THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

William Bartoswicz, et al.

v.

Town of Effingham, et al.

Docket No. 212-2024-CV-00017

ORDER

The petitioners, William Bartoswicz and Tammy McPherson, bring this action against the defendants, Town of Effingham ("Town") and the Town of Effingham Planning Board ("Planning Board"), appealing the Planning Board's decision to conditionally approve a site plan application filed by intervenor Meena, LLC ("Meena").[1] Upon review of the parties' arguments and the applicable law, for the following reasons, the decision of the Planning Board is AFFIRMED.

Factual Background

This matter concerns Meena's site plan application for a gas station, convenience store, and apartments on property located at 41 NH Route 25 in Effingham ("Property"). Certified Record ("CR") at p. 3. The Property is located within the Town's Groundwater Protection District. CR 45. As a result of the creation of the Groundwater Protection District, gas stations are now prohibited on the Property as a matter of right.

[1] Meena intervened in the matter on February 16, 2024. (Doc. 4.)

CR 1146. Before the creation of the Groundwater Protection District, however, the Property was the site of a gas station, which closed and whose underground storage tanks were removed in 2015, ultimately leading to the abandonment of the gas station for the purposes of zoning. CR 1, 150.

After acquiring the Property in February 2021, Meena submitted its site plan review application with the Town. CR 1. Meena then appeared before the Planning Board, on May 6, 2021, for the first of numerous hearings regarding the application. CR 45. Around the same time, Meena began work on underground tanks on the Property, which resulted in the Town issuing a cease-and-desist order on or about May 13, 2021, prohibiting Meena from continuing its site work activity at the Property. CR 47.

Thereafter, the Planning Board referred Meena to the ZBA for a variance due to the Property's location within the Ground Water Protection District. On or about August 4, 2021, the ZBA issued that variance, with conditions, to permit Meena to operate a proposed gasoline station and convenience store on the Property. CR 68. The Planning Board then found Meena's site plan application complete on February 3, 2022. CR 223. The Planning Board determined that Meena's proposed development may have regional impact, so surrounding communities were notified and provided the opportunity to offer feedback. CR 227. The Lakes Region Planning Commission suggested that the Planning Board retain a third-party consultant to review the Project. CR 246. The Planning Board agreed with this suggestion and retained Northpoint Engineering, LLC ("Northpoint"). CR 251.

Northpoint provided its first detailed comments about the application's stormwater management and spill prevention plan under letter dated April 26, 2022. CR

251. Both Meena, CR 257, and Meena's engineering firm, Horizons Engineering, LLC ("Horizons"), responding to Northpoint's comments. CR 280. Northpoint provided additional technical information to the Planning Board on July 7, 2022, CR 283, to which Horizons again responded. CR 293. At the Planning Board's request, Meena submitted updated plans on September 8, 2023. CR 309. Northpoint provided technical review based on the revised plan set on September 28, 2022. CR 440. Horizons responded by noting its willingness to adjust the plans according to Northpoint's comments. CR 448. Under letter dated April 24, 2023, Northpoint signed off on the stormwater management design and plan and spill prevention plan subject to two minor comments. Northpoint concluded by stating that:

> the submitted material appears to meet the applicable criteria of Town of Effingham Site Plan Regulations and the Town of Effingham Zoning Ordinance Section 2210 Performance Standards of the Groundwater Protection District. In addition, the submitted material appears to meet general industry standards and to be in compliance with the NH Stormwater Manual. We have no further comments relative to the proposed stormwater management design.

CR 505. The Planning Board reviewed the revised application and corresponding review materials at its meetings on June 6 and June 13, 2023. A site visit was conducted on June 19, 2023, followed by another meeting on June 20, 2023. CR 755-95.

Throughout this lengthy process, the petitioners were actively involved and attended the Planning Board hearings. See, e.g., CR 131, 211, 222, 226, 248, 260, 262, 302, 478, 481, 730, 755, 781. Additionally, petitioners hired Geoscience Solutions, LLC to conduct a review of the site plan application and submitted various testimony from Dr. Robert Newton in which he expressed multiple concerns regarding the site plan application. See CR 226, 291, 730, 736, 740, 755, 757, 759, 762, 767, 959, 1251, 1393.

On July 11, 2023, the Planning Board voted to approve Meena's application and approve the notice of decision. CR 796-800. The original decision was slightly modified on August 8, 2023. CR 936. The Notice of Decision is thirteen pages long and contains 100 paragraphs of specific findings of fact made by the Planning Board in support of its decision. CR 936. On January 4, 2024, the Planning Board determined that Meena had satisfied all conditions precedent to final Planning Board approval of its application. CR 1057. The Planning Board Chair then signed the notice of decision and related materials. CR 968, 1003, 1048, 1066.

Petitioners appealed that January 4, 2024, decision to the ZBA and to this Court.[2] This decision follows.

Standard of Review

"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. Upon review of the substance of the action, "[t]he court may reverse or affirm, wholly or partly, or may modify the decision . . . when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable." RSA 677:15, V. However, such review is limited. Ltd. Editions Props., Inc. v. Town of Hebron, 162 N.H. 488, 491 (2011). The Court "must treat the factual

[2] The ZBA denied petitioners' appeal on March 6, 2024, after which petitioners appealed the ZBA's decision to this Court. See Docket No. 212-2024-CV-00055 (the "ZBA Appeal"). By Order dated October 1, 2024, the Court dismissed the ZBA Appeal.

findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law." Id. The Court's review is not to determine whether it agrees with the Board's factual findings, but whether there is evidence upon which they could have been reasonably based. Summa Humma Enters., LLC v. Town of Tilton, 151 N.H. 75, 79 (2004). "The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable." Id.

Analysis

On appeal, petitioners allege that the Planning Board's decision was unreasonable and unlawful based on several grounds. The Court shall address each, in turn.

First, however, the Court addresses Meena's Motion for Order Requiring Plaintiffs to Post a Bond. RSA 677:20, I, effective as of August 2022, provides that

> [w]henever an appeal to the superior court is initiated under this chapter, the court may in its discretion require the person or persons appealing to file a bond with sufficient surety for such a sum as shall be fixed by the court to indemnify and save harmless the person or persons in whose favor the decision was rendered from damages and costs which he or she may sustain in case the decision being appealed is affirmed.

As noted by Meena, besides conferring the Court with significant latitude to require a bond under this section, the plain language of the statute does not provide the Court with a clear standard to apply. That said, the Court employs a general balancing test in an effort to accomplish the presumed purpose of the law (to prevent frivolous land use appeals and to indemnify permit holders) while taking measures to protect meritorious appeals. Cf. Damaskos v. Bd. of Appeal of Bos., 359 Mass. 55, 64 (1971).

The record reflects that the petitioners have filed five appeals concerning Meena's proposed gas station. The first case was an appeal of the ZBA's grant of a variance to Meena. CR 68. It was denied by the Court, CR 265, with no appeal taken to the New Hampshire Supreme Court. The second case was an appeal of the decision not to require a Special Use Permit in light of the issuance of the variance. That case was also denied by the Court with no appeal taken. CR 471. The third case was an appeal of the Planning Board's conditional notice of decision. CR 935. It was non-suited without prejudice given that various conditions precedent had not yet been satisfied. CR 935. This case represents the fourth appeal, and the fifth appeal lodged by the petitioners is discussed above and referred to as the ZBA Appeal. See supra n.2. Petitioners have not succeeded with any of their appeals.

In addition to considering the merits of petitioners' appeal, the sheer number of unsuccessful appeals filed by the petitioners concerning Meena's proposed development is a factor that supports the imposition of an appeal bond in this case. However, those are not the only factors before the Court. The Court also acknowledges that Meena appears to have originally commenced construction on its project prior to obtaining all necessary permits, which resulted in the Town issuing a cease-and-desist. While Meena contends that it relied upon advice from the Town, the fact remains that a cease-and-desist was issued and is part of the posture of the case. Moreover, the proposed development includes a use that is no longer permitted on the Property, given its inclusion in the Ground Water Protection District. Likewise, the record reflects that the Property does serve as a valuable ecological resource to the Town. It is reasonable for abutters (here, the petitioners whose wells are located nearby) to have an interest in

the project. The Court also notes the size of the bond requested by Meena. In seeking a bond in the amount of $603,450.85, with no supporting details of note, Meena asks the Court to require an incredibly high bond about which the Court is somewhat skeptical. With these factors in mind, the Court exercises its discretion not to impose an appeal bond in this case. While close, the Court sees no bad faith and ultimately cannot assent to Meena's request for such a large bond given the facts of this case. As such, Meena's motion for bond is DENIED.

The Court now moves to the merits of the petitioners' appeal. First, petitioners argue that Meena's site plan does not comply with Section 6.4(J) of the Town's Site Plan Review regulations concerning pollution control in that it does not appropriately protect groundwater and other natural resources. However, the record contains substantial evidence that the Planning Board considered pollution control in this case. For one, correspondence from the Town's peer reviewer specifically concludes that Meena's submittals appear to comply with the Town's Site Plan regulations and the Town's Zoning Ordinance. CR 505. Moreover, Section 6.4(J) was specifically addressed by the Planning Board during the public hearing process, CR 776, and in its written decision. CR 944. The fact that petitioners also introduced evidence on this topic, which the Planning Board ultimately rejected, does not render the underlying decision unlawful. See Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 519 (2011) (stating, in context of a zoning board of appeals, boards are to resolve conflicts in evidence and assess the credibility of the offers of proof).

Petitioners also allege that the site plan is deficient with respect to Section 6.4(I) of the Town's Site Plan Review regulations, which prohibits increases of peak flow

surface runoff. CR 1164. Petitioners contend that the stormwater system here is inadequate and cite to testimony of Dr. Newton in support. However, the record also contains testimony from Meena that there is no increase in peak flow. CR 281. This conclusion was echoed by the Town's peer reviewer, CR 253, and specifically addressed by the Planning Board during public hearing, CR 776, and in its written decision. CR 944. To the extent that petitioners assert that the proposed project would violate certain DES regulations concerning stormwater, the Town's peer reviewer also testified that the submitted materials appear to meet industry standards as well as the NH Stormwater Manual. CR 505. Again, the fact that the Planning Board ultimately came to a different conclusion from what the petitioners desire does not result in an unlawful decision given the contents of the record before the Court.

Next, petitioners argue that the plan fails to satisfy Section 6.4(L) of the Site Plan Review regulations, which govern so-called "unsuitable land." CR 1165. Petitioners assert that the location of a gas station in the Groundwater Protection District and next to wells with transmissive soils make it unsuitable for its proposed use. The Planning Board specifically discussed this provision of the regulations. CR 778. The issue was also addressed in the Planning Board's decision. CR 945. In both, the Planning Board concluded that the Property was suitable as it did not contain steep slopes (greater than 15 degrees) or wetlands. The record supports this finding. CR 1052-54.

Petitioners further contend that the proposed project violated Section 6.4(M) of the Site Plan Review regulations, which requires safe and attractive development that guards against conditions as would involve danger or injury to health, safety, or prosperity. CR 1165. To this point, petitioners contend that the Planning Board erred in

rejecting Dr. Newton's testimony concerning leaks from the proposed underground tanks that would endanger the Ossipee Aquifer. However, the record reveals that the Planning Board found that the proposed development improved safety by removing one existing driveway. CR 778-79. With respect to the fear of leaky tanks, such argument is not only overly speculative but also ignores the fact that the tanks were approved by the New Hampshire Department of Environmental Services. CR 17-20. Furthermore, the Spill Prevention Control and Countermeasure Plan was approved by the Town's peer reviewer as compliant with DES guidelines. CR 756. Finally, hypothetical future violations are inadequate to reject an otherwise compliant application. Cf. Raymond v. Town of Plaistow, 176 N.H. 111, 118 (2023).

Petitioners also allege that the Planning Board erred in not obtaining Fire Chief sign off about the Spill Prevention Control and Countermeasure Plan, as required by Section 2211 of the Town's Zoning Ordinance.[3] However, the record indicates that the fire chief did, in fact, review the plan and concluded that the submitted plan appears to comply with the Town's Zoning Ordinance. CR 951. The Fire Chief also understood that such plan was not required by DES. CR 951.

Petitioners also contend that the Planning Board improperly delegated discretionary decision-making authority over the project's spillway to the board's Chair and peer reviewing engineer, in contravention of RSA 676:4. However, the Court finds that the condition at issue does not involve discretionary judgment; rather, the Town's peer reviewing engineer was tasked with administratively adjusting the location of the

[3] To the extent that this argument involves an application of the Town's Zoning Ordinance, RSA 677:15, I-a(a) requires an appeal to the board of adjustment prior to appeal to Court. The Court assumes without finding that this argument is preserved on appeal.

spillway from a technical perspective. Moreover, the issue of the spillway move was before the Planning Board on November 30, 2023, when the board reviewed the project's conditions precedent. CR 961-62.

Conclusion

The record in this case consists of more than 1400 pages. It reflects an extensive and iterative application process that spanned three years during which time Meena's plans were adjusted based on technical review of the project. Incredibly, the application on appeal was heard by the Planning Board no fewer than 22 times. It was subjected to extensive peer review. The fact that petitioners disagree with the Planning Board's ultimate decision does not render the decision unreasonable or unlawful, considering the contents of the certified record. See RSA 677:15, V.

In light of the foregoing, the decision of the Planning Board that is on appeal is hereby AFFIRMED. Petitioners' appeal is DISMISSED.

SO ORDERED.

Date: October 1, 2024

Michael A. Klass
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/01/2024