

STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

William Bartoswicz and Tammy McPherson

v.

Town of Effingham and Town of Effingham Zoning Board of Adjustment

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

**Appeal of Zoning Board of Adjustment Decision Pursuant to RSA 677:4**

William Bartoswicz and Tammy McPherson, by and through their attorneys, Ransmeier & Spellman, P.C., file this appeal of the Town of Effingham Zoning Board of Adjustment's decision to deny their appeal challenging the Town of Effingham Planning Board's July 11, 2023 decision to conditionally approve Meena, LLC's site plan application, stating in support thereof as follows.

**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 Zoning Board of Adjustment ("ZBA"), which have a mailing address of 68 School Street, Effingham, New Hampshire 03882.

## **JURISDICTION AND VENUE**

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

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 is located within both the Town's Groundwater Protection District and Rural Agricultural District, and 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.

8. 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.

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, 212-2024-CV-00017.)<sup>1</sup>

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

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<sup>1</sup> Docket No. 212-2024-CV-00017 is still pending before this Court and is a related appeal concerning those aspects of the Planning Board's July 11, 2023 decision that were not based upon the terms of the Town's Zoning Ordinance.

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 Zoning 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." (Zoning 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 gas 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

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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.

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. (Zoning Ordinance at Art. 22, Sec. 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 against Meena on or about May 13, 2021, prohibiting Meena from continuing its site work activity at the Property.<sup>5</sup>

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.<sup>6</sup>

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.

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

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

<sup>4</sup> Paragraph 12 of the July 13, 2023 Planning Board 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 Planning Board’s 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.”

<sup>5</sup> The cease-and-desist order was lifted on or about September 5, 2023.

<sup>6</sup> As discussed in more detail below, Meena has claimed it was able to “operate” the store on May 16, 2023, over two years after the cease-and-desist order was issued.

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>7</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 and the size of the convenience store.

23. Throughout this process, the petitioners 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 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

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

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 (“Amended Notice of Decision”). The quoted material above was the same in the Amended Notice of Decision

29. 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.

30. Of particular relevance here, these plans, like the prior plans submitted to the Planning Board, have the diesel canopy, diesel pump, gasoline pumps, fuel tanks, 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 petitioners subsequently appealed the Planning Board’s decision to both the ZBA, regarding those aspects of the decision that were based upon the terms of the Town’s Zoning Ordinance, on or about September 13, 2023<sup>8</sup> and to this Court, regarding those aspects of the Planning Board’s decision that were not based upon the terms of the Town’s Zoning Ordinance (Docket No. 212-2024-CV-00017), on or about February 2, 2024.<sup>9</sup>

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<sup>8</sup> Ossipee Lake Alliance initially filed the appeal to the ZBA with Mr. Bartoswicz, and Ms. McPherson, but it later withdrew as an appellant and is, therefore, not a party to this appeal.

<sup>9</sup> 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.

33. 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.

34. 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.

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

36. Planning Board Chair George Bull subsequently signed the notice of decision regarding the January 4, 2024 decision, which, strangely, is dated February 22, 2024.<sup>10</sup>

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

38. While the Planning Board process was underway, the petitioners' September 13, 2023 appeal was still pending before the ZBA.

39. The ZBA appeal included two main issues: the Town's 50-foot setback requirements and the size of the convenience store on the Property.

40. On January 3, 2024, the ZBA held a hearing on the petitioners' September 13, 2023 appeal. At the hearing, despite the documents that had been provided to the ZBA and public testimony, the ZBA did not determine that the Planning Board erred.

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<sup>10</sup> 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.



41. During the January 3<sup>rd</sup> hearing, counsel for the petitioners, 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.

42. Ultimately, the ZBA voted against granting the petitioners' appeal. They issued a decision to that effect dated January 3, 2024.<sup>11</sup>

43. Thereafter, the petitioners timely filed a motion for rehearing with the ZBA on or about February 1, 2024.

44. In the motion for rehearing, the petitioners argued that the ZBA erroneously voted to deny their appeal and that the January 3<sup>rd</sup> ZBA hearing was replete with numerous deficiencies, including, but not limited to, the fact that the Lakes Region Planning Commission ("LRPC") was not notified of the hearing despite being a party entitled to notification because Meena's application involves a development of regional impact.

45. The ZBA held a meeting on the issue on February 21, 2024, at which the ZBA addressed the motion for rehearing and voted to grant it for the "limited purpose" of giving LRPC the opportunity to be heard and that only LRPC would be able to speak at the rehearing, which was scheduled for March 6, 2024.<sup>12</sup>

46. On or about March 5, 2024, counsel for the petitioners sent the ZBA a letter in anticipation of the March 6, 2024 rehearing. In the letter, counsel argued that the ZBA's decision to grant the motion for rehearing for the "limited purpose" of giving LRPC the opportunity to be heard and that only LRPC would be able to speak at the rehearing was in error. The letter further

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<sup>11</sup> The ZBA did not provide the petitioners with a written notice of decision until late morning on February 1, 2024.

<sup>12</sup> To date, the minutes of the February 21, 2024 meeting are not available.

noted that the notices the Town had sent out in advance of the rehearing were somewhat contradictory and unclear as to who would be allowed to speak at the March 6<sup>th</sup> hearing.

47. The ZBA held the limited rehearing on March 6, 2024. No authorized representative from LRPC appeared at the hearing and the ZBA did not allow anyone else to provide comments. Rather, the ZBA, without seeming to consider the arguments in the petitioners' motion for rehearing, "determined that no new evidence or testimony had been offered" and voted 3-2 to deny the petitioners' appeal. (See March 8, 2024 ZBA Notice of Decision.)

48. In particular, the March 8, 2024 ZBA Notice of Decision states, in part, as follows: "the majority of the ZBA found that the Applicant did NOT abandon a previously obtained 2021 Special Exception, which, under Article 7, Section 702 of the EZO affords qualifying uses and structures relief from, *inter alia*, otherwise applicable dimensional constraints (i.e. setbacks, square footage minimums, etc.)."<sup>13</sup>

49. The petitioners now appeal that decision.

### **ARGUMENT**

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

51. "Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing . . . ." RSA 677:4.

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<sup>13</sup> This exact language was also used in the ZBA's January 3, 2024 Notice of Decision.

52. “The petition shall set forth that such decision or order is illegal or unreasonable, in whole or in part, and shall specify the grounds upon which the decision or order is claimed to be illegal or unreasonable.” Id.

53. Here, the ZBA’s decision to deny the petitioners’ appeal challenging the Planning Board’s July 11, 2023 decision to conditionally approve Meena’s site plan application, the ZBA’s granting of only a limited rehearing, and the ultimate decision to again deny the petitioners’ appeal following the limited rehearing are illegal and unreasonable.

54. 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. In particular, this appeal concerns two primary issues: the Town’s 50-foot setback requirements and the size of the convenience store on the Property.

55. At the outset, however, the petitioners first address some overarching issues regarding the ZBA hearings in this matter.

**A. Issues Regarding the ZBA Hearings**

56. First, as noted in the petitioners’ February 1, 2024 motion for rehearing, which is incorporated herein by reference, the January 3<sup>rd</sup> 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.

57. Additionally, the ZBA did not provide the petitioners with a written notice of decision until late morning on February 1, 2024, 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.”).

58. Furthermore, LRPC was not notified of the January 3<sup>rd</sup> hearing despite being a party entitled to notification because Meena’s application involves a development of regional impact.

59. Although the ZBA did rectify the issue of LRPC not being provided proper notice, its decision to limit the testimony of the rehearing to only LRPC was in error and runs afoul of RSA chapter 677 and publicly available guidance. The ZBA was not entitled to conduct a limited rehearing. Rather, the hearing should have been conducted the same as any other public hearing.

60. If the ZBA “grants the motion for rehearing, an entirely new hearing must be advertised and appropriate notice given to abutters. At the time of the new hearing, all evidence is to be considered and the hearing conducted in the same manner as the original hearing although presumably, in the interest of saving time, the board could accept as part of the record testimony and exhibits introduced at the first hearing.” Loughlin, 15 N.H. Practice: Land Use Planning and Zoning, 4<sup>th</sup> ed., § 21.18, at 340 (LexisNexis Matthew Bender 2010); see also Board of Adjustment in New Hampshire: A Handbook for Local Officials (noting that if the ZBA

“decides to grant the rehearing, a new public hearing is scheduled with new notice to everyone and the process moves forward.”<sup>14</sup>

61. The Effingham ZBA Rules of Procedure also provide that public hearings the ZBA conducts shall allow the applicant and their representatives to speak, as well as those in favor of the application, and those opposed to the application. (ZBA Rules of Procedure at 6.)

62. Here, the ZBA issued multiple notices for the March 6<sup>th</sup> hearing. One, advertised in the Conway Daily Sun on February 22, 2024, states, in part, as follows:

The ZBA is notifying all abutters again, including the Lakes Region Planning Commission (LRPC) for any additional information relevant to the case.

The ZBA will reopen the case hear any input from LRPC and consider that input at a hearing on Wednesday, March 6<sup>th</sup> at 7:00pm at the Effingham Town Hall.

Any interested parties should plan to be present for the scheduled ZBA meeting . . .

63. Another notice, sent in the mail, states, in part, as follows:

The ZBA is notifying all abutters again, including the Lakes Region Planning Commission (LRPC) so that the LRPC may be afforded an opportunity to offer any additional information relevant to the case.

The ZBA will reopen the case hear any input from only the LRPC, if any, and consider that input at a hearing on Wednesday, March 6<sup>th</sup> at 7:00pm at the Effingham Town Hall.

Any interested parties should plan to be present for the scheduled ZBA meeting . . .

64. Both notices provide that if “you are unable to attend in person, you may submit your comments regarding the application in writing to the Town of Effingham Zoning Board of Adjustment . . . .”

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<sup>14</sup> Available on the New Hampshire Department of Business and Economic Affairs website: <https://www.nheconomy.com/getmedia/af1c9f31-db3c-427d-83f8-ce5befd0e2e3/Chapter-IV-Appeal-from-a-Board-Decision-ZBA-Handbook-2023-1.pdf> at IV-2 (last accessed March 29, 2024).

65. The notices are unclear as to who would be allowed to speak at the March 6<sup>th</sup> hearing and provided a chilling effect for individuals who are not part of the LRPC from speaking or even attending the hearing.

66. That chilling effect became a complete freeze when the ZBA determined, at the March 6<sup>th</sup> hearing, after no authorized representative from LRPC appeared, that no one else would be allowed to provide additional comments. Rather, the ZBA “determined that no new evidence or testimony had been offered” and voted 3-2 to deny the petitioners’ appeal. (See March 8, 2024 ZBA Notice of Decision.)

67. The ZBA should not have had a “limited” rehearing and the public should have been made fully and clearly aware of their ability to participate in a full rehearing.

68. The ZBA also should not have denied the petitioners’ appeal.

**B. The ZBA Erroneously Denied the Petitioners’ Appeal**

69. The petitioners’ appeal to the ZBA concerned the Planning Board’s decisions regarding the Town’s Zoning Ordinance in its site plan review process for Meena’s site plan application.

70. 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.)

71. 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.”

**i. 50-foot Setback Requirements**

72. 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, fuel tanks, oil water separators, and other storm management devices within the Town Zoning Ordinance’s 50-foot setback requirements.

73. 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.

74. Even Meena’s proposed site plans appear to acknowledge that these setback distances are applicable.

75. The Town’s Zoning Ordinance defines a “structure” 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.)

76. The diesel canopy, diesel pump, gasoline pumps, fuel tanks, 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.

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

78. Nevertheless, during the January 3<sup>rd</sup> 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 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 petitioners 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 requirements.

79. Additionally, contrary to the further arguments of counsel for the Planning Board at the January 3<sup>rd</sup> hearing, the petitioners were 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) of the Zoning Ordinance.<sup>15</sup> 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, 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, such as Article 4, Section 402. Meena did not request another variance, but it should have.

80. 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.

81. In both its March 8, 2024 Notice of Decision and its January 3, 2023 Notice of Decision, the ZBA stated that “the majority of the ZBA found that the Applicant did

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<sup>15</sup> Article 22, Section 2207A(8) prohibits the development or operation of gasoline stations with the Town’s Groundwater Protection District.



NOT abandon a previously obtained 2021 Special Exception, which, under Article 7, Section 702 of the EZO affords qualifying uses and structures relief from, *inter alia*, otherwise applicable dimensional constraints (i.e. setbacks, square footage minimums, etc.).” Such reasoning, however, was in error.

82. The diesel canopy was not in existence at the time the ZBA granted the special exception. Additionally, the underground storage tanks Meena installed on the Property in 2021, after the special exception was granted, are substantially larger than the tanks Boyles Market used before their removal in 2015.

83. In addition, Article 7, Section 703 of the Zoning Ordinance considers non-conforming uses to be abandoned if discontinued for two years or more. The January 3<sup>rd</sup> Notice of Decision states that the 2021 Special Exception was not abandoned, but the ZBA seems to conflate its reasoning about the setback requirements with the use of the convenience store on the Property.

84. “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.

85. 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. (See the certified record from Docket No. 212-2021-CV-151 at CR 119). 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.

86. Nor does the special exception Meena received in 2021, before Attorney Serge's determination, change that. The special exception Meena received to add gasoline 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 has argued, or the ZBA has found, that the location of the gasoline 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.

87. 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. The ZBA's decisions to the contrary were in error.

88. Similarly, the diesel canopy, oil water separators, and other storm water management devices were never raised in the special exception application and could not

have been covered and were not covered in the ZBA decision to grant the special exception.

89. Accordingly, the ZBA erred when it denied the petitioners' appeal.

## **ii. The Convenience Store**

90. Moreover, the ZBA and 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.

91. 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.

92. Contrary to Meena's arguments before the ZBA, neither the cease-and-desist order nor the court-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.<sup>16</sup>

93. Furthermore, Meena has claimed 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 petitioners' knowledge, Meena has not reopened the store since the cease-and-desist order was lifted in September 2023, thus negating its

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<sup>16</sup> At the Planning Board's August 7, 2023 meeting, Planning Board alternate member Michael Cahalane noted that Meena acknowledged it would assume all liability in the event the Planning Board required any changes or alterations to their plans after installing the underground storage tanks.

arguments that the cease-and-desist order was preventing it from operating. Accordingly, the convenience store is not a lawful nonconforming use.

94. 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.").

95. Moreover, as stated above, 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 10, Section 1031. The ZBA's decisions to the contrary were, therefore, in error.

### **CONCLUSION**

96. Based on the foregoing and the record in this matter, the Court should declare that the ZBA acted illegally and/or unreasonably.

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

- A. Declare that the Town of Effingham Zoning Board of Adjustment 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: April 5, 2024

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