

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**2010 TERM
FEBRUARY SESSION**

No. 2009-0752

**JOHN AND BRENDA GALLOWAY,
Petitioners-Appellants,**

v.

**THE TOWN OF KINGSTON,
Respondent-Appellee.**

**RULE 7 MANDATORY APPEAL FROM
LOWER COURT DECISION ON THE MERITS**

**BRIEF OF RESPONDENT-APPELLEE,
THE TOWN OF KINGSTON**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the ruling of the trial court, sustaining the decision of the Kingston Planning Board that it had no power to grant a subdivision application that violated a frontage requirement in the Kingston Zoning Ordinance, should be affirmed.

2. Whether the trial court's decision affirming the denial of a variance should be sustained because evidence that the variance would threaten public health, safety and welfare reasonably supports the finding that the petitioners did not prove that the variance would not be contrary to the public interest and consistent with the spirit of the ordinance.

3. Whether the trial court's decision affirming the denial of a variance should be sustained because the record reasonably supports the finding that the petitioners' goal could be achieved by another reasonably feasible method, without the need for a variance, such that they did not demonstrate that literal enforcement of the ordinance would result in unnecessary hardship.

STATUTES AND ORDINANCES INVOLVED IN THE CASE

A. NEW HAMPSHIRE STATUTES

RSA 677:6

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

RSA 677:15, V

The court may reverse or affirm, wholly or partly [the decision of the planning board], or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that

said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.

B. KINGSTON ZONING ORDINANCE

Article 5.10.1

Every building lot shall have a minimum frontage of two hundred (200) feet on a “public right-of-way” (the term “public right-of-way” for the purposes of this ordinance shall be limited to those highways which qualify as Class I through V highways under the provisions of N.H. RSA 230:4) and shall contain a minimum area of 80,000 (eighty thousand square feet).

C. KINGSTON SUBDIVISION REGULATIONS

Article 52.10.2.a

These regulations are written for the following purpose:

- a. To protect and provide for the public health, safety, and general welfare of the town.

Article 52.30.1.a

The plat shall conform with all state and town laws or regulations although this shall not preclude the petitioner from applying to the Zoning Board of Adjustment for a variance from the terms of the zoning ordinance.

Article 52.60.12

If the Planning Board finds that extraordinary hardships or practical difficulties may result from strict compliance with these subdivision regulations and/or the purposes of these regulations may be served to a greater extent by an alternative proposal, it may approve waivers to these subdivision regulations so that substantial justice may be done and the public interest secured, providing that such waiver shall not have the effect of nullifying the intent and purpose of these regulations; any waiver from the regulations shall be subject to a majority vote of approval of the Board and be duly recorded in the minutes.

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of an attempt by the petitioners, John and Brenda Galloway, to subdivide their property located at 12 Route 125 in Kingston into three separate lots,

all of which are serviced by a private road known as Roadstone Drive. (A1: 1, ¶2; A2: 9).¹ The Galloways stated that they wished to subdivide the property for estate planning purposes because they had three children. (A2: 9).

I. The Planning Board.

The Galloways first filed a Subdivision Application with the Kingston Planning Board (A2: 9), which was the subject of three public hearings on June 17, 2008, September 16, 2008 and October 21, 2008. (A2: 37, 41, 47). Article 52.30.1.a of the Kingston Subdivision Regulations requires all subdivision plans to “conform with all state and town laws or regulations”, including the Kingston Zoning Ordinance. Among other things, the petitioners asked the Planning Board to waive the requirement in Article 5.10.1 of the Kingston Zoning Ordinance that all lots have frontage on a public way. (A2: 49). Specifically, Article 5.10.1 provides as follows:

Every building lot shall have a minimum frontage of two hundred (200) feet on a “public right-of-way” (the term “public right-of-way” for the purposes of this ordinance shall be limited to those highways which qualify as Class I through V highways under the provisions of N.H. RSA 230:4)

(A1: 24). The Galloways said it was their intent “to keep this road as a private way and not have the Town take it over.” (A2: 38). Several concerns were raised at the Planning Board hearings about the Galloways’ desire to keep Roadstone Drive private. At the June 17th hearing, the Kingston road agent noted that the Route 125 Corridor Improvement Plan called for Roadstone Drive “to be turned into a public road to access all the industrial land in the zone. He stated that our requirements for subdivision call for interconnectability for backland regardless of ownership to provide for future development.” (A2: 39). At a subsequent hearing, it was noted that the State’s Route 125 Corridor study

¹ The Galloways’ Appendix is referenced as “A1”; the Town’s Appendix is referenced as “A2”.

had “flagged [Roadstone Drive] as a potential future road to take the industrial traffic off of Dorre Road”, a road that accessed the Brox property abutting the Galloway property. (A2: 43, 44, 57). The plan was for Dorre Road to connect to Roadstone Drive so that all industrial traffic would join Route 125 at Roadstone Drive, bypassing the residential part of Dorre Road. (A2: 55).

At the second hearing, Police Chief Briggs “questioned how much authority law enforcement would have on a private road giving limited ability to enforce certain laws.” (A2: 44). Mr. Galloway responded that, although Roadstone Drive would be gated at night, he welcomed police protection and would give the Chief a key to the gate. Id. Chief Briggs responded that “there are certain statutes regarding private property that limit enforcement actions . . . and there could be concerns depending on the use within the proposed subdivision.” Id. For instance, he said, if there were speeding complaints and reckless operation complaints, the P[olice] D[epartment] could be restricted from enforcing those” Id. At the third hearing, Chief Briggs reiterated “that on private ways, the Police Department does not have the ability to enforce motor vehicle statutes.” (A2: 50). While the Galloways sought to grant the police such powers, he doubted they had the authority to do so, absent legislative action. Id. Although there had been no problems prior to the requested subdivision, he was concerned “with possible future development with additional traffic and ensuing issues.” (A2: 45). At least two board members shared Chief Briggs’s concerns. (A2: 51, 53).

It should be noted that the Galloway property abuts land owned by Brox Industries. (A2: 58). Access to that property is via Dorre Road, referenced above, immediately to the north of the Galloway property. (A2: 57). The Galloways’ business, Road-

stone, Inc., operates an asphalt manufacturing plant on the property they seek to subdivide. In two previous actions in Rockingham Superior Court, Brox Industries sought authority to build their own asphalt manufacturing plant. Roadstone, Inc. intervened in both of those actions to oppose Brox's attempt to build a competing asphalt plant. (A2: 3, ¶11).

As noted above, the Route 125 Corridor Improvement Plan called for Roadstone Drive to be turned into a public road to access all the industrial land in the area. Evidence was submitted to the Planning Board, in a letter dated September 16, 2008, that such a plan was actually in the works. (A2: 55). Based on the idea of a former Brox employee, an area engineer had contracted with Torremeo Industries (located on Dorre Road with Brox) to connect Dorre Road to Roadstone Drive, all to be laid out as a commercial road. Id. At the third hearing before the Planning Board, one of the board members recommended just such a plan. (A2: 50). He said

that the best interest of the Town would be to do a public road on Roadstone, to the Brox property with the 60 foot right-of-way with the hope that Brox would someday take it to the next step and connect up to Dorre Road to Mr. Torromeo's property which would provide for a single road, coming onto Route 125 at a signalized intersection.

Id. Another board member agreed, opining "that it would be in the best interest of the Town to require that Roadstone Drive be a public road with the potential to divert commercial traffic off of Dorre Road." Id.

John Galloway reacted sharply to this proposal. Earlier, he said he wanted to keep Roadstone Drive private because it "currently has significant truck traffic and he didn't want to add any additional non-commercial truck traffic to the road as a safety concern." (A2: 39). However, when presented with a proposal that would connect his

road to the Brox property, he chose to “remind[] the Board that the road would remain private. He stated that the Board could decide to subdivide or not subdivide but the road would remain private.” (A2: 50). Two board members suggested that they would be willing to accept Roadstone Drive as a private road if the Galloways were “willing to work with the Town to recognize that Roadstone Drive would need to be a public road” either when it could be connected to Dorre Road, or “should the abutter [Brox] decide to develop [its] property.” (A2: 51). The minutes of the meeting do not reflect that the Galloways responded in any way to the suggestion that they be flexible.

At the conclusion of the third public hearing, the Planning Board voted to deny the Galloways’ subdivision application. (A2: 53). The Board’s Notice of Decision summarized its vote as follows: “to deny the subdivision application based upon section 5.10.1 of the Town’s zoning ordinance that requires every newly developed lot in Kingston to have 200 feet of frontage on a Class V or better road. As the application involved creation of lots on a private road, the application must be denied.” (A2: 54).

II. The Zoning Board.

The Galloways filed a timely appeal to Rockingham Superior Court, which action was stayed pending resolution of two related matters pending before the Kingston Zoning Board of Appeals (“ZBA”). First, the Galloways took an administrative appeal to the ZBA from the Planning Board’s denial of their subdivision application. (A2: 22-26). Second, they applied to the ZBA for a variance from the requirements of Article 5.10.1 of the Kingston Zoning Ordinance, “to permit the creation of a subdivision of three lots each with over 200 feet of frontage on a private road.” (A2: 16).

The two ZBA matters were the subject of a public hearing on December 11, 2008. The ZBA chair asked the Galloways' attorney to speak to the issue of keeping Roadstone Drive private, as "the Planning Board could not grant a waiver for this and that was why they were before the ZBA." (A2: 28). Counsel said they intended to maintain Roadstone Drive the same way a public road would be maintained, recording guarantees to that effect that would run with the property, but that the Galloways wanted the road to remain private. *Id.* Notwithstanding the Galloways' promise to maintain Roadstone Drive as the Town would in perpetuity, one ZBA member expressed concern for a time in the future, when the Galloways no longer owned the property – "what happens then, if subsequent owners can't afford to maintain this road [and] the town has to take it over." (A2: 29). Another board member expressed concern that, if the property was sold, Roadstone Drive would not be maintained up to the standards proposed by the Galloways, which "would put the town at risk." (A2: 30). Another ZBA member echoed Police Chief Briggs's concerns about traffic enforcement, asking who would enforce speed limits, to which Mr. Galloway replied: "the Mine Safety [and] Health Administration." *Id.*

When asked again why the Galloways did not want to make the road public, counsel simply reiterated what had been said before: "since the lot's inception it has been a private road." (A2: 29). Mr. Galloway himself repeated that he would like to keep the road private, adding that "if it was a public road cars and people with baby carriages, bikes, etc. could go in and mix with the asphalt plant" *Id.* He also stated that it could not be a public road "because there was a gate in there, which is closed at night." (emphasis added) (A2: 30).

The Galloways submitted a five-page memorandum to the ZBA. (A2: 17-21). Of the five legal prongs that an applicant has the burden of satisfying in order to obtain a variance, the memorandum only addressed the “unnecessary hardship” element. (A2: 18-20). As to the other four elements – that granting of the variance will not be contrary to the public interest, is consistent with the spirit of the ordinance, will do substantial justice, and will not diminish surrounding property values – the Galloways only offered the statement that “[c]learly, these remaining requirements are satisfied.” (A2: 20). At the conclusion of the hearing, the ZBA first voted to deny the administrative appeal, by a vote of 4 to 0, with one abstention. (A2: 31). The ZBA chair then read the five criteria that must be satisfied in order to grant an area variance, noting that all five must be satisfied. *Id.* The Board then voted, by the same margin, to deny the variance application. (A2: 31-33).

On February 12, 2009, the ZBA heard the Galloways’ request for a rehearing. (A2: 34). Counsel for the Galloways reiterated that they wished to keep the road private for safety reasons and that doing so “would in no way detract from the ordinance or be in violation of the spirit of the ordinance.” *Id.* When asked by a new board member why the variance was denied, the chair of the ZBA stated that “it did not meet all the criteria” for granting a variance. *Id.* She also noted that the ZBA was concerned that a private road would not be properly maintained by the Galloways’ successors. *Id.* Notwithstanding promises to maintain the road, she “stated that it was one thing for Mr. Galloway to say that is the way it will be and a whole different thing for whoever may come subsequent to Mr. Galloway.” *Id.* The Board then voted unanimously to deny the request for a

rehearing. (A2: 35). The Galloways then filed timely appeals of the zoning board decisions to Rockingham Superior Court.

III. The Superior Court's Decision.

In a decision dated September 11, 2009, the court (McHugh, J.) noted that the record of this dispute reflected “detailed consideration” by both the Planning Board and the ZBA. (A1: 57). Initially, it found that, because the Kingston Zoning Ordinance requires all buildable lots to have frontage on a public way, the “Planning Board . . . correctly determined that before the plan could be considered the plaintiffs would have to go before the . . . Zoning Board in order to get a variance.” *Id.* at 57-58. The court went on to note that a “variance would be unnecessary if plaintiffs permitted Roadstone Drive to become a public street.” *Id.* at 58. It could be found, it continued, “that the reasons expressed by both Town boards for demanding that it become public are meritorious.” *Id.* “For purposes of all town services and public protection,” the court said, “the benefits to the municipality” in roads being public “far out weigh the detriments.” *Id.* Thus, it concluded, it had “no difficulty in concluding that the demand of the Kingston Planning and Zoning Boards that the plaintiffs’ proposed subdivision be contingent upon making Roadstone Drive a public way are both reasonable and lawful.” *Id.* at 59. Accordingly, it denied the plaintiffs’ appeals. *Id.*

The court also granted all of the Town’s Requested Findings of Fact and Rulings of Law. *Id.* at 57. In so doing, it found that, because the Galloways could have reasonably achieved their estate planning goal of subdividing their land into three lots for their three children by making Roadstone Drive public, without the need for a variance, they had “not demonstrated unnecessary hardship and were not entitled to a variance.” (A2:

6-7, ¶30). The court further found that the Galloways failed to sustain their burden of demonstrating that granting a variance would not be contrary to the public interest or in violation of the spirit of Article 5.10.1 of the Kingston Zoning Ordinance. (A2: 7, ¶34).

In adopting the Town's requested findings, it further ruled as follows:

A reasonable person could conclude that permitting a subdivision on a private road, where there were legitimate concerns that the road might not always be safely maintained to town standards, that traffic safety and other laws could not be enforced on the road, and emergency vehicles would have difficulty accessing the road when the gate at the end of it was locked, would threaten the public health, safety or welfare.

(A2: 7, ¶34).

The Notice of Decision on the court's Order was dated September 17, 2009. The Galloways filed a timely Notice of Appeal on October 16, 2009.

SUMMARY OF THE ARGUMENT

1. The Galloways' subdivision application asked the Kingston Planning Board to waive the terms of Article 5.10.1 of the town zoning ordinance which required all building lots to have a minimum of 200 feet of frontage on a public way. However, planning boards do not have the power to waive zoning requirements; only zoning boards can do that by granting a variance. Indeed, Kingston's Subdivision Regulations require subdivision plans to conform with all town regulations, and only permit waivers to the subdivision regulations themselves. Thus, where a subdivision plan violates a zoning ordinance, it cannot be approved. The Galloways' plan had zero feet of frontage on a public way, where Article 5.10.1 required all lots to have 200 feet of such frontage. Thus, because the Planning Board had no authority to waive the terms of the zoning ordinance, it correctly denied the Galloways' subdivision application, and the trial court correctly affirmed that decision.

2. An applicant seeking a variance must prove, among other things, that the variance will not be contrary to the public interest and is consistent with the spirit of the ordinance. To satisfy those requirements, the applicant must show that the variance will not threaten public health, safety or welfare. Ordinances requiring frontage on public ways have long been recognized by the courts as being reasonably related to the promotion of public welfare. Here, the Kingston Police Chief voiced doubts that traffic safety laws could be enforced on a private Roadstone Drive and was concerned about access for emergency vehicles through a locked gate. Several board members shared those concerns, and were troubled that the road might not be safely maintained by subsequent owners. Thus, the record before the ZBA reasonably supported the Board's conclusion, and the trial court's affirmance thereof, that the Galloways did not prove that a variance would not be contrary to the public interest and consistent with the spirit of the ordinance.

3. A variance applicant must also prove that a literal enforcement of the ordinance at issue will result in unnecessary hardship. To establish unnecessary hardship, an applicant must show that the benefit sought cannot be achieved by some other reasonably feasible method that would not require a variance. Here, the Galloways could realize their goal of dividing their land into three lots for their three children, with no need for a variance, simply by making Roadstone Drive public. That is a reasonable way to achieve their goal because it would not require them to change the use of their property from what they proposed in their subdivision application. Thus, the evidence before both the ZBA and the trial court reasonably supports the conclusion that the Galloways did not prove that literal enforcement of Article 5.10.1 of the Kingston Zoning Ordinance would result in unnecessary hardship.

ARGUMENT

I. THE PLANNING BOARD'S DECISION SHOULD BE AFFIRMED

A. The Standard of Review

The superior court may reverse a planning board decision only “when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.” RSA 677:15, V; Star Vector Corp. v. Town of Windham, 146 N.H. 490, 493 (2001) (superior court must determine whether the planning board’s decision “was unreasonable or erroneous as a matter of law). It must decide whether, on the evidence before it, a reasonable person could have reached the same conclusion. Star Vector, 146 N.H. at 493. The person appealing a planning board decision has the burden of proof. Bayson Props. v. City of Lebanon, 150 N.H. 167, 169 (2003). “If any of the board’s reasons for denial support its decision, then the plaintiff’s appeal must fail.” Durant v. Town of Dunbarton, 121 N.H. 352, 354 (1981). Moreover, “the trial court may not substitute its judgment for that of the board.” Cherry v. Town of Hampton Falls, 150 N.H. 720, 724 (2004).

“In reviewing a decision by the superior court the standard for review . . . is not whether [the Supreme Court] would find as the trial court did, but whether the evidence reasonably supports the finding.” Condos East Corp. v. Town of Conway, 132 N.H. 431, 434 (1989) (quoting Cutting v. Town of Wentworth, 126 N.H. 727, 728 (1985)). The Court must focus its inquiry on whether a reasonable person could find as the trial court did. Id. 434-35. Thus, the Supreme Court “will not overturn the superior court’s decision unless it is unsupported by the evidence or legally erroneous.” Deer Leap Assocs. v. Town of Windham Rock Pond Improvement Ass’n, 136 N.H. 555, 557 (1992).

B. The Evidence Supported the Trial Court’s Finding that the Planning Board Correctly Denied the Galloways’ Subdivision Application Because it Could Not Waive the Requirement in the Kingston Zoning Ordinance that Each Lot Have 200 Feet of Frontage on a Public Way

It is generally recognized that subdivisions should “comply to the local requirements for the safety, health and general welfare of the subsequent owners of the individual lots therein and of the community”. Blevens v. Manchester, 103 N.H. 284, 286 (1961) (quoting Rathkopf, The Law of Zoning & Planning, c. 71, § 9 (1960)). Indeed, it is a stated purpose of the Kingston Subdivision Regulations to “protect and provide for the public health, safety, and general welfare of the town.” Article 52.10.2.a. Moreover, it should also be noted that “[enactments] in the field of zoning and subdivision control are necessarily related to each other and they should be read and considered together. . . . A subdivider, seeking approval of a subdivision plat, must first meet applicable zoning regulations.” Keene v. Town of Meredith, 119 N.H. 379, 382 (1979) (Lampron, J., dissenting) (quoting 3 E. Yokley, Zoning Law & Practice, § 17.10 at 86-87 (4th ed. 1979)). “Thus, where a preliminary plat indicates on its face that it is violative of zoning ordinances, the subdivision plan must not be approved.” 15 New Hampshire Practice: Land Use Planning & Zoning, § 29.03, p. 389 (3d ed. 2000) (citing Keene, 119 N.H. at 382); see also, Article 52.30.1.a, Kingston Subdivision Regulations (subdivision plans must “conform with all . . . town laws or regulations”, including the Kingston Zoning Ordinance).

Not only was there nothing legally erroneous or unreasonable about the Planning Board’s decision, but in fact Article 5.10.1 of the Kingston Zoning Ordinance compelled it to deny the Galloways’ subdivision application. As noted above, a subdivision application must meet applicable zoning regulations. Keene, 119 N.H. at 382; Article 52.30.1.a,

Kingston Subdivision Regulations. If it does not, the application must be denied. 15 New Hampshire Practice, *supra*, § 29.03, p. 389. Article 5.10.1 requires all lots in a proposed subdivision to have 200 feet of frontage on a “public right-of-way”. None of the lots in the Galloways’ application had any frontage on a public road as they all abutted the private Roadstone Drive. Hence, the Planning Board was legally required to deny their subdivision application. This was precisely what happened in Beck v. Town of Auburn, 121 N.H. 996 (1981), a case relied on by the petitioners. (Appellants’ Brief, p. 14). There, a planning board denied a subdivision application because two lots did not have frontage on an improved public road as required by the town’s zoning ordinance. *Id.* at 997. The Supreme Court affirmed the planning board’s decision. *Id.* at 998-99. Just as the planning board in Beck was required to deny a subdivision application because it violated the town’s zoning ordinance, so too the Kingston Planning Board was compelled to deny the Galloways’ application for the same reason. Because the Kingston ZBA was the only body that could give the Galloways relief from that ordinance, the Planning Board’s decision, and the superior court’s ruling affirming it, should be sustained.

The Galloways assert in their Brief that the Planning Board exceeded its authority by requiring Roadstone Drive to become a public way.² They base their argument that the Planning Board exceeded its authority on the Beck case, 121 N.H. 996 (1981), which is discussed above. However, the Galloways misconstrue both what the Kingston Planning Board did and the holding in Beck. First, the Planning Board did not order Roadstone Drive to become public. Rather, it ruled that it had no authority to approve the Gal-

² At the outset, it should be noted that neither the Planning Board nor the ZBA were ordering Roadstone Drive to be public. They were simply telling the Galloways that if they agreed to the road being public, and the road was accepted by the Board of Selectmen, their subdivision plan would no longer violate Article 5.10.1 of the zoning ordinance.

loways' subdivision because it violated Article 5.10.1 of the Kingston Zoning Ordinance which required all lots to have 200 feet of frontage on a public way. Of course, had the Galloways taken the steps before other town bodies to make Roadstone Drive public, the zoning ordinance would not have been an impediment to their application. Second, in Beck, the facts of which are remarkably similar to those here, the planning board denied a subdivision application both because it violated a similar frontage ordinance and because it had no authority to approve a requested upgrade of the road in question. Id. at 997. The Supreme Court affirmed the planning board's decision. Id. at 998-99. Here too, the Planning Board's denial of the Galloways' subdivision application must be affirmed because it had had no power to waive the requirements of the town zoning ordinance; nor did it have the power to make Roadstone Drive public even if it had wanted to.

The Galloways further claim that the Planning Board failed to follow its own rules by not granting a waiver from the terms of the zoning ordinance. In support of that argument, they rely on Section 52.60.12 of the Kingston Subdivision Regulations, which allows the Board, in certain circumstances, to "approve waivers to these subdivision regulations" (emphasis added). However, the Galloways did not seek a waiver from Kingston's Subdivision Regulations; they sought a waiver from the terms of the Kingston Zoning Ordinance. As noted above, the Planning Board had no power to waive the requirements of the zoning ordinance. Keene, 119 N.H. at 382; Beck, 121 N.H. at 997-99; 15 New Hampshire Practice, supra, § 29.03, p. 389. Indeed, the Kingston Subdivision Regulations themselves bar such a waiver as they require subdivision plans to "conform with all . . . town laws and regulations", including the town zoning ordinance.

The minutes of the three hearings before it provide additional support for the Planning Board's decision to deny the Galloways' subdivision application. As noted above, the Board members were concerned about providing an interconnection between Roadstone Drive and Dorre Road so that all of the industrial traffic in the area would be channeled into Route 125, thereby avoiding residential areas of the town. This had been an ongoing concern of State and local planning entities.³ Moreover, Police Chief Briggs expressed considerable concern about his Department's ability to enforce the law on Roadstone Drive, particularly motor vehicle laws, if the road remained private. Those concerns could not have been eased when John Galloway said that speed limits on Roadstone Drive could be enforced by the "Mine Safety and Health Administration"; and they were likely increased by Mr. Galloway's assertion that a gate at the end of Roadstone Drive would be locked at night. While he promised to give the police and fire department a key to the lock (a lock that might be changed by subsequent owners), that would not offer much comfort to a patrolman or an EMT called to the property in the middle of the night who first had to hunt down the key. As noted above, planning boards are charged with seeing that subdivisions "comply to the local requirements for the safety, health and general welfare" of the lot owners and the community as a whole. Blevens, 130 N.H. at 286 (quoting Rathkopf, The Law of Zoning & Planning, c. 71, § 9). Given its concerns regarding the interconnectivity to backland and between Roadstone Drive and Dorre Road (and its effect on industrial traffic in residential zones), the enforcement

³ The Galloways note in their Brief that the Chair of the Zoning Board "didn't believe [the project] was on the drawing board anymore." (A2: 30). However, the project to which the Chair was referring was simply one to install a "set of [traffic] lights." Id. Moreover, even the Galloways' own attorney admitted that the project simply wasn't going forward "at this time." Id. Indeed, several Planning Board members, and the town road agent, indicated that there was a strong desire to make the interconnection plan happen. (A2: 50-51).

of motor vehicle and other laws on a private road, and the ability of emergency personnel to rapidly respond to an incident on the property, a “reasonable person” could certainly have reached the same conclusion as the Planning Board. Star Vector, 146 N.H. at 493.⁴ Thus, the decision of the superior court should be affirmed for those reasons as well.

II. THE ZONING BOARD’S DECISION SHOULD BE AFFIRMED

A. The Standard of Review.

A petitioner for a variance has the burden of proving all issues wherein the exercise of the zoning board’s discretion is sought. Fisher v. City of Dover, 120 N.H. 187, 190 (1980); Peabody v. Town of Windham, 142 N.H. 488, 493 (1997). The burden is a “heavy” one. Hanson v. Manning, 115 N.H. 367, 368 (1975). The superior court must afford deference to a zoning board’s decision. Ouellette v. Town of Kingston, 157 N.H. 604, 611 (2008).

In an appeal to the [superior] court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order is unreasonable.

RSA 677:6; see also, Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580 (2005). “The superior court’s review in zoning cases is limited.” Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 309 (2007). The court does not sit as

⁴ The Galloways did express some safety concerns about Roadstone Drive being public because “cars and people with baby carriages” might start using the road located in the heart of an industrial zone. (A2: 29). The weight to be given to those arguments, however, is questioned by the fact that the Galloways would risk far less liability for accidents happening on the road were the Town of Kingston responsible for maintaining it rather than them. Moreover, one wonders whether the Galloways’ opposition to Roadstone Drive being public relates more to the fact that it would benefit Brox Industries, owner of property abutting Roadstone Drive, which the Galloways opposed in two legal attempts to get approval for a competing asphalt plant.

a “super zoning board.” Thomas v. Town of Hooksett, 153 N.H. 717, 724 (2006). The burden is on the appellant to convince the court that the order is either unjust or unreasonable. Cook v. Town of Sanbornton, 118 N.H. 668, 670 (1978). The court should not “determine whether it agrees with the [zoning board’s] findings, but [should] determine whether there is evidence upon which they could have been reasonably based.” Lone Pine Hunters’ Club v. Town of Hollis, 149 N.H. 668, 670 (2003) (quoting Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992)).

Similarly, the Supreme Court’s “review in zoning cases is limited. Only if [it] find[s] a trial court’s decision to be unsupported by the record or erroneous as a matter of law will [it] overturn its judgment.” Hill v. Town of Chester, 146 N.H. 291, 292-93 (2001). Indeed, this Court’s “standard of review of a trial court’s [zoning] decision strongly favors upholding that decision”. Brewster v. Town of Amherst, 144 N.H. 364, 369 (1999) (quotation omitted). Thus, “the standard of review of this court is not whether we would find as the trial court did, but whether the evidence reasonably supports the finding. We will therefore uphold the trial court’s decision on appeal unless it is not supported by the evidence or is erroneous as a matter of law.” Town of Plaistow v. Town of Plaistow, 146 N.H. 263, 264 (2001). Moreover, even if the trial court reaches the correct result for the wrong reasons, the decision must still be affirmed “if there are valid alternative grounds to support it.” Sherryland, Inc. v. Snuffer, 150 N.H. 262, 267 (2003); H.P. Hood & Sons, Inc. v. Boucher, 98 N.H. 399, 404 (1953) (“a wrong reason given by a court does not invalidate a correct ruling”).

B. The Requirements for a Variance.

An applicant seeking a zoning variance must demonstrate that: (1) the variance will not be contrary to the public interest; (2) special condi-

tions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship (3) the variance is consistent with the spirit of the ordinance; (4) substantial justice is done; and (5) granting the variance will not diminish the value of surrounding properties.

Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 105 (2007). “To be contrary to the public interest . . . , the variance must unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” Chester, 152 N.H. at 581. “In determining whether a variance violates an ordinance’s basic zoning objectives, [the court] look[s] to, among other things, whether it would alter the essential character of the locality or threaten public health, safety or welfare.” Nine A. LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008)). The requirement that the variance be consistent with the spirit of the ordinance is related to the requirement that it not be contrary to the public interest. Malachy Glen, 155 N.H. at 105). To establish unnecessary hardship, the applicant also must show that “the benefit sought . . . cannot be achieved by some other reasonably feasible method” that would not require a variance.” Boccia v. City of Portsmouth, 151 N.H. 85, 94 (2004).

C. The Purpose of Frontage Ordinances.

The requirement in the zoning ordinance at issue here, that the lots to be subdivided have minimum frontage on a public way, is amongst the most commonly imposed restrictions in zoning ordinances. 3 E. Zeigler, Rathkopf’s The Law of Zoning & Planning, § 53.22, p. 53-30 (Thomson West 2006); see also, 2 K. Young, Anderson’s American Law of Zoning, § 9.65, pp. 317-18 (Clark Boardman Callaghan 1996). Such restrictions “have long been recognized by the courts as being reasonably related to promotion of public welfare.” Rathkopf at § 53:2. “The principal purpose of the requirement of

frontage on a public street is to . . . prohibit[] the issuance of a building permit for a structure on a lot unless there is reasonable access from a street improved to the satisfaction of the planning board, for fire, and other emergency vehicles.” *Id.* at § 53:22, p. 53-31.

D. There Was Sufficient Evidence to Support the Finding that the Galloways Did Not Satisfy Their Burden of Showing that a Variance Would Not be Contrary to the Public Interest and Consistent with the Spirit of the Ordinance.

To establish that a variance will not be contrary to the public interest, the petitioners must show that the variance would not “threaten public health, safety or welfare.” *Nine A*, 157 N.H. at 366.⁵ The same demonstration must be made in order to show that a variance would be consistent with the spirit of the ordinance. *Malachy Glen*, 155 N.H. at 105. The ordinance at issue here requires all lots to have 200 feet of frontage on a public way. As noted above, such ordinances “have long been recognized by the courts as being reasonably related to promotion of public welfare.” *Rathkopf* at § 53:2. They ensure access for fire and other emergency vehicles. *Id.* at § 53:22, p. 53-31. None of the three lots proposed here has a single foot of frontage on a public way. ZBA members expressed numerous concerns regarding the safety consequences should Roadstone Drive remain private. They were worried that Roadstone Drive would not be safely maintained to town standards by subsequent owners of the property (A2: 29, 30, 34) and they doubted whether traffic safety laws could be enforced if the road were not public except, perhaps, by the Mine Safety & Health Administration. (A2: 30). Those concerns piggy-

⁵ At the ZBA, the Galloways focused on just one of the five elements they had to prove in order to get a variance – that enforcement of Article 5.10.1 would cause them unnecessary hardship. (A2: 17-20). With respect to the other four elements, they simply stated in their memorandum to the ZBA that “[c]learly, these remaining elements are satisfied.” (A2: 20). However, they had the burden of proving those elements to the ZBA. *Fisher*, 120 N.H. at 190; *Peabody*, 142 N.H. at 493.

backed on the public welfare concerns expressed by Police Chief Briggs, including ones relating to the enforceability of many laws on Roadstone Drive if it were private (A2: 44, 50), and the ease of access by emergency vehicles through a locked gate. (A2: 30, 44). As noted above, the promise to give the Town a key would offer little relief to the patrolman or EMT called to the property on a late night emergency who had to go in search of a key. Thus, the Town submits, the Superior Court's decision should be affirmed because a reasonable person could find that allowing three lots with zero frontage on a public road would threaten public health, safety or welfare, such that granting a variance would be contrary to the public interest and in violation of the spirit of Article 5.10.1 of the Kingston zoning ordinance..

The Galloways argue that Metzger v. Town of Brentwood, 117 N.H. 497 (1977), supports their claim that granting a variance would not violate the spirit of the ordinance. However, Metzger is distinguishable for two reasons. First, Metzger held that a frontage ordinance was unconstitutional as applied to the plaintiffs' property, an issue that has not been raised here. Second, and perhaps more importantly, the plaintiffs in Metzger had 123 of the required 200 feet on a public road, such that the Court found that any public safety considerations in the ordinance were satisfied. Id. at 501. The Court went on to suggest that the frontage requirement would have been upheld if, as in Trottier v. City of Lebanon, 117 N.H. 148 (1977), the landowner had no frontage on a public street. Id. at 503. Here, as in Trottier, the Galloways proposed lots have no frontage on a public way. Thus, Metzger does not support their claim that a variance would not violate the spirit of the ordinance. Instead, Trottier supports the conclusion that the requested variance was properly denied.

E. The Galloways Did Not Demonstrate Unnecessary Hardship Because They Could Have Achieved Their Goal by Another Reasonably Feasible Method Without the Need for a Variance.

As noted above, the Galloways argued to the ZBA that enforcement of Article 5.10.1 would cause them unnecessary hardship. (A2: 17-20). However, the Galloways could have achieved their stated goal of getting three lots for their three children, to satisfy their estate plan, simply by agreeing to make Roadstone Drive public, something they steadfastly refused to do. If they had agreed to that, no variance would have been necessary. As noted above, to establish unnecessary hardship, the applicant must show that its goals “cannot be achieved by some other reasonably feasible method” that would not require a variance. Boccia, 151 N.H. at 94. By making Roadstone Drive public the Galloways would not have been required to use their property any differently than what they proposed in their subdivision application. See, Vigeant v. Town of Hudson, 151 N.H. 747, 753 (2005). That is precisely what the Superior Court found when it said that a “variance would be unnecessary if the plaintiffs permitted Roadstone Drive to become a public street.” (A1: 58). Accordingly, the evidence supports the finding that the Galloways did not sustain their burden of proving that denial of the requested variance would cause them unnecessary hardship. Thus, the ruling of the Superior Court should be affirmed for that reason also.

CONCLUSION

For the reasons stated above, the Respondent-Appellee, the Town of Kingston, respectfully requests that this Court affirm the judgment of the Superior Court.

REQUEST FOR ORAL ARGUMENT

The Respondent-Appellee, Town of Kingston, hereby requests oral argument. It is estimated that the Appellee will need fifteen minutes for such argument. Peter J. Loughlin, Esq., will present oral argument on behalf of the Appellee.

Respectfully submitted,
THE TOWN OF KINGSTON,
By and through its attorneys,

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Dated: February 1, 2010

CERTIFICATE OF SERVICE

I, Robert G. Eaton, hereby certify that on the 1st day of February, 2010, I served two copies of the foregoing Brief of the Respondent-Appellee, Town of Kingston, on all counsel of record, via first class mail, postage pre-paid, to the following:

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