

EFFINGHAM, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT

No. _____

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

MOTION FOR REHEARING

William Bartoswicz and Tammy McPherson, by and through their attorneys, Ransmeier & Spellman, P.C., submit this Motion for Rehearing of the Town of Effingham Zoning Board of Adjustment's decision of January 3, 2024, in which it denied their appeal of the Town of Effingham Planning Board's decision to conditionally approve Meena, LLC's site plan application, stating in support thereof as follows.

STANDARD OF REVIEW

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. . . .

RSA 677:2.

A motion for rehearing pursuant to RSA 677:2 "shall set forth fully every ground upon which it is claimed that the decision or order complained of is *unlawful or unreasonable*." RSA 677:3 (emphasis added).

BACKGROUND

As the ZBA is aware, Mr. Bartoswicz and Ms. McPherson are appealing the Planning Board's July 11, 2023 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, also known as Tax Map 401, Lot 5 (the “Property”).

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.

The site plan at issue here violates the Town’s 50-foot setback requirements under Article 4, Section 402 of the Town’s Zoning Ordinance. The former gas station on the Property ceased operations in 2015 and was subsequently abandoned. Accordingly, 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. As discussed in further detail in the appeal and undersigned’s letter to the ZBA dated January 3, 2024, both of which are incorporated herein by reference, neither Meena’s variance nor the special exception it received in this matter waive the applicability of the Town’s 50-foot setback requirements under Article 4, Section 402 of the Zoning Ordinance.

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, fuel tanks, oil water separators, and other storm management devices within the setback without the benefit of a variance.

Similarly, the Planning Board also overlooked the fact that the convenience store on the Property 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.

These issues were before the ZBA during its hearing on January 3, 2024 where, despite the documents that have been provided to the ZBA and public testimony, the ZBA did not

determine that the Planning Board erred. During the January 3rd hearing, counsel for the appellants, counsel for the Planning Board, counsel for Meena, and various members of the public spoke. The members of the ZBA then briefly deliberated, although it was difficult if not impossible for the members of the public to hear the deliberation, which was pointed out to the ZBA several times during the hearing. Ultimately, the ZBA voted against granting the appellants' appeal. The appellants now seek a rehearing.

ARGUMENT

The appeal here concerns two issues: the Town's 50-foot setback requirements and the size of the convenience store on the Property. The appellants seek a rehearing regarding both of those issues. At the outset, however, the appellants first address some overarching issues regarding the January 3, 2024 ZBA hearing.

The January 3rd hearing was replete with numerous deficiencies. The public could not adequately hear as the members of the ZBA refused to use the available microphones in violation of RSA chapter 91-A. See RSA chapter 91-A:2 III(c) ("Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting."). The members of the ZBA appeared confused as to what was happening and what they were voting about. When they finally did vote, they voted on the appeal in its entirety and did not appear to separately address each issue within the appeal. It is difficult to discern what exactly happened, however, because, in addition to the poor audio during the hearing, the draft minutes of the hearing that are currently available are poorly written, incomplete, and inaccurate. Nor has the ZBA provided a written notice of decision yet, which violates RSA 676:3, II ("Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which

such vote is taken, including the written decision containing the reasons therefor and all conditions of approval, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote.”).¹

Additionally, it is the appellants' understanding that the Lakes Region Planning Commission was not notified of the hearing despite being a party entitled to notification because Meena's application involves a development of regional impact. For these reasons alone, the ZBA should hold a rehearing.

The ZBA should also grant this motion for rehearing because it erroneously voted to deny the appellants' appeal. In regards to the Town's 50-foot setback requirements, 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, fuel tanks, oil water separators, and other storm management devices within the Town Zoning Ordinance's 50-foot setback requirements. 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. Even Meena's proposed site plans appear to acknowledge that these setback distances are applicable. Nevertheless, during the January 3rd hearing, counsel for the Planning Board argued that Section 1005 of the Zoning Ordinance is applicable here. That section states, in pertinent part, that, in regards to automobile service stations, “[p]umps are to be

¹ Accordingly, the appellants reserve their right to amend this motion for rehearing. See RSA 677:2 (stating, “if the moving party 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 person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed.”).

located no closer than 15 feet to any building or 25 feet to the right-of-way of any street.” Even if that section was applicable, which the appellants do not concede that it is, there would still be structures here, such as the diesel canopy, that are not pumps that would still violate the 50-foot setback requirement.

Additionally, contrary to the arguments of counsel for the Planning Board, the appellants are not asking the ZBA to change its decision from over two years ago when it granted Meena a variance from Article 22, Section 2207A(8)² of the Zoning Ordinance. Although the ZBA did not include a requirement to get a variance regarding the 50-foot setback requirements at that time, that issue was not before the ZBA at the time. The Planning Board is still required to make sure the site plan application conforms with all aspects of the Zoning Ordinance,³ and it failed to do so. Meena was issued a variance from Article 22, Section 2207A(8) of the Zoning Ordinance only. It was not granted a variance from any other part of the ordinance. Meena did not request another variance, but it should have. Accordingly, the ZBA erred when it denied the appellants’ appeal regarding the 50-foot setback requirements.

The ZBA also erred when it denied the appeal regarding the size of the convenience store as the Planning Board 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. 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. Contrary to Meena’s arguments, neither the cease-and-desist order nor the court-

² Article 22, Section 2207A(8) prohibits the development or operation of gasoline stations with the Town’s Groundwater Protection District.

³ 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.”

imposed stays on the Planning Board proceedings prevented the store from operating. Rather, Meena created its own alleged inability to open the store by prematurely installing the underground storage tanks knowing there would be risks in doing so. Additionally, Meena's arguments that it did not intend to abandon the store are irrelevant as "consideration of intent to abandon is not necessary when an ordinance defines abandonment without a consideration of intent" as the Town's Zoning Ordinance does here. See McKenzie v. Town of Eaton Zoning Bd. of Adjustment, 154 N.H. 773, 777 (2007); Zoning Ordinance at Art. 7, Sec. 703 ("A non-conforming use shall be presumed abandoned if the use has been discontinued for a period of two years or more.").

Based on the foregoing, the ZBA's decision to deny Mr. Bartoswicz and Ms. McPherson's appeal here was unreasonable and unlawful. Accordingly, the ZBA should grant a rehearing of this matter.

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

- A. Grant this Motion for Rehearing; and
- B. Reverse the decision of the Planning Board.

Date: _____

Respectfully submitted,

William Bartoswicz and Tammy McPherson

Through their counsel,

RANSMEIER & SPELLMAN, P.C.

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