lot size and frontage. Mr. Dunphy said the Cooks worked with Meridian Land Services to draft a plan to show where the septic and the home will be.

Mr. Dunphy said the Board has the application submitted. Mr. Dunphy said numbers one and two of the variance criteria are similar and usually read together. He said they are: The variance will not be contrary to the public interest and The spirit of the ordinance is observed. Mr. Dunphy said the Supreme Court has stated that for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, granting the variance must violate the objectives of the ordinance not merely conflict with them. Mr. Dunphy said here they are requesting a single-family home on a residential lot in a residential zone. Mr. Dunphy said Hinds Lane is along Gumpus Pond and most of the existing homes in this area are similar lot sizes and many are smaller. He said there are no concerns for the health, safety, and welfare of the neighborhood because of the minimum increase in density, traffic, and other activities that come from another home in the area. He added further development is limited in this area because this property borders the 150 acres of Town Conservation Land.

Mr. Dunphy said the third element of the variance is the substantial justice prong which is measured by whether the loss to the individual is outweighed by the general public in denying the variance. Mr. Dunphy said here if the variance is denied then the Cooks would be left with no possible use for this property because, under the zoning ordinance, there is no principal use that this property can be used for without relief such as a variance. Mr. Dunphy said there is no gain to the public in denying this variance. He said there is a negligible increase in density, traffic, and other potential issues that the public may be interested in.

Mr. Dunphy said the fourth element is diminishing surrounding property values. Mr. Dunphy said this property will fit the characteristics of the neighborhood; it won't impact the conservation land around it. And there will be no impact on surrounding property values. Mr. Dunphy said there are two letters of support from neighbors.

Mr. Dunphy said the fifth prong is unnecessary hardship. Mr. Dunphy said there are two potential tests that they believe they meet. Mr. Dunphy said A i. is no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property. He said the lot size requirements are limited to create density and create open space areas. He said there are also other minor goals such as safety and ensuring the proper spreading of the population. He said this does not apply to the Hinds Lane area because any of the lots here were created before the ordinance and it is a high-density area on small lots. Mr. Dunphy said, unlike the other properties in the area, this lot is undeveloped, and it sets it apart along with the 150 acres of conversation land abutting the land which limits any further development in this area. Mr. Dunphy said the Cooks home will not negatively impact the neighbors or the town. Mr. Dunphy said the second prong 5 ii. is proposed use is a reasonable one. He said they are requesting a single-family home in a residential zone on a lot that is the same size if not bigger than the other lots in the area. He said (B) under 5 states if the criteria in subparagraph A are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is, therefore, necessary to enable reasonable use of it. Mr. Dunphy said the property cannot have a primary use under the ordinance because of the lot size. He said this property had

existed before the zoning ordinance and unlike many of the lots in the area it was never developed, and it was never able to comply with the zoning ordinance. Mr. Dunphy said the Cooks have attempted to lessen the nonconformance by acquiring all the land possible from the abutting property and the variance is necessary to allow basic use of this property which is a single-family house.

Mr. Wing read the following two letters from abutters at 33 Hinds Lane and 59 Hinds Lane into the record.

From Edward Savard
33 Hinds Lane
Pelham, NH 03076
To The Town of Pelham
Village Green
Pelham, Nh 03076

RECEIVED

OCT 16 2023

October 14, 2023

About the variance hearing on the 16th of October 2023

Hi,

I live at 33 Hinds lane, and I wish to let the Boards know that I am in favor of granting the requested variance for 50 Hinds Lane. My home sits on much less area then this home will have. In fact it looks like it will be one of the biggest yards in the area. Not only that but it will sit surrounded by over 100 acres of undeveloped land that the town owns.

Edward Savard

To Pelham, Bd Adjustment
 From Anthony Silva, 51 Hinds Lane

RECEIVED

OCT 16 2023

October 11, 2023

Town of Pelham, NH
 Planning Department

Concerning the meeting on allowing a home to be built at 50 Hinds Lane.
 Allowing a home to be built there will have no detriment affect on the neighborhood.
 The house will have more usable land than mine and most of the homes on the Pond.
 A home built on the site is much more appealing than a shed that currently exists on the property.
 I do understand why anyone would vote against the request.

Yours,

Tony Silva
 Tony Silva

Mr. Masse-Quinn asked what the square footage of the new property would be. Mr. Dunphy said the square footage is 14,034. Ms. Masse-Quinn asked if they received approval from DES for the septic system. Mr. Bill Cook replied

and said that his engineer said the septic system was designed and it was approved.

Mr. Welch asked what the square footage of the new dwelling is. Mr. Dunphy said it is 1,800 square feet, has 2 bedrooms, and 2 stories. Mr. Welch confirmed it is 1,800 square feet on a 14,000 square foot lot.

Mr. Wing asked if they fell within the shoreline protection zone. Mr. Cook said no, they are outside it.

Mr. Wing stated that Mr. Hamilton would sit on this Case #2023-00017.

Mr. Stanvick asked if there were any other undeveloped lots in the area. Mr. Cook said no. Mr. Wing said there was only one other property that was undeveloped on the corner of Bush Hill and Hinds Lane.

Mr. Welch stated that the well radius overlaps an abutter well and asked if there was a well release form in place. Mr. Cook said the neighbor is present and he is in support of this. Mr. Cook said they have the same engineer, and everything was designed so there would be no conflicts. Mr. Welch said because they overlap there would need to be a well-release form in place and documented adding that it would be a condition of the waiver.

Mr. Wing opened the floor for public comment. Mr. Wing asked if anyone from the public would like to speak in favor of this application.

Ms. Elizabeth Carvalho approached the Board and introduced herself from 41 Hinds Lane. Ms. Carvalho said she lives at one of the small lots and there has been a lot of development all around her. She said she has lived there for about 25 years now. She explained that the building around her only makes for a nicer neighborhood because they are new homes.

Mr. Wing asked if anyone from the public would like to speak in favor of this application. Hearing none, Mr. Wing asked if anyone from the public would like to speak in opposition to this application. Hearing none, Mr. Wing brought the discussion back to the Board.

Mr. Wing closed the floor for public comment.

Mr. Wing said the Board would discuss the five criteria. Mr. Stanvick asked if the applicant's findings of facts that were submitted could be used if the Board did not have any disagreements with them as submitted. Mr. Wing said yes, they could.

MOTION: (Stanvick/Welch) To accept the applicant's findings of facts with the conditions of a well release form from the abutter, a DES approval of septic, and to not exceed 30' in height.

VOTE: (5-0-0) The motion carried.

ROLL-CALL VOTE:

Criteria 1-5 and final vote:

Mr. Stanvick	- YES
Mr. Welch	- YES
Mr. Hamilton	- YES
Mr. Wing	- YES
Ms. Masse-Quinn	- YES

Mr. Wing announced the waiver is granted and there is a thirty-day right of appeal.

ADJOURNMENT

MOTION: (Stanvick/Welch) To adjourn the meeting.

VOTE: (5-0-0) The motion carried.

The meeting was adjourned at 10:03 PM.

Respectively Submitted,
Heidi Zagorski
Recording Secretary