

EFFINGHAM, NEW HAMPSHIRE  
ZONING BOARD OF ADJUSTMENT

No. \_\_\_\_\_

Appeal of Ossipee Lake Alliance,  
William Bartoswicz, and Tammy McPherson

**APPEAL OF PLANNING BOARD'S JULY 11, 2023 DECISION TO CONDITIONALLY  
APPROVE MEENA, LLC'S SITE PLAN APPLICATION WHEN THE SITE PLAN  
VIOLATES THE TOWN'S SETBACK REQUIREMENTS**

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 to conditionally approve Meena, LLC's site plan application when the site plan violates the Town's 50-foot setback requirements under Article 4, Section 402 of the Town's Zoning Ordinance, stating in support thereof as follows.

**PARTIES**

1. Appellant 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.
2. Appellant 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.
3. Appellant Tammy McPherson owns a parcel of real property known as Tax Map 47, Lot 4100 in Center Ossipee and has a mailing address of 5 Blueberry Road in Center Ossipee, New Hampshire

4. The appellees 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**

5. Appeals of planning board decisions fall within the jurisdiction of the Zoning Board of Adjustment (“ZBA”) under RSA 677:15, I-a (a).<sup>1</sup>

### **BACKGROUND**

6. This case should not be unfamiliar to the ZBA.

7. It involves Meena’s site plan application for a gas station, convenience store with food service, and pre-existing apartments at 41 NH Route 25 in Effingham, also known as Tax Map 401, Lot 5 (the “Property”).

8. The Property is located within both the Town’s Groundwater Protection District and Rural Agricultural District.

9. The Property was formerly known as Boyles Market and included a convenience store over 2,000 square feet in size and a previously abandoned gas station.

10. The appellants have previously filed appeals with both the ZBA and the Carroll County Superior Court concerning Meena’s attempts to get Town approval for their building project at the Property.

11. Appellant 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

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<sup>1</sup> On or about August 10, 2023, the appellants also filed an Appeal in the Carroll County Superior Court challenging the Planning Board’s July 11, 2023 decision to conditionally approve Meena, LLC’s site plan application pursuant to RSA 677:15.

the Planning Board's decision. His well is located just 310 feet from the underground storage tanks Meena installed on the Property.

12. Similarly, Appellant 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.

13. Appellant 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, particularly due to the Property's location within the Town's Groundwater Protection District and "the most sensitive recharge area of the Ossipee Aquifer." (May 24, 2023 Geoscience Solutions LLC report at 8.)

14. 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.

15. On or about March 29, 2021, Meena obtained a special exception from the ZBA to allow it to install gasoline pumps under the gasoline canopy that remained following a prior owner's discontinuance of a gasoline station in 2015.<sup>2</sup> The notice of decision regarding the special exception states that "Special Exceptions and Variances authorized under RSA 674:33 shall be valid if exercised within 2 years from the date of final approval." It has been more than two years since such approval.

16. Gas stations are specifically prohibited from the Town's Groundwater Protection District. *Id.* at § 2207. Despite that, and without proper permits or site plan approval, Meena<sup>3</sup> began installing underground storage tanks and conducting work on the Property in the spring of 2021.<sup>4</sup> As a result, the Town issued a cease-and-desist order<sup>5</sup> against Meena on or about May 13, 2021, prohibiting Meena from continuing its site work activity at the Property.

17. The cease-and-desist order did not prohibit the continued operation of the convenience store. Nevertheless, the convenience store has not operated since at least the issuance of the cease-and-desist order.

18. Shortly before the Town issued the cease-and-desist order, Meena went before the Planning Board, on May 6, 2021, for the first of what would ultimately be many hearings regarding its site plan application.

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<sup>2</sup> The gas station that was previously on the Property had been there before the Town adopted its Groundwater Protection Ordinance and was subsequently abandoned.

<sup>3</sup> Meena acquired the Property on February 25, 2021.

<sup>4</sup> Paragraph 12 of the Notice of Decision in this matter erroneously states that Meena had the Board of Selectmen's approval for their installation of the underground storage tanks despite there being no evidence in the record to support that conclusion. The Planning Board addressed the issue at a public meeting on August 7, 2023.

<sup>5</sup> It is the appellants' understanding that the Town's Board of Selectmen rescinded the cease-and-desist order on or about September 5, 2023.

19. At this first hearing, the Planning Board referred Meena to the Town's Zoning Board of Adjustment ("ZBA") for a variance regarding the Property's location within the Ground Water Protection District. (May 6, 2021 Planning Board Meeting Minutes at 1.)

20. On August 4, 2021, Meena received a variance from the ZBA to develop and operate a gas station on the Property at issue here.<sup>6</sup>

21. Following that decision, the site plan application process continued for nearly two years. During that time, the Planning Board held multiple public hearings at which numerous members of the public expressed their concerns and opposition to the site plan application; Meena revised its site plan application; Northpoint Engineering, LLC performed a technical review of the plans and material for the Property at the request of the Planning Board; and the Planning Board voted, pursuant to RSA 36:56, to declare the project one of regional impact.

22. Of particular relevance here, concerns were also raised before the Planning Board regarding the 50-foot setback requirements as depicted on the site plan.

23. Throughout this process, the appellants were actively involved and attended the Planning Board hearings either individually or through counsel.

24. Additionally, Mr. Bartoswicz and Ms. McPherson hired Geoscience Solutions LLC to conduct a review of the site plan application. Dr. Robert Newton, the executive director of Geoscience Solutions LLC, provided a report to the Planning Board dated May 24, 2023, as well as testimony during multiple Planning Board hearings, through which he expressed various concerns regarding the site plan application. The conclusion of the report, which highlighted numerous issues with the site plan application, states as follows:

There is a Public Water Supply well on site that is located less than 500 ft from the proposed location of the USTs. There are many other private water supply wells

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<sup>6</sup> The appellants appealed this decision to the Carroll County Superior Court, which upheld the ZBA's decision. See Docket No. 212-2021-CV-151.

located downstream from this site. The project makes no effort to protect their water supply with monitoring wells and regular testing programs to alert them of any contamination. There are required components to the facility (e.g. a diesel pump canopy) that are not included in the project documents. The proposed bioretention basin fails to meet the criteria specified in Env-W 1507.02 and Env-Wq 1508.07. The hydrologic modeling of the stormwater drainage system shows the system fails under a 10-year storm.

(May 24, 2023 Geoscience Solutions LLC report at 8.)

25. Despite Dr. Newton's warnings and the public's widespread concerns regarding both the project and the Planning Board's process, as laid out in testimony and written submissions to the Planning Board, on July 11, 2023, the Planning Board voted to approve Meena's site plan application "pursuant to the Notice of Decision as amended." (Jul. 11, 2023 Planning Board Meeting Minutes at 4.) The Notice of Decision included both conditions subsequent and conditions precedent.

26. The Planning Board then issued a written Notice of Decision dated July 13, 2023 with 100 paragraphs.

27. Of particular significance to this appeal, the Notice of Decision states as follows:

- a. "On June 20, 2023, the Board reviewed the Site Plan Regs and the Zoning Ordinance (both referenced herein according to section) in conjunction with the Application to see if the Applicant had met the applicable requirements of Site Plan Review." (Jul. 13, Notice of Decision at ¶ 50.)
- b. "In addition to the Site Plan Regs, the Board found that the Applicant must meet certain requirements of the Zoning Ordinance." (Id. at ¶ 86.)
- c. "The Board concluded that the Site Plan Regs and Zoning Ordinance requirements have been reviewed and confirmed the requirements have been met." (Id. at ¶ 93.)

- d. Having considered all of the evidence presented to the Board during the above-referenced public hearings and given such evidence the weight it deserves, the Board hereby grants the Applicant's Site Plan Review Application with the conditions precedent and conditions subsequent as set forth [in the July 13, 2023 Notice of Decision]. (Id. at ¶ 100.)

28. Thereafter, the Planning Board held another public meeting on August 7, 2023 to "clarify" the July 13<sup>th</sup> Notice of Decision. This resulted in the Planning Board issuing an amended notice of decision dated August 8, 2023.

29. Around that same time, Meena provided the Planning Board with a revised set of plans dated August 7, 2023.

30. Of particular relevance here, these plans, like the prior plans submitted to the Planning Board, have the diesel canopy, diesel pump, gasoline pumps, oil water separators, and other storm management devices within the Town's 50-foot setback requirements.

31. None of the Planning Board's conditions in either notice of decision fix this issue.

32. The appellants now appeal that decision.

### ANALYSIS

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

34. "If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section." RSA 677:15, I-a (a).

35. "If, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any

construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section. . . .” RSA 676:5, III.

36. The issues here involve the Planning Board’s decisions regarding the Town’s Zoning Ordinance in its site plan review process for Meena’s site plan application.

37. Importantly, the “Site Plan Review procedure in no way relieves the developer or his/her agent from compliance with the Zoning Ordinance, Subdivision Regulations or any other ordinance which pertains to the proposed development. No site plan will be approved until it complies in all respects with any and all pertinent ordinances and regulations.” (Site Plan Regs. at § 2.)

38. Under Section 8 of the Town’s Site Plan Review Regulations, all applicants must “be in compliance with the articles contained in the Effingham Zoning Regulations when applying for site plan review.”

39. Here, the Planning Board voted to conditionally approve Meena’s site plan application despite the fact that the site plan has the diesel canopy, diesel pump, gasoline pumps, oil water separators, and other storm management devices within the Town Zoning Ordinance’s 50-foot setback requirements.

40. Article 4, Section 402 of the Town’s Zoning Ordinance addresses lot requirements, including the minimum structure setback requirements. In particular, the minimum front setback requirement for structures with the Town’s Rural Agriculture District, where the Property is located, is 50 feet. The side setback requirement is 30 feet, and the rear setback requirement is 50 feet.



41. A structure is defined as follows: “Anything constructed or erected with a fixed location on the ground or attached to something having a fixed location on the ground.” (Zoning Ordinance at Art. 3, Sec. 302.)

42. The diesel canopy, diesel pump, gasoline pumps, oil water separators, and other storm management devices fall within the definition of a structure as they will either be built with a fixed location on the ground or attached to other things with a fixed location on the ground.

43. Those items, as depicted on the site plan, are to be placed closer than the 50-foot front setback allows.

44. Thus, the Planning Board disregarded the front setback requirements of the Town’s Zoning Ordinance by allowing construction of a diesel canopy, diesel pump, gasoline pumps, oil water separators, and other storm management devices within the setback without the benefit of a variance.

45. In addition, Article 7, Section 703 of the Zoning Ordinance considers non-conforming uses to be abandoned if discontinued for two years or more. Similarly, the notice of decision Meena received from the ZBA in March 2021 regarding the special exception to allow it to install gasoline pumps under the gasoline canopy that remained following a prior owner’s discontinuance of the gasoline station, states that “Special Exceptions and Variances authorized under RSA 674:33 shall be valid if exercised within 2 years from the date of final approval.” It has been more than two years since such approval.

46. In light of this, the gasoline pumps and associated improvements under the original canopy permitted by the special exception fail to maintain their non-conforming status and must now comply with current setback requirements.

47. Moreover, the Planning Board also overlooked the issue of the convenience store on the Property failing to comply with section 1031 of the Zoning Ordinance, which requires retail stores to have a maximum floor space of 2,000 square feet per floor.

48. The convenience store here is more than 2,000 square feet in size. Thus, it is non-conforming. Because the store has not been operating for over two years, it is abandoned. It, therefore, must now comply with the Zoning Requirements.

49. Accordingly, the Planning Board's decision to conditionally approve Meena's site plan application is unreasonable and in violation of the Zoning Ordinance for multiple reasons, and should be reversed.

WHEREFORE, the appellants respectfully request that the Zoning Board of Adjustment:

- A. Declare that the Planning Board acted illegally or unreasonably for the foregoing reasons.

Date: 9/13/23

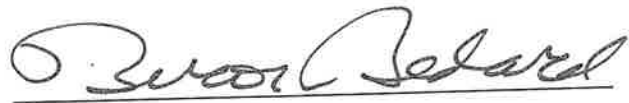
Respectfully submitted,

**William Bartoswicz, Tammy McPherson, and  
Ossipee Lake Alliance**

Through their counsel,

**RANSMEIER & SPELLMAN, P.C.**

By:



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