

STATE OF NEW HAMPSHIRE

CARROLL, SS

SUPERIOR COURT

No. 212-2021-CV-00151

GREEN MOUNTAIN CONSERVATION GROUP, OSSIPEE LAKE ALLIANCE, WILLIAM
BARTOWSWICZ, AND TAMMY McPHERSON

v.

TOWN OF EFFINGHAM and
TOWN OF EFFINGHAM ZONING BOARD OF ADJUSTMENT

INTERVENOR MEENA LLC'S TRIAL MEMORANDUM

NOW COMES the Intervenor in the above-captioned matter, MEENA, LLC, ("MEENA" or "Applicant") by and through its' attorneys, Devine, Millimet & Branch, Professional Association, and submits the following Trial Memorandum to aid the Court in its analysis of this appeal.

Introduction

The Zoning Board of Adjustment ("ZBA") acted appropriately in analyzing the five (5) factors required for the granting of the Variance Application submitted by MEENA to the ZBA. The Application sought a variance to allow MEENA to resume operations of a previously existing gas station on a portion of commercial property acquired by MEENA abutting Route 25 in Effingham, New Hampshire. Certain of the petitioners lack standing to even bring this appeal. The petitioners that do have standing to challenge the ZBA's decision can point to no fact or law decided incorrectly by the ZBA. The ZBA analyzed all of the relevant criteria over a series of meetings and when necessary sought legal counsel to aid in their decision-making. The ZBA

fully and completely deliberated on the five (5) factors necessary for the granting of a variance and then granted the variance. This Court should affirm the ZBA's decision in all respects.

Relevant Factual and Procedural Background

Effingham adopted a Groundwater Protection District in May of 2011. *See* Certified Record ("CR") at Ex. A. 53.

On or about March 30, 2021, MEENA was granted a special exception so that it could operate an auto service station. CR at 10. No appeal was taken of this decision. During this process MEENA had sought the advice and guidance of town officials regarding what approvals were necessary to resume operations of the convenience store and apartments and to reactivate the gas station on the property that it had acquired.

Originally, no mention was made of the Groundwater Protection District. Initially the Town and MEENA believed that MEENA only needed a special exception to operate as an auto service station on the property. Only later did MEENA learn of the existence of the Groundwater Protection District (the "GPD").

On or about May 14, 2021, MEENA submitted an application to the ZBA for a variance from the GPD. CR at 1-21.

The ZBA held its first meeting on June 29, 2021, at which point it declared that the Application was complete. CR at 36.

The ZBA took public comment and received public filings but did not complete its deliberations on that night and instead continued the hearing for further discussion. CR at 41.

The ZBA reconvened on July 8, 2021 to continue the public hearing over the application. CR at 41. During this meeting, the ZBA specifically analyzed whether the project triggered a regional impact and concluded that it did not. CR at 41.

The ZBA reconvened on July 20, 2021 for a continuation of the public hearing. It was not until the end of this meeting that the ZBA closed the public hearing. CR at 47.

The ZBA began its deliberations at its next meeting on July 29, 2021 but concluded that it wanted the input from legal counsel and continued its deliberations one more time. CR at 55.

The ZBA completed its deliberations on August 4, 2021, when after a lengthy analysis encompassing the last two meetings, it voted 4-1 to grant the variance application. CR at 60.

The Petitioners filed a motion for rehearing, which was considered at a ZBA meeting on September 28, 2021, and denied. CR at 62.

The appeal to this court followed.

Applicable Legal Standard

The trial court, “in reviewing the decision of a zoning board of adjustment, is limited to a determination of whether, on the balance of the probabilities, the decision was unlawful or unreasonable.” *Rochester City Council v. Rochester Zoning Board of Adjustment*, 171 N.H. 271, 275 (2018) (citation and quotations omitted). “To the extent the ZBA made finding upon questions of fact properly before the court, those findings are deemed *prima facie* lawful and reasonable.” *Id.* Importantly, “[w]hen reviewing a decision of a zoning board of adjustment, the superior court acts as an appellate body, not as a fact finder.” *Chester Rod & Gun Club, Inc. v. Town of Chester*, 152 N.H. 577, 583 (2005). “The trial court does not sit as a ‘super zoning board.’” *Rochester City Council*, 171 N.H. at 275. Thus, “the trial court’s review is not to determine whether it agrees with the zoning board of adjustment’s findings, but to determine whether there is evidence upon which they could have been reasonably based.” *Chester Rod & Gun Club, Inc.*, 152 N.H. at 583.

The ZBA Properly Analyzed the Five Factors in Granting a Variance

The Certified Record reflects that for each of the five (5) criteria required to obtain a variance, the ZBA considered each factor independently and had substantive discussions regarding each of the factors. At the first meeting beginning its deliberative process, the ZBA analyzed each of the five factors with input and analysis from all of the ZBA members. CR 50-55. The Certified Record reflects that the ZBA engaged in detailed analysis of each of the criteria, weighing whether the evidence presented met the criteria. Positive and negative points were openly analyzed. At the end of this meeting, the ZBA decided to continue the meeting so it could seek legal guidance on the prior use of the property as a gas station.

At the next meeting on August 4, 2021, the ZBA continued to deliberate and analyze the fifth and final factor regarding hardship. The ZBA also considered whether additional safeguards should be required and concluded that it would require the Applicant to provide a storm water management plan as well as a spill prevention plan. The minutes reflect careful consideration of the application and the factors and a careful weighing of the evidence. After deliberating throughout most of the meeting, the ZBA called for a vote and voted on a 4-1 basis to grant the variance subject to the condition that a storm water management and spill prevention plan be provided. CR at 56-60.

Central to the ZBA's analysis was the information provided to the ZBA chair from the Department of Environmental Services ("DES"). The ZBA chair, Ms. Swanick, sought guidance from DES regarding the current safety protocols for underground gas tanks. CR at 68-77. The DES made clear in its written response that the system requirements presently are designed so that no release will occur. The DES can make such a statement because the DES now mandates double walled tanks, piping, sump tanks, spill buckets and the multiple alarms and sensors in

place. The DES further stated that it was not in favor of municipalities requiring that additional safeguards be provided because DES believed that its current safeguards were more than sufficient to ensure that no release into the groundwater would occur. CR at 68. These requirements now imposed on gas station operators by DES exceeded significantly the requirements in place when the Town of Effingham adopted the GPD in May of 2011. CR at 72 n. 5 (noting that DES amended its rules in 2012). It was not until after passage of the GPD that DES revised its regulations to require double-walled tanks as well as a multiple sensor system designed to detect even the smallest volume leaks. *See id.*

The ZBA considered the evolution of technology and evolution of safeguards at length and this evolution underpinned their conclusion that a variance would be appropriate because the factual predicate for the GPD had changed significantly since when the ordinance was first passed. The ZBA recognized this fact and properly relied on this changed circumstance. CR at 59.

This type of analysis is exactly the rationale for why variances from the strict application of zoning ordinances are permitted under particular circumstances. The Applicant, MEENA, in this case meets those requirements because its system is designed in a way that was not contemplated when the GPD was first put in place and MEENA will be subject to not only these new stringent construction and installation requirements, but also more stringent testing and inspection requirements moving forward. Thus, it was well within the ZBA's discretion to conclude that risk of a spill into the groundwater was so remote to justify granting the variance allowing the Applicant to use the property as a gas station as it was previously used.

The ZBA Properly Concluded That This Project Did Not Create a Regional Impact

Petitioners challenge the ZBA's decision not to declare that this project created a regional impact. This court should reject this argument because the petitioners never asserted that this was an actual error made by the ZBA in their motion for rehearing. *See* CR at 24-35. It is settled law that any issue not raised in a motion for rehearing is waived. *See* RSA 677:3, I; *Nbac Corp. v. Town of Weare*, 147 N.H. 328, 331 (2001).

Even were the court to find that it could consider this argument, the argument is without merit. The ZBA considered the issue of regional impact and determined that no regional impact existed given the new technology designed to eliminate the risk of a leak and the overall nature of the project. CR at 40-41.

The ZBA Chair Did Not Need to Recuse Herself

Petitioners also argue that ZBA Chair Swanick, who sits on the Planning Board as well, should have recused herself due to unexplained conflicts of interest. Petitioners point to no factual basis for why she should recuse herself and do not suggest that she is somehow biased or prejudged the application. *See* CR at 34; RSA 673:14, I. Even at the oral argument on this appeal, petitioners articulated no basis for why Ms. Swanick needed to recuse herself. Furthermore, the minutes from the ZBA do not reflect that the petitioners ever raised this issue before the ZBA until *after* the variance was granted. Finally, RSA 673:7 expressly permits a planning board member to serve on another local land use board.

The Petitioning Organizations Lack Standing

To achieve standing, the Petitioning Organizations – Green Mountain Conservation Group and Ossipee Lake Alliance (the “Organizations”) must show that “some direct, definite interest in the outcome of the action or proceeding.” *Golf Course Investors of NH v. Town of*

Jaffrey, 161 N.H. 675, 680 (2011). To make this showing, the court has developed a four factor test first set out in *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 545 (1979). Factor one considers the proximity of the challenging party's property. *Id.* at 545. Here, neither Organization owns property directly abutting the project. Green Mountain owns two lots in Effingham but this fact alone does not support standing. Factor two asks about the type of change proposed. *Id.* Here, the change is merely a re-establishment of a prior use of the property to once again operate as a gas station. The lack of a dramatic change in use further indicates a lack of standing. Factor three focuses on the immediacy of the claimed injury. *Id.* As the certified record reveals, there is no claim of an immediate injury. All the Organizations claims is that there is a risk that they cannot define or quantify that a hypothetical future spill might occur at the gas station and if such a spill occurred there is a hypothetical risk that the spill could reach the underground aquifer. This concern is highly speculative and remote both in likelihood of occurrence and timing. This factor also favors a finding of no standing. The fourth factor asks about the Organization's participation in the administrative proceedings. This factor is the only other factor that could possibly support standing because it is undisputed that the Organizations did actively participate in the ZBA meetings. On balance, however, the remaining three factors all demonstrate that the Organizations do not have independent standing.

In addition to affirming the ZBA's decision, this court should hold that the Organizations lack independent standing to pursue appeal of the ZBA decision.

Petitioners Can Point To No Lack of Notice

For the first time in their complaint, petitioners also allege that possibly an abutter did not receive notice. This argument was not raised in petitioners' motion for rehearing. CR at 24-35. Thus, as noted above, this argument is not properly before this court. *See RSA 677:3, I.*

Furthermore, the allegation in the complaint does not actually claim a lack of notice and the petitioners have presented no evidence in the certified record or otherwise to show any lack of notice. See Complaint at ¶¶ 74-77. For these reasons, this argument likewise should be rejected.

CONCLUSION

The ZBA held multiple meetings to obtain comment from all interested parties. The ZBA then deliberated over a series of two meetings, analyzing each of the five (5) variance factors. The ZBA ultimately concluded that MEENA was entitled to a variance. The certified record conclusively demonstrates that the ZBA acted fairly and reasonably in analyzing the application and making its decision. This court should affirm the ZBA's decision.

Respectfully submitted
MEENA, LLC

By their Attorneys,
DEVINE, MILLIMET & BRANCH, P.A.

Dated: February 25, 2022

By: /s/ Matthew R. Johnson
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CERTIFICATE OF SERVICE

I, Matthew R. Johnson, do hereby certify that on the date referenced below, that a copy of the foregoing was forwarded to Matthew Serge, Esq., counsel for the Town of Effingham, and Biron L Bedard, Esq., and Meaghan A. Jespen, counsel for the Petitioners, via the Court's Electronic Filing System.

Dated: February 25, 2022

/s/ Matthew R. Johnson _____
Matthew R. Johnson