

STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

William Bartoswicz and Tammy McPherson

v.

Town of Effingham and Town of Effingham Planning Board

Docket No. _____

Petition of Certiorari
Appeal of Planning Board Decision Pursuant to RSA 677:15

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, stating in support thereof as follows.¹

PARTIES

1. Petitioner 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.

2. Petitioner Tammy McPherson owns a parcel of real property known as Tax Map 47, Lot 41000 in Center Ossipee and has a mailing address of 5 Blueberry Road in Center Ossipee, New Hampshire.

3. The respondents 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.

¹ The petitioners have also filed an appeal of this decision with the Town's Zoning Board of Adjustment regarding those aspects of the decision that were based upon the terms of the Town's Zoning Ordinance. There is currently a motion for rehearing pending on that appeal.

JURISDICTION AND VENUE

4. Appeals of planning board decisions fall within the jurisdiction of the Superior Court under RSA 677:15.

5. Venue is proper in Carroll County as all of the parties reside in Carroll County.

BACKGROUND

6. This case 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").

7. 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.

8. The Property lies within an old, abandoned gravel pit situated on the south side of a kame delta built into Glacial Lake Ossipee about 15,000 years ago.

9. The petitioners have previously filed appeals with this Court concerning Meena's attempts to get Town approval for their building project at the Property. (See Docket Nos. 212-2021-CV-151, 212-2022-CV-102).²

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

² The petitioners, along with Ossipee Lake Alliance, also filed an appeal in this Court on or about August 10, 2023 regarding the same issues as addressed in this action (Docket No. 212-2023-CV-127). Ultimately, the petitioners and Ossipee Lake Alliance filed a Motion for Voluntary Nonsuit without Prejudice, which the Court granted. See Order dated September 22, 2023.

11. Similarly, Petitioner 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.

12. Both Mr. Bartoswicz and Ms. McPherson also have deep concerns regarding the health of the Ossipee Aquifer and its effect on their health.

13. The Ossipee Aquifer, New Hampshire's largest stratified drift aquifer, is the source of drinking water for 14 communities in two states, including the Towns of Effingham and Ossipee, among others. The Property at issue here is located 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. Gas stations are specifically prohibited from the Town's Groundwater Protection District. Id. at § 2207.³ Despite that, and without proper permits or site plan approval, Meena⁴ began installing underground storage tanks and conducting work on the Property in the spring of

³ Before the creation of the Town's Groundwater Protection District, the Property was the site of a gas station, which closed and whose underground storage tanks were removed in 2015, ultimately leading to the Property's use as a gas station being abandoned.

⁴ Meena acquired the Property on February 25, 2021.

2021.⁵ As a result, the Town issued a cease-and-desist order against Meena on or about May 13, 2021, prohibiting Meena from continuing its site work activity at the Property.⁶

16. 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.

17. 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.)

18. On August 4, 2021, Meena received a variance from the ZBA to develop and operate a gas station on the Property at issue here.⁷

19. 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 ("Northpoint") 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.

⁵ Paragraph 12 of the July 13, 2023 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. Accordingly, Paragraph 12 of the August 8, 2023 Amended Notice of Decision states, "After removal of the prior underground storage tanks, etc. and discussion with Town personnel, Meena LLC began reinstalling the underground storage tanks, etc. in the spring of 2021 with the Town's Board of Selectmen's knowledge."

⁶ 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. The cease-and-desist order was lifted on or about September 5, 2023.

⁷ The variance was the subject of an appeal to this Court, which upheld the ZBA's decision. See Docket No. 212-2021-CV-151.

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

21. 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 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.)

22. 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" had been drafted by counsel for the Planning Board in advance of the July 11, 2023 meeting and included both conditions subsequent and conditions precedent.

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

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

- a. Meena's proposed development is to occur within the existing structures on the Property, "except for the construction of a proposed impervious dumpster pad and the completion of the installation of the underground storage tanks, etc. and related infrastructure" (Notice of Decision at ¶ 17);
- b. The Planning Board "found no additional stormwater runoff will be generated under Section 6.4I Stormwater Drainage" (Id. at 72);
- c. The Planning Board found that an environmental impact study is not required (Id. at ¶ 94);
- d. "[T]he soil testing underneath the Bioretention Basin area for VOC's with the threshold of DES standards was needed as a condition precedent to the signing of the final Site Plan with the express condition that if VOC's are found in excess of such threshold, then the Applicant will need to return to the Board with a redesigned Bioretention Basin for the Board's review and possible approval" (Id. at ¶ 96);
- e. "[T]he following changes to the final Site Plan were needed as conditions precedent to the signing of the same: (1) revised location of diesel pump at least 15 feet from building and 25 feet from the right of way with blockage to prevent usage of the pump between the building and the pump (or the Applicant shall return to the Board with a revised Site Plan if the Applicant decides upon a different traffic pattern for the diesel pump); (2) impermeable liner on the sides of the Bioretention Basin; (3) the drainage area between buildings needs additional spot elevations; (4) clarification

of pavement removal on the plan; (5) gravel areas to be seeded need to be shown; (6) Basin Spillway shall be moved further to the east away from the steep slopes; and (7) spot elevations and drainage flow arrows in the areas of the pumps shall be added” (Id.);

- f. As an additional condition precedent, Meena “is required to pay all of the Board’s expenses associated with Northpoint Engineering’s review of the various plans and documents and participation in the various hearings of this matter” (Id. ¶ 97)
- g. Mr. Lewis of Northpoint Engineering and the Planning Board Chair “are authorized to determine together if the conditions precedent have been met” (Id. at 98); and
- h. “[T]he following additional conditions subsequent are imposed on the Applicant, its successors and assigns: (i) the Applicant must provide to the Town a complete set of “as built” plans covering the USTs, canopies, the Stormwater Management infrastructure, impervious dumpster pad and landscaping as well as a copy of the UST Application that was approved by DES; (ii) the Applicant must comply with all required testing of the public water supply well on the Property, including but not limited to the quarterly testing of the water for VOC’s with the results of the same to be provided to the Town’s Board of Selectmen on a timely basis; (iii) the Applicant shall comply with all aspects of the Spill Prevention Control and Countermeasure Plan and Stormwater Management Plan tendered as part of this Application process; (iv) the Applicant shall obtain all

necessary State permits for operation of the business as proposed and shall provide copies of all such permits to the Town for its file on the Property; and (v) the Applicant shall operate the business on the Property only between the hours of 6 a.m. and 11 p.m. seven (7) days a week and that the gas/diesel pumps shall be operational only during such hours (§ 99).”

25. Thereafter, the Planning Board held another public meeting on August 7, 2023 to “clarify” the July 13th Notice of Decision. This resulted in the Planning Board issuing an amended notice of decision dated August 8, 2023 (“Amended Notice of Decision”). The quoted material above was the same in the Amended Notice of Decision.

26. Around that same time, Meena provided the Planning Board with a revised set of plans dated August 7, 2023. Meena made further revisions to the plan, including the most recent made in December of 2023.

27. The Planning Board held a meeting on November 30, 2023 regarding the conditions precedent. That meeting began at 6:00 pm, despite the meeting being posted as starting at 6:30 pm. At the meeting, the Planning Board determined that the conditions precedent had been met.

28. At its meeting on December 21, 2023, the Planning Board acknowledged that the November 30, 2023 meeting was not properly posted. The Planning Board also noted that the public had brought up several other items that needed more consideration, including the spillway not being reflected accurately on the plat and Dr. Newton noticing differences in elevation on the plat. As a result, the Planning Board decided it would hold a hearing on these issues on January 4, 2024.

29. On January 4, 2024, the Effingham Planning Board unanimously found that the conditions precedent have all been met.

30. Planning Board Chair George Bull subsequently signed the notice of decision regarding the January 4, 2024 decision, which, strangely, is dated February 22, 2024.⁸

31. The February 22, 2024 notice of decision states that the conditions precedent were based on the Amended Notice of Decision.

32. The petitioners now appeal the Planning Board's decision to conditionally approve Meena's site plan application.

ANALYSIS

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

34. "Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable." RSA 677:15, I.

35. The Planning Board's conditional approval of Meena's Site Plan Application is both illegal and unreasonable.

36. The Planning Board was required to review Meena's site plan application in accordance with the Town's Site Plan Review Regulations.

37. "The purpose of the Site Plan Review process is to *protect the public health, safety, and welfare*; to promote balanced growth; to promote the timing of development to prevent premature and uncoordinated development of land without the adequate provision of public services and facilities; to ensure sound site utilization; *to avoid development which may result in*

⁸ Undersigned received a copy of this signed notice of decision on January 25, 2024, so it must have been signed on that day or earlier.

negative environmental impacts; and to guide the character of development.” (Site Plan Review Regulations at §2 (emphasis added).)

38. Meena’s site plan application is not copacetic with the purpose of the Town’s Site Plan Review Regulations and violates its Zoning Ordinance. Its many defects were brought before the Planning Board during the site plan review process.

39. Meena’s application constitutes a “Major Site Plan Review,” thereby triggering section 6.4 of the Town’s Site Plan Review Regulations. Meena’s application is deficient regarding section 6.4(J) of the Site Plan Review Regulations, which states as follows:

Pollution Control: To avoid undesirable and preventable elements of pollution such as noise, smoke, soot, particulate, or any other discharges into the environment which might prove harmful or a nuisance to persons, structures, groundwater, or adjacent properties. The applicant will employ the standards and technology available at the time. No plan shall be approved which does not appropriately protect groundwater and other natural resources from adverse conditions caused by the development.

40. The site plan does not “appropriately protect groundwater and other natural resources from adverse conditions caused by the development.” It takes a safe, environmentally stable site with existing viable commercial and residential uses and adds a use which is dangerous and threatening to the aquifer and abutters. Additionally, there is a need for better subcatchment delineation, and the design of the oil-water separation system will likely fail in extreme weather events.

41. Moreover, the site plan application is deficient in regards to section 6.4(I) of the Site Plan Review regulations, which states: “No increase in the peak flow of surface runoff should be permitted if such increased runoff passes beyond the property lines of the parcel upon which the development occurs, unless it is within an approved public storm drainage system.” As noted by Dr. Newton, the stormwater system here appears to be inadequate.

42. Deficiencies in the design of the stormwater management plan appear to run afoul of the rules for stormwater management systems set forth in Env-Wq 1507, especially as they relate to high load areas, bio retention basins, and liners.

43. The site plan application likewise fails to meet the requirements of section 6.4(L) of the Site Plan Review Regulations, which states as follows:

Unsuitable Land: Land of such character that it cannot safely be used for building purposes because of danger to health or peril from fire, flood, or other hazard shall not be platted for occupancy, nor for other use which would tend to increase the danger to health, life, or property or aggravate a flood hazard. Land subject to periodic flooding, poor drainage or other hazardous conditions, shall not be developed. No land described above and no land designated a flood zone or shown to be a bog, marsh, swamp area, area of high water table, or designated as wetlands, or any similar situation, or with slopes in excess of 15%, or ledge which is exposed, or land which is subject to an easement or right-of-way shall be developed.

44. Here, the location for the proposed gas station within the Town's groundwater protection district and adjacent to numerous residential wells, in addition to the historic use of the Property as a gravel pit with highly transmissive soils, make it uniquely unsuitable for a gas station. It constitutes land of such character that cannot safely be used.

45. Similarly, section 6.4(M) of the Site Plan Review Regulations states, "[t]he site plan shall provide for the safe and attractive development or change or expansion of use of the site and guard against conditions as would involve danger or injury to health, safety, or prosperity."

The site plan application here does not do so.

46. The Amended Notice of Decision barely even references the important fact that the Property is located within the Town's Groundwater Protection District.

47. The Planning Board appears to have erroneously believed that because Meena received a variance for a gas station, approving the site plan application was inevitable, regardless of the environmental concerns, the Property's location within an extremely sensitive

recharge area of the Ossipee Aquifer, and without bothering to do an environmental impact study.⁹

48. The Planning Board had ample evidence to find that contaminants from leaks and spills at the proposed gas station will infiltrate into the Ossipee Aquifer and migrate to the nearby public water supply well. The main system to protect the Ossipee Aquifer from such leaks and spills is the stormwater management system, which includes curbs, catch basins, an oil/water separator, and a bioretention basin. Overflow from the bioretention basin runs directly off the Property onto property owned by the New Hampshire Department of Transportation (“DOT”)¹⁰ into a small wetland that drains into Phillips Brook, which runs directly into Ossipee Lake. The stormwater management system as designed cannot handle the runoff from the Property as it is based on an incorrect interpretation of the watershed areas.

49. The Planning Board also failed to require the Fire Chief to sign off on the Spill Control and Countermeasure Plan as required under Section 2211 of the Zoning Ordinance.

50. The Planning Board also disregarded the front set back requirements of the Town’s Zoning Ordinance by allowing construction of a diesel canopy, diesel pump, oil water separators, and other storm management devises within the setback without the benefit of a variance.¹¹

51. The Planning Board improperly delegated to its chairman and consulting engineer discretionary decision making with respect to the conditions precedent, such as: “Basin Spillway shall be moved further to the east away from the steep slopes,” “clarification of the pavement removal on the plan,” and “spot elevations and drainage flow arrows in the areas of the pumps shall be added.”

⁹ The Lakes Region Planning Commission recommended an environmental impact analysis be conducted.

¹⁰ By letter dated August 24, 2022, DOT informed the Petitioners that the highway right-of-way could not be used as an integral part of Meena’s stormwater management plan.

¹¹ This is a subject of the petitioners’ ZBA appeal.

52. RSA 676:4, I (i) only permits final approval of a plan with conditions when the conditions are:

- (1) Minor plan changes...compliance with which is administrative and which does not involve discretionary judgment; or
- (2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or
- (3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards and agencies...

Conditions which do not meet the aforementioned criteria require a hearing and notice in accordance with RSA 676:4, I (d).

53. Matters such as how far to move the Basin Spillway so as to not impact steep slopes, the number and location of spot elevations and directional flow which in part allow you to check the accuracy and adequacy of drainage flows are not minor administrative items, especially when the petitioners have an expert who has disputed the validity of the applicant's calculations.

54. Additionally, the Amended Notice of Decision disregarded Section 6.5 of the Town's Site Plan Review Regulations, which state, in pertinent part, that: "All expenses and fees incurred during the review of the application shall be paid by the applicant prior to the approval."¹²

55. Although the Planning Board has attached both conditions precedent and conditions subsequent to the Amended Notice of Decision, they are inadequate to remedy the site plan application's deficiencies.

56. As a result, the Planning Board's decision to approve Meena's site plan application is

¹² The Planning Board addressed the issue at a public meeting on August 7, 2023.

both unlawful and unreasonable.

WHEREFORE, William Bartoswicz and Tammy McPherson respectfully request this Honorable Court:

- A. Declare that the Town of Effingham Planning Board acted illegally and/or unreasonably for the foregoing reasons; and
- B. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

William Bartoswicz and Tammy McPherson

By and through their counsel,

RANSMEIER & SPELLMAN, P.C.

Date: February 2, 2024

By: /s/Biron L. Bedard
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VERIFICATION

I swear or affirm that the statements in this Petition of Certiorari Appeal of Planning Board Decision Pursuant to RSA 677:15 are true and accurate to the best of my knowledge and belief.

Date: February 2, 2024

/s/ Tammy McPherson
Tammy McPherson

/s/ William Bartoswicz
William Bartoswicz