

**Effingham Zoning Board of Adjustment**  
**Meeting Minutes**  
**January 4, 2023**  
**Effingham Public School**

**Members Present:** Jim Pittman (Chair), Tim White (Vice Chair), Mike Cahalane, Lawrence Edwards, Alan Taylor

**Absent:** Nate Fogg (Land Use Clerk)

**Others Present:**

**Applicants**

Bioron	Bedard	Agent Attorney
Matt	Howe	Green Mountain Conservation Group
Tim	Otterbach	Ossipee Lake Alliance

**Effingham Planning Board**

Chris	Boldt	Planning Board Attorney
Theresa	Swanick	Planning Board Chair

**Meena, LLC**

Matt	Johnson	Meena LLC Attorney
Steve	Guyotte	Meena LLC
Mark	McConkey	Freedom

**Other Attendees**

Rich	Fay	Ossipee
Blair	Folts	Effingham
Corey	Lane	Porter, ME
Billie	Lunt	Ossipee
Stella	Lunt	Ossipee
Roberta	MacCarthy	Freedom
Susan	Marks	Freedom
Cindy	Pfeiffer	Wakefield
John	Pfeiffer	Wakefield
Leona	Simon	Ossipee
Dana	Simpson	Ossipee
Brian	Taylor	Freedom
Carole	Taylor	Freedom

*Note: Attendees were asked by the Chair to record their names and affiliations on a sign-up sheet prior to the meeting. Every attempt has been made to ensure accuracy, but there could be errors owing to failure to sign, omissions, legibility, etc.*

**Meeting called to order:** 6:32 PM

**Review of Agenda:** No changes or additions to the agenda were made.

**Review of Minutes of the November 2, 2022, meeting:** Moved to accept with no corrections by Mr. Cahalane, seconded by Mr. White. The minutes were unanimously approved.

**Review of Minutes of the December 7, 2022, meeting:** Moved to accept with no corrections by Mr. White, seconded by Mr. Cahalane. The minutes were unanimously approved.

**Public Hearing Commenced:** 6:45 PM

The Chair stated that there would be two orders of business regarding the application for an Appeal from an Administrative Decision regarding the Planning Board's decision to not require Meena LLC to apply for a Special Use Permit in its construction and operation of a gas station in the Town's Groundwater Protection District.

He introduced the Agent for the applicants, Attorney Biron Bedard, representing the applicants, Green Mountain Conservation Group, Ossipee Lake Alliance, William Bartoswicz, and Tammy McPherson.

### **Review of Application as Complete**

The Chair stated that the Board's first order of business would be to review the application for acceptance as complete. He went on to explain that, when first received, the Board had determined there were missing abutters on the application. Attorney Bedard had worked with the Board to identify the missing abutters and they had subsequently been included in the noticing for the meeting, and it appeared that all certified mail return cards were received.

Mr. Otterbach protested that there was no return card from the Town of Effingham, which he felt meant they had not been properly notified of the hearing.

Mr. Cahalane offered that as a Selectman, he advocated for notice to the town so a Selectman could attend hearings. However, he added that counsel had informed him that such notification was not required.

Mr. Otterbach argued that there was a requirement in the RSA's, but could not cite the relevant reference.

*[Note: Mr. Otterbach did not use the microphone and much of his commentary was unintelligible to the recording. Consequently, these minutes may not reflect his full comments.]*

Ms. Folts offered that because the Town of Effingham owns land adjacent to the subject property, it was an actual abutter, not just a representative of the town, and so, it should be notified in the same manner as all other abutters.

Mr. White observed that, by default, the Town is listed as the first entry on the application paperwork. The Chair opined that this might serve as de facto notice to the Town whenever an application was received.

The Chair asked if anyone saw reason to impede the acceptance of the application based on questions about the completeness of the abutter list. Attorney Johnson stated that if the Board decided that the Town would have to be noticed, he would move to have the application dismissed as he felt the applicants had two opportunities to get it right and his client, Meena LLC, was being unreasonably delayed as a result.

Attorney Boldt introduced himself as Special Counsel for the Planning Board and offered that he is also authorized by the Selectmen to appear for the Town in the companion lawsuit filed by Attorney Bedard. He added that he was technically not the ZBA's counsel. In response to Attorney Johnson's statement, he offered that his opinion was that the Town was noticed by virtue of the submission of the application to the town's agent, the ZBA. Therefore, he felt this was not "the proverbial ditch to die in" that should derail the proceedings.

The Chair stated that, in his opinion, we had a functionally complete abutter list. He also noted that Attorney Bedard had provided a check for noticing the additional abutters and the full fee requirement was met.

The Chair further noted that at a previous meeting a question was raised as to the meaning of finding the application as “complete”. He explained that it only referred to having properly filed paperwork and submission of fees, and did not address any merits of the case itself.

Mr. Cahalane moved to accept the application as complete. Mr. Edwards seconded the motion. The Board voted unanimously to approve the motion by a roll call vote.

### **Hearing of the Application for Appeal from Administrative Decision.**

The hearing commenced at 7:00 PM

The Chair briefly stated the procedure for the hearing – Attorney Bedard, agent for the applicants, would be allowed to make his case, followed by rebuttal by Attorney Boldt, representing the Planning Board. The Chair would allow the two parties to offer their exchanges before allowing input from the floor.

### **Applicants’ Opening Presentation**

Attorney Bedard introduced himself. He reviewed that the ZBA had previously granted a variance to Meena LLC for a gas station in a ground water protection area.

He observed that during site plan review before the Planning Board that a third party had recommended that Meena apply for a Special Use Permit because they would be storing petroleum of more than one hundred gallons on the property.

He stated that Meena’s argument against requiring the Permit was that the ZBA had granted a variance against a prohibited use, and that Section 2208, for Uses Requiring a Special Use Permit, stated that its provisions applied to permitted uses. Consequently, because although the variance was granted for a prohibited use, it was still not a permitted use, and so did not require a Special Use Permit.

Attorney Bedard continued that the Planning Board had come to a similar conclusion during their August 2022 meeting, as reflected in the minutes, that the possession of the variance had negated the need for a Special Use Permit. He maintained that the Planning Board had disregarded the ordinance, which stated that if a use was being permitted, and in this case met a condition of Section 2208, then the permit should be required.

He continued that in not requiring the Special Use Permit, the Planning Board was depriving themselves of critical information associated with section 2208 requirements that go beyond the conditions set by the Zoning Board in their variance. He cited examples such as storm water management, oil/water separation, and spill control plans that would need information related to effectiveness and compliance. He observed that, based on information provided to the Planning Board, that there was just four feet to the seasonal high-water table on the property, which was a concern.

He noted that with a Special Use Permit in place, compliance with Section 2210, A,2, b and c, related to stormwater management and pollution prevention, would be required, which he asserted was important based on the past and proposed use of the site.

Attorney Bedard offered that Meena LLC could come to the ZBA and ask for a variance from the requirements of Section 2208, and that the Planning Board’s decision to not require it was effectively usurping the authority of the ZBA to make that decision. He also observed that the Planning Board could have followed the procedure under Section 2208:L that allows for the waiver of some or all the Special Use Permit requirements. He observed that, based on meeting minutes, the Planning Board did not discuss or apply this section, nor did Meena LLC request waivers based on it.

He concluded by stating that the matter should revert back to the ZBA, under the authority granted in RSA 677:15,I-a(a) (Appeal and Court Review of Planning Board Decisions), to interpret how the ordinance should be applied.

## **Planning Board Representative Response**

The Chair invited a representative of the Planning Board to respond to Attorney Bedard. Attorney Boldt introduced himself.

Attorney Boldt began by agreeing with Attorney Bedard that there was a waiver provision in the ordinance. He continued by asking “where is the harm?” The case before us was granted a variance after the environmental issues received “hot and heavy” consideration. An appeal went before the Superior Court, where the environmental issues again received considerable consideration. Then Judge Ignatius wrote a twelve-page opinion upholding the variance.

He continued that, as special counsel, he was a “betting man” by profession and looks at the likely outcome if a matter goes to Court and advises his client accordingly. He noted that we had a “noticed decision of a variance for this use, on this property, in this district, that went to the same Superior Court that we would be in front of for a challenge to this decision of whether a Special Use Permit was required.” He maintained that the Court’s prior decision upheld and addressed a number of the same issues brought by the four appealing parties, and he consequently felt it was “best to be with the Court.”

He maintained that we had clear language in the Ordinance that supports a denial in sections 2206 and 2208, particularly that says a gas station is a prohibited use. Section 2208:B requires the Planning Board to determine, when they ask for a Special Use Permit, if it is a prohibited use, because you can’t give it to a prohibited use.

He went on to say that he felt the Court would take a “de novo” review of the ordinance, meaning they look at it on their own, and try to interpret that language. He reiterated that he thought the Court would determine that a Special Use Permit could not be granted to a prohibited use.

He concluded that the ZBA had already covered the issues in question, and that it would be improper for the Planning Board to have said that a Special Use Permit was needed in this situation. He reminded that the ZBA’s jurisdiction on Planning Board’s decisions is limited to their interpretation of the ordinance. It is not to “get into the weeds” of site plan review or reopen the granted variance. He maintained that the ZBA’s job was strictly to determine if the Planning Board got it wrong in this case, or as he asserted, did get it right in not requiring the Special Use Permit.

## **Attorney Bedard’s Response**

Attorney Bedard observed that the Planning Board made a very similar argument to the one the applicants made, and the response is “if the use is prohibited, then how can you have a Special Use Permit?” However, he said he believed the reason that Section 2208:B reads like it does is so you can’t use a Special Use Permit as a “back-door” for a prohibited use to be allowed by the Planning Board without coming to the ZBA for a variance. He maintained that getting a variance for a prohibited use means that use is no longer prohibited for that particular location and that use becomes a permitted use, therefore making the requirements of 2208:A apply. He stated that to say otherwise was “semantic maneuvering” and did not make sense.

## **Attorney Boldt’s Response**

Attorney Boldt started by saying we had a unique ordinance that is less than clear. He pointed out that in Section 2206 “All uses permitted by right or allowed by special exception in the underlying district are permitted in the Groundwater Protection District unless they are Prohibited Uses or Special Uses as listed in the Article.” He continued that because our ordinance has that “weird phrase”, “permitted by right or special exception”, he disagrees that getting a variance does not make it a permitted use under the ordinance. He opined that this language limited the ability of the Planning Board to require a Special Use Permit and has created the current “conundrum”

## **Input from other parties**

The Chair recognized that Attorney Johnson had raised his hand. At that point the Chair observed that the matter before the ZBA was an Appeal for an Administrative Decision, which was not a common action before the Board, and he reiterated that the purpose of the hearing was to determine whether the Planning Board was correct in their decision or not. He added that there are other parties that have an interest in this case, but it was important to maintain focus on the primary reason for the appeal.

Attorney Johnson, representing Meena LLC, maintained that the ZBA's only role in this case was to analyze the "plain language of the ordinance" and determine whether the Planning Board got it right. He stated that the Planning Board did get it right and the complaint should be dismissed.

### **Board Member Questions**

The Chair stated that he would open the floor to other input but wanted to give other members of the Board the opportunity to ask questions first.

Mr. Cahalane questioned Attorney Bedard about Section 2204:9 regarding exemptions for storage tanks and whether that would apply to gas tanks. The attorney responded that it might but would probably depend on what was being stored in them. If it was water, it would probably be allowed. But if it was something like gasoline, which would involve the NH Department of Environmental Services (DES) oversight, then it would not.

Mr. Cahalane stated that he found the language related to storage tanks in 2204 unclear, including in sections 2210 (Performance Standards) and 2212 (Maintenance and Inspection). Attorney Bedard offered that some of those issues are addressed in the Spill Prevention Control and Storm Water Management Plan which had been commented upon by the third-party engineers. He also believed that some requirements will need to be fulfilled regardless of whether the Special Use Permit is required or not.

Mr. Cahalane offered that he was having trouble understanding how the definition of a prohibited use, as in Section 2206, could change to a permitted use by virtue of receiving a variance. He offered that a variance issued to a non-conforming lot does not make it into a conforming lot, just that permission has been given to do something on it.

He also offered a theoretical case where the gas station buys an adjoining lot and decides to expand because it is now a permitted use. Could it now bypass the ZBA and just get permission from the Planning Board to expand?

Attorney Bedard responded that in the case of a possible expansion, he felt the Planning Board's failure to issue the Special Use Permit potentially removed certain protections in the future, specifically related to Section 2210:A,c that would require an amended stormwater plan, by virtue of saying that the existing variance was enough to provide protection. He repeated that the Planning Board could have required the Permit and then Meena could seek relief through Section 2208:L, but instead the Planning Board choose to shortcut the process by not requiring the Permit at all.

Mr. Cahalane returned to the issue of how, by defining the gas station as a permitted use, there were implications for many sections within Article 22. He offered that perhaps Attorneys Boldt and Johnson might want to weigh in on the subject.

The Chair protested that we had spent enough time entertaining this theoretical situation, but offered Attorney Boldt the opportunity to speak.

Attorney Boldt posed the question of how the law treats a use allowed by variance, and does it morph into a permitted use? He stated that case law, as demonstrated by a number of cases, basically says "no." He quoted from one case that "a variance is in the nature of a waiver from the strict letter of a zoning ordinance without sacrifice to its spirit or purpose." He added "a variance by definition grants authority to an owner to use his property in a manner that otherwise contravenes the generally applicable zoning ordinance." He went on to say that he would argue that these

cases do not support the applicants' assertion that, by obtaining a variance, it becomes a permitted use under this provision of the ordinance. To do so would cause you to ignore "the clear language of section 2207" (Prohibited Uses).

Mr. Cahalane responded by again asking how the performance standards under section 2210:2 would be exercised based on the Planning Board's application of exemptions under section 2204? He referenced the recommendations of Northpoint Engineering during site plan review to require a Special Use Permit but recognized that they were an engineering company and not in the business of interpreting zoning ordinances or suggesting legal definitions. He offered that it appeared the site plan review was still ongoing and in-depth, so he questioned whether the ZBA could determine if standards are being met at this time.

Attorney Boldt agreed that the site plan review was currently mid-stream in its process. But he reminded that the issue before us was limited to "did the Planning Board get it wrong in saying that under these circumstances, with the variance, with the court case, with this odd language, that a Special Use Permit was not required?" He asserted that they got it right but stated that the ZBA were the ones to decide. He added that the Court would also have their say in the matter. He continued that this project hasn't been approved yet. It still has to go through the finalization of all the site plan requirements. He also shared that Attorney Bedard had conveyed Attorney Johnson's representation that they (Meena LLC) planned to meet the performance standards. He summed up by saying he felt this was a premature effort and the ZBA should deny the current action.

Attorney Boldt addressed Mr. Cahalane's question regarding the definition of storage tanks. He said our provision of the ordinance does not define, by product, anything in the underground storage tanks. Accordingly, he said that when the Court looks at the ordinance they will use the standard definition of an underground storage tank, which can contain many things.

#### **Question of Authority**

The Chair, referring to all the conversation about the court case, asked about the matter of jurisdiction. He cited Section 2201 of the ordinance, that states: "The Town of Effingham hereby adopts this Article pursuant to the authority granted under RSA 674:16 (Grant of Power), in particular RSA 674:16, II relative to innovative land use controls."

*Note: RSA 674:16, II reads "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 is not limited to, the methods contained in RSA 674:21 (Innovative Land Use Controls)"*

He called attention to RSA 676:5.III (Appeals to Board of Adjustment) that in part, states: "if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 (Innovative Land Use Controls) 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 (Court Review)"

The Chair stated that, based on the reading of these RSA's, there was a possibility the ZBA did not have the authority to consider the application and invited opinion from the attorneys present.

Attorney Bedard offered that the point was well taken. He stated that while the site plan review was still under way, when the Planning Board made the decision to not require the Special Use Permit, it triggered the timeline running for the thirty-day appeal period to Superior Court.

Although a motion had been filed with the Court, he offered that also filing with the ZBA was pre-emptive to the possibility that the Court would object to not having come to the ZBA first. (He added that Attorney Boldt had also filed a Motion to Dismiss with the Court.)

He restated that the normal sequence of events would be to come to ZBA first, with a potential appeal then going to the Court, but currently the filings are moving forward at the same time. He summed up by asking Attorneys Boldt and Johnson if they agreed with his assessment, to which they both replied in the affirmative.

The Chair restated that his core question was whether the ZBA had the authority to make a ruling on this application?

Attorney Boldt responded that this is one of the “weirdness’s” of our ordinance, which he characterized as “muddy.” He said RSA 674:16:II (Grant of Power) enables the Zoning Ordinance, and then refers to RSA 674:21 (Innovative Land Use Controls), which says, if it is a Planning Board matter, the ZBA “doesn’t get to play”, the authority is delegated to the Planning Board. So if it is a Planning Board matter, where the zoning ordinance language gives the authority to the Planning Board to make the decisions, it is not appealed to the ZBA, it is appealed to the Superior Court.

He continued that he was “sufficiently perplexed by our language” to not be confident which way the Court would interpret it and it was one of the factors in his filing of the Motion to Dismiss. He believed it was entirely possible that when the Court interprets this entire section of the ordinance, they will determine that the intention of the voters, when they approved it eleven years ago, was to put the authority with the Planning Board. He pointed out that Section 2208:L, says waivers are by the Planning Board, and if that was not intended as an Innovative Land Use control measure, that provision would not be there. He concluded by saying it gives us “a punt opportunity.”

The Chair invited Attorney Bedard to expand on his statements regarding the ZBA’s authority to hear the appeal.

Attorney Bedard started by say “I’d love to do this only once. But if I don’t do this twice” he was concerned he would not have exhausted the remedy he has under RSA 677 (Rehearing and Appeals Procedures), which is coming to the ZBA in respect to the interpretation of the zoning ordinance. He continued that he did not want his clients to suffer by not going to every place that he should. He said, as a lawyer, he is “paranoid”, and because of that, he covers as many bases as he can, and that when the “other side” gives him an opening, he takes it.

### **Board Members Questions**

The Chair asked the board members if they had questions at this point.

Mr. Taylor asked “If we vote that the Planning Board made a mistake, what happens?”

Attorney Boldt stated that it would then go back to the Planning Board to evaluate whether or not to grant a waiver to any part or all of the provisions of the ordinance. He offered that if we voted that the Planning Board got it wrong, then “another party in the room” might then challenge that appeal up to Superior Court, which would be their right. He offered that he did not currently know what the Planning Board’s actual response would be, but also noted that the current Superior Court case would factor into any next steps the Planning Board would take.

Attorney Johnson offered that if the ZBA found the Planning Board was wrong, they would appeal to the Court, but as there is already an appeal in process, as a practical matter, they would ask to consolidate the issue, which is the interpretation of the zoning ordinance. He said they just wanted the question to be answered.

Mr. Taylor offered that he did not understand how, when the town voted not to have a gas station there, that we are now back to it. He said it did not make sense that the ordinance said in one place it was prohibited and in another place it said it might be prohibited because it has storage tanks. He added we have to get a Special Use Permit as a backdoor to protect the aquifer.

Attorney Boldt stated that it was a “good public policy question. Unfortunately, it is completely contrary to the law.” He noted a variance granted by this Board becomes the “law of the case.” So that is what made this non-allowed use allowed by variance.

Mr. Taylor asked how we could “turn that around.” And restated that the Special Use Permit has got to help protect that property.

Attorney Boldt responded that Section 2207 states a gas station is a prohibited use, and Section 2208:B requires the Planning Board to determine if the use is not prohibited in order to issue a Special Use Permit. The result is a “ Gordian-knot” that is “what is the law of the case” in the Court’s eye? The Court will take a look at the ordinance and make their own decision. The Planning Board is looking at “these are the cards that the Planning Board’s dealt. Got a variance, got a court decision, got this weird language. What do we do with it as a Planning Board, knowing that we will get sued by somebody for whatever decision. My attitude is what’s the law of the case? The law of the case is a variance upheld by the Court and not a Special Use because of the variance and a court case. The Special Use Permit does not apply in this case.” He reiterated that the ZBA still had the option of deciding that Section 2201 offered the possibility that the Board could decide they did not have jurisdiction to rule on the appeal

Mr. White observed that without the Special Use Permit we seem to have created a rogue entity in that we cannot give the Special Use Permit because it is not a permitted use, but it has to be allowed to go forward because the ZBA told them they could have this through the variance. He asked, “what are the handles on this business” if you remove the oversight provisions of the Special Use Permit?

Attorney Boldt responded that the bulk of the provisions were defined by the ZBA through the conditions for approval when the variance was granted, the groundwater and spill management plans.

Mr. White offered that it seems the Special Use Permit has more continuing oversight.

Attorney Boldt responded that in hindsight, the ZBA, in the variance, could have said that the applicant needed to meet the performance standards of the Special Use Permit, but they did not.

Mr. White said that he thought at the time that the ZBA was trying to not usurp the authority of the Planning Board in terms of Site Plan Review. Unfortunately, as a result, it has come back to the ZBA.

Mr. Taylor added that he thought a Special Use Permit gave more control.

Attorney Boldt offered that we could go from “we don’t have jurisdiction, to we have jurisdiction and agree, or we have jurisdiction and don’t agree.” He reiterated that the question was whether the Planning Board made a mistake or not.

Mr. Cahalane agreed with Mr. White’s statement that we were allowing the Planning Board to do their job when the ZBA issued the variance, and only put in the “big ticket” items that we wanted to make sure were in there. He opined that the Planning Board’s review seemed to be addressing concerns from the public and it was in-depth. He observed that they were also reaching out to third parties when legitimate concerns were raised. He observed that the Planning Board had the right to give waivers, so they had control to do whatever they choose.

He added that despite the Innovative Land Use consideration, he believed this Board should make a decision, and if the Court decided it was an invalid decision because we did not have the authority, at least if it “goes the other way, we don’t have to keep doing this.” He believes the ZBA should finish what it started and make a decision.

Mr. Cahalane speculated that Attorney Boldt had advised the Planning Board on their decision to not require the Special Use Permit. Attorney Boldt replied that he could only say there was in-depth analysis of the language of the ordinance and history of the law of the case.

Mr. Cahalane offered that decisions made by Boards were not always popular, and often there were emotional elements that went beyond just reading the words in the ordinance.

#### **Input from others in Attendance**



The Chair reminded that despite all the passion surrounding this entire case, we needed to stay focused on the sole task before the ZBA, which was to determine if the Planning Board had made a mistake in their decision to not require the Special Use Permit.

Ms. Folts spoke on behalf of Tammy McPherson, who could not be at the meeting. She said the Special Use Permit adds one more layer of protection for Tammy's well, which is just a few hundred feet from the gas station property. She offered that if the applicant wasn't worried about what they were doing, and where they were doing it, they would have no problem with the Special Use Permit. It is the Planning Board's job, as residents of Effingham, to protect our water.

The Chair noted that he thought he had seen a statement that Meena LLC was open to fulfilling the requirements of the Special Use Permit. Attorney Johnson responded that they had said that to the extent applicable, we intend to meet the performance standards as set by the Planning Board. He offered that the Site Plan Review was still in process, and this appeal needed to be resolved as part of the ongoing process.

The Chair asked if they intended to say that the requirements of the Special Use Permit might be redundant because they already had requirements from the Department of Environmental Protection?

Attorney Johnson responded that some of them are redundant because they already have State approval, and there is a lot of overlap. That is why he said, "to the extent applicable", because many of the details still need to be worked out with the Planning Board review process with the engineers.

The Chair asked Attorney Johnson if they were concerned that the Special Use Permit would impose requirements that would go beyond what they ideally hoped they would have to fulfill?

Attorney Johnson responded that it was not really the province of the ZBA, but he would offer an answer. He said they already had a variance, but if they had to get a Special Use Permit, then what does the variance mean? He added, "we were a prohibited use, we went and got the variance, they challenged it in court, the court agreed that we got a variance, and then we went through the Planning Board process, and they said we got it backwards and they we need a Special Use Permit. You can't get a Special Use Permit if you are a prohibited use, and we are a prohibited use." He asserted that the Planning Board minutes will reflect that they have worked as collaboratively as possible to address any legitimate and meaningful concerns of abutters and that the project has evolved over time to try and meet any of those concerns.

Ms. Stella Lund identified herself as an abutter. She offered that much time and effort was expended to develop laws and regulations to protect the water and the granting of a variance overrides these efforts. She felt the applicants had already acted poorly and could not imagine what they would do if there was no oversight at all.

Mr. Tim Otterbach noted that the primary focus of the evening's discussion hinges on the requirement for a Special Use Permit, and acutely focused on the terms "permitted use" versus "allowed use." He felt the Board needed to get a definition of the two terms. He said that when a variance gives relief to a particular prohibited use, it becomes allowed because if it is not permitted, it cannot move forward. The determination of whether a Special Use Permit is required hinges on whether the use is permitted. He felt that the terms "allowed" and "permitted" are interchangeable and relevant to the decision process.

Ms. Corey Lane shared that applicant William Bartoswicz is a veteran who bought the abutting house after much research, including whether a gas station would be permitted next door and he had the water tested. She questioned why the Planning Board did not require the Special Use Permit as there was a thirty-thousand gallon tank at the gas station. She opined that the applicants did not want to have to jump through difficult hoops to ensure safety. She offered that abutters should not have to keep testing their water for safety because of this issue. She added that there are ten towns who could potentially be affected. She asked who would be liable if there was a problem, the taxpayers?

She noted that it is a risky property, and if the applicants did not want to comply with the performance standards, then they should not have bought the property. She concluded by saying that the abutters deserve these regulations.

Ms. Leona Simon stated that she was probably not technically an abutter, but lived nearby on Blueberry Road. She said she built the house after her first husband died. She shared that the whole time he was sick they lived in a house with contaminated water and had to find local water to take care of her family. She felt that when she built her new house thirty years ago, she would not have to worry about water safety anymore. She said now someone is threatening her water, and not offering, to her knowledge, any compensation if anything should go wrong. She thought the Special Use Permit would help to address some of those issues and she felt it was the job of the ZBA and Planning Board to represent the desires of townspeople and they wanted an ordinance to prevent this problem.

Mr. Rich Fay of Ossipee offered that he thought the ZBA should vote on the Special Use Permit and not defer to the Court. He noted that the variance notice of decision granted by the ZBA was clear but only about one sentence. By contrast, he noted that the Planning Board did not issue a notice of decision in regard to not requiring the Special Use Permit, but only noted it in the minutes without any detail. He maintained that the applicants took as many short-cuts as possible to make it easier on themselves, including installing the tanks before they had permission. He lamented the lack of standards and the authority to apply them. He shared that the Freedom Selectmen stated that this project should have 2022 standards going forward. He asked the ZBA to vote on Regional Impact as well.

Mr. Brian Taylor said he was just a member of the public from Freedom. He said he supported the Special Use Permit because he did not have confidence that the applicant would do what they say. He felt controls were needed, not just verbal assurances.

### **Closing Statements**

The Chair asked if the applicant had any closing statement as it appeared we had come to the end of public input.

Attorney Bedard asked that we look at our ordinance. He said it was put in place to protect the aquifer and the public's health and safety. He added that multiple parties, including engineers who work on these types of projects, believe a Special Use Permit should be required. He said not requiring the Permit is a "shortcut of epic proportions." He stated that the ZBA's job was to determine if the ordinance was being correctly applied, or not. He asked the Board to decide to enforce the provisions of the ordinance and require the Special Use Permit, as it clearly should.

Attorney Boldt said he agreed we should look at our ordinance, as the Planning Board did. He maintained that we are having difficulty overcoming the initial language of Sections 2207 and 2208:B and need to ignore those provisions to get into the remaining sections. He said there were many things in the standards that are not applicable, such as animal manures, etc. He notes that the stormwater and spill maintenance plans are already in place. He felt the only thing he could see that was in the purview of the Planning Board were some inspections, but which might already be done by the Department of Environmental Protection. He again stated that it was the job of the ZBA to determine if the Planning Board made the right decision or not.

### **Recess**

The Chair called for a five-minute recess before calling an end to public input.

Upon return, the Chair asked if anyone wanted to offer additional input. Hearing none, he asked for a motion to close public input. Mr. Taylor moved to close public input and the motion was seconded by Mr. Edwards. No discussion ensued. A roll call vote was asked for, but by a voice vote the motion was unanimously approved.

Public input was closed at 8:38 PM.

### **Deliberation**

The Chair reminded the attendees that the Board would no longer accept input.

He asked the Board if they wanted to begin deliberation this evening, or wait to think about the information presented, research the ordinance or RSA's, or to contact our attorney, etc.

It was asked if we wanted to reach out to Counsel, such as if we had jurisdiction over the decision.

Mr. Taylor said he already knew how he was going to vote.

Mr. White offered that we could begin deliberations and see how we progressed. The Chair began by repeating the summary description of the Appeal, to determine if the Planning Board had erred in their decision to not require a Special Use Permit

Mr. Taylor offered that he believed the Planning Board made a mistake and he would vote to require the Special Use Permit.

Mr. Edwards said he would prefer to continue deliberations until our next meeting so he would have time to digest the information we heard, study the RSA's, and review the relevant sections of the Zoning Ordinance.

Mr. Edwards moved that we postpone the deliberations until our next regular meeting on February 1st. Mr. Cahalane seconded the motion. Mr. Cahalane offered that even if only one member needed more time, then it should be postponed. Mr. White said he was in support of any member who needed more time. By a roll call vote, all approved with the exception of Mr. Taylor, who voted nay. The motion carried.

Based on the attendance at the meeting, it was decided to hold the next meeting at our regular venue of Effingham Town Hall, at 7:00 PM on Wednesday, February 1, 2023.

A question was asked by an attendee as to whether we could arrange for Zoom access. The Chair responded that he would look into setting that up.

### **Adjournment**

Motion to adjourn made by Mr. Cahalane. Seconded by Mr. White. All in favor.

Meeting adjourned at 8:50 PM.