Approved:_____
Approved with changes:_____

Effingham Zoning Board of Adjustment
Meeting Minutes
July 29, 2021

Members Present: Theresa Swanick (chair), Tim White (vice chair), Jim Pittman, Nate Williams, and Mike Cahalane (seated for Knute Ogren).

Others Present: Nate Fogg, Mark and Jacob McConkey, Prince and Neha Garg, Lori Dunne and Matt Howe of Green Mt Conservation Group (GMCG), Erik Jones, and Edward Tobin.

Continuation of Meena Variance Deliberation - 7:00pm

Chair introduced the board members, noted applicant, owners and members of the public present.

Mr. White indicated that he considered the application fails to meet hardship and the public interest criteria has weight on both sides. He considers hardship the real crux. The uniqueness of that property in comparison to other properties in the area. Are there mitigating circumstances that would allow us to set aside the ordinance? The public interest is thorny because of interests on both sides.

Mr. Pittman prefaced comments with reminder to keep in mind the purpose of the zoning board of adjustment: it is required by state statute to provide a means of relief from imperfect zoning ordinances. Dictates the board try to find a path forward to try to find relief even if we might may have personal opinions about the merits of any particular project. It comes back to the ordinance and can we work within that framework to meet the needs of the applicant. In this case, there are different variables. The ZBA granted a Special Exception for the service station. When we got to the ground water protection piece, it's important to keep in mind that is part of the ordinance, not state law, we have jurisdiction. So, when it says 'prohibited uses', that is not immutable; we can make rulings based on that – it's not immune to consideration by this board. Important to say, whether we support it or not personally as a section of the ordinance, it is the purview of this body to make judgments based on that.

Mr. Pittman hopes to discuss whether the state of abandonment of nonconforming use applies here per Section 703. Even though it has been a few years since the tanks were in place, he isn't clear if grandfathering is still applicable here. Also, not clear to him is Section 2204 Exemptions #9 re UST inspection requirements. Those points he wants the board to consider.

Mr. Cahalane sees merit on both sides of the issue. The grandfathered use is a consideration as Mr. Pittman noted. Economics are not the driving issue but relevant for commercial property and part of hardship and some consideration should be given there. He felt the deliberations in GMCG minutes that preceded adoption of the ordnance are relevant and wants to discuss. There was a lot of discussion of tanks which at the time were lacking the technical standards that exist today. In ZBA decisions there is a concept called the 'evolution of an industry' – his comparison is camp grounds: started with pup tents, then campers then trailers and now behemoth RVs. This ordinance was crafted with great discussions, is there a point where the technology evolution has exceeded our ordinance? This ordinance is 10-year-old and every so often planning boards update ordinances to keep them relevant. Hard to keep up with that. Makes me wonder whether technology has evolved beyond the original ordinance. I wrestle with that.

Nate William can see both sides and feel really on the fence. I agree that technology has come a long way. Also, the fact that DES approves all the USTs and the groundwater rules; same government department regulates both of these areas, is a consideration for him.

Chair Swanick said her thoughts are along the lines of what Tim said; the public interest is the thorniest for her and the hardship, the technical meeting of the hardship provision is an issue for her. She suggested to start further discussion on the grandfather issue.

Mr. Pittman referred to Section 703 – Abandonment of nonconforming use or structure. Number of questions. In 2015 the tanks were removed but it was still an operating business until the sale. Only closed recently for sale and renovation by new owner. It continued as same entity, the business itself was not abandoned. Whether the removal of tanks constitutes abandonment.

Mr. White indicated if there was never abandonment, no variance is needed.

Chair Swanick indicated that in 2000 when zoning was adopted, the gas station was grandfathered. There is more than one use there, gas station store, food service, apartments. The significant change of use was removal of gas tanks. In 2011 when groundwater protection ordinance was adopted, they became a non-conforming use. Application now is to reinstate that use.

Mr. Pittman said he still questions the abandonment if business never ceased. Our process is to decide if it really was abandonment or not.

Mr. White suggested that the Zoning Officers direction for the applicant's prior application for Special Exception was implicitly a judgment of abandonment of use to require filing with ZBA?

Mr. Cahalane suggested there are several uses there – store, apartment, laundromat – clarify what specific use – gas portion was removed.

Mr. Pittman suggested they removed tanks per DES requirement. Mr. Williams said yes and DES also considered it the same site as the old one in the new permit to install tanks, pumps in the same spot. Swanick said they got to have the same setback to the well because it was the same facility.

Mr. Cahalane noted if look at core business as a whole, all under one umbrella, is one use enough for abandonment – should ask our atty about hiatus in gas station function of site. Another thorny issue.

Mr. Pittman referred to Section 709, voluntary demo and removal of structure. The board discussed and did not feel this applied and should focus on use vs structure. Mr. Pittman was fine to set aside.

Mr. Pittman agreed with Mr. Cahalane that 703 is something to consult counsel on.

Mr. Pittman asked if board could agree that whichever way case goes, we agree the tank designs are adequate? Mr. White added they wouldn't be subject to condition. Mr. Williams agrees the tanks are top notch and don't need to be hashed out anymore. Mr. White said they came in with state-of-the-art design and it's a question whether state-of-the-art is good enough for our aquifer. Mr. Cahalane said it goes to his statement on evolution of an industry; he is very comfortable with technology put forward. Chair Swanick agrees that the technology has evolved, compared to 2012 when DES could

only test down to a low leak, whereby a system could continue an even lower leak undetected. This system tests for any amount of leak into containment. I am comfortable with how advanced it is. It is already 360-degree sensor detection. Risk remains with human operation and maintenance and inspection.

There was a discussion of who might have legal standing to challenge a decision.

Criteria 1: public interest –

Mr. White voiced that this has potentially generational consequences – we need to satisfy ourselves in balancing the interests on both sides. Mr Cahalane noted public interest in having this commercial property active again, but everyone has a stake in the game and there is not a bad argument out there.

Criteria 5: hardship analysis –

Mr. Cahalane suggests the property is unique. Mr. Pittman agrees and notes the preexisting structures that will be used. Sets it apart from other properties in the area. Goes a long way toward satisfying the hardship consideration. There doesn't seem to be another path forward.

Mr. Cahalane indicated that another consideration of hardship is the economics. The board heard that the draw to convenience stores is customers stopping for gas. Gas really does support the other parts of the business. Even if its break even, the gas is what gets people on the property; it's the draw. Mr. White added it has become the norm to have to two paired together – gas and convenience store.

Chair Swanick raised the hardest part of hardship for her is 674:33, I(b)(1)(A) "…no fair and substantial relationship exists between the ordinance provision and the specific application of that provision to the property". Mr. White's opinion is it fails that test, so must to revert to (2). Swanick read aloud: "…owing to the special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance…"

Mr. Pittman interjected that the board has to decide whether the tanks mitigate concerns enough to set aside the ordinance in this case. In the bigger picture do we feel even if we can demonstrate hardship, are we going to ignore the prohibition of a gas station?

Criteria 4: Value of Surrounding Properties –

Mr. Cahalane asked if we could all agree on criteria number 4. Swanick agreed it's more obvious, barely need to discuss: the value of surrounding properties not diminished. All were in agreement.

Criteria 1: Public Interest –

Mr. White noted the crux of this whole thing – the battle, say – is significant public interest in restoring the whole functionality of that business, and the fact that under scientific guidance it was deemed 10 years ago that there was a no-go line, and this is over that line. There's public interest vs public interest, there is also private interest to be balanced.

Mr. Cahalane noted law has evolved over time - used to be the criteria required provision of a benefit to the public – current law for criteria requires 'no harm to the public.' To try to be on both sides; we've heard a lot from the opposing side on this. What would make it not contrary to the public interest? Look at the evolution of these tanks and the safety requirements that potentially could say the risk has been minimized and it isn't the threat that it once was to the public. Maybe there are other aspects of lower gas prices, availability of gas, not driving so far to get gas.

Mr. White added: availability of fuel, tax base, jobs, viability of business – these are all public interest. Price competition, he's not sure what drives that.

Mr. Cahalane asked again what would make it contrary to the public interest? Without having an accident on site that pollutes the ground, what would make it contrary? If we've established that the tanks are next generation and the comfort level from DES and the board has reached a new height that maybe our ordinance has not maintained with the industry that has addressed a lot of the original concerns. What would actually be contrary? Chair Swanick suggested the risk is contrary. Mr. White said traffic. Mr. Pittman suggested litter.

Chair Swanick suggested there was consensus around the criteria of public interest. Mr. Cahalane said the board can't demonstrate succinctly that it would not be contrary to the public interest.

Criteria 2: Spirit of the Ordinance is Observed.

Mr. Cahalane noted they've touched on maybe the ordinance has not kept pace with things. One thing that bothered him in reading early discussions around the time of the groundwater ordinance is that it was incorrectly stated that the state prohibited gas stations in certain areas; that wasn't and isn't the case – the state did not prohibit gas stations.

Chair Swanick shared they are probably on a list of sources of potential contamination, but looking at one for 2020, it is not on that list. She noted from a DES groundwater classification document: the only groundwater classification that had any land use prohibitions is wellhead protection areas and those are the six that are in the state groundwater protection law, no prohibition of gas stations.

Mr. Cahalane added that this site is outside a wellhead protection area. Swanick affirmed it is.

Mr. Pittman noted that back when this was adopted gas stations were not what they are now.

Chair Swanick agreed and noted from a 2012 DES handout on groundwater protection for municipalities that is an earlier version that the 2020 one she handed out to the board at the start of this case. The 2012 version notes that single wall tanks and piping systems could only be tested to a certain low level of leakage, below which they could continuously leak undetected.

Mr. Pittman posed that if the ordinance was being written from scratch today, it would still be a risk but maybe not a prohibited risk, as containment is far more robust than it used to be. His point being re spirit of the ordinance, this might fall outside the limitation category written today.

Mr. Cahalane agreed this went along with his point about evolution of an industry. The discussions pre-ordinance that if used double-walled tanks, containment, then maybe that would be different.

In terms of spirit of the ordinance, Mr. Pittman suggested that even if the board was fine with putting this aside, it would still conform to the spirit - by trying to provide low risk gasoline stations.

Mr. Cahalane noted there is an argument that it perhaps is meeting the spirit of the ordinance with all the upgrades in technology. Is there a counter argument, how does this not meet the spirit of the ordinance? Mr. White suggested its theoretical but 'if anything goes wrong.' He noted it's making a judgment on probabilities.

Chair Swanick agreed that the investing in the latest and the greatest is a way to ensure the health and welfare of the public by having a system that will detect the minute leaks within double-walled containment so that any problem is attended to before any kind of release, which was never the case at the time that this ordinance went into effect.

Mr. Williams said with his job in fire dept. always dealing wish risk, risk is always there, always have to assess the risk. Never been to a gas leak. Mr. Pittman said that is a great observation.

[Chair called a break for a few minutes at 8:50pm, resumed at 8:55pm.]

Mr. Cahalane offered before leaving the discussion of Spirit of the Ordinance, that section 2202 states the purpose of groundwater ordinance: "in the interest of public health, safety, and general welfare, to preserve, maintain, and protect from contamination existing and potential groundwater supply areas and to protect surface waters that are fed by groundwater." Next paragraph: "The purpose is to be accomplished by regulating land uses that may contribute pollutants to designated wells and to aquifers that provide current or future water supplies for this town and surrounding municipalities which share such wells and aquifers". I think we really addressed that with our discussion with the exception of the word 'may' because how do you mitigate everything that 'may.' But the purpose for which the ordinance is there for I think we have addressed.

Mr. White asked what could possibly go wrong; we're ten years overdue for an earthquake. This is all about what could possibly go wrong.

Mr. Pittman agreed with Mr. Cahalane, he agreed with both men. It's subjective, he doesn't know if it's immeasurable to say what a failure rate might be in terms of gas stations. You might come up with something that says a tank fails every 223 years in your community, or every 70 years they're likely to fail – those would be two different considerations.

Mr. White added that comes down to normal wear and tear and the expected unexpected vs what happens if something shears a line in the ground. Mr. White suggested it's a decision we are making with decades of consequences, more so than if it was a different kind of soil. All the public benefits we talk about still apply. We need to, if we set aside this part of the ordinance, to be reasonably confident in decades worth of acceptable functioning.

Chair Swanick suggested moving on to Substantial Justice.

<u>Criteria 3</u>: Substantial Justice

Mr. Cahalane offered the test is any loss to the individual that is not outweighed by the gain to the general public is an injustice. The owners have significant investment on the line here – and not talking about work already done that was not approved. A purchase, property has a value, their business could do better with the option to dispense gas. A measurable gain to the owners and I'm not sure what would outweigh that gain to them from the general public. His question is what would be the gain to the general public in not allowing this to go through? Swanick said potential harm. Mr. Pittman noted potential harm of failure but otherwise no other suffering. Mr. White said all the benefits will kick in immediately; benefits public and private would be virtually immediate.

Mr. Cahalane offered the public's gain would only be recognized if catastrophic failure. Mr. White noted the risk is of catastrophic failure.

Chair Swanick asked if there is individual harm not achieving more economically? Noting they didn't buy a gas operation; so it must not have cost the same as a site with a gas operation. They purchased something with a value they can enhance. Asks if substantial justice is weighing the harm of not achieving something you might possibly achieve in the future versus immediate harm.

Mr. White noted they bought it on its potential and predicated it on providing a benefit to the public for a profitable return; they probably wouldn't have bought it if they hadn't the expectation to turn it into a gas station, reinstate it. Mr. Williams added that they own other gas stations; they're in that industry so it makes sense.

Mr. Cahalane asked if this is not allowed to be a gas station, what would be the gain to the public? He doesn't think we should predicate it on that there's going to be a disaster. So what is the gain?

Chair Swanick noted the gain to the public to deny would be removing the potential harm. Mr. White added it eliminates the risk entirely of fuel contamination in the aquifer.

Mr. Cahalane asked does removing that potential threat outweigh any loss to the individual – not from their acquisition but what they are trying to accomplish having an active gas station? He suggested dispensing gas is the loss.

Mr. White noted dispensing gas is only part of the loss, as action of having the gas operation does go to enhancing the value of the business, assessment of the business, revenue to the town, the jobs that are created and maintained; there are public goods. It strictly comes down to the reasons for creating groundwater protection and that specific site has a potential way of introducing a large amount of petroleum contamination into what has been deemed a critical area for groundwater resources. And because it's purely conjectural it makes it very difficult to answer, doesn't mean it is easy to dismiss.

Mr. Pittman offered his opinion that there would be no material gain to the public otherwise in denying the application. If set that tank thing aside, in every other manner no substantial gain.

Mr. White noted that you cannot prove a negative, if you prevent a disaster then the disaster never happens and nobody knows what they missed.

Mr.Cahalane noted we looked at the tanks and the risk on other criteria as we've gone through this and we agree it's been mitigated to a good extent. The gain to the public might be that we eliminate

all the risk. But we understand that the risk has certainly been minimized over the years since the ordinance was adopted. That potential that is the public gain, hard to quantify, apply that against the loss to the property owner – what they have at stake and the potential this brings to their business.

Mr. White added the loss to the town if that site is permanently restricted going forward which means that anybody that comes in there commercially is going to have to operate within those parameters. Is this going to have an overall dampening affect economically that makes it worth having dodged the specific risk of the underground storage tanks?

Mr Cahalane suggested there would be an absolute loss if the owners cannot dispense gas… he personally isn't likely pull off a highway going 55 mph to a convenience store. He would stop for gas and maybe then do business at a location.

Mr. Pittman suggested in his mind he summarizes it as the owner has everything to lose if this is denied and the public has little to gain if it's denied.

Mr. Cahalane suggested there are merits on both sides. This could be resolved by issue of nonconforming use and the abandonment is real. If abandoned, we have to go on the 5 criteria.

Chair Swanick asked to return to this issue of hardship.

Criteria 5: Hardship – RSA 674:33,I (a) and (b) [references corrected between handout and statute]

Mr. White felt it requires defaulting to (b)(2) because he doesn't think it meets (b)(1).

Mr. Cahalane read criteria RSA 674:33,I(b)(1) Under A – "no fair and substantial relationship exist between the general public purpose of the ordinance provision and the specific application of that provision to the property" – he asked why that doesn't pass? Mr. White indicated it doesn't pass.

Swanick said the word "no", a groundwater protection ordinance prohibiting a gas station and the particular application of that provision to this property. Mr. White offered that rather than choke on that, you do have (2) below that.

Mr. White read criteria RSA 674:33,I(b)(2) "If the criteria in (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owning to the special conditions of the property that distinguish it from other properties in the area, the property be cannot reasonably used in strict conformance with the ordinance and a variance is therefore necessary to enable a reasonable use of it." Mr. White feels the elements exist – the fact that it was developed as this kind of business, operated for quite a while, that predisposes the property to this kind of use, that's your entry to making that fit 'hardship'. And then when you add that the courts consider economics aspects for commercial properties…

Mr. Cahalane said 'use in strict conformance with the ordinance', the ordinance in this case is Article 22. He felt prior discussion seem to have covered a lot of that. Under A, 'no fair and substantial relationship exists' how do you disqualify on that? Mr. White indicated he thinks it's why it's here in the first place. It absolutely does not fit because it is prohibited. But you can move to see if it meets the more lenient standard in second part, where you can take into account the development of a

particular type that has happened on that parcel that definitely sets it apart from other properties which are primarily residential. Mr. Cahalane acknowledged that. Mr. Pittman said he agreed with all of that.

Mr. Cahalane noted that (b)(1)(A) has always troubled him with how to interpret it. So, the other seems the default as A is not clear. Chair Swanick said it seems clear here.

Mr. Cahalane indicated there appears to be a path forward in hardship potentially if that is what people are feeling; I guess there is an outline to approve unless we find out that this use was abandoned. That would bring up a new discussion once we know that.

Mr. White noted that at that point you'd have to decide if you are comfortable with the potential harm and the demonstrable and rather immediate benefit going forward.

Mr. Cahalane offered that it's been narrowed down to talking to counsel about the abandonment of use issue, and it will solve the whole puzzle or we then have to make the hard decision.

Mr. Pittman asked if the board can agree we now need input from legal counsel on Section 703 and based on information learned there, factor that into further deliberation.

Chair Swanick noted that one argument is that the original instruction to go for Special Exception would have been assuming that this was abandoned. Mr. White agreed and indicated counsel's advice will either render that moot or a non-issue for the most part. Chair Swanick noted she hadn't expecting to consider whether the use was abandoned. Mr. White agreed the board has proceeded on that all along but offered that if there is a legal point to be made. If they had not been required to remove the tanks, they would not have removed the tanks, they would have just gone on. Mr. Williams noted the business continued on and never ceased.

Mr. White noted it is proactive of us to do this since it could be an avenue for appeal in event of a denial. Mr. Cahalane said it would put the question to rest by having counsel weigh in. Mr. White opined that having raised the question we would be irresponsible to settle it without advice.

Mr. Pittman moved to Continue deliberation to Wednesday, August 4 at 7pm at the town offices, Mr. White seconded. All in favor, the motion passed 5-0.

Adjournment:

Motion to adjourn by Mr. Pittman, seconded by Mr. White, all in favor. Motion passed.

Adjourned at 9:35pm