TOWN OF PELHAM
ZONING BOARD OF ADJUSTMENT
September 18, 2023

Chairman David Wing called the meeting to order at approximately 7:01 pm.

PLEDGE OF ALLEGIANCE

ROLL CALL

PRESENT ROLL CALL: David Wing
Danielle Masse-Quinn
Ken Stanvick
Matthew Welch
Alternate Shaun Hamilton
Planning Director/Zoning Administrator Jennifer Beauregard
Recording Secretary Cassidy Pollard

ABSENT: John Westwood

Mr. Wing appointed Mr. Hamilton to vote for the entire meeting.

MINUTES

August 14, 2023
MOTION: (Masse-Quinn/Stanvick) To approve the August 14, 2023, meeting minutes as amended.

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

REQUEST FOR REHEARINGS
Case #ZO2023-00013
Map 22 Lot 8-85-1
BRIDGESIDE COMMONS, GENDRON, Patrick (Owner), & Cronin, Bisson, & Zalinsky, PC (Applicant) – 579 Bridge Street – Requesting a rehearing of the denial of an APPEAL OF AN ADMINISTRATIVE DECISION concerning: Article III General Provisions, Section 307-13A lot size requirements of the Zoning Ordinance and the Planning Board's interpretation of the Zoning Ordinance specifically, whether the provisions of the Section listed above are applicable.

Mr. Wing informed the public that this is a request for rehearing and is only open for discussion from the Board and there will be no public input. He stated that the Board would either vote yes and agree to rehear the case or would vote no and would not agree to rehear the case. He explained that a reason for rehearing the appeal would be that some new information had come to light or that there was a mistake in the decision.

Ms. Masse-Quinn recused herself from the case as she sits on the Planning Board as Secretary.

DISCUSSION

Mr. Wing stated that he has had second thoughts about the decision and does not think that the Board is leading the Town Attorney into a good spot and thinks that he would have a challenge defending some of the arguments they made. He explained that he believes their findings of facts are thin and would suggest that the Board rehear the case.

Mr. Stanvick asked Mr. Wing what finding of facts he would consider to be thin. Mr. Wing stated that it would be his own argument where he suggested that the applicant knew the intent of the law, but the intent is not written. He explained that the Attorney's observation that multifamily housing is not specifically listed in 307-13A, is true and stated that he believes he is correct in that observation. He explained that there is no rationale for denial for finding a loophole as they cannot guess what the drafters of the ordinance might have intended.

Mr. Stanvick added that the Town attorney gets paid to provide the Board with direction and he doesn't want to second guess the attorney. Mr. Hamilton added that he agrees with Mr. Stanvick. Mr. Wing added that they need three in favor in order to rehear the case since there isn't a five-member Board. Mr. Welch added that he is in favor of rehearing, but not to reverse the decision of the Board but to enter more solidified findings of facts. Mr. Wing added that they've done that in the past where the conclusion was the same but only provided a stronger finding of facts.

Mr. Hamilton asked if the Board agreed to rehear the case if it would go back in front of Planning Board. Mr. Wing answered that if the Board agreed to rehear the case, then it would start over, and the applicant would return and make his case. He stated that if the Board agreed that he is correct then it would go back to the Planning Board. He explained that the Planning Board already has a case in the Housing Appeals Board on other matters and isn't sure how this would fall into that. He stated that this appeal was part of a multi-pronged effort by the parties in question and that one prong is the appeal of how the ordinance is written which is this Boards decision to make. He explained that there were several other appeals that went directly to the Housing Appeals Board with regards to loading calculations, conservation easements and other matters that are not before them.

Mr. Stanvick made a motion to not rehear the case based upon not seeing anything that's substantially different than what has been before them several times. Mr. Hamilton agreed and stated that having no decision from the Housing Appeals Board is beyond their scope. Mr. Wing stated that they will be doing a roll call vote for this case.

Case #ZO2023-00013
ROLL CALL VOTE:

Mr. Welch - "YES"
Ms. Wing– "YES"
Mr. Stanvick - "NO"
Mr. Hamilton - "NO"

(2-2-0) The motion passed.

The request for rehearing was **DENIED.**

Ms. Masse-Quinn rejoined the Board.

Case #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, & 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.

Case #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, & Article VIII-I, Section 307-48-1-1 of the Zoning Ordinance and the Administrative Decision made by the Selectmen, & 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.

Attorney Laura J. Gandia of Devine & Millimet approached the Board with Mr. Bruce Bilapka and Ms. Andrea Page of 35 and 49 Woekel Circle. Ms. Gandia stated that they have two appeals of administrative decisions and that they were before the Board last month but due to the lack of a full five-member Board, they asked that this be continued. She stated that during that discussion there was talk about having a possible site walk of the property and didn't know if the Board would entertain continuing this matter to have one and possibly getting input from the Conservation Commission as well. Mr. Wing stated that he would like more information as to why they're here before the Board before discussing the matter of a site walk.

Mr. Wing explained to the Board that this is an appeal of an administrative decision and isn't a review of the five criteria. He stated that it would be a yes or no answer, yes that they agree with the appeal and overturn the decision or no they don't agree and the decision stands.

Ms. Gandia stated that there are two cases in front of the Board tonight, the first being 2023-0015 which is an appeal of an administrative decision based on the health officer's decision to approve the ISDS system for the subject property and the second matter is 2023-0016 which is an appeal of the administrative decision based on a mutual settlement agreement that was issued by the Hillsborough County Superior Court on June 5th, 2023. She stated that they're appealing the Board of Selectmen's decision to enter into that mutual settlement agreement.

Ms. Gandia handed out a document titled, ***APPEAL OF ADMINSTRATIVE DECISION NARRATIVE CASE NOS. ZO 2023-00015 & 00016*** and read the following information to the Board.

Per NHRSA 674:33 Powers of Zoning Board of Adjustment:

I(a) The zoning board of adjustment shall have the power to:

> 1. Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and
> 2. . . . .

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

These two appeals are seeking the reversal of the following administrative decisions regarding the approval of an Individual sewage disposal system at 37 Woekel Circle (Map 31 Lot 11-20) ("Property") owned jointly by Charles Smith and Robert Habeeb ("Owners"):

> 1. 06/06/2023 **MUTUAL SETTLEMENT AGREEMENT**, Docket No. 226-2023-CV-00182, Charles Smith, Jr. et al. v Town of Pelham by the Town of Pelham Board of Selectman or designee (See Exhibit 1); and
> 2. 06/21/2023 **LOCAL APPROVAL FOR CONSTRUCTION OF AN INDIVIDUAL SEWAGE DISPOSAL SYSTEM** by Health Officer (See Exhibit 1A)
>
> ** Hereinafter referred to as "Decisions" **

These appeals are submitted to the Zoning Board by Bruce Bilapka and Andrea Page, 35 & 49 Woekel Circle ("Pages"), direct abutters to the Property who are aggrieved by the Decisions.

The pertinent procedural history of this matter is as follows:

The Property is non-conforming lot consisting of 0.11 acres with a 492 SF seasonal camp with no heat type and a cess pool. The Property is part of the Little Island Pond Association and subject to the 250 shoreland protection buffer. The Property was sold to the Owners in 2016 for approximately $48,000. As part of the sale and pursuant to NHRSA 4:40-A, 485-A:2, 485-A:39 and 483-B:4, a Waterfront Assessment Survey was performed. The statutory requirements require that Prior to executing a purchase and sale agreement for any "developed waterfront property" using a septic disposal system, an owner shall, at his or her expense, engage a permitted subsurface sewer or waste disposal system designer to perform an on-site assessment study. This study was done which revealed that an individual sewage disposal system could not

be properly installed or otherwise designed on the Property. The Property has not been used consistently for over 30 years and was basically abandoned and left in a state of disrepair.

The current structure on the Property is non-conforming as it encroaches into the side setbacks and the shoreland protection buffer. The Property is known to be highly saturated and is subject to routine flooding creating safety concerns and hazards along the roadway.

Due to the continuous flooding on the Property, the Owners have taken it upon themselves to illicitly pump water from the Property into the roadway. The Owners were ordered to cease this behavior by the Town.

Numerous concerns and complaints have been raised and presented to the Town regarding the condition of the Property.

The Owners are seeking to rebuild, relocate, expand or otherwise alter the existing footprint of the non-conforming seasonal structure, and install an ISDS which requires approval from various authorities to include the Town of Pelham, the New Hampshire Department of Environmental Services ("NHDES") and the NH Shoreland Protection Bureau. The Town of Pelham requires local approval for the ISDS. Under half of the communities in the State of New Hampshire require this local approval.

The Owners have filed for an ISDS through NH DES and the Pages have consistently raised concerns over the application. The Owners have submitted various documents as part of their application. As part of the application process, documents were submitted that contain information different from the town records. For example, the application does not indicate that the property and the existing structure is non-conforming. The documents do not indicate that the property is seasonal but rather it is claimed that the property is year-round.

As part of this application process, on or about November 15, 2022 (See Exhibit 16), the Town of Pelham Board of Selectman ("BOS") convened the Pelham Board of Health pursuant to NHRSA 147:1 to consider approval for the ISDS and associated waivers and voted to deny the well radius waiver request for 37 Woekel Circle (4-1-0). The Owners filed suit in the Hillsborough County Superior Court challenging said denial. The Town and the Owners entered into a Mutual Settlement Agreement dated June 6, 2023, where the Town "approves the installation of the Petitioners' redesigned septic system prepared by Hayner/Swanson, Inc. ("HIS") subject to approval by NHDES and subject to the same setback waivers that had been previously approved by the Town's health officer in June, 2021." The agreement also provided "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 as identified herein." The Town through its Health Officer issued said permit on or about June 21, 2023.

Since that time, the Hillsborough County Superior Court issued an order dated August 17, 2023 in a case entitled Charles Smith Jr. and Robert Habeeb v. Bruce Bilapka and Andrea Page which contained the following pertinent factual findings relative to the matter at hand. Those findings are:

1. "The Property contains a single-family cottage that was built sometime prior to 1950, but is not currently habitable" (Page 1);
2. "[t]he Property has consistently experienced more flooding than the surrounding lots, with water primarily pooling around the cottage and on the front lawn" (Page 3);
3. "In an attempt to remediate the severity of the flooding, Mr. Ste Marie's predecessors-in-title installed a sump pump sometime before 2001…The pump redistributed water from the middle of the Property off to a corner…This caused standing water on the Property to dissipate more quickly but it also caused water to pool on 39 WC…" (Page 3).
4. In 2007, the owner of 39 WC approached the then owners of 37 WC "about trying to resolve the runoff issues with the Property that were causing water to pool on 39 WC… As a result of their conversation, Ms. Martin (then owner of 39 WC) "permitted the owner of 37 WC to run tow pipes from the Property across 39 WC ,and into a culvert located on the other side of WC (Page 3)…This system pumped water off the Property and into the culvert year round…" (Page 4).
5. In 2016 39 WC sold and the "neighborly agreement" with the owner of 37 WC was terminated (Page 5).
6. Over the past few years, the "amount of standing water on the Property has increased in depth, and water remains on the Property for a longer duration of time…it now experiences standing water throughout the entire spring and almost all summer, making it nearly impossible to mow the grass or access the front door without rain boots..." (Page 6).
7. "In sum, the Court understands that the amount of standing water on the Property undoubtedly interferes with the plaintiffs' ability to use and maintain their land..." (Page 13).

These timely appeals followed.

NHRSA 676:5 Appeals to Board of Adjustment provides:

I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer.

II. For the purposes of this section:

(a) The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

An Appeal of an Administrative Decision allows this Board to step into the shoes of the administrative official. These Decisions involve the construction, interpretation and application of the following terms of the Town of Pelham's Zoning Ordinance ("ZO"):

ARTICLE III GENERAL PROVISIONS - SECTION 307-8 NONCONFORMING USES

Any nonconforming use may continue in its present use except that any nonconforming use of land or
buildings may not be:
A. Changed to another nonconforming use.
B. Re-established after discontinuance for one (1) year, except to a conforming use.
C. Extended.
D. Rebuilt after damage exceeding fifty percent (50%) of its value.

NHRSA 483-B:11 NON-CONFORMING STRUCTURES

I. Except as otherwise prohibited by law or applicable municipal ordinance, nonconforming structures located within the protected shoreland may be repaired, replaced in kind, reconstructed in place, altered, or expanded. Repair, replacement-in kind, or reconstruction in place may alter or remodel the interior design or existing foundation of the nonconforming structure, **but shall result in no expansion or relocation of the existing footprint within the waterfront buffer. However, alteration or expansion of a nonconforming structure may expand the existing footprint within the waterfront buffer, provided the structure is not extended closer to the reference line and the proposal or property is made more nearly conforming than the existing structure or the existing conditions of the property. This provision shall not allow for the enclosure, or conversion to living space, of any deck or open porch located between the primary structure and the reference line and within the waterfront buffer**.

In failing to apply section 307-8 of the ZO to the requirements of NHRSA 483-B:11, the Decisions were made in error and otherwise unlawful and unreasonable. Interpretation and applicability of the terms of section 307-8 was necessary. Here, the lot and structure are both non-conforming which necessitates the implementation of different rules and standards in the approval of the ISDS (Structure encroaches into the side setbacks, See Exhibit 12). The application failed to denote this and the administrative official failed to apply or otherwise interpret this provision in tis approval. In fact, the Shoreland Permit application submitted by the owners of 37 Woekel Circle fail to mention that the structure is non-conforming even when on Page 2 of the application it asked "this shoreland permit application requires neither a proposal to make the property more nearly conforming… indicating that there was no nonconformity but clearly there is. If the Town of Pelham properly applied section 307-8 when reviewing the ISDS application for approval, then the requirements of NHRSA 483-B:11 would have been triggered, and the Pages contend that ISDS approval would have been denied or reviewed differently. Further, the Pages contend that the property has not been in use for over thirty years. The Town's ordinance provides that any non-conforming use of land or building may not be re-established after discontinuance for one year except to a conforming use. With this, if the Owners are going to use the lot, the building must now be in conformance with the Town's regulations and clearly it is not. The previously referenced Hillsborough County Court order found that the cottage was not habitable and from 2001 until the time the Owners purchased the property in 2016, the cottage was used for storage. In fact, it was abandoned for many years. It is unlawful and unreasonable for the Town to approve the ISDS permit for a plan as presented given these non-conformities. In an October 12, 2017 (See Exhibit 17), NH DES phone note by Neil Bilodeau, it was written that Paul Zarnowski (Deputy Health Officer, Town of Pelham)

stated that the property has not been used for about 30 years. In essence, the non-conforming use of the structure was abandoned. It was an error for the Town not to apply 307-8 in determining whether the ISDS should be approved.

Additionally, NHRSA places limits on the expansion and remodeling of a non-conforming structure as it relates to the shoreland protection act. The application as presented by the Owners to the Town and NHDES violates NHRSA 483-B:11 as there is no indication of the existing non-conformity.

Further, the seasonal use status property needs to be interpreted and applied as it relates to the ZO and the state's requirements. The Town's property record card clearly states the Property is seasonal. NHDES and NH Shoreland Protection Bureau have certain requirements for seasonal property as compared to year-round property. The Owners have stated repeatedly that they want to use the property year-round, and that the property is a year-round property; however, this is clearly not the case, and it is unlawful and unreasonable for a permit to be issued based on a property that is clearly seasonal.

The Town's Waste Disposal System Regulations provide for the distinction between seasonal and year-round properties. Seasonal property is defined as:

> **SEASONAL PROPERTY** - Any property within five-hundred (500) feet of Little Island Pond, Gumpus Pond, Harris Pond and Long Pond, not occupied on January, 1, 1990, as the principal residence of a legal resident of the Town of Pelham.
>
> **The subject property does not meet the definition of year-round as it lacks the basic criteria necessary to establish a year-round property**.

Despite this, approval for an ISDS was issued in violation of NHDES rules and regulations. As the Property is not year-round, the provisions of RSA 483-B:11 apply as this is not a primary structure as defined in the zoning ordinance.

ARTICLE VII WETLANDS CONSERVATION DISTRICT
SECTION 307-38 WETLANDS INCORRECTLY DELINEATED

Where it is alleged that an area has been incorrectly delineated as a wetland, or that an area not so designated meets the criteria for wetlands designation, the soil scientist shall determine whether the area has been correctly delineated. The Conservation Commission shall make their judgment under this section only upon the determination by a qualified soil scientist(s) and/or plant scientist(s) suitable research, that the information contained on the Wetlands Map is incorrect. This evidence shall be acceptable only when presented in written form by said scientist(s) to the Conservation Commission. Any necessary soil testing procedures shall be conducted at the expense of the landowner or developer. Once an area has been determined to be a wetland under this section that area shall become part of the Wetland Conservation District.

The Pages and others on repeated occasions expressed concerns over the existence of wetlands on the Property (See Exhibits 10, 11 and 22) and the 2016 plot plan (See Exhibit 12). These exhibits and the testimony of witnesses as referenced in the Hillsborough Superior Court case entitled Smith et al. vs. Bruce Bilapka and Andrea Page ORDER dated August 17, 2023, demonstrate that the Property is saturated with standing water and there are wetlands on the Property. Additionally, there is a vernal pool within 100 feet of the Property. The Pages have alleged that the Property meets the criteria for wetlands designation thereby triggering the implementation of Article VII Wetlands Conservation District. The Owners contend that there are no wetlands; however, Exhibit 13 delineates a wetland setback line without clearly showing

the wetlands. When this happens the terms of Section 307-38 apply. Section 307-38 provides the process which requires input by the Conservation Commission. The provisions of this section were never applied. It was unlawful and unreasonable for the approval without applying/interpreting Section 307-38.

The ZO defines wetlands as follows:

29. Wetland: a wetland is an area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions, does support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include, but are not limited to, swamps, marshes, bogs, and similar areas. Wetlands shall be delineated by either a certified soil scientist or a professional wetland scientist according to the Corps of Engineers Wetlands Delineation Manual, 1987, and the Regional Field Indicators for Identifying Hydric Soils in New England, 1995.

SECTION 307-41 SPECIAL PROVISIONS

A. Residential and commercial septic leachfields must be setback from wetland areas the following
distances:
1. Poorly Drained Soils - 50 feet
2. Very Poorly Drained Soils - 75 feet
3. Ponds, streams and year-round brooks - 75 feet
B. No building or structure may be located within a Wetland Conservation District area.
C. No individual, company, or entity shall cause to remove from the Town's above ground water resources or below ground aquifers more than 1000 gallons of water per day, unless said water is for the purpose of redistributing that water to the landowners of Pelham.

The Decisions fail to properly apply, construct and interpret the existence of poorly drained soils despite all of the evidence presented. The lack of applicability is unlawful and unreasonable. A July 21, 2023 letter from Olver Environmental (See Exhibit 19) discussed the presence of poorly drained soil; however, this Section of the ZO was never applied.

Furter, the ZO provides in Section 307-44 Conflict with other Regulations, "Where any provision of this ordinance is in conflict with State law or other local ordinance, the more stringent provision shall apply."

ARTICLE VIII-I ILLICIT DISCHARGE DETECTION AND ELIMINATION (IDDE) ORDINANCE

Section 307-48-1-1 Purpose and Intent

The purpose of this Illicit Discharge Detection and Elimination Ordinance (the Ordinance) is to protect water quality in the Town of Pelham (Pelham or the Town) necessary to provide for the health, safety, and general welfare of the citizens through the regulation of non-storm water discharges to storm drain systems, surface waters, or ground water to the maximum extent practicable as required by federal and state law. To comply with requirements of the National Pollutant Discharge Elimination System (NPDES) permit, this Ordinance intends to provide for the protection of Pelham's local natural resources by establishing and enforcing the prohibition of illicit discharges that can carry pollutants into local surface waters and ground water. The objectives of this Ordinance are to: 1. prevent pollutants from entering Pelham's storm drain systems, surface waters, or ground water. 2. prevent the pollution of surface waters and ground water that serve as a primary source of local drinking water supplies. 3. prohibit illicit discharges and connections to Pelham's storm drain systems, surface waters, or ground water. 4. require the removal of all known illicit connections. 5. comply with state and federal statutes and regulations

relating to storm water discharges. 6. establish legal authority to carry out all inspection, surveillance, monitoring, and enforcement procedures necessary to ensure compliance with this Ordinance.

Section 307-48-1-2 Definitions

E. Illicit Connection An illicit, unauthorized, or illegal connection that drains into or is connected to a storm drain system, surface waters, or ground water, shall mean either of the following:

1. any pipe, drain, open channel, or other conveyances that has the potential to allow an illicit discharge. Including, but not limited to any conveyances which allow non-storm water discharge such as sewage, process wastewater, or wash water to enter storm drain systems, surface waters, or ground water. This includes any connections to storm drain systems, surface waters, or ground water from indoor drains and sinks regardless of whether said drain or connection had been previously allowed, permitted, or approved by the Town.

In the 2019 timeframe, John Lozowski on behalf of the Town investigated the water run-off onto a town road. During that investigation, part of the findings included that the Property has flooded and caused problems on the roadway resulting in a runoff problem on Woekel Circle for a number of years. The Town's engineer also weighed in and Steve Keach advised the Town that the area is of a high saturation level. There were concerns of the run-off creating a hazard. The Town ordered the Owners to cease pumping water off of the subject property into the road. On April 26, 2019, NH DES SSB Compliance and Inspection Report (See Exhibit 18) state as its inspection purpose: "Flooding has caused the property owner to use a sump pump to try to remove the water. Water is pumped to edge of the street and discharges south to a trench drain in the street, which ultimately feeds into Little Island Pond." This same report noted potential wetlands to the east and upgradient and that two engineers investigated the site and ultimately determined that an ISDS could not be properly designed. This report also noted that the property has not been occupied for approximately 10 years. The applicability of this section to determine the suitability and approval of a ISDS was needed.

The approval of the ISDS required applicability of ARTICLE VIII-I ILLICIT DISCHARGE DETECTION AND ELIMINATION (IDDE) ORDINANCE for the health and safety of the Town, its residents, protection of groundwater and of Little Island Pond. Without this, the Decisions are unlawful and unreasonable and should be reversed.

In conclusion, the Decisions failed to properly apply, interpret or otherwise construct certain sections of the Town's ZO as required. This failure resulted in unlawful and unreasonable decisions in violation of the Town's ZO and its Purpose.

307-2 Purpose The purpose of this Ordinance is to promote the health, safety and general welfare of the inhabitants of the Town of Pelham, New Hampshire by encouraging the most appropriate use of land throughout the Town and to: A. lessen congestion in streets; B. secure safety from fires, panic and other dangers; C. provide adequate light and air; D. prevent the overcrowding of land; E. avoid undue concentration of population; F. conserve property values; G. facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care, and housing opportunities for all family types and income levels; and H. assure the proper use of natural resources and other public requirements.

The Pages request that the Zoning Board of Adjustment reverse the Decisions and deny the approval of the permit as said Decisions are unlawful and unreasonable and not in conformity with the Town's ZO and its state purposes.

Or at a minimum, the Zoning Board should conduct a site walk and hire an independent consultant to study the soils, the wetlands and the adjacent vernal pools in addition to the flow of water and ground water as well as the applicable portion of the ZO cited herein. This Board has within its jurisdiction the ability to hire its own independent expert to determine the wetlands on the property. See RSA 676:5.

Ms. Gandia then handed out a document titled ***APPEAL FROM ADMINISTRATIVE DECISION JURISDICTION OF ZONING BOARD TO HEAR AND DECIDE CASE ZO2023-00015 Map 31 Lot 11-20*** and read the following information to the Board.

Jurisdiction of the Zoning Board of Adjustment is governed by the following:

RSA 674:

I(a) The zoning board of adjustment shall have the power to:

(1) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and

(2) . . . .

II. In exercising its powers under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

676:5 Appeals to Board of Adjustment. –

I. Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

II. For the purposes of this section:

(a) The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.

(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any

construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

The "administrative officer" is the Pelham Board of Selectman.

The "decision of the administrative officer" is the decision of the Board of Selectman to enter into the MUTUAL SETTLEMENT AGREEMENT dated June 5, 2023 as discussed in further detail below. The decision involves the construction, interpretation and application of the terms of the ordinance as described in Case No. ZO2023-00016 See Zoning Ordinance Article III Section 307-8, Article VII Section 307-38, Article VIII Section 307-41, Article VIII-I Section 307-48-1-1, Section 307-48-1-2 Definitions).

The Appellants filed an appeal alleging error in the order/decision/determination made by the Board of Selectman which involved the enforcement of the Town of Pelham's zoning ordinance when it entered into the settlement Agreement in the Rockingham County Superior Court, Charles F. Smith v. Town of Pelham, Docket No. 226-2023-CV-00182 and agreed as follows:

"2. The Town approves the installation of Petitioners' redesigned septic system prepared by Hayner/Swanson, Inc. ("HIS") subject to approval by NHDES and subject to the same setback waivers that had been previously approved by the Town's health officer in June 2021 as identified on the HIS 37 Woekel Circle septic plan dated June 18, 2021.

3. 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 as identified herein."

The Pelham Zoning Board of Adjustment has jurisdiction over this appeal and the Town of Pelham Zoning Board of Adjustment should exercise its jurisdiction and hear said appeal in accordance with its rules of procedure, the Town of Pelham's zoning ordinance and applicable state statutes. Failure to do so results in unreasonable and unlawful actions of the Zoning Board of Adjustment.

Ms. Gandia then pointed to the table of contents containing the aforementioned exhibits and asked the Board to step into the shoes of the administrative official and ask what they would've done and if it was the right thing to do so approve the permit. She stated that there are a lot of moving parts, NHDES, the Shoreland Protection Bureau, the applicability of State Statues and Town Zoning. She stated that in the table of contents there is the decision they're appealing, the mutual settlement agreement, the applicable sections of the Town Zoning, the request for more information where the nonconformity was not put into the forefront or properly reviewed, pictures of Woekel Circle and the certified plot plan which is exhibit 12. She asked the Board to look at exhibit 12 as that is what the owners had when they were going to buy the property and it clearly shows the wetlands. She explained that you can see that the whole front of the property is wet and that this is what was given to the owners when they purchased the property.

Mr. Hamilton stated that what he sees in the pictures is a wet property that has been created by its abutters. Ms. Gandia stated that that was addressed in the court case and that court case has been attached for the Board and explained that the court did not find any evidence that her clients created

any of that. She stated that it was found by a court of competent jurisdiction that that was not the case. Mr. Hamilton stated that this property was constructed before 1950 and the hot top road did not exist then, so that road has been elevated and has created a setback into the property. He added that Mr. Bilapka has a retaining wall, and his property is elevated with a brand-new foundation. He stated that when they put in the new foundation, they built the property up which is going to bring water into the subject property. He explained that everybody around this property has done renovations, remodels, and have rebuilt their properties except for this property. He stated that when do construction there will be materials being brought in and moved around creating all new pools and elevations. Ms. Gandia added that Mr. Hamilton's position was part of what the current owners put forward to a court of competent jurisdiction and that judge disagreed with that set of facts after a four-day trial with numerous witnesses and said that her clients were not responsible and that their improvements were not responsible for any of the standing water or any of the problems that the lot in question experiences. She stated that she is not dismissing everything that Mr. Hamilton brought up as it is very real to current property owners, so real that they took her clients to court and were not successful on that claim and would direct him to review the court order as there is a lot of facts that the court found after four days of testimony that would disagree with his claims.

Ms. Gandia stated that in 2016 you can see that there are wetlands and that there are numerous pictures that show the property being inundated with water which has going on for a long time and that the previous property owners had agreements to pump the water off the property. She explained that based on everything she has put forth, the applicable portions of the Town Zoning Ordinance, her clients contend that the administrative decision made by both the Board of Selectmen and the Health Officer were in error and are asking that those decisions be reversed.

Mr. Wing asked if there were any questions from the Board.

Ms. Masse-Quinn asked if they could hear testimony from the Engineers.

Mr. Lee Kavanaugh, owner of Oliver Environmental approached the Board. He stated that he is a septic designer and not an engineer and that in the course of his work designers do delineate wetlands to determine how far away septic systems can be. He handed a document to the Board and stated that these are the definitions of what a poorly drained and very poorly drained soil is. He stated that when a lot isn't inundated with water, you have to read the soil, the flotsam and jetsam. He explained that its like when you go to the ocean you can see how high the tide went because all the debris build up to a certain place and that as a designer, soil scientist and engineers they look at the flotsam and jetsam from the water table and where it reaches its highest point. He explained that that is the seasonal high-water table when determining a poorly drained soil. He stated that what they are looking for is markers and a poorly drained soil is where the groundwater is present within the upper part of the soil during the growth season and that lot in question has been flooded all summer. He explained that all the regulations are very simple and that if water is within the surface of the ground during growth season, which in New Hampshire begins at the last frost in mid-May, the regulations used to be more restrictive where it only had to be wet for two

weeks of the growth season, now it can be wet anytime during the growth season. He stated that we are four or five months into the growth season and the property has been covered with water throughout that period. He spoke in defense of the inspectors and reviewers as they depend on the designer to give them correct information and if the reviewed for the Town was out there at a time where there wasn't water on the surface, he would have to go with the paperwork he's presented. He stated that he has said in the past that there was an error made in reading the soil on the lot as the seasonal high water table markers take place in the root zone. He explained that the engineers brought out their tractors and dug right through the root zone which would have given them that high water mark which is a red color in the soil. He explained that the red markers are iron in the soil which have a free oxygen molecule and when the water table comes up, the aerobic bacteria in the soil are drowned, but before they drown, they take that free oxygen molecule out of the iron in the soil and create a thin red line in the soil. He added that through the photographs it is visible that the lot is inundated during the growth season and that the regulations allow for a monitoring well which should have been put in to determine where the water table is and where it isn't. He elaborated that a reason the water table wasn't found was because they had gone through it and it was in the root zone. He stated that they went down into the parent material which is a canton soil which is all under Little Island Pond which contains no markers in the soil because aerobic bacteria can't live in a saturated environment. He explained that the same thing that Soil Scientist found on this lot, no soil markers in the soil, is because there is so much water on the lot that the markers never took place in the soil.

Mr. Kavanaugh addressed Mr. Hamilton's claim about the lot being so wet and stated that the lot is like a valley for that little part of Pelham as that is the low spot coming from the woods above and has always been like that. He explained that since the Ice Age 12,000 years ago that that lot has been in a valley and when the water drains through those woods that the lot has always been wet. He stated that markers in the soil last forever and that they can read what was in the soil 10,000 years ago and if that soil was ever not saturated it would have had the blaze red markers in it from the bacteria at any given time in the lower part of the soil. He reiterated that the lot has always been a drainage valley for the woods.

Mr. Wing asked if the gentlemen he referred to had the same seal of approval as he does. Mr. Kavanaugh responded that yes he has the same Designer/Installer State Seal which means he took a test and knew something at one point. Mr. Wing responded that the other designer presumably knew something at one point too. Mr. Kavanaugh stated yes, but that everybody can make mistakes. Mr. Wing asked if that's what they're contending here is that this was a mistake in the design. Mr. Kavanaugh stated that he doesn't believe his design shows that he did the soil test and that he probably used someone else's earlier test, but would have to look on the design to see who took the test and when. He added that the interesting thing is that what he's telling the Board is still there today and what the other designer is saying is not there and if the Board was to go out there, they would see the red line in the root zone. He stated that it's a constant and isn't like a car accident where you have two different vantage points of the accident, this exists today, it existed two months ago and its going to continue to exist.

Ms. Gandia added that on page 12 of the court order that the court, after a four-day trial, said indeed the testimony presented at trial supports the conclusion that the plaintiffs current water issues are attributable to the absence of a pumping system rather than any improvements made by the defendants. She stated that she wanted that to be crystal clear that that was already decided there.

Mr. Wing asked Ms. Gandia where she got the definitions of administrative officer from. She replied that it's from State Statute 676:5. Mr. Wing asked if the mutual settlement agreement dated June 5th was witnessed by a Superior Court judge. She replied that that has no relevance to whether or not it was lawful and reasonable. She explained that Superior Court judge isn't taking the Town of Pelham Zoning Ordinance and going through it. She stated that the judge is not going to be going in and looking at everything as he has two parties who are represented by attorneys that are entering to a settlement agreement and he's not seeing anything glaring that's violating any of the rules that he knows so he goes and signs off on it. She explained that the decision for them to sign that settlement agreement points directly back to the Town Zoning which is key and can't be overlooked. She explained that the settlement agreement says the Town approves the installation of the petitioners redesigned septic system prepared by Hayner Swanson, subject to be Approved by NHDES is subject to the same setback waivers that have been previously approved by the Town's health officer in June 21 as identified on the HIS 37 Woekel Circle Septic Plan dated June 18, 2021, and that the Town shall issue a permit consistent with the settlement agreement upon submittal of an application for the septic system that NHDES has or will approve as identified herein. She explained that those two statements as part of that settlement agreement tied directly back to how the Town is interpreting, construction, constructing or applying the Town's Zoning Ordinance and making that decision. She stated that we have the administrative officer, the Board of Selectmen, we have administrative decision that's doing exactly what the definition of a decision is supposed to do it involves the construction, interpretation or application of the terms of the ordinance. She stated that they correctly identified that as an administrative decision and that they have correctly appealed it to this Board as an appeal of administrative decision for the Board's review.

Mr. Wing asked if Ms. Gandia was looking at lines two and three of the mutual settlement agreement. She replied that was correct. Mr. Wing stated that they approved the installation of the septic system prepared by Hayner Swanson that was subject to approval by NHDES, which he assumed occurred which was subject to the same setback waivers that had been previously approved. Ms. Gandia handed out a list of Towns that require local approval. She stated that a lot if towns don't require that, but Pelham does. She explained that there are 221 towns, some unincorporated villages in the State of New Hampshire that require local approval and Pelham does. She stated that you have to get local approval first as part of the application process and then NHDES will approve. She explained that she doesn't know how it all plays out but that you need the local approval first and that's what this settlement agreement was authorizing. She stated that it was authorizing the local approval which is the decision from the Health Officer that they are appealing.

Mr. Wing opened the floor to the public. No one came forward that was in favor of this appeal. He opened the floor to anyone in opposition to this proposal.

Mr. Daniel Muller of Cronin, Bisson, and Zalinsky approached the Board as counsel for the owners of 37 Woekel Circle whose approval is being challenged tonight. He explained that he will touch on things that have been misrepresented, some mischaracterizations of law, which is probably a good reason why these sorts of issues are not for this Board. He stated that the Board probably knows that they're a creature of statute that has its powers given to them by statues which are the only powers they have. He brought up the case Dembiec v. Town of Holderness where the issue was whether the ZBA had equitable rights and the answer is no because the statute doesn't apply or grant the Board those powers. He stated that the power here is to hear administrative appeals from decisions relative to the Zoning Ordinance. He explained that the Health Officer's decision was made under the Board of Health Waste Disposal Systems Regulations, Chapter 295 those regulations, or 295:1 authority, arise under RSA Chapter 147:1 is the public health statute and is not a Zoning Ordinance. He stated that the decision to grant the waiver and that this would also apply with respect to the court action was a decision under that particular ordinance which is important because they talked about 674:33 but glossed over a little bit of 676:5 which talks about appeals to the Board of Adjustment. He explained that what the Board is allowed to do is hear appeals of the Administrative Officer and an Administrative Officer is any official or Board in that municipality that has responsibility for issuing permits or certificates under the ordinance or for enforcing the ordinance. He stated that the ordinance in question is the Zoning Ordinance because they're the Zoning Board of Adjustment and it is not the Waste Disposal System Regulations. He explained that the Alternate Deputy Health Officer, his authority to make decisions and grant approvals were under these regulations, and not the Zoning Ordinance. He stated that what they're asking you to do here is to charge the alternative health officer. He explained that The Board of Health enforces only one provision and that's the groundwater provision in the Zoning Ordinance, no other provisions. He added that everything else goes to building inspector or to selectmen. He explained that the health officer, because they're not enforcing or interpreting or applying this provision, they're applying these disposal regulations is not an administrative officer which is specifically under RSA 676:5 II sections A and B. He stated that there is no jurisdiction, because what they're asking the Board to do is to basically review a decision made under a different ordinance and they are trying to bring in all this zoning stuff and trying to make it a zoning decision when it's not. This is a creature of your Town Ordinance which has its own standards and its own considerations. He mentioned that the Board had asked earlier if the State approved the septic and the answer is yes, they have, they approved it back in June. He stated that they had challenged that up at the State and that what they're trying to do is have as many bites at the apple as possible by creating something into a zoning issue, which it really isn't. He explained that the settlement that's been approved, is a court order that binds the Town of Pelham, and they are suggesting that you tell the Town of Pelham to violate a court order, which will lead to a contempt argument or contempt motion against the Town saying that they're not abiding by the court order which they have agreed to. He stated that that will bring along costs and fees, or at least a request for them, because again turning to the statute, is reviewing court orders is part of this Board's authority or has this board ever reviewed a court order because that's what they're asking you to do as part of

the administrative appeal. He stated that in his view, there is no subject matter jurisdiction and that these are issues for other bodies, not for this Board. He explained that he will spend a little bit of time at least trying to correct some of the facts and some of the statements that were made.

He stated that if we are going to get into zoning, there was a lot of talk about seasonal versus year-round. He mentioned the case Severance v. Town of Epsom, a case that they do not cite in which the New Hampshire Supreme Court said, if you're going to treat them differently as in terms of uses on your Zoning Ordinance then you have to do it. He stated that in the table of uses 307:18 single family, two family, and multifamily that there is no seasonal/year-round. He explained that it may be that that's a distinction for the waste disposal system regulations, but again that's not within this board's purview and that it is for somebody else and that was for the deputy health officer.

He stated that there was not a suitability assessment done and that he does not know what they provided to the Board but guesses that it might have been an assessment done for the prior owner by Mr. Kavanaugh for a septic that was provided to my clients after they bought the property and was not a suitability assessment as that notion is defined by state statute.

He explained that the Board also heard about wetlands but that there was only one certified wetland scientist who looked at this property. He stated that Mr. Kavanaugh, who was part of the trial, is not a certified wetland scientist or a certified soil scientist, which is a problem because if you try to act as one is a crime in this State. He explained that they did have someone look at the wetlands on this property in 2019, Mr. Jim Gove, who is a certified soil scientist and a certified wetland scientist, did look and did not find that there were wetlands on the property. He explained that there is reference to a survey that the wetlands shown on, or at least the designation wetlands, was done by somebody who is a licensed septic designer but is not a soil scientist nor wetland scientist. He stated that in court they weren't allowed to give an opinion because they weren't certified. He stated that their whole argument about its wetlands, they have no basis for it except to say, well, people who aren't certified to do it said so, i.e., people who the statute sort of suggest shouldn't be doing this and may get into criminal trouble for doing it because they think there might be something, we'll go along with that, but the only person who was certified said there were no wetlands on the property.

He explained that he heard a lot about the Shoreland Protection act and the Shoreland Protection Act is not something that this Board gets into, but even worse, if they’re going to discuss it, let's make sure that we understand what we're discussing. He explained that when he talked about nonconforming uses under 483-B11, no expanding, that's from the 50-foot primary building set back line, not from the 250-foot limit. He stated that we have all these issues that are all confused and all over the place which the Board doesn't need to worry about that because you don't decide shoreline protection issues and if they wanted to appeal that they should have done it well over a year ago, not now.

He stated that there's also been a lot of talk about the water on the property and there is no doubt

that the court did what it did. He explained that they brought a claim that they unreasonably altered the drainage so as to unreasonably increase the water and the court did not rule in their favor. He stated that they're dealing with that through an engineering means at this point in time. He explained that he wanted to specify or sort of go through is that the issue here was for a septic approval. He stated that they didn't apply for a building permit and that they haven't done any of those other things and that they simply are here on a septic approval that was done under your waste disposal regulations which is the purview of the health officer and not the purview of this Board. He stated that the simple fact that has to be made is that the Zoning Board of Adjustment does not have authority to review decisions made under RSA 147:1 as their authority is limited to zoning interpretations and applications, not this. He stated that he would ask that the Board deny the application. He stated that he knows that the applicants here have raised their complaints before other boards specifically at something that was advertised as a workshop back on June 19, 2023, where Mr. Bilapka, as a member of the Planning Board, sort of presented his version of facts and suggested that my clients be made to get approvals from every Board there. He stated that he just wanted to make certain that nobody has spoken to Mr. Bilapka outside of this hearing as complaints were raised in the public forum and when members sit on the Board, they sit sort of like judges and if one party is speaking to a judge outside the proceedings, it obviously doesn't look good to the other party. He explained that one of the things that he has to make certain of is that that did not occur here, because he knows that the Planning Board this property was discussed, it wasn't specifically named but all the details were put out there. He stated that he would be happy to answer any questions the Board may have.

Mr. Stanvick stated that Mr. Muller brought a lot of information to the table and asked if he would be willing to put what he's stated into writing. Mr. Muller replied that if the Board would like something in writing, then he'd be happy to put something in writing. Mr. Wing asked Mr. Muller what a fair time frame would be and if a week or ten days would be would sufficient. Mr. Muller stated that he'd be happy to provide a copy to counsel and to the applicant so that everybody has it as he is not trying to hide anything. Mr. Wing stated that the Board will probably continue this hearing next month and will want to read this so within 10 days would be sufficient enough time for them.

Ms. Masse-Quinn stated that Mr. Muller said that the Board of Health is supposed to work under the RSA 147, which is nuisances, toilets, drains, expectorations, and waste. She explained that according to that document that the health officer is working off and if you look at number four, it says all wells for new construction shall be set back a minimum of 75 feet from all septic tanks and leaching fields. Additionally, all wells for new construction shall be set back 50 feet from the nearest edge of all existing travel ways or right of ways and a minimum of 75 feet from all lot lines to avoid property encroachment unless the standard release form for a protective well radius has been executed. She explained that that same wording is also found in the Zoning Ordinance under 307-41, residential and commercial septic leach fields must be set back from wetland areas following poorly drained soils 50 feet and very poorly drained 75 feet. She stated that that is part of their zoning that is incorporated under the Health Officer. Mr. Muller replied that the health officer acts under the Board of Health and asked if the Zoning Ordinance give the health officer

authority to enforce that section. He explained that Board of Health that there is a provision in there dealing with the groundwater district, but that is it. He stated that otherwise, it's the Building Inspector and Board of Selectmen only. Ms. Masse-Quinn asked why his client did not go through the Board of Adjustment for a variance request. She stated that usually when you have nonconforming lots as such a lot of people come in front of them for a variance request. Mr. Muller stated with zoning the usual process is that you go for building permit and the building permit is denied if they don't comply with the zoning, then you go to the Board of Adjustment based on the denial of the building permit and get your relief so you can get the building permit. He stated that they haven't reached the building permit stage. He reiterated that the only thing here was the septic under these regulations because this is what the health officer acts on when he issues that approval which is the approval that the court order allowed under those regulations. Mr. Wing stated that the structure is not changing, it's only the installation of a septic system on this property at this point in time. Mr. Muller replied that they have not come forward to apply for a building permit to do anything with the structure at this point and that is something that potentially is down the road, but they haven't gotten to that stage. He stated that the only thing that they've gotten is approval for the septic system to go on the property, and that's both here and at the state. Mr. Hamilton stated that that made sense to him because it's pointless to go for a building permit if you don't have place to put the waste from that building into.

Ms. Masse-Quinn stated that according to the civil engineer Paul Cordeo in his letter wrote that the proposal is asking for waivers under Chapter 295:16 which is the health ordinance right under the 147, setback distances that are leach bed to well that it requires 75 feet, and 75 feet is required through our zoning as well as the state of New Hampshire. Mr. Muller replied that it was his understanding that the Health Ordinance was amended so that the reflected the State of New Hampshire's setback requirements, so they were consistent so that is correct. She replied that it states that it requires 75 feet and the proposed design identified those distances for each abutting lot affected, lot 11-19 is 65 feet, 10 feet under the 75 feet, Lot 11-22 is 55 feet under the 75 feet and lot 11-20 is 66 feet that is your their own land and then lot 11-21 is 77 feet and it's the only one that would meet the requirement by two feet. She added that it also says in addition to the setback distances shown above a separate requirement and separation from wells to septic tank that the requirement is also for 75 feet but may be reduced to 50 feet with the use of SDR26 pipe or better in the septic tank and the pump chamber sealed and grouted to prevent infiltration and exfiltration. She read that both SDR26 pipe and seal and grouting are proposed in the design and that below you will find the separate distances for each of abutting lot affected. She stated that lot 11-19 is 59 feet which is under the 75 feet lot 11-21 is 65 feet and under the 75 feet, lot 11-22 is 66 feet, under the 75 feet, and lot 11-20 is 54 feet, which states that it their own lot. She explained that Zoning does call for 75 feet and asked if he could understand maybe why there's kind of an issue. Mr. Muller replied that just the way she went about it doesn't change the fact that decision that was made was made under the health ordinance. He stated that they're appealing a particular decision and no matter how you go about it, the health officer made a decision under this particular ordinance. He explained that they have to have an administrative official, administrative officer for the state statute and they have to be charged with administering the zoning ordinance. He stated that the Health officer, Alternate Health officer, Alternate deputy Health Officer. They may be

charged with administering the health ordinance, but they are not charged with administering any of the other zoning ordinances that have been discussed here. He explained that it can't fit under the state statute because the decision maker doesn't fit the definition and you cannot modify the definition. He explained that municipalities can only do and exercise their powers consistent with what the legislature says they can do. He stated that legislature says you can review decisions of administrative officers, and that this is what an administrative officer is and at the end of the day, the decision under this doesn't fit the statutory definition.

Ms. Masse-Quinn referred to the 2021 case New Hampshire Alpha of SAE Trust v. Town of Hanover and when looking at the letter A and the jurisdiction of the ZBA, it says the trial court ruled that the ZBA had jurisdiction the SAE's appeal because the notice was an administrative decision involving the construction, interpretation or application of the ordinance and we are talking about a Health Ordinance. Mr. Muller stated that he doesn't agree with that, and that that was the interpretation of a zoning ordinance, and it was not the interpretation of an ordinance under 147:1, as that was a zoning case. He stated that that is the same argument that he is making. He explained that the Board gets to hear because that's what the statute says, appeals from decisions under the zoning ordinance, not decisions from or appeals from decisions under other ordinances. He stated that every ordinance under the law of the state has to further the public public health welfare sector and that's called the police power. He explained that if she's going to twist it like that and say because it becomes zoning, that means you could review decisions under any ordinance because every ordinance as a matter of law has to further the public health, safety, or welfare in the state. He reiterated that the Board is only here to decide zoning ordinance decisions.

There were no further questions from the Board for Mr. Muller.

Ms. Gandia rebutted that it is being put forward that the health officer is just looking at Section 2, Chapter 295 in a vacuum. She stated that he's not looking at any of the zoning and so when he's making this very important decision to approve the ISDS, he's not looking at any of the Town Zoning, he's not looking at anything, and that he's only looking at eight pages of chapter 295 and a lot of that is definitions and other things. She stated that she thinks that's an interesting argument to say that the health officer is not going to look at anything except for Chapter 295 and make a decision and asked how he could not look at the Town Zoning Ordinance when issuing approval for the ISDS. She stated that if you're going to pigeonhole the health officer into making a decision based just on 295, that that's a very precarious position to put the health officer in without letting him look at all the other applicable things that go into making a decision for that local approval.

She stated that there was mention that they were asking this Board to violate a court order and as an attorney she would never ask a board to violate a court order. She stated that the process would be if this Board agreed with her client's contention that the decision to enter into that agreement should not have happened, that that was an error, that they can go back to the court and ask for that settlement agreement to be vacated based on the decision of this Board. She stated that there was never any intent to suggest that my clients or that she is saying for this Board to violate a court order. She explained that they're not asking you to review the court order except to review it as it

relates to the Zoning as that's what they're charged to do. She stated that they're not asking the Board to take any other look at except for the two particular points that she pointed out that tie back again to zoning and if those decisions tie back to zoning. She stated that it can't be said that the ISDS is just here with these eight pages of regulation, the Board of Selectmen can say it's chapter 295 and the Town Zoning. She asked if the Board of Selectmen can make the decision based on Chapter 295 and the Zoning, but that the health officer can't. She asked how the health officer is going to make a decision that's in the best interest of the Town protecting groundwater and doing everything else that he's supposed to do.

She mentioned the suitability assessment as far as she understood for her clients, is that they did have two people tell them that they cannot put the ISDS system on there. She mentioned the claim that there were no wetlands on the property. She stated that she read their definition of wetlands, and that they've seen the pictures and she thinks it meets. She explained that the Board should also be aware that they have different people defining wetlands in different ways, NHDES defines wetlands a certain way and the Town can define wetlands a certain way and in Chapter 295 it states that whichever is the stricter one is the one that's going to apply.

She stated that they're not asking you to interpret the Shoreland Protection and that they're simply pointing out that provisions of your zoning that go into filing applications were not in her client's opinion, properly put forward as far as nonconforming. She explained that a member of the Board asked what the plan was and on the septic system application plan it clearly shows there's a proposed addition that's moving closer. She stated that for them to say that the don't know what they're doing is incorrect as they submitted a septic plan that shows a proposed addition right here and basically a reworking of the whole house. She explained that there are plans to expand and basically demolish that existing structure. She stated that nothing can be done with that structure and that existence structure is to be moved and raised and they are adding a proposed addition. She reiterated that she is not asking the Board to interpret the Shoreland Protection but that the Shoreland protection application permit filed by the applicants or their representatives that shows that the project is proposed to lift, move, excavate, form and pour a new concrete foundation for the existing house in add a new 12' x 14' ADA bedroom addition to the front of the relocated house, a new walk will be added to access the front along with the new ADA walk and a 12' x 12' deck in the rear for ADA access. She stated that it's very clear that they have put forward that they are expanding a non-conforming structure.

Mr. Bilapka stated that he would like to address a couple items and the first being the actual dimensions for the well radius. He stated that none of them are correct and gave the example of his property on 49 Woekel Circle. He stated that his property is 50 feet wide and abuts the back of this property. He explained that his well is 15 feet from the property line and that 50 minus 15 is 35 feet to the property line. He stated that 10 feet over the property line is where the septic system is going, so that makes it 45 feet. He explained that the other well radii are not near those numbers either, but that they're close, but that they're all under 75 feet. He stated that the next issue is with wetland and what delineation of wetlands means. He explained that the wetlands have been delineated or what that means is a fee was paid to the state of New Hampshire. He stated that the

wetlands are still on that property, but they are so small that they basically make it go away but they are still there. He stated that how Mr. Gove could see no wetlands he has no idea as the lot in inundated with water in the pictures. He stated that his other point is that if they put a septic system on this on this lot that there is no drainage system and no way to drain the water except for into the pond which is already contaminated. He explained that the signs got put up before Labor Day and that it's not from the boats but it's from the saturation and the releases from the septic systems around the pond. He stated that if they put a septic system on this lot, it's not a matter of if it's going to fail, it's a matter of when it's going to fail. He stated that one individual that doesn't look into all this information, the alternate health inspector, or whether it was our own a health inspector, turns around and determines that his wells can get contaminated. He stated he's already informed the Board of Selectmen last November if they wanted to take it upon themselves to have his wells replaced or pay for any damages done to his property because he currently has two good working wells on his properties and his neighbor has a good working well too. He explained that this system will fail with the amount of water that runs onto that property. He stated that there had been cutting of trees at a higher elevation by another landowner who supposedly had a permit from the selectmen, not to clear cut, but the cut. He explained that this has increased the water runoff down the top of the hill and onto that lot. He stated that that lot has always been in the water as he's been there for 23 years, and that lot has never been dried unless it's pumped. He explained that even when it was pumped, it was still spongy. He stated that the grass on that property is unlike the grass in the neighborhood because it's the same grass that's in the vernal pool, that is in a wetland and that is at the bottom of the pond is on that lot. He explained that as far as any discussion that went on at the planning level, it was about the 75 foot well radius set back which the Board never waives.

Mr. Lee Kavanaugh of Oliver Environmental approached the Board. He explained that he wanted to clarify a few things. He stated that he is a designer and wetlands delineation in soils work is allowed for the designer. He explained that he would think that Mr. Jim Gove would be embarrassed if he saw these photographs in the middle of the summer. He stated that when you look at the definition, wet water at the surface during the growth season, that when he was out, there probably was no water, but he'd be embarrassed to see that. He explained that the attorney kind of implied that the Town inspector is like a rubber stamp for the state and that's not true. He stated that he goes into a lot of communities and the inspectors make sure the he is complying with the local ordinances. He explained that for the longest time Pelham had a 100 foot well radius protection and it wasn't the states 75-foot radius. He stated that the inspector is there to make sure his design that is presented complies with the local and state ordinances.

Mr. Hamilton asked Mr. Bilapka and Ms. Page if their property was a conforming lot. Mr. Bilapka answered that his property is not a conforming lot. Mr. Hamilton asked if his neighbor's property was conforming lot. He asked if when they installed their well that it wasn't on an existing lot. Mr. Bilapka replied that it was existing and so was his neighbors well. Mr. Hamilton stated that there is an 8-inch pipe that Mr. Bilapka installed to divert water from his property. Mr. Bilapka replied that that was incorrect. Mr. Hamilton stated that he is just going by what he is reading in the paperwork, and it says that there is an 8-inch pipe that sees no daylight and is diverting water from

the vernal pool. Mr. Bilapka replied that he is not diverting water and that water has always run through that property. Mr. Kavanaugh stated that the pipe is at the elevation of the soil at the time and that there is a V in the ground to allow aquatic life to migrate back and forth across the property, but it is for the aquatic life. Mr. Bilapka added that it was required by the State as part of his septic design and the rule is that you cannot stop the flow of water from wetlands, vernal pools, streams, lakes, or ponds and that's why there's an open culvert. He stated that they were under strict orders to hold the bottom of that pipe at the same elevation so that when the water level drops down in the vernal pool no water runs through that pipe and when the vernal pool rises the water goes through, and it has always flowed on to that lot. He explained that there were no elevation changes on that lot, and it is the same height as the road. He stated that the property was that height when he bought it and when they put the foundation in that the footing is basically at the surface as it is a foot below grade, so he didn't raise the grade. He explained that the grade is the same all the way across the road and is even with the road and that lot has always been lower for the 23 years that he's been there. He stated that they showed pictures of the lot and that at one time it was even with the road and asked why somebody would go in and dig that lot out. He explained that no elevations have been changed and that he's done everything that the State and the Town has asked him to do.

Ms. Gandia stated that 147:10 prohibits the Health Officer or the Town from issuing permits that are injuries to the health, safety, and welfare of the community, which again is tying back into the Zoning. She stated that that argument just pigeonholed the health officer to those particular sections would result in disastrous results for any community that would undertake such a thought process. Mr. Bilapka added that the lot would not sustain that septic system.

Mr. Stanvick stated that there seems to be some controversy over if there is a wetland if there isn't a wetland and would like the Conservation Commission to have an opportunity to do a site walk. He explained that he would also like to understand what the current situation is in terms of helping him understand, is it a wetland or isn't it a wetland.

Mr. Hamilton added that what they have for existing soil according to what you're saying, is retaining water, but if they're going to dig that soil out to install a system, aren't they installing sand and stone so that it leaches and it won't be holding water anymore. Mr. Kavanaugh responded that the lot can't help but hold water because it is elevation that determines where the water goes as what seeks its own elevation. He stated that Mr. Bilapka's lot is higher than this lot, not by much but enough. He explained that there needs to be two feet of aerated soil for aerobic bacteria to devour the viruses and pathogens. He said that the problem is that you can dig down and put in sand but it's still in a wet environment and the ability for the bacteria that is required to kill the viruses and pathogens isn't there. Mr. Hamilton asked if what he's saying is that there's absolutely no way that a system could be designed for this particular property. Mr. Kavanaugh replied that he's not going to get painted into that corner because everything is changing. Mr. Bilapka added that the problem with this lot is that it's not a matter of if it'll fail, it's going to fail because of the amount of water that goes on to this lot. He stated that if you raise that water, if you raise that lot up, where's that water going to go? He explained that It's going to go to onto his two properties

and other property across the road, which there is already a sheet flowing across the road and into the pond and when the system goes into failure it's going to contaminate everything. Mr. Hamilton added that is because you're not supposed to stop the flow of water. Mr. Bilapka stated that is correct and that if you raise the lot to the road, where is the drainage system and what kind of drainage system could be put onto that lot to hold that water on that property. He explained that if you raise it up, you're going to push the water back on everybody else's property and make their septic systems non-compliant because their water table would rise and then they would be polluting the viruses and pathogens which would inevitably end up in the pond.

Mr. Wing closed the floor to the public.

Mr. Welch added that it's clear that there are a lot of questions as to if there are or aren't wetlands and he believes that the Board should take advantage of their ability to hire an outside specialist to come in and evaluate the lot. Ms. Beauregard added that the Board should decide whether they feel that they have jurisdiction to hear these cases.

MOTION: (Stanvick/Welch) To conduct a site walk of the property and invite the Conservation Commission to attend.

VOTE: (4-0-0) Motion carried.

The site walk was set for Saturday September 30th at 9:00am at the subject property.

Mr. Wing stated that the question to the Conservation Commission would be their opinion on whether or not they believe there is a wetland on the lot. Ms. Beauregard added that they won't be able to determine whether or not it's a wetland, but they might be able to determine whether or not it appears to be a wetland which would then need a professional opinion.

CASES DATE SPECIFIED TO OCTOBER 16, 2023

Mr. Wing stated that the Board needs to consider whether or not it's a wetland, whether or not the septic is properly designed, and if it is within this Boards purview to hear these cases. He explained that they would be overturing a Health Officer decision and a Board of Selectmen Decision and their settlement with the Superior Court. He stated that he's gone through his training and doesn't see where this Board has the power to overturn the court. He explained that they should wade into the waters of legislative decisions lightly. He stated that whatever their decision is that they should have a strong finding of facts to support it.

Ms. Masse-Quinn stated that she does believe that the Board does have jurisdiction over interpretation of Zoning and that's exactly why they had to initially sit on the first case which was just for the interpretation of part of Zoning. She explained that they do have the applicant asking for interpretation on Article 3, Section 307-8. Non-conforming uses, Article 8 Section 307-308, Article 7, Section 307-41, Article 8-1, Section 307-4 48-1-1. She stated that she knows that the

Board does have jurisdiction over the interpretation of zoning. Ms. Beauregard stated that that was correct, over the interpretation of the Zoning Ordinance.

Mr. Welch stated that he thinks that the question at hand is just whether or not that decision fell under it. He explained that there's been arguments for and against and it's it's definitely not a clear decision because what's the purpose of having a local approval and a local health officer if they're not going to take our local zoning into effect as they might as well just follow the state standard at that point. Ms. Masse-Quinn added that what would be the point of having a board of adjustment if the other board could just do variances and waivers. Mr. Welch added that he thinks the fact that they do as a Town require local approval and it's heavily hinged upon stuff that's in the zoning as far as setbacks and septic requirements and that points to the fact that the health officer is working to that in his decisions, or he should be considering it if nothing else.

DATE SPECIFIED CASE(S) – OCTOBER 16, 2023

Case #ZO2023-00015 – Map 31 Lot 11-20 – PAGE, Andrea & BILAPKA Bruce – 37 Woekel Circle

Case #ZO2023-00016 – Map 31 Lot 11-20 – PAGE, Andrea & BILAPKA Bruce – 37 Woekel Circle

ADJOURNMENT

MOTION: (Masse-Quinn/Stanvick) To adjourn the meeting.

VOTE: (4-0-0) The motion carried.

The meeting was adjourned at approximately 9:13pm.

Respectfully submitted,
Cassidy Pollard
Recording Secretary