

**THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT**

**BELKNAP, SS.**

**SUPERIOR COURT**

Ossipee Lake Alliance, et al

v.

Town of Effingham, et al

No. 212-2022-CV-00102

**ORDER ON MOTION TO DISMISS**

The petitioners, Green Mountain Conservation Group, Ossipee Lake Alliance, William Bartoswicz, and Tammy McPherson, brought this petition against the respondents, the Town of Effingham and the Town of Effingham Planning Board, seeking an appeal of a planning board decision, pursuant to RSA 677:15. See generally Court Index #1 (Pet.). Their appeal revolves around the Planning Board’s determination that the applicant, Meena, LLC’s (“Meena”), did not require a Special Use Permit, as articulated in Article 22 of the Effingham Zoning Ordinance (“EZO”), in its application to operate a gasoline station within the Groundwater Protection District. Id. Now, the respondents move to dismiss, arguing that the petitioners have misinterpreted the EZO and therefore fail to state a claim. See Court Index #9 (Mot. Dis.). The petitioners object. See Court Index #10 (Obj.). On January 6, 2023, the Court held a hearing on this matter. For the following reasons, the Court GRANTS the respondents’ motion to dismiss.

**FACTUAL BACKGROUND**

The Court draws the following facts from the certified record (“CR”), public documents, and the pleadings.

Currently, the Planning Board is in the process of reviewing Meena's Site Plan application to build a gas station at 41 NH Route 25 in Effingham (Tax Map 401, Lot 5), which is located in the Town's Groundwater Protection District.

Article 22 of the EZO governs the Groundwater Protection District. It states in relevant part that "[a]ll 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 enumerated in the Article." Court Index #9 Ex. A at Article 22, Section 2206. Further, "[t]he development or operation of a gasoline station" is a Prohibited Use. Id. at Section 2207(A)(8).

On August 6, 2021, the ZBA granted the applicant a variance from Article 22, Section 2207A(8), thereby allowing it to operate a gasoline station at the Property. This is conditioned on the applicant filing: (1) a Stormwater Management Plan and (2) a Spill Prevention Control and Countermeasure Plan. Court Index #9 Ex. B. Both of these plans must be produced per New Hampshire Department of Environmental Services guidelines and will be submitted as part of the Site review process.

On June 2, 2022 the Court (Ignatius, J.) affirmed the ZBA's granting of the variance. See generally Green Mountain Conservation Group, et al. v. Town of Effingham, Docket No. 212-2021-CV-00151, Court Index #12 (Jun. 2, 2022) (Ignatius, J.). Shortly thereafter, on August 22, 2022, the Planning Board met and determined that the applicant is not required to obtain a Special Use Permit to operate a gasoline station at the Property.

On September 20, 2022, the petitioners filed this petition, seeking review of the Planning Board's decision that the applicant need not submit a Special Use Permit.

Now, the respondents move to dismiss, arguing that because the applicant's use of the Property is a Prohibited Use under the EZO, the Planning Board was correct in its determination and the petitioners therefore fail to state a claim. The petitioners object, arguing that because the ZBA granted a variance it permitted the applicant's use of the Property, thereby requiring it to avail itself to the Special Use Permit requirement of Article 22.

### **STANDARD OF REVIEW**

“In ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted.” Provencher v. Buzzell-Plourde Associations, 142 N.H. 848, 852-53 (1998). In making this determination, the Court generally accepts all facts pleaded by the plaintiff as true and view those facts in the light most favorable to the plaintiff. Id. at 853. However, when the “motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim, but instead raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has substantially demonstrated his right to claim relief.” Id. (citations and quotations omitted). “An assertion that a claim should be dismissed because the trial court lacks jurisdiction to hear the claim due to the plaintiff's failure to exhaust its administrative remedies is one such defense.” Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010).

“The interpretation of a zoning ordinance is a question of law, which [courts] review de novo.” Town of Bartlett Bd. of Selectman v. Town of Bartlett Zoning Bd. of Adjustment, 164 N.H. 757, 761 (2013). “Where the ordinance defines the term in issue,

that definition will govern.” Trottier v. Lebanon, 117 N.H. 148, 150 (1977). “When the language of an ordinance is plain and unambiguous, [courts] need not look beyond the ordinance itself for further indications of legislative intent.” Fox v. Town of Greenland, 151 N.H. 600, 605 (2004). Furthermore, “the words used in a zoning ordinance will be given their ordinary meaning unless it appears from their context that a different meaning was intended.” Feins v. Town of Wilmot, 154 N.H. 715, 719 (2007). The Court determines a zoning ordinance’s meaning “from its construction as a whole, not by construing isolated words or phrases.” Id. “[The Court] will not insert into a statute words that the legislature has not chosen to include.” Belluscio v. Town of Westmoreland, 139 N.H. 55, 56 (1994).

### **ANALYSIS**

The respondents argue that the development and operation of a gasoline station is a “Prohibited Use” within the Groundwater Protection District” and not a “Special Use” requiring a Special Use Permit. Further, the respondents contend that although the EZO Section 2208(A) notes the section might apply to “use[s] otherwise permitted in the underlying district,” the section would require the Planning Board to determine that the proposed use is not a Prohibited Use, thereby disallowing the application of its Special Use provisions to Prohibited Uses. Therefore, as the applicant’s use remains a Prohibited Use under the EZO, it cannot also be subjected to the Special Use Permit procedure.

The petitioners object, arguing that the applicant’s use of the property is currently permitted by the Town due to the variance it granted the applicant from Section 2207(A)(8) of the EZO. Specifically, they contend that the variance effectively made the

use permitted in connection with the Property. They further argue that without a Special Use Permit, it is unclear how the Town will evaluate and enforce the performance standards under Section 2210. Finally, they contend that the conditions included with the variance are insufficient to avoid a special use permit.

Upon review, the Court finds that because the applicant's use is a Prohibited Use, it is not required to secure a Special Use Permit. First, the Court must clarify that the Town's granting of a variance does not equate the applicant's intended use to be a "permitted use" under the EZO. See Court Index #10 ("Although it is not a typical permitted use, Meena's proposed use of the Property for a gas station is currently permitted by the Town due to the variance that Meena has received from Section 2207(A)(8) of the Zoning Ordinance.") "A variance has been defined as authority granted to the owner to use his property in a manner otherwise violative of the zoning regulations." New London v. Leskiewicz, 110 N.H. 462, 466 (1970). "In other words, a variance is in the nature of a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose." Id. This differs from other relief such as the granting of a special exception in that, "a variance is authority extended to a landowner to use property in a manner prohibited by the ordinance (absent a variance) while a special exception allows the owner to put property to a use which the ordinance expressly permits." 15 Land Use Planning and Zoning § 23.02 (2022) (citing Stucki v. Plavin, 291 A.2d 508, 511 (Me. 1972)). While a variance may provide an applicant with authorization to use it property in violation of the zoning ordinance, the granting of such permission does not transform the use into a permitted use under the relevant zoning ordinance.

Consistent with the above, “prohibited use” and “special use” are mutually exclusive terms under the EZO, and therefore the applicant need not pursue a Special Use Permit. Section 2206 of the EZO notes that uses permitted within the underlying district are permitted in the Groundwater Protection District “unless they are Prohibited Uses or Special Uses.” Court Index #9 Ex. A at Article 22, Section 2206 (emphasis added). In addition, the EZO states that “a use otherwise permitted in the underlying district” would require a Special Use Permit under certain conditions, including where it involves the “[s]torage, handling, and use of regulated substances in quantities exceeding 100 gallons or 800 pounds dry weight at any one time[.]” Id. at Article 22, Section 2208(A)(1). However, the remaining paragraphs of this section instruct the board to “determine that the proposed use is not a Prohibited Use” as listed in the article. Id. at Article 22, Section 2208(B). This demonstrates that Prohibited Uses and Special Uses are mutually exclusive: a Special Use cannot be a Prohibited Use. While the ZBA’s granting of a variance authorized the applicant to utilize his property as a Prohibited Use, it did not change the character of that use under the EZO. Indeed, the Court agrees with the respondents that to read Section 2208 as being applicable to Prohibited Uses would require the Court ignore the distinctions between the two made within the EZO, thereby introducing surplusage. See Londonderry v. Faucher, 112 N.H. 454, 457 (1972) (“all words used should be given their ordinary meaning unless it appears from the context that a different meaning was intended.”) Accordingly, as the applicant’s use is a Prohibited Use, it is not a Special Use and cannot be subject to the Special Use Permit procedures.

**CONCLUSION**

For the reasons noted above, the respondents' motion to dismiss is GRANTED.

SO ORDERED.

January 27, 2023



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Elizabeth M. Leonard  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 01/27/2023