

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 Planning Board

Docket No. _____

Petition of Certiorari
Appeal of Planning Board Decision Pursuant to RSA 677:15

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 Planning Board's decision that Meena, LLC ("Meena") does not need to apply for a special use permit under Article 22 of the Town's Zoning Ordinance, stating in support thereof 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 Planning Board (“Planning Board”), which have a mailing address of 68 School Street, Effingham, New Hampshire 03882.

JURISDICTION AND VENUE

6. Appeals of planning board decisions fall within the jurisdiction of the Superior Court under RSA 677:15.

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 Planning Board’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 Planning Board’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, New Hampshire's largest stratified drift 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 Planning Board'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 Planning Board's decision here.

12. The Planning Board is in the process of reviewing Meena's Site Plan Application to build a gas station in the Town's Groundwater Protection District. In particular, Meena is attempting to develop and operate a gas station at 41 NH Route 25 in Effingham, also known as Tax Map 401, Lot 5 (the "Property").

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. However, Meena has received a variance to develop and operate a gas station on the Property at issue here.¹ Nevertheless, Meena still needs other approvals, including the acceptance of its site plan application, before it can actually develop and operate the proposed gas station here.

15. As part of the site plan review process and at the request of the Planning Board, Northpoint Engineering, LLC (“Northpoint”) performed a technical review of the plans and material for the Property. In Northpoint’s report dated April 26, 2022, Northpoint recommended that Meena submit a special use permit application to the Planning Board.

16. In particular, Northpoint noted that Section 2208 of the Town Zoning Ordinance requires the Planning Board grant a special use permit for any use that will store, handle, or use regulated substances in quantities exceeding 100 gallons, and that such a special use permit appears to be needed here. Meena, on the other hand, argued that it is not required to obtain such a permit, a position with which the petitioners expressed their disagreement.

17. On August 22, 2022, the Planning Board held a special meeting regarding Meena’s site plan application. At the meeting, the Planning Board voted unanimously that the special use permit under Article 22² of the Zoning Ordinance pertaining to the handling and use of regulated

¹ The variance was the subject of an appeal to this court. See Docket No. 212-2021-CV-151.

² The Town adopted Article 22 “pursuant to the authority granted under RSA 674:16, in particular RSA 674:16, II relative to innovative land use controls.” (Zoning Ordinance at § 2201.) RSA 674:16, II states as follows: “The power to adopt a zoning ordinance under this subdivision expressly includes the power to adopt innovative land use controls which may include, but which are not limited to, the methods contained in RSA 674:21.” Under RSA 676:5, III, “. . . if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board’s decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.” Accordingly, the petitioners are appealing here.

substances in quantities exceeding 100 gallons in areas of groundwater protection was not needed.

18. The petitioners now appeal that decision.

ANALYSIS

19. The petitioners restate and reallege the information contained in the preceding paragraphs as if fully stated herein.

20. “Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable.” RSA 677:15, I.

21. The Planning Board’s decision that Meena does not need to apply for a special use permit under Article 22 of the Town’s Zoning Ordinance is both illegal and unreasonable.

22. Here, Meena is attempting to build and operate a gas station in the Town’s Groundwater Protection District.

23. Although gas stations are specifically prohibited from the Town’s Groundwater Protection District, Meena has received a variance to develop and operate a gas station on the Property at issue here. Meena, however, also needs a special use permit.

24. Section 2208 of Effingham’s Zoning Ordinances outlines the uses requiring a special use permit. Of particular relevance here, the “Planning Board may grant a Special Use Permit, in accordance with the provisions of [Section 2208 of the Town’s Zoning Ordinance], for a use otherwise permitted in the underlying district, if the permitted use is involved in” various activities including, “[s]torage, handling, and use of regulated substances in quantities exceeding 100 gallons. . . .” (Zoning Ordinance at § 2208.)

25. Here, Meena plans to store, handle, and use regulated substances in quantities exceeding 100 gallons. Meena's proposed use of the Property for a gas station, although not a typical permitted use, is currently permitted by the Town due to the variance that Meena has received from Section 2207(A)(8) of the Zoning Ordinance. When Meena obtained the variance for the Property, it effectively made the use permitted in connection with the Property.

26. Accordingly, Meena must apply for a special use permit.

27. If Meena wanted to be absolved of the requirement to obtain a special use permit, then it should have sought a variance from the special use permit requirement.

28. Meena has stated that while it does not believe it needs a special use permit, it will meet the performance standards under Section 2210 of the Zoning Ordinance. However, without completing a special use permit application it is unclear how Meena will meet or the Town will evaluate and enforce a number of the performance standards. These standards include, for example, maintaining the appropriate vertical separation from storm water management practices and the average seasonal high water table, and where transfers from petroleum delivery trucks will occur in compliance with the performance standards.

29. Nor are the conditions³ included with the variance Meena received sufficient to avoid a special use permit, as the Planning Board seemed to believe during the August 22nd meeting.

30. Accordingly, the Planning Board's decision that Meena does not need to apply for a special use permit under Article 22 of the Town's Zoning Ordinance is unreasonable and in violation of the Zoning Ordinance.⁴

³ Those conditions are 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." (See Notice of Decision dated Aug. 6, 2021.)

⁴ The Petitioners reserve the right to amend this appeal, particularly in light of the fact that the Town has yet to provide the applicable meeting minutes. See RSA 677:15, I ("Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the

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 Planning Board acted illegally and/or unreasonably for the foregoing reasons; and
- B. Grant such other and further relief as this Court deems just and proper.

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 21, 2022

By: /s/ Biron L. Bedard
Biron L. Bedard (NHBA #8758)
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VERIFICATION

I swear or affirm that the statements in this Petition of Certiorari Appeal of Planning Board Decision Pursuant to RSA 677:15 are true and accurate to the best of my knowledge and belief.

Date: September 21, 2022

By: Matthew Howe
Matthew Howe, Executive Director
Green Mountain Conservation Group

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_____ same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed.”)