

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. YOR-23-424

ROGER K. MOREAU,

Petitioner-Appellee

vs.

TOWN OF PARSONSFIELD,

Respondent-Appellee

and

MICHAEL J. NELLIGAN,

Party-In-Interest/Appellant

On Appeal from Maine Superior Court
(York County)

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT.....1

I. The Ordinance requires that when a commercial use is proposed to be included on a non-conforming back lot, the private way must meet the road standards for a commercial use......1

II. Conclusion10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

Page No(s).

Citations

Town of Parsonfield, Land Use and Development Ordinance

Article I, General Provisions

Section 5 (Conformity Required)4

Section 6 (Non-Conformance).....5

E. Creating Rear Lots 6-7, 8, 9

Article II, Land Use Districts and Uses

Section 6 (General Performance Standards)

A. Access to Lots3, 4, 6

N. Road Construction and/or Acceptance2

N. Table 5 Street Standards2

Appendix A: Definitions, Section 2 (Definition: Access Road)1

ARGUMENT

I. The Ordinance requires that when a commercial use is proposed to be included on a non-conforming back lot, the private way must meet the road standards for a commercial use.

The Planning Board erred in approving the Third Application (as further amended after initial approval and appeal) because that application did not show access to Mr. Moreau’s commercial use that meets the private way commercial access road standards in the Ordinance.¹ The private way commercial access road standards in the Ordinance require that for a new commercial use served by a private way, the road access be provided by a deeded 60-foot right of way in width with 30-feet of improved surface on center. It is undisputed that the Third Application as approved by the Planning Board after remand from the Board of Appeals does not show access by a private way to Mr. Moreau’s commercial use meeting the commercial road standards. It shows a 50-foot deeded right of way and 13-15 feet not on center of dirt surface.

Mr. Moreau’s counsel conceded below that when a commercial use is located on a rear lot to be accessed by a private way, the Ordinance requires that the access road meet the standards for a commercial use, a 60-foot right of way

¹ The Ordinance defines “Access Road” as follows: “Access Road: All private ways constructed or used to provide motor vehicle access to: (i) two or more lots; or (ii) to rear lots; or (iii) two or more distinct areas or buildings, in developments that are not subdivided. Usually consisting of a bed of exposed mineral soil, gravel, asphalt or other surfacing material.” Ordinance, Appendix A: Definitions, Section 2. (A111)

with travel lane of 30-feet on center. There is no dispute that Mr. Moreau seeks after the fact approval of a commercial use in operation on a rear lot served by a private way.

Article 1.6.E. states with respect to creating rear lots, “Access road quality - ...If serving a business ... the access road must meet the construction requirements of road construction (*see* Article II, Section 6, N, pg 27 (*sic*)).” (A078-79) In other words, for road access to serve a business located on a back lot when lawfully created, Article 1.6.E requires that the standards for road construction in Article II, Section 6.N be met. (A.078-79; R.01039-1040).

Article II.6.N.4.c & d of the Ordinance contains the standards for road construction for a private way. It states:

c. The standards shown in Table 5, apply according to street classification (both **private** and Town owned).

d. The centerline of the roadway must be at the centerline of the right-of-way.

TABLE 5
Street Standards

Description	Coll.	Type of Street	
		Residential & Rural	Industrial & Commercial
Minimum Right-of-way Width	50'	50'	60'
Minimum Pavement Width	24'	20'	30'

(A091-92; R.01059-60) (highlights added).

The Board of Appeals correctly applied the above provisions of the Ordinance to vacate the Planning Board’s decision.

The Planning Board relied on Article II.6.A, 1 and 3, stating:

The PB reviewed the Town of Parsonsfield Land Use and Development Ordinances (LUO) Article II, Section 6, Paragraph A, Items 1 and 3. Reed Lane is fifty (50) feet wide, is an existing private way, is sufficient access to the lot, has the proper drainage ditches and culverts, and any emergency vehicles have a sufficient turnaround area as depicted on the site plan submitted.

Conclusions

Based on the above finding of fact, the Parsonsfield Planning Board makes the following conclusions:

- Reed Lane is fifty (50) feet wide, is an existing private way, and per the Town of Parsonsfield Land Use and Development Ordinances (LUO) Article II, Section 6, Paragraph A, Items 1 and 3 is sufficient access to the lot, has the proper drainage ditches and culverts, and any emergency vehicles have a sufficient turnaround area as depicted on the site plan submitted.
- Reed Lane is an existing private way and would not fall under LUO Article II, Section N, Paragraph 4, Items a. through g. as they apply to streets within subdivisions.

(A058-59; R.00762-63)

But Article II, Section 6, paragraphs A, items 1 and 3, applies when creating access to a back lot with residential uses only. Here is the Ordinance:

Section 6. General Performance Requirements

The following standards *apply to all lots created and all land use activities undertaken*, where applicable.

A. Access to Lots

1. Each lot must be provided with right of access to the property from public or private ways.

3. All access roads (new and existing) must be constructed to a minimum width of twelve (12) feet if serving one dwelling unit, and fifteen (15) feet if serving two or more dwelling units. The access road must contain a minimum depth of twelve (12) inches of bank-run gravel for the gravel base course and two (2) inches of crushed surface gravel for the surface gravel course. It must have drainage ditches and culverts at all

appropriate points and must provide sufficient area to allow a fire truck or other emergency vehicle to maneuver.

(A088; R.01050) (emphasis supplied)

Since Mr. Moreau is seeking after the fact approval for an already in existence commercial use and commercial auto repair garage—and not another dwelling unit—application of this section simply does not apply.

Mr. Moreau conceded below that: “*The commercial and industrial use standards require 30 feet of pavement on a 60-foot right of way.*” Attorney Cramer’s letter to the Planning Board, April 15, 2021, at page 7. (R.00288) (emphasis supplied) *See also* Attorney Cramer letter to Planning Board, June 28, 2021, at page 5, ¶ 2 (“...*even though Mr. Moreau is proposing a new commercial use, the road should not be required to be paved per the industrial standards:...*”) (R.00436) (emphasis supplied).

Article I, Section 5 states:

Section 5. Conformity Required

Except as hereinafter specified, no building, structure or land shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, expanded, moved, or altered except in conformity with all of the regulations herein specified for the district in which it is located, unless a variance is granted. All lots created shall be in conformity with all regulations herein specified for the district in which it is located.

Article I, Section 5 (A075; R.01036)

Article I, Section 6 states:

Section 6. Non-conformance

It is the intent of this Ordinance to promote land use conformities, except that non-conforming conditions that existed before the effective date of this Ordinance or amendments thereto shall be allowed to continue, subject to the requirements set forth below. Except as otherwise provided in this Ordinance, a non-conforming condition shall not be permitted to become more non-conforming.

Article 1, Section 6 (A075; R.01036)

Reed Lane did not come into existence until 1991 after the Town adopted zoning when the back lot (26 Reed Lane) was split off from a larger parcel. (R.00369; R00761; R.00265-66; R.00371-73) At that time, prior to division, the parcel had a single residence with a driveway that came off of Maplewood that extended to the rear of the property where an outbuilding was located. Any intimation that driveway perhaps in existence “for many years” became in 1991 legally non-conforming “private way” is inaccurate because the way did not come into existence until 1991 when the back lot was created.

When 26 Reed Lane, a back lot, was created, it was an illegal lot because the access way did not meet the standards to serve a residential use. The Ordinance in effect at that time did not allow for the creation of lots in the Village Residential zone without a minimum street frontage of 100 feet. (R.01179) As a result the lot was not legal.

In seeking after the fact site plan approval for his existing commercial business, because the back lot was not legal, in 2021 while his application was pending, Mr. Moreau recorded a deed granting to 26 Reed Lane a 50-foot ROW from a public way (Maplewood) in order to satisfy the minimum access standards for creating a back lot to serve one or more residential uses. Moreau 80B Br. at 7 (argued that with the recording of the deed, “Reed Lane was established as a private road meeting the General Performance Standards set forth in LUO Article II, Section 6(A).”); Moreau Red Br. at 5 (arguing that with the recording of the corrective easement deed confirming “Reed Lane as a fifty-foot right of way with fifteen feet of gravel and a two-inch subbase, the minimum required under the ‘General performance Requirements’ Article II(6)(A) of the LUO.”) This is another way of saying that until 2021, 26 Reed Lane remained an illegal lot. The General Performance Standards Section 6(A) states: “The following standards apply to *all lots created* and all land use activities undertaken, where applicable.” Article II, Section 6(A) (A088) (emphasis added).

The Article II.6.A standards are in addition to the specific standards associated with the creation of a rear lot, which are located in Article I.6.E. That section states:

E. Creating Rear Lots

Rear lots without the required road frontage may be created if they meet the following requirements:

- Must meet lot size and dimension requirements (see Article II, Section 5), except road frontage
- Must have an access at least 50' wide as part of the property, or a deeded right of way at least 50' wide from a state, town or private road. If deeded right of way, the deed must state that the rear lot owner has the right to construct an access way at least to the standards the town requires.
- Access road quality – If serving up to two outbuildings or a single residence with up to two outbuildings, the access road must meet the construction requirements for a driveway (Article II, Section 6, S 2, pg 39). If serving a business or more than one residence, the access road must meet the construction requirements of road construction (see Article II, Section 6, N, pg 27). More than one residence or two outbuildings would require a Site Plan Review. The access road must be maintained year round once any buildings are constructed on the parcel.
- No building can be erected in the access way.
- Any business use of a new rear lot, other than a home business, requires a site plan review.
- A turn around for emergency vehicles must be available. Either a cul-de-sac, constructed to subdivision standards (Property line setback: same as building setback; outer edge of pavement: 50 feet; inner edge of pavement: 30 feet.) or an area to back into that is least 25' along the road by 50' deep and perpendicular to the road on flat ground, maintained year-round once any buildings are constructed, must be available within 75' of all residences or out buildings.
- Setbacks from all boundaries must meet the rear setback requirement for a lot in the same zone (ie – any buildings on a rear lot in the rural residential zone must be 50' from all boundaries, the rear setback requirement).
- The use of the access road to access multiple lots, whether developed or not, will require a Site Plan Review.
- A lot created under this section will be classified as a rear lot unless the access road (*sic*) becomes a public road.

Article I, Section 6(E). (A078-79)

Mr. Moreau in essence asserts that because during the pendency of his site plan applications he caused the rear lot to come into compliance with requirements for residential use, and performance standards in Article II.6.A for access to one or more residential uses, he need not bring the access into conformity with the commercial access standards for his then already in existence business use. Mr. Moreau's self-help overlooks the fact that when he sought to make access to the back lot conforming, he was already serving a business on the lot, since at least 2019 he had been using his property for a commercial purpose. Moreau Red Br. at 3 (acknowledging in 2019 Moreau was seeking an after the fact permit for his commercial auto repair shop). If subsequently in 2021 he wanted to make access to the back lot conforming for both the residential uses and business use, he had to meet the access standards for roads, and not driveways. *See* Article I, Section 6(E). (A078-79)

Mr. Moreau offers several arguments seeking to avoid application of the access standards for his existing commercial use. Mr. Moreau says that 26 Reed Lane is no longer a rear lot, and therefore Article II.6.N road construction standards for a private way access to a commercial use imposed by Article I.6.E do not apply. Per Mr. Moreau 26 Reed Lane somehow ceased to be a rear lot when in 2021 the deed was recorded giving 26 Reed Lane a ROW 50-foot in width over a private way, Reed Lane to a public way, Maplewood Road. When created in 1991,

the deeded ROW was of undefined width. This change in 2021 per Mr. Moreau gave 26 Reed Lane frontage on Reed Lane that it did not have before. *See* Moreau Red Br. at 32 n.18.

But the last sentence of Article I.6.E states “[a] lot created under this section will be classified as a rear lot unless the access road (*sic*) becomes a public road.” Article I, Section 6(E) (A079) Mr. Moreau does not claim, and cannot, that Reed Lane is a public road. That means that access by the private way no matter how counted will not remove the lot from being a rear lot under Article I.6.E of the Ordinance. Therefore given in 2021 he was already operating a business use on the rear lot, just bringing the rear lot into conformity with the residential access standards did not exempt him from having to comply with the commercial access standards for his existing commercial use.

So, try as he may, Mr. Moreau cannot escape the fact that when he sought an after the fact permit for an already existing business use located on a rear lot, he was required under Article I.6.E to meet the road construction standards for a commercial use. As noted above, Mr. Moreau concedes that those standards have not been met here.

This Court should vacate the Superior Court decision and affirm the Board of Appeals decision that vacated the Planning Board’s approval, after further amendment, of Mr. Moreau’s Third Application for Site Plan Approval.

II. Conclusion

For the reasons stated above, this Court should vacate the Superior Court's judgment. Mr. Moreau's Third Application did not show compliance with the Ordinance standards. The Board of Appeals was correct to vacate the Planning Board's approval of Mr. Moreau's Third Application as amended.

Dated: April 10 , 2024

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CERTIFICATE OF SERVICE

I, David P. Silk, certify that on April 10, 2024, I caused two copies of the foregoing Reply Brief for Appellant to be served on counsel for the parties listed below, by depositing the same in the United States Mail, first-class, postage prepaid, and via electronic mail, addressed as follows:

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