THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

No. 212-2021-CV-00151

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

v.

TOWN OF EFFINGHAM and
TOWN OF EFFINGHAM ZONING BOARD OF ADJUSTMENT

DEFENDANTS' HEARING MEMORANDUM

I. INTRODUCTION

Simply because a use of property is prohibited in a particular zoning district does not mean a variance cannot be granted to allow such use. Indeed, were that the case then the right to seek a variance, which exists to afford land owners the right to use their properties in a manner inconsistent with the local zoning ordinance, would be meaningless. Variances because of their nature, however, should not be granted lightly. It is for this reason that a land owner must satisfy a number of statutory criteria codified in RSA 674:33 before being granted variance relief. In addition, regardless of the outcome, a zoning board of adjustment's decision concerning a variance must be supported by evidence in the record.

Here, the evidence before the Town of Effingham Zoning Board of Adjustment (ZBA) supported the ZBA's decision to approve a variance to allow the operation of a gasoline station in the Groundwater Protection District (where gasoline stations are prohibited). A review of the ZBA's meeting minutes reveals that the Board members spent a great deal of time discussing each of the variance criteria in light of the evidence presented. Importantly, the ZBA recognized

that the property contained a gasoline station operation up until 2015, and that the technological advances in such operations (specifically with respect to underground storage tanks and hoses) rendered contamination of the ground or surface water highly unlikely. This was supported by the New Hampshire Department of Environmental Services, which noted that gasoline stations designed, installed and maintained in compliance with the state's current requirements are more than adequate to protect the soil and groundwater. This evidence, combined with the fact that a reasonable use of the property included a gasoline station and convenience store (which has continued to operate at the property), supports the ZBA's decision to grant the variance.

The opposition to this variance application was based purely on speculative harm of possible gasoline leaks or spills, and the fact that the Zoning Ordinance prohibits the use in the zoning district. These reasons do not outweigh the evidence presented to the ZBA in favor of approval. As a result, for the reasons discussed further below and at the merits hearing held on February 11, the ZBA's decision approving the variance application was neither unlawful nor unreasonable and should be affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 14, 2021, Meena LLC (the Applicant) applied to the ZBA for a variance to operate a gasoline station in the Town's Groundwater Protection District. The station is located at 41 NH Route 25, which is also identified on the Town of Effingham tax map as Map 401, Lot 5 (the Property). Certified Record (CR) at 1-21. The Groundwater Protection District was adopted in 2011 and is codified in Article 22 of the Zoning Ordinance. CR, Appendix (App.) A. The development or operation of a gasoline station is prohibited in the Groundwater Protection District. CR, App. A.

At the time of the variance application, the Property was being used for the operation of a

convenience store, laundromat, and accessory apartments. CR at 7, 63-67. The prior owner of the Property also operated a gasoline station for many years until closing that portion of the operation in 2015 due to costs associated with compliance with then-current regulations of underground storage tanks (UST). CR at 6, 36. A closure report was produced after the gasoline station use ceased, in which it was reported that the USTs that were removed were "observed to be in good condition, with no overt evidence of holes or pitting observed." CR at 80. In addition, it was reported that "[g]roundwater was not encountered during the UST removal; therefore, the potential for groundwater quality impacts related to subsurface releases from the USTs systems cannot be determined at this time." CR at 81. Based upon that report the New Hampshire Department of Environmental Services (NHDES) stated in a letter to the Property's former owner "Based upon the information contained in the reports, it does not appear that a discharge of petroleum that would ultimately impact surface water or groundwater of the State has occurred related to the former tank system. Therefore, DES will not require additional investigation of remedial measures." CR at 84.

With respect to the new gasoline station, the Applicant stated that, consistent with current state regulations, the USTs and piping "will be double-walled, automatic leak detection systems will be put in place, fill protection measures put in place during the delivery of the product from the distributor and containment in the concrete pad in case a consumer overfills their tank." CR at 6. In addition, "[t]he installation, operation and the ongoing monitoring of the operation is overseen by the state waste division. In addition to the state oversight, the owner must have permitted class A, B and C operators to handle the day-to-day compliance." CR at 7. The ZBA held public hearings on the application on June 29, July 8, and July 20, 2021. CR at 36-47. Mark McConkey (Mr. McConkey), the Applicant's representative, reiterated that the new

gasoline station will have the same number of pumps as was used with the prior facility, and that "[t]here are sensors between the walls of the tanks to check for leaks and a control panel to check fuel levels and sensor operation." CR at 37, 39. A number of concerned citizens attended the public hearings and objected to the variance due to its proximity to an aquifer that runs through the towns of Effingham and Ossipee, among others. CR at 40. Letters in opposition were also submitted to the ZBA. CR at 105-119. It was also noted during the hearings that "Effingham is the lower end of the watershed," and that the gasoline station is outside a wellhead protection zone in the abutting town of Ossipee. CR at 38-39. At the conclusion of the July 8 hearing, the ZBA voted not to declare the project one of regional impact. CR at 41.

During the July 20 public hearing, the owner of the Property, Mr. Prince Garg, noted that he needed to reinstitute the gasoline station use in order to bring customers to his convenience store. CR at 45. The UST design engineer, Chris Williams, explained that the Applicant obtained a permit from NHDES to install the USTs, and there are two tanks installed, which are both double-walled with piping running to three dispensers. CR at 43. The UST installer, Mark Winslow, stated:

> double wall design means there is an inner wall and an outer wall with an interstitial space in between with electronic sensors that is electronically monitored 24/7 by a console inside the building. The design is containment within containment. If there is a leak inside a tank, it goes into containment and sets an alarm off, whether it is water getting in or gas getting out.

CR at 43. Mr. Winslow also explained that the piping is double-walled, and is also electronically monitored, and goes from the tanks to the gas pump. CR at 44.

> Under the dispensers is a fiberglass sump with sensors in there, so that if water entered or gas entered, alarm would go off, a liquid alarm, monitored 24/7. He explained that the submersibles, product pressure lines, have electronic leak detection system so that if there happens to be a leak, it shuts that submersible down to prevent any more product going into the secondary containment. It's fail-proof.

. . .

> If the inner wall leaks, it goes into containment which is pitched to go back to the sump where it sets off an alarm saying there is a leak. If there is more than a fraction of a leak, the pumping unit shuts down and doesn't allow pumping. If the product pressure in the line drops, it shuts down.

CR at 44. With respect to potential spills while customers are pumping gas, it was explained that there is a canopy over the pumping area, with catchment grooves, and that if someone were to drive off with the hose still in the car the design provides for the pump to automatically shut-down once breakaway happens. CR at 44. Older systems, such as the one that existed on the Property prior to 2015, did not have the same protections in place. CR at 45.

ZBA member Michael Cahalane reviewed meeting minutes from the Green Mountain Conservation Group meetings when the groundwater ordinance was being discussed, and "specifically noted discussions of prohibited uses and or gas stations in GMCG committee minutes . . . [and] [i]n the March 12, 2010 mtg, it was suggested that lining bunkers, monitoring systems, etc. could be sufficient to allow this type of system in the aquifer." CR at 45. In response to questions from ZBA member Theresa Swanick about possible leaks, Mr. Winslow repeated that the pump system would shut itself down, and that there is "containment with sensors that shut off automatically. New breakaways, auto shut off, and any gas still in hose is not coming out due to valve shutoff with plunger suction." CR at 46. Ms. Swanick also introduced into evidence an e-mail from Mr. Chad Hayes at NHDES, who was familiar with the project and stated that "the design is specifically to deter small quantity of liquid so any issue is caught before groundwater release." CR at 47. In his email to the ZBA, Mr. Hayes, in addition to repeating the safety measures used in new gasoline pump systems, noted that "[t]ypically, NHDES does not get into the business of offering extra protection measures. We feel that

systems designed, installed and maintained in compliance with our current requirements are more than adequate to protect the soil and groundwater." CR at 68.

The ZBA voted to close the public hearing and subsequently deliberated on July 29 and August 4. CR at 48-60. During deliberations, the ZBA discussed the five variance criteria in detail. Mr. Cahalane noted that the fact the Property had been previously used as a gasoline station was an important factor, and that the economics surrounding the need for the station should be considered. Finally, he noted that the groundwater protection ordinance is 10 years old, and that perhaps "technology has evolved beyond the original ordinance." CR at 48. He also commented that these factors are important when considering unnecessary hardship. CR at 50. ZBA member Nate Williams stated that "I agree that technology has come a long way. Also the fact that DES approves all the USTs and the groundwater rules; same government department regulates both these areas, is a consideration for him." CR at 49. Ms. Swanick stated that she "agrees that the technology has evolved, compared to 2012 when DES could only test down to a leak, whereby a system could continue a lower leak undetected. This system tests for any amount of leak into containment. I am comfortable with how advanced this is." CR at 50. She also noted that "investing in the latest and the greatest is a way to ensure the health and welfare of the public by having a system that will detect the minute leaks within double-walled containment so that any problem is attended to before any kind of release, which was never the case at the time that this ordinance went into effect." CR at 52. The ZBA recognized that the potential harm to the public was difficult to quantify because of safety measures in place with the new system, and that any possible harm seemed to be outweighed by the loss to the Applicant. CR at 53. All ZBA members appeared to agree that under the circumstances the use would not diminish the value of surrounding properties. CR at 50.

Following further discussion, the ZBA voted 4-1 to grant the variance for the gasoline station, subject to the conditions that the Applicant present a stormwater management plan, and spill prevention and control response plan, part of the site plan review process. CR at 60. A written decision was issued on August 6, 2021. CR at 22. The Plaintiffs subsequently filed a motion for rehearing, CR at 24-35, which the ZBA considered and denied at a public meeting on September 28, 2021. CR at 61-62. A written decision of that decision was issued on September 29, 2021. CR at 23.

III. STANDARD OF REVIEW

Judicial review of decisions of a zoning board of adjustment is limited. P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning, Volume 15, Chapter 25.10 (2000) (citations omitted). The court may not simply substitute its judgment for that of the ZBA. Id. (citing Saturley v. Hollis, 129 N.H. 757 (1987)). In an appeal of a ZBA decision, the burden of proof is on the party seeking to set aside the ZBA decision to show that the decision is unlawful or unreasonable. RSA 677:6. All findings of the ZBA concerning questions of fact are *prima facie* lawful and reasonable, which means that all doubts in the evidence are resolved in favor of the ZBA's determination. Bois v. Manchester, 113 N.H. 339, 342 (1973). If any of the ZBA's reasons for granting the variance support its decision, then the appeal must fail. Jensens Inc. v. Dover, 130 N.H. 761, 765 (1988); Burke v. Jaffrey, 122 N.H. 510, 514 (1982) ("[t]he resolution of conflicts in the evidence and the determination of issues of fact are functions of the board . . . [t]he board's findings . . . will not be set aside if they could reasonably have been made on the evidence.") (internal citations omitted). The superior court defers to the findings of the ZBA because "[t]he ZBA, composed of members of the community and having knowledge and understanding of the surrounding area, is in the best position" to decide issues within its

jurisdiction. See Farrar v. City of Keene, 158 N.H. 684, 690 (2009). "Although disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefor, is not in and of itself error." Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007).

IV. ARGUMENT

This court should affirm the ZBA's decision to grant the Applicant a variance to operate a gasoline station on the Property because the evidence in the record supports its decision.

A. THE VARIANCE STANDARD

To obtain a variance, a landowner bears the burden of proving:

(1) The variance will not be contrary to the public interest;

(2) The spirit of the ordinance is observed;

(3) Substantial justice is done;

(4) The values of surrounding properties are not diminished; and

(5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For the purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) the proposed use is a reasonable use.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the

> ordinance, and a variance is therefore necessary to enable a reasonable use of it.

RSA 674:33, I(b); see also Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 512 (2011). Here, the evidence supports the ZBA's decision that the Applicant satisfied all of the above criteria and, as a result, it was entitled to a variance.

1. The evidence in the record supports the ZBA's decision that the variance will not be contrary to the public interest, and it will be consistent with the spirit of the ordinance.

The New Hampshire Supreme Court has stated that the public interest factor is coextensive and related to the requirement that the variance be consistent with the spirit of the ordinance. Harborside Associates, L.P., 162 N.H. at 514. "The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance." Id. In doing so, the Court will examine whether granting the variance would "unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Id. Ways in which a variance may violate basic zoning objectives is if it would alter the essential character of the locality or threaten the public health, safety or welfare. Id.

As the ZBA recognized, the proposed use is unique since a gasoline station was in operation at the Property until 2015. While the goal of the Groundwater Protection District is to protect against contamination of ground and surface waters, see CR, App. A, the evidence presented to the ZBA overwhelming establishes that the proposed systems for the station will be state-of-the-art and designed to meet all state requirements. Indeed, correspondence from NHDES concerning the proposed station shows that the systems are designed to prevent leaks or spills, and that such systems are "more than adequate to protect the soil and groundwater." CR at 68. As ZBA members noted during the Board's deliberation, the Groundwater Protection

District was adopted prior to these new systems being available, and that this is a situation where "technology has evolved beyond the original ordinance." CR at 48. As a result, given the history of the Property use, and the safeguards that will be in place, the evidence supports a finding that the proposed use would not alter the essential character of the surrounding locality, and would not violate the basic objectives of the Groundwater Protection District. See Harborside Associates, L.P., 162 N.H. at 514. Nor does the station pose a credible threat to public health, safety or welfare.

The Plaintiffs' objection to the variance focuses essentially on the fact that gasoline stations are prohibited in the Groundwater Protection District, and that allowing such use would therefore be contrary to the voters' intent in adopting that District. "As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto . . . ." Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 (2005) (quotations omitted). Consequently, conflict with the terms of the ordinance alone is insufficient to find that the variance is contrary to public interest or inconsistent with the spirit of the ordinance. Perreault v. Town of New Hampton, 171 N.H. 183, 186 (2018).

As a result, the evidence in the record supports the ZBA finding that the variance will not be contrary to the public interest, and that the use will be consistent with the spirit of the zoning ordinance.

2. The evidence in the record supports the ZBA's decision that the Applicant will sustain an unnecessary hardship without the variance.

In deciding whether a landowner has satisfied the test for unnecessary hardship under RSA 674:33, I (b)(5)(A) or (B), the landowner must first show that particular property is unduly restricted by the zoning ordinance because of special conditions unique to that property which

distinguish it from all others similarly restricted. RSA 674:33, I (b)(5); see also Garrison v. Town of Henniker, 154 N.H. 26, 32-33 (2006); Harrington v. Town of Warner, 152 N.H. 74, 81 (2005). As the Court noted in Harrington,

> This [uniqueness] factor requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property. It does not, however, require that the property be the only such burdened property. Rather, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the landowner. Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general.

Harrington, 152 N.H. at 81 (citations omitted).

Here, the Property was previously used as a gasoline station, along with a convenience store and accessory apartments. Although the gasoline station ceased operating in 2015, the other uses on the Property continued to the present time. The Property, therefore, is uniquely suited to the gasoline station / convenience store use, and the Zoning Ordinance, therefore, places a unique burden on the Property that is not shared by other properties in the area.

Further, the evidence in the record supports a finding that there is no fair and substantial relationship between the general public purposes of the Groundwater Protection District and the application of that zoning provision to the Property. Again, while the goal of the District is to prevent contamination of water, the proposed use will be conducted in a manner that drastically reduces the possibility for contamination of the aquifer or local well water. Thus, allowing the proposed gasoline station use would not compromise the goals of the Zoning Ordinance. The Plaintiffs continually argue that a variance is unlawful because of the danger of leaks or spills, but these concerns are completely speculative. Indeed, the ZBA could not rely upon such vague and speculative concerns if it were to deny the application. Cf. Trs. of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 508 (2018) ("[A] planning board's decision must be based upon more

than the mere personal opinions of its members. Although the members of a planning board are entitled to rely, in part, on their own judgments and experiences, the board, as a whole, may not deny approval on an ad hoc basis because of vague concerns.")

The proposed use is also reasonable for purposes of RSA 674:33, I (b) given the Property's history and the nature of the proposed use. Given the Property's previous use as a gasoline station along with a convenience store, the applicant's desire to continue that combined use is logical and the ZBA could find that it would provide him a reasonable return on his investment. Farrar v. City of Keene, 158 N.H. 684, 690 (2009) (recognizing that "reasonable use" factor "includes consideration of the landowner's ability to receive a reasonable return on his or her investment").

Finally, the evidence supports the ZBA's decision to the extent it found unnecessary hardship under RSA 674:33, I (a)(E)(b)(2). As discussed above, the Property has special conditions associated with it that distinguishes it from other properties in the area, and it is reasonable to conclude that the Property, as currently configured, cannot be reasonably used in strict conformance with the ordinance. Thus, a variance is justified in order for the applicant to implement what the evidence shows is a reasonable use of the Property.

As a result, the ZBA did not err in concluding that the Applicant met its burden of showing that it will suffer an unnecessary hardship without the variance.

3. The evidence in the record supports the ZBA's decision that substantial justice will be achieved if the variance is granted.

"Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007) (quotation and brackets omitted). The court also considers

"whether the proposed development [is] consistent with the area's present use." Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011).

In discussing this factor, the ZBA acknowledged the advances in technology compared to the prior USTs that were being used, and that the danger to the public in the form of a leak or spill was minimal. CR at 53-54. With respect to the potential loss to the Applicant, the ZBA recognized that the owners have invested significantly in the Property, and that a gasoline station is better for the overall business use, as well as providing general benefits to the public in the form of additional revenue for the community and jobs. CR at 53. As one member stated "the owner has everything to lose if this is denied and the public has little to gain if it's denied." CR at 54. Thus, given the minimal threat to the public, the ZBA's finding that substantial justice would be achieved is supported by the record. See Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2011) (proposed storage facility project worked a substantial justice because it "posed no further threat to the wetlands, . . [was] appropriate for the area [,] and [did] not harm its abutters[;] [therefore,] the general public [would] realize no appreciable gain from denying this variance.")

4. The evidence in the record supports the finding that granting the variance will not diminish surrounding property values.

The ZBA members unanimously agreed that this prong of the variance criteria was satisfied. CR at 50. The evidence supports this finding given the history of the property, including that a gasoline station had operated there for years until 2015. The only factor that the Plaintiffs point to in support of the argument that surrounding property values will be diminished is the speculative harm of a fuel leak or spill contaminating groundwater and wells. Given the protection measures in place at the proposed station, however, the ZBA could justifiably find that

no surrounding property values would be diminished if a gasoline station was reopened at the Property.

B. ZBA MEMBER THERESA SWANICK DOES NOT HAVE A CONFLICT OF INTEREST.

The Plaintiffs argue that the ZBA should have reheard this matter because ZBA member Theresa Swanick was sitting as the chair of both the ZBA and the Planning Board. Complaint at ¶72. The Plaintiffs allege that this is somehow a conflict because Ms. Swanick is engaged in discussions and votes on both boards. Leaving aside the fact that the law does not prevent an individual from sitting on both the ZBA and Planning Board, the Plaintiffs have failed to present any evidence to show that Ms. Swanick has a conflict of interest.

Conflicts of interest for land use boards is governed by RSA 673:14, which, in part, provides:

> No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

The Plaintiffs cite no evidence indicating that Ms. Swanick has any direct personal or pecuniary interest in the case, or that she should otherwise be disqualified under the juror standard set forth in RSA 500-A:12. Rather, it appears that the Plaintiff is suggesting that Ms. Swanick is disqualified simply by virtue of being a member of both the ZBA and Planning Board. RSA 673:7 states, however, that "[a]ny 2 appointed or elected members of the planning board in a city

or town may also serve together on any other municipal board or commission, except that no more than one appointed or elected member of the planning board shall serve on the conservation commission, the local governing body, or a local land use board as defined in RSA 672:7." As Ms. Swanick is the only member of the Planning Board also serving on the ZBA, her membership on both boards is authorized by law.

For these reasons, the Plaintiffs' conflict of interest claim must be denied.

C. THE PLAINTIFFS' REMAINING CLAIMS WERE NOT PRESERVED FOR REVIEW BY THIS COURT AND ARE WAIVED.

The Plaintiffs raise two procedural claims toward the end of their complaint. First, they contend that the ZBA erred by failing to vote to declare the project as one of regional impact under RSA 36:56. Second, they claim that some abutters may not have been given notice of the variance application. Both of these claims should be rejected as they were not set forth in the motion for rehearing.

RSA 677:2 provides:

> A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

This "statutory scheme is based upon the principle that the local board should have the first opportunity to pass upon any alleged errors in its decisions so that the court may have the benefit of the board's judgment in hearing the appeal." Atwater v. Town of Plainfield, 160 N.H. 503, 511–12 (2010) (quotation omitted).

While the Plaintiffs' acknowledged in their motion for rehearing that the ZBA voted on July 8 to not declare the variance application a project of regional impact, they did not cite that in their argument as a basis for rehearing. CR at 28, 30-34. Nevertheless, the ZBA has discretion in determining whether or not to declare a development application as having regional impact. See RSA 36:55. While proximity to an aquifer is one circumstance that may warrant a finding of regional impact, the evidence presented here supports the ZBA's finding that the project would not "reasonably be expected to impact on a neighboring municipality" and, therefore, a finding that there would be no regional impact was not unlawful.

With respect to the ZBA's alleged failure to notify all abutters of the variance, this claim was not raised anywhere in the motion for rehearing. CR at 27-35. In a footnote to the complaint, the Plaintiffs rely upon an abutter list from a planning board process whereby a lot was allegedly listed, that was not listed for the ZBA process. The Plaintiffs, however, did not seek leave to introduce the purported abutter list from the planning board matter. Moreover, the ZBA matter was heard over multiple months and the Plaintiffs could have investigated the issue and raised it at any time during those proceedings. Indeed, a simple review of the relevant tax map would reveal whether or not abutters were notified.

Regardless, the Plaintiffs do not have standing to challenge either the regional impact decision or the abutter notification issue since they were not the parties who were adversely affected by the ZBA's actions. When analyzing standing to challenge land use board decisions, the Supreme Court has stated:

> Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis. When evaluating whether an appealing party has standing in this context, we consider the following factors: (1) the proximity of the challenging party's property to the subject site; (2) the type of change proposed; (3) the

> immediacy of the injury claimed; and (4) the challenging party's participation in the administrative hearings. This list is not exhaustive; we also consider any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding.

Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (citations and quotations omitted). Here, aside from participating in the administrative hearings, the factors set forth in Hannaford Bros. Co. do not confer standing for the Plaintiffs to assert rights on behalf of those parties who would be entitled to regional impact notice (the regional planning commission and any affected municipalities), or possible abutters who allegedly failed to receive notice of the ZBA proceedings. Put simply, the Plaintiffs cannot "demonstrate a direct, definite interest in the outcome of the action or proceeding" with respect to the claims asserted. Id.

As a result, the court should deny the Plaintiffs' claims concerning regional impact and abutter notice.

V. CONCLUSION

In conclusion, the evidence in the record supports the ZBA's decision to grant the Applicant a variance to operate a gasoline station on the Property, and the ZBA's decision should be affirmed.

Respectfully submitted,

TOWN OF EFFINGHAM

By Its Attorneys,

DRUMMOND WOODSUM & MacMAHON

Date: February 25, 2022

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CERTIFICATION

I hereby certify that this Hearing Memorandum has been forwarded to Biron L. Bedard, Esq. and Meaghan A. Jepsen, Esq., counsel for the Plaintiffs, and Matthew R. Johnson, Esq., counsel for the Intervenor, Meena, LLC.

Date: February 25, 2022

/s/ Matthew R. Serge
Matthew R. Serge