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January 3, 2024

Lawrence Edwards, Chair
Effingham Zoning Board of Adjustment
Town Offices
68 School Street
Effingham, NH 03882

**Re: Response to Meena, LLC's Request for the Dismissal of the Appeal of its Site
Plan Approval**

Dear Chair Edwards:

I write in anticipation of the ZBA hearing scheduled for January 3, 2023 and in response to the letter from Attorney Matthew Johnson dated November 29, 2023 sent to you on behalf of his client, Meena, LLC, regarding my clients' appeal of the Effingham Planning Board's July 11, 2023 decision to conditionally approve Meena's site plan application. The appeal was initially filed by Ossipee Lake Alliance, William Bartoswicz, and Tammy McPherson; although Ossipee Lake Alliance has since withdrawn as an appellant.

My clients, Mr. Bartoswicz and Ms. McPherson, are appealing the Planning Board's decision to conditionally approve 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.

As stated in the appeal, and as timely raised with the Planning Board by members of the public, including but not limited to Robert Newton, Corey Lane and Timothy Otterbach the site plan violates the Town's 50-foot setback requirements under Article 4, Section 402 of the Town's Zoning Ordinance. 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 within the Town's Rural Agriculture District, where the

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1915-2010
Lawrence E. Spellman
1924-2001
Ronald E. Cook
1947-2021
Daniel J. Mullen
1953-2021

¹ Also admitted
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² Also admitted
in Massachusetts

³ Also admitted
in Vermont

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Property is located, is 50 feet. The side setback requirement is 30 feet, and the rear setback requirement is 50 feet.

Meena claims that “the building housing the convenience store and all other aspects of the property then in existence [when Effingham adopted its Zoning Ordinance in 2000], which have not changed and which Meena is not seeking to expand, are protected as pre-existing non-conforming uses. . . [including] the diesel pump and covering and gasoline pumps and canopy. . . .” (Nov. 29, 2023 Meena letter at 1.)

“A nonconforming use is a lawful use existing since prior to the adoption of a zoning ordinance prohibiting such use, and that does not conform to the requirements of the ordinance.” Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 750 (2017). Although nonconforming uses are protected uses, to qualify for such protections, “a nonconforming use must lawfully exist at the time the restriction is adopted *and have continually existed since that time.*” Id. at 751 (quotation omitted) (emphasis added). “The burden to prove a lawful nonconforming use is on the party asserting that right.” Id. (quotation omitted) Meena has failed to do that here.

The property at issue here involves a previously abandoned gas station and convenience store. Article 7, Section 703 of the Effingham Zoning Ordinance considers nonconforming uses to be abandoned if discontinued for two years or more. It is undisputed that the former gas station on the property was abandoned. It ceased operations in 2015. In 2021, the Town’s attorney, Matthew Serge, provided an email to then-Chairwoman Swanick stating his opinion that the gas station is not a lawful nonconforming use and that the property’s use as a gas station had been abandoned. Thus, the gas station associated structures, such as the diesel pump and covering and gasoline pumps and canopy, are not lawful nonconforming uses and are subject to the Town’s current Zoning Ordinance.

Nor does the special exception Meena received in 2021, before Attorney Serge’s determination, change that. The special exception Meena received to add gas pumps to the convenience store only addressed Sections 1005 and 702 of the Zoning Ordinance. It did not address Section 402 regarding setback requirements. Thus, to the extent Meena is arguing the location of the gas pumps are protected from the setback requirements under the special exception, to the extent the special exception has not expired, such arguments are without merit.

Moreover, Meena was issued a variance from Article 22, Section 2207A(8) of the Zoning Ordinance. It was not granted a variance from any other part of the ordinance. Thus, Meena must still comply with Article 4, Section 402 (setback requirements) and Article 10, Section 1031 (retail store size). Meena’s arguments to the contrary, therefore, fail.

Similarly, Meena’s arguments regarding the definition of a structure also fail. Under the Zoning Ordinance, 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.) The Zoning Ordinance does not use the word “structure” as a synonym for a “building.” Rather, the Zoning Ordinance has a completely separate definition for “building” as follows: “Any structure having a roof supported by columns or walls and intended for the shelter, housing, or enclosure of any individual, animal, process, equipment, goods, or materials of any kind. Aside from ‘Accessory Buildings’, all buildings must have a permanent foundation.” (Id.)

The plain language of the definition of a “structure” states it can be either constructed or erected and that it have either a fixed location on the ground or be attached to something with a fixed location on the ground. As stated in the appeal, 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 constructed with a fixed location on the ground or attached to other things with a fixed location on the ground. Those items, as depicted on the site plan, are to be placed closer than the 50-foot front setback allows. 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.

As for the convenience store on the property, despite Meena’s arguments, it has also been abandoned and must comply with Article 10, Section 1031 of the Zoning Ordinance, which requires retail stores to have a maximum floor space of 2,000 square feet per floor. Neither the cease-and-desist order nor the court-imposed stays on the planning board proceedings prevented the store from operating. For example, Meena claims it was able to “operate” the store on May 16, 2023. This, however, was over two years after the cease-and-desist order was issued; and Meena has stated that it otherwise has not operated the store since the cease-and-desist order was issued. Moreover, to the appellants’ knowledge, Meena has not reopened the store since the cease-and-desist order was lifted in September 2023, thus negating its arguments that the cease-and-desist order was preventing it from operating. Accordingly, the convenience store is not a lawful nonconforming use.

Based on the foregoing and the arguments made in the appeal, the Zoning Board should deny Meena’s request to dismiss this appeal and instead determine that the Planning Board acted illegally and/or unreasonably.

Respectfully Submitted,



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cc: clients

Matthew Johnson, Esq.

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Chris Drescher, Esq.
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Clients

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