

EFFINGHAM, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT

Case No: #097

In re Variance Application of Meena, LLC

MOTION FOR REHEARING

William Bartoswicz, Tammy McPherson, Ossipee Lake Alliance, and Green Mountain Conservation Group, by and through their attorneys, Ransmeier & Spellman, P.C., submit this Motion for Rehearing of the Town of Effingham Zoning Board of Adjustment's decision of August 4, 2021, in which it granted Meena LLC's variance application, and in support thereof state as follows.

STANDARD OF REVIEW

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. . . .

RSA 677:2.

BACKGROUND

William Bartoswicz resides at 1 Blueberry Road in Center Ossipee, New Hampshire, directly north of the property at issue here, and, as an abutter, is directly affected by the ZBA's decision. Similarly, Tammy McPherson resides at 5 Blueberry Road in Center Ossipee, New Hampshire and, as an abutter is likewise directly affected by the ZBA's decision.

Ossipee Lake Alliance (“OLA”) was formed in 2003 and is a charitable volunteer organization dedicated to preserving and protecting Ossipee Lake and the surrounding waters as a unique recreational, environmental, and economic resource, and promotes the careful stewardship and shared enjoyment of the lake. Its mission includes the defense of the Ossipee Aquifer, which is the source of drinking water for the Ossipee Lake community, which includes the Towns of Effingham and Ossipee, among others. Its members are directly affected by the ZBA’s decision here.

Green Mountain Conservation Group (“GMCG”) was founded in 1997 and is a community-based, charitable organization dedicated to the protection and conservation of natural resources in the Ossipee Watershed in central Carroll County, including the Towns of Effingham and Ossipee, among other towns. The group promotes an awareness of and appreciation for clean water and the wise use of shared natural resources across the Ossipee Watershed while advocating strategies to protect them. Its members are likewise directly affected by the ZBA’s decision here.

The Ossipee Aquifer is New Hampshire’s largest stratified drift aquifer and serves as the primary source of drinking water for 14 communities, including Effingham. In 2011, Effingham voted to adopt a groundwater protection ordinance. The purpose of the groundwater protection ordinance is “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.” ZBA Ordinance at Art. 22, Sec. 2202. “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 [Effingham] and surrounding

municipalities which share such wells and aquifers.” Id. Gas stations are specifically prohibited from the Town’s Groundwater Protection District. Id. at § 2207.

In its variance application, dated May 14, 2021, Meena LLC (“Meena”) seeks a variance from Article 22, Section 2207(A)(8) of the Effingham Zoning Ordinance in order to develop and operate a gas station at 41 NH Route 25 (Tax Map 401, Lot 5), which is within the groundwater protection district in Effingham, sits over the State’s largest stratified drift aquifer, and is within 300 feet of Phillips Brook, which runs directly into Ossipee Lake.

The property at issue here (the “Property”) previously contained a gas station and convenience store in the 1990s and had underground storage tanks, which were removed in 2015 when the previous owner did not want to stay in that line of business.

The Property was subsequently bought by Meena LLC (“Meena”). Meena desires to convert the Property back to a gas station. In furtherance of that goal, Meena installed underground storage tanks without first acquiring the proper permits from the Town.

On March 29, 2021, Meena went before the ZBA to request a Special Exception per Article 9, Section 904 of the Zoning Ordinance for the operation of a gas station under Section 1005, and a Change/Expansion of Non-conforming Use per Section 702 to add gas pumps and to convert a laundromat into a third apartment on the Property. At their meeting, the ZBA voted to approve the special exception request.

Thereafter, Meena went before the Effingham Planning Board on May 6, 2021 for their site plan application review.¹ During the public hearing on the site plan application, the Planning Board noted that a gas station is a prohibited use within the groundwater protection district, within which the Property is located. The Planning Board then voted to continue the public

¹ It is noted that Theresa Swanick is the chair of both the ZBA and the Planning Board.

hearing on the site plan application after review by the ZBA for resolution of the groundwater protection district issue.

On June 29, 2021, Meena subsequently returned to the ZBA for a variance.² At their meeting, the ZBA voted in favor of accepting Meena's variance application as complete. The ZBA held a public hearing on the variance application, which was continued to July 8, 2021.

At the July 8th hearing, Moselle Spiller of GMCG brought a stratified drift aquifer model to show how a stratified drift aquifer, which has high transmissivity, can spread a leak quickly. The ZBA also looked at an aquifer map that showed the wellhead protection areas. The Property at issue here is just outside a wellhead protection area for a public water supply in Ossipee. Lorie Dunne, the Effingham town representative for the GMCG board of directors, read a statement from GMCG and urged the ZBA not to support the variance application. She noted that the Ossipee aquifer affects 14 communities and is the largest stratified drift aquifer in New Hampshire.

At the July 8th hearing, the ZBA voted on whether or not to declare regional impact, which failed (*i.e.*, the ZBA voted not to declare regional impact).³ The ZBA also voted to continue the hearing to July 20, 2021.

At the July 20th hearing, additional individuals expressed their concern about the variance application. Included in the meeting minutes is a letter from Dr. Robert Newton, professor emeritus at Smith College, in which he notes that the Ossipee Aquifer is a highly productive

² In the meantime, the Town, on May 13, 2021, had provided Meena with a cease and desist order for lack of site plan approval.

³ This decision was unreasonable given the wide impact the Ossipee Aquifer has on the area and the Property's location on the border of Effingham and Ossipee. See RSA 36:56 ("A local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.").

groundwater resource and that any contaminants that enter the ground in the area will rapidly infiltrate and move into the groundwater system. He further noted that gas stations have a long history of contaminating groundwater in New Hampshire and have resulted at times in significant aquifer contamination with large impacts to local residents. This is particularly relevant here given the fact that the homes close to the Property rely on domestic wells for their water supply and that there are approximately 20 homes located within just 1,000 feet of the proposed gas station.

Due to the large amount of public discussion on the variance application at the July 20th hearing, the ZBA again voted to continue the deliberation to July 29, 2021. At the July 29th hearing, the ZBA deliberated regarding the five variance criteria and decided to seek legal advice regarding the issue of abandonment of use.⁴ The ZBA also voted to continue the deliberation to August 4, 2021.

At the August 4th meeting, the ZBA continued their deliberation from the previous meeting and ultimately voted 4-1 to grant Meena's variance application with two conditions. In particular, the written decision signed by Theresa Swanick, Chair of the ZBA, on August 6, 2021, states the two conditions as follows: (1) "A Stormwater Management Plan, per NH DES guidelines, shall be submitted for Site Plan Review" and (2) "A Spill Prevention Control and Countermeasure Plan, per NH DES guidelines, shall be submitted for Site Plan Review." The written notice of decision further states that the ZBA has determined that granting the variance "falls within the Spirit of the Ordinance and Public Interest, that Substantial Justice is served, and

⁴ The Town's attorney, Matthew Serge, thereafter provided an email to Chairwoman Swanick stating his opinion that the gas station is not a lawful non-conforming use and that the Property's use as a gas station had been abandoned.

Surrounding Property Values will not be diminished. Further, this decision prevents Unnecessary Hardship to the applicant.”

Mr. Bartoswicz, Ms. McPherson, OLA, and GMCG now seek a rehearing of the ZBA’s decision as the decision is both unlawful and unreasonable.

ARGUMENT

Meena seeks a variance from Article 22, Section 2207(A)(8) of the Effingham Zoning Ordinance in order to develop and operate a gas station within the Town’s groundwater protection district. Under Article 22, Section 2207(A)(8) of the Zoning Ordinance, the development and operation of gas stations are prohibited in the Town’s groundwater protection district. Thus, in order for Meena to operate a gas station in its proposed location, it would need a variance.

Under RSA 674:33, the ZBA has the power to authorize a variance from the terms of the zoning ordinance if:

- (A) The variance will not be contrary to the public interest;
- (B) The spirit of the ordinance is observed;
- (C) Substantial justice is done;
- (D) The values of surrounding properties are not diminished; and
- (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

RSA 674:33, I. For purposes of the statute, “unnecessary hardship” means that “owing to special conditions of the property that distinguish it from other properties in the area: (A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) The proposed use is a reasonable one.” RSA 674:33, I(b)(1). The granting of Meena LLC’s variance application does not satisfy these prongs.

In order to grant a variance, the application must satisfy each individual prong. N.H. Practice: Land Use Planning and Zoning, Loughlin § 24.08 at 388 (4th Ed. 2010). Satisfactory compliance with one prong cannot be used to justify granting a variance when other prongs are not satisfied. Id. Similarly, satisfaction of a majority of the prongs does not justify the granting of a variance. Id. At all times, the applicant bears the burden of satisfying the criteria for a variance, which Meena has failed to do here. See id.; see also Grey Rocks Land Trust v. Town of Hebron, 614 A.2d 1048, 1050 (N.H. 1992) (“The party seeking a variance . . . bears the burden of establishing each of the requirements for a variance.”).

In regards to the first prong, the variance here would be contrary to the public interest. To be “contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 (2005) (quotations omitted). “One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. As the fundamental premise of zoning laws is the segregation of land according to uses, [a] variance must be denied if the proposed use will alter the essential character of the neighborhood.” Id. (internal citations and quotations omitted). “Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.” Id.

Here, the residents of Effingham specifically voted to prohibit the very type of activity Meena seeks to conduct on the Property in order to protect its invaluable water resources in that area. Although there used to be a gas station on the Property in the past, there has not been one there for many years and the residents of Effingham, through the enactment of their groundwater

protection ordinance, have specifically prioritized their health, safety, and general welfare over the ability of a new gas station to operate there. To grant a variance here, with an impact to the State's largest stratified drift aquifer, would create a dangerous precedent in New Hampshire and negatively impact the 108 towns in the State that have groundwater protection ordinances. It would also alter the essential character of the neighborhood. Thus, the first prong of the variance test is not satisfied.

For similar reasons, the spirit of the ordinance is not observed by the granting of a variance here. The Town's Zoning Ordinance has specific protections in place for its groundwater. Allowing a gas station at the Property at issue here when it is within the groundwater protection district in Effingham, sits over the State's largest stratified drift aquifer, and is within feet of Phillips Brook, which runs directly into Ossipee Lake, is in direct contradiction of the spirit of the Ordinance. Additionally, the ZBA spent considerable time discussing whether or not the technology in regards to underground storage tanks has advanced in the approximately ten years since the Town adopted its groundwater protection ordinance; thereby implicating the merits of the Ordinance. The ZBA should not have entered into such a discussion, however, since it "cannot change or rewrite an ordinance." N.H. Practice: Land Use Planning and Zoning, Loughlin § 24.12 at 396 (4th Ed. 2010). Rather the "wisdom of a particular ordinance provision is a consideration for the legislative body and not for the ZBA. . . ." Id. Thus, the second prong of the variance test is not satisfied.

Likewise, granting the variance does not promote substantial justice. "Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 34 A.3d 584, 590 (N.H. 2011). Although Meena has argued that it purchased the Property with the

assumption that they could operate a gas station on it, their unfamiliarity with the Town's zoning laws is no excuse for them to have prematurely and illegally installed underground storage tanks and no reason to disregard the regulations in place to protect the residents of the area (both in Effingham and the surrounding towns) and their water. Thus, the third prong of the variance test is not satisfied.

In regards to the fourth prong of the variance test— the values of surrounding properties— there is a strong likelihood that the values of surrounding properties could be diminished if there is groundwater contamination from the gas station. As Dr. Newton opined, the Ossipee Aquifer is a highly productive groundwater resource and any contaminants that enter the ground in the area will rapidly infiltrate and move into the groundwater system. He further informed the ZBA that gas stations have a long history of contaminating groundwater in the State and have resulted at times in significant aquifer contamination with large impacts to local residents, which is particularly troubling here given the fact that the homes close to the Property rely on domestic wells for their water supply and that there are approximately 20 homes located within just 1,000 feet of the proposed gas station.

In addition, Meena is fundamentally changing the character of the neighborhood by creating a gas station and adding a third apartment in a zone where gas stations and multi-family housing are not permitted as a matter of right. To suggest that will not negatively affect property values without empirical evidence to the contrary is irresponsible. Thus, the fourth prong of the variance test is not satisfied.

Nor is the fifth prong of the variance test satisfied as literal enforcement of the provisions of the Ordinance would not result in an unnecessary hardship. Again, although Meena bought the Property thinking they could convert it back into a gas station and were under the impression

they had done everything required to reinstate the gas operation, ignorance of the law is no excuse and does not create a legal hardship. Meena failed to do their due diligence here and the residents of Effingham, the abutters to the Property, and those who use and appreciate the area's water should not be punished for it. The Property has been used without a gas station on it for many years and can be reasonably used without one. Accordingly, Meena has not met the variance standard here and the ZBA should not have granted its application.

In addition to the fact that the variance here does not comply with RSA 674:33, the ZBA should also grant a rehearing since the Town has the same person, Theresa Swanick, sitting simultaneously as both the chair of the ZBA and the chair of the Planning Board. Ms. Swanick engaged in discussions and votes regarding Meena at both the Planning Board level and at the ZBA, which poses a conflict of interests.⁵

CONCLUSION

Based on the foregoing, and the substantial testimony and written documentation provided to the ZBA during their deliberative process on this matter, the ZBA's decision to grant Meena's variance application for a gas station within Effingham's groundwater protection district was unlawful and unreasonable. Accordingly, the ZBA should grant a rehearing of this matter and deny Meena's variance application.

WHEREFORE, William Bartoswicz, Tammy McPherson, Ossipee Lake Alliance, and Green Mountain Conservation Group respectfully request that the Zoning Board of Adjustment:

- A. Grant this Motion for Rehearing; and
- B. Deny Meena LLC's variance application.

⁵ See, e.g., <https://www.nhmunicipal.org/town-city-article/multiple-board-memberships-serving-more-one-board-same-time> (last accessed Aug. 31, 2021).

Respectfully submitted,

William Bartoswicz, Tammy McPherson, Ossipee
Lake Alliance, and Green Mountain Conservation
Group

By and through their counsel,

RANSMEIER & SPELLMAN, P.C.

Date: September 1, 2021

By: _____

Biron L. Bedard (NHBA #8758)
Meaghan A. Jepsen (NHBA #266707)
1 Capitol Street, P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477
bbedard@ranspell.com
mjepsen@ranspell.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded by first class mail this day
to Meena LLC.

Date: September 1, 2021

Biron L. Bedard