

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
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NOTICE OF DECISION

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Case Name: **Nottingham Board of Selectmen v Nottingham Zoning Board of Adjustment,
et al**
Case Number: **218-2011-CV-00677**

Enclosed please find a copy of the court's order of November 02, 2011 relative to:

Final Order

November 14, 2011

Raymond W. Taylor
Clerk of Court

(507)

C: Michael Lee Donovan, ESQ; Douglas N. Leib, Trustee of the Douglas N. Leib Living Trust

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TOWN OF NOTTINGHAM

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

2011-CV-677

NOTTINGHAM BOARD OF SELECTMEN

V

NOTTINGHAM ZONING BOARD OF ADJUSTMENT AND DOUGLAS N.
LIEB, TRUSTEE

FINAL ORDER

Defendant Trustee, Douglas Lieb owns a parcel of property along Pawtuckaway Lake totaling 6.8 acres. He is desirous of dividing the property up into a three lot subdivision, and each one of his proposed lots would meet the two acre minimum lot size required under the Nottingham Zoning Ordinance. On two of the proposed three lots a dwelling structure currently exists and it is not the intention of Mr. Lieb to destroy or substantially expand either of the two existing homes. Rather his purpose for filing the three lot subdivision is to enable him to build a home on the third lot which he would sell.

Mr. Lieb was required to petition the Nottingham Board of Adjustment for two variances. The first requested relief from the zoning ordinance provision that commanded that each lot have minimum contiguous frontage on a Class V road or better of at least 200 feet. The second requested relief from the zoning ordinance provision that requires that each lot contain a 200 foot by 200 foot area fit for building or a 30,000 square foot contiguous area lot envelope in which a house and septic system could be placed. After numerous public hearings with respect to Mr. Lieb's request, the Nottingham Zoning Board of Adjustment granted him both a "frontage variance" and a "lot envelope variance", by the identical vote of three to two. It is from these two

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decisions of the ZBA that the plaintiff appeals.

This case is unusual in that the appealing party is not an objecting abutting property owner as is usual in this type of litigation. In fact it appears that none of the abutters lodged any serious objection to the two variances sought by Mr. Lieb. The plaintiff is the Nottingham Board of Selectmen. It voiced its objection to the variance request prior to and at the public hearings held on this issue. The primary reason for the objection was a perceived safety concern. Specifically, the plaintiff alleges that because the roads servicing Mr. Lieb's property were private, narrow, and dirt based, it believed that in an emergency it would be difficult to get fire and police assistance to the property. Although the variances were approved upon condition that the servicing road or roads be expanded, the plaintiff argues that the expansion ordered by the ZBA is insufficient to eliminate its safety concerns.

Although these facts do not bear directly on the two variances granted to Douglas Lieb, the ZBA was aware of the fact at the time it considered the variance requests that there were 73 existing homes that abut the same private roads as Mr. Lieb's lots that border Pawtuckaway Lake. Each of these other lots contained significantly less water frontage than does Mr. Lieb's property. Of the 73 lots, 70 consist of an area significantly smaller than each of Mr. Lieb's proposed two acre lots. Moreover for the entire neighborhood of over 100 lots, there is only one access point to Route 158, which is the only Class IV road that connects to the neighborhood. Twenty three of these lots are located further away from Route 158 than are the lots that are the subject of these variance requests.

With that backdrop, it is easy to understand how the ZBA could have felt a denial of Mr. Lieb's variance requests, given the actual situation with respect to property

bordering Pawtuckaway Lake, would be grossly unfair. While the majority of the ZBA members may have been less than articulate in describing their reasons for believing that the criteria necessary for the granting of these variances was met in this case, their concern for fundamental fairness is readily apparent if one reads their comments.

The plaintiff's arguments are law based not equity based. They point to the specific provisions of the Zoning Ordinance as well as case law regarding the criteria necessary before a ZBA grants a variance. Although the Court has been provided with a copy of the Nottingham Zoning Ordinance, it is impossible to determine exactly when the section pertaining to this litigation, to wit, Article II-Section C.1 was incorporated or amended. It seems likely however that existing lots were developed before the present "frontage variance" and "lot envelope variance" numbers that are contained in the present ordinance were implemented. Again, the majority of the ZBA may have been mindful of that fact as they considered these variance requests.

As the defendants cite in their Requests, the law in terms of this Court's review of the ZBA action is decidedly in their favor. A Superior Court's review in zoning cases is limited. Findings of Fact are deemed Prima Facie lawful and reasonable and cannot be set aside by the Court absent errors of law, unless the Court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable. It is the party seeking to set aside the ZBA decision that bears the burden of proof. The Court cannot substitute its judgment for that of the Board. It is also required to give deference to decisions made by local land use boards because its members are more familiar with the area involved than is the Court.


Given this Court's limited review power, it finds and rules that the plaintiff has not met its burden of proof with respect to its request that the Court deny the two variances

granted by the ZBA. It appears that the property of Mr. Lieb is the last parcel on the Lake that is undeveloped and therefore the plaintiff need not be concerned with a claim that the granting of these variances will set a precedent for other undeveloped lots that border Pawtuckaway Lake. Moreover with respect to the plaintiff's safety concern, which the Court assumes to be valid, it appears that the eventual owners of this property will be far less at risk with respect to police and fire emergencies than will the majority of the present homeowners that are located further away from the public highway than is the Lieb property. While that fact may have no legal significance, it certainly is the basis for the reasonableness of the majority ZBA decision. Accordingly the plaintiff's appeal is denied.

Both parties have filed a series of Requests for Finding of Facts and Rulings of Law. With respect to the plaintiff's Requests for Findings of Fact, the Court grants all but Request number 6 which is denied. Regarding the plaintiff's Requests for Rulings of Law, the Court grants Requests 1, 3, 7, 8, and 18. It denies Requests 2, 4, 5, 6, 9 through 17, and 19. The Court grants all of defendant Nottingham Zoning Board of Adjustment Requests. Defendant Douglas Lieb did not file any Requests.

So Ordered.

DATED: November 2, 2011


Kenneth R. McHugh
Presiding Justice

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