

STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

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

v.

Town of Effingham and Town of Effingham Zoning Board of Adjustment

Docket No. 212-2021-CV-00151

Appeal of Zoning Board of Adjustment Decision Pursuant to RSA 677:4

Green Mountain Conservation Group, Ossipee Lake Alliance, William Bartoswicz, and Tammy McPherson, by and through their attorneys, Ransmeier & Spellman, P.C., file this appeal of the Town of Effingham Zoning Board of Adjustment's denial of their rehearing request in regards to the ZBA's decision to grant Meena LLC's variance application, and in support thereof state as follows.

PARTIES

1. Petitioner Green Mountain Conservation Group is a community-based, charitable organization dedicated to the protection and conservation of natural resources in the Ossipee Watershed in central Carroll County, and has a mailing address of PO Box 95, Effingham, New Hampshire 03882.
2. Petitioner Ossipee Lake Alliance is a charitable volunteer organization dedicated to preserving and protecting Ossipee Lake and the surrounding waters, and has a mailing address of PO Box 173, Freedom, New Hampshire 03836.
3. Petitioner William Bartoswicz owns a parcel of real property known as Tax Map 33, Lot 2000 in Center Ossipee and has a mailing address of 1 Blueberry Road in Center Ossipee, New Hampshire.

4. Petitioner Tammy McPherson owns a parcel of real property known as Tax Map 47, Lot 41000 in Center Ossipee and has a mailing address of 5 Blueberry Road in Center Ossipee, New Hampshire.

5. The respondents in this matter are the Town of Effingham (“Town”) and Town of Effingham Zoning Board of Adjustment (“ZBA”), which have a mailing address of 68 School Street, Effingham, New Hampshire 03882.

JURISDICTION AND VENUE

6. Appeals of Zoning Board of Adjustment decisions fall within the jurisdiction of the Superior Court under RSA 677:4.

7. Venue is proper in Carroll County as all of the parties reside in Carroll County.

BACKGROUND

8. 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.

9. 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.

10. 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.

11. 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 others. 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.

12. 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.

13. 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.

14. Gas stations are specifically prohibited from the Town’s Groundwater Protection District. Id. at § 2207.

15. 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.

16. 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.

17. Meena subsequently bought the property. 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.

18. 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. During this meeting and follow up deliberations, there was no mention of Effingham's groundwater protection ordinance prior to any vote.

19. Thereafter, Meena went before the Effingham Planning Board on May 6, 2021 for its site plan application review.

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

21. On June 29, 2021, Meena subsequently returned to the ZBA for a variance.¹ 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.

22. 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 or spill quickly.

23. 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. In addition, the public water supply well is within 175 feet of the tanks.

24. 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.

25. 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). The ZBA also voted to continue the hearing to July 20, 2021.

26. 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 their Geoscience Department, in which he notes that the Ossipee Aquifer is a highly productive groundwater resource and that any contaminants that enter the ground in the area will rapidly infiltrate and move into the groundwater system.²

¹ In the meantime, the Town, on May 13, 2021, had provided Meena with a cease and desist order for lack of site plan approval.

² Dr. Newton authored the surficial geologic map of the area.

27. Dr. Newton 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.

28. Despite the gravity of the variance, the ZBA did not send the variance application out for independent review and, other than Dr. Newton, did not have information from a geologist or hydrogeologist concerning the effects of a gas station on the aquifer and surrounding properties.

29. 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.

30. 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.³ The ZBA also voted to continue the deliberation to August 4, 2021.

31. 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.

32. In particular, the written decision signed by Theresa Swanick,⁴ 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."

³ 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.

⁴ Chairwoman Swanick was the chair of both the ZBA and the Planning Board. It is the petitioners' understanding that Chairwoman Swanick has since stepped down as Chair of the ZBA, but that she is still a member of the ZBA and still the chair of the Planning Board.

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

34. On or about September 1, 2021, Mr. Bartoswicz, Ms. McPherson, OLA, and GMCG filed a motion for rehearing with the ZBA.

35. The ZBA denied their request at their meeting on September 28, 2021.

36. In particular, in its notice of decision dated September 29, 2021, the ZBA stated, “The Board reviewed all of the grounds set forth in the motion and concluded that it did not err in its initial decision, and that the Board’s decision is neither unlawful nor unreasonable.”

ARGUMENT

37. The petitioners restate and re-allege the information contained in the preceding paragraphs as if fully stated herein.

38. “Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing” RSA 677:4.

39. “The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable.” Id.

40. Here, the ZBA’s granting of Meena’s variance request and denial of the petitioners’ motion for rehearing is both illegal and unreasonable.

41. 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.

42. Under Article 22, Section 2207(A)(8) of the Zoning Ordinance, the development and operation of gas stations are specifically 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.

43. 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.

44. 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).

45. The granting of Meena's variance application does not satisfy these prongs.

46. 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).

47. 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.

48. 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.”).

49. 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).

50. “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).

51. “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.

52. 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.

53. 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.⁵

54. To grant a variance here, with a potentially devastating 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.

55. For similar reasons, the spirit of the ordinance is not observed by the granting of a variance here.

56. 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 in close proximity to Phillips Brook, which runs directly into Ossipee Lake, is in direct contradiction of the spirit of the Ordinance.

57. Moreover, the public water supply well here is within 175 feet of the tanks on the Property, which is in violation of New Hampshire regulations. In particular, ENV-OR 407.06 specifies the minimum distance from gasoline UST systems to a public water supply well is 500 feet.

58. 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

⁵ Additionally, the well at issue here was granted public water supply status after the tanks were removed.

Town adopted its groundwater protection ordinance; thereby implicating the merits of the Ordinance.⁶

59. 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.

60. Likewise, granting the variance does not promote substantial justice.

61. “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).

62. Although Meena has argued that it purchased the Property with the assumption that it could operate a gas station on it, its unfamiliarity with the Town’s zoning laws is no excuse for it 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.

63. 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 would be diminished if there is groundwater contamination from the gas station.

⁶ This discussion did not include any mention of spills and accidents that occur and lead to groundwater contamination. For example, the New Hampshire Department of Environmental Resources’ OneStop lists nine reported incidents where more than ten gallons of fuel has been spilled at Carroll County gas stations.

64. 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.

65. Dr. Newton 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.⁷

66. 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. Not to mention that the apartments are supplied with water from the public water supply well that is located too close to the tanks at issue. Thus, the fourth prong of the variance test is not satisfied.

67. 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.

68. Again, although Meena allegedly bought the Property thinking it could convert it back into a gas station and was under the impression it had done everything required to reinstate the gas operation, ignorance of the law is no excuse and does not create a legal hardship.

⁷ Dr. Newton has collected additional data regarding groundwater flow and property values, among other items. Because the ZBA wrongfully denied the petitioners' motion for rehearing, it has not yet reviewed this data, but the Court should consider it in this appeal should the petitioners move to expand the record.

69. Moreover, any belief Meena may have had that the gas station use on the Property had not been abandoned was erroneous as further evidenced by Town counsel's opinion that such use had been abandoned.

70. Meena failed to do its due diligence here and the residents of Effingham, the abutters to the Property, and those who use, rely upon, 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.

71. Accordingly, Meena has not met the variance standard here and the ZBA should not have granted its application.

72. In addition to the fact that the variance here does not comply with RSA 674:33, the ZBA should have also granted a rehearing since the Town had the same person, Theresa Swanick, sitting simultaneously as both the chair of the ZBA and the chair of the Planning Board. Chairwoman Swanick engaged in discussions and votes regarding Meena at both the Planning Board level and at the ZBA, which poses a conflict of interests.⁸

73. Additionally, the ZBA's decision not to declare regional impact 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.").

⁸ See, e.g., <https://www.nhmunicipal.org/town-city-article/multiple-board-memberships-serving-more-one-board-same-time> (last accessed Oct. 20, 2021).

74. Moreover, all the abutters to the Property at issue do not appear to have been properly noticed in this case.⁹ Every abutter must receive proper notice under RSA 676:7.

75. An “abutter” is defined as “any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board.” RSA 672:3.

76. “A necessary prerequisite to a zoning board of adjustment’s jurisdiction to consider a request for a variance is that any statutory notice procedure be satisfied.” Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). “In order for the ZBA to have jurisdiction to consider the [applicant’s] request for a variance, it is therefore necessary that each and every abutter be given the notice prescribed by RSA 676:7.” Id. at 232.

77. Here, because certain abutters were not given proper notice, the ZBA lacked jurisdiction and thus, the variance that was granted is invalid and of no effect as “it was void from the very date on which it was issued.” See id.

78. As a result, the Court should declare that the ZBA acted illegally and/or unreasonably.

WHEREFORE, William Bartoswicz, Tammy McPherson, Ossipee Lake Alliance, and Green Mountain Conservation Group respectfully request this Honorable Court:

- A. Declare that the Town of Effingham Zoning Board of Adjustment acted illegally and/or unreasonably for the foregoing reasons; and
- B. Grant such other and further relief as this Court deems just and proper.

⁹ For example, the most recent abutter list Meena submitted to the Planning Board now includes Tax Map 406, Lot 75 owned by Erin and Amy Hartley. This lot appears to be across the street from the Property, but was not included on the abutter list to the ZBA.

Respectfully submitted,

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

By and through their counsel,

RANSMEIER & SPELLMAN, P.C.

Date: October 28, 2021

By: /s/ Biron L. Bedard

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