

STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT

Green Mountain Conservation Group, Ossipee Lake Alliance,
William Bartoswicz, and Tammy McPherson

v.

Town of Effingham and Town of Effingham Zoning Board of Adjustment

Docket No. 212-2021-CV-151

PETITIONERS' POST-HEARING MEMORANDUM

Green Mountain Conservation Group (“GMCG”), Ossipee Lake Alliance (“OLA”), William Bartoswicz, and Tammy McPherson, by and through their attorneys, Ransmeier & Spellman, P.C., file this post-hearing memorandum following the February 11, 2022 hearing on the merits, stating in support thereof as follows.

This case is an appeal of the Town of Effingham Zoning Board of Adjustment’s denial of the petitioners’ rehearing request in regards to the ZBA’s decision to grant Meena LLC’s variance application. The Court held a hearing on the merits on February 11, 2022. For the following reasons, and those laid out in the hearing and in the petitioners’ appeal, the Court should find that the Town of Effingham Zoning Board of Adjustment acted illegally and/or unreasonably.

BACKGROUND

This case involves the ZBA’s granting of a variance from Effingham’s express prohibition of gas stations within the Town’s groundwater protection district. The case also directly involves the Ossipee Aquifer, which is New Hampshire’s largest stratified drift aquifer and serves as the primary source of drinking water for 14 communities, including Effingham.

In 2011, Effingham voted to adopt a groundwater protection ordinance. Zoning Ordinance at Art. 22.¹ 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.” Id. 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. Importantly, gas stations are specifically prohibited from the Town’s Groundwater Protection District. Id. at § 2207.

In its variance application, dated May 14, 2021, Meena LLC (“Meena”) seeks a variance from Article 22, Section 2207(A)(8) of the Effingham Zoning Ordinance in order to develop and operate a gas station at 41 NH Route 25 (Tax Map 401, Lot 5), which is within the groundwater protection district in Effingham, sits over the State’s largest stratified drift aquifer, and is within 300 feet of Phillips Brook, which runs directly into Ossipee Lake. (See C.R.² at 1, 83, 105.) The property at issue here (the “Property”), where Meena wants to put a gas station, previously contained a gas station and convenience store known as Boyle’s Family Market, and had underground storage tanks, which were removed in 2015. (C.R. at 16, 36, 39.) Although the gas station operations ceased in 2015, the former Boyle’s Family Market continued to operate as a convenience store, laundromat, and apartment building. (C.R. at 7, 49, 119.)

Meena subsequently bought the Property and now desires to convert the Property back to a gas station. (C.R. at 6, 36.) In furtherance of that goal, Meena installed underground storage tanks without first acquiring the proper permits from the Town. (C.R. at 43, 45–46.) Then, on

¹ The Town’s Zoning Ordinance can be found in Appendix A of the Certified Record.

² “C.R.” refers to the Certified Record.

May 13, 2021, the Town provided Meena with a cease and desist order for lack of site plan approval. (C.R. at 37.)

On June 29, 2021, Meena went before the ZBA for a variance. (C.R. at 36.) At their meeting, the ZBA voted in favor of accepting Meena's variance application as complete. (Id.) The ZBA then held a public hearing on the variance application, which was continued to July 8, 2021. (C.R. at 36–38.)

At the July 8th hearing, Moselle Spiller of GMCG brought a stratified drift aquifer model to show how a stratified drift aquifer, which has high transmissivity, can spread a leak or spill quickly. (C.R. at 39.) The ZBA also looked at an aquifer map that showed the wellhead protection areas. (Id.) The Property at issue here is just outside a wellhead protection area for a public water supply in Ossipee. (Id.) There is a public water supply well within 175 feet of the tanks. (C.R. at 46.)

Lorie Dunne, the Effingham town representative for the GMCG board of directors, read a statement from GMCG and urged the ZBA not to support the variance application. (C.R. at 40, 117.) She noted that the Ossipee aquifer affects 14 communities and is the largest stratified drift aquifer in New Hampshire. (C.R. at 40.)

At the July 8th hearing, the ZBA voted on whether or not to declare regional impact, which failed (*i.e.*, the ZBA voted not to declare regional impact). (C.R. at 41.) The ZBA also voted to continue the hearing to July 20, 2021. (Id.)

At the July 20th hearing, additional individuals expressed their concern about the variance application. (C.R. at 42.) Included in the meeting minutes is a letter from Dr. Robert Newton, professor emeritus of geosciences at Smith College, in which he notes that the Ossipee Aquifer is “a highly productive groundwater resource” and that any contaminants that enter the ground in

the area “will rapidly infiltrate and move into the groundwater system.”³ (C.R. at 112.) Dr. Newton further noted that gas stations “have a long history of contaminating groundwater in New Hampshire” and have resulted at times “in significant aquifer contamination with large impacts to local residents.” (*Id.*) This is particularly relevant here given the fact that the homes close to the Property rely on domestic wells for their water supply and that there are approximately 20 homes located within just 1,000 feet of the proposed gas station. (*Id.*)

Despite the gravity of the variance and the fact that the issues involved in Meena’s variance application, especially those posed by being located over a stratified drift aquifer, are beyond the reasonable experience of the typical ZBA member, the ZBA did not send the variance application out for independent review and, other than Dr. Newton, did not have information from a geologist or hydrogeologist concerning the effects of a gas station on the aquifer and surrounding properties.

Due to the large amount of public discussion on the variance application at the July 20th hearing, the ZBA again voted to continue the deliberation to July 29, 2021. (C.R. at 47.) At the July 29th hearing, the ZBA deliberated regarding the five variance criteria and decided to seek legal advice regarding the issue of abandonment of use.⁴ (C.R. at 48–55.) The ZBA also voted to continue the deliberation to August 4, 2021. (C.R. at 55.)

At the August 4th meeting, the ZBA continued their deliberation from the previous meeting and ultimately voted 4-1 to grant Meena’s variance application with two conditions. (C.R. at 60.) In particular, the written decision signed by Theresa Swanick,⁵ Chair of the ZBA,

³ Dr. Newton authored the surficial geologic map of the area. (C.R. at 112.)

⁴ The Town’s attorney, Matthew Serge, thereafter provided an email to Chairwoman Swanick stating his opinion that the gas station is not a lawful non-conforming use and that the Property’s use as a gas station had been abandoned. (C.R. at 119.)

⁵ Chairwoman Swanick was the chair of both the ZBA and the Planning Board. (C.R. at 62.) Chairwoman Swanick has since stepped down as Chair of the ZBA, but she is still a member of the ZBA and still the chair of the Planning

on August 6, 2021, states the two conditions as follows: (1) “A Stormwater Management Plan, per NH DES guidelines, shall be submitted for Site Plan Review” and (2) “A Spill Prevention Control and Countermeasure Plan, per NH DES guidelines, shall be submitted for Site Plan Review.” (C.R. at 22.)

The written notice of decision further states that the ZBA has determined that granting the variance “falls within the Spirit of the Ordinance and Public Interest, that Substantial Justice is served, and Surrounding Property Values will not be diminished. Further, this decision prevents Unnecessary Hardship to the applicant.” (Id.)

On or about September 1, 2021, the petitioners filed a motion for rehearing with the ZBA. (C.R. at 24.) The ZBA denied their request at their meeting on September 28, 2021. (C.R. at 62.) Specifically, in its notice of decision dated September 29, 2021, the ZBA stated, “The Board reviewed all of the grounds set forth in the motion and concluded that it did not err in its initial decision, and that the Board’s decision is neither unlawful nor unreasonable.” (C.R. at 23.)

ARGUMENT

I. All the petitioners have standing

In the Town’s answer to the petitioners’ appeal, it argues that OLA and GMCG do not have standing to appeal the ZBA’s decision. To the contrary, all the petitioners have standing here.

“*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 (emphasis added).

Board. (C.R. at 62; see also <https://www.effinghamnh.net/zoning-board-of-adjustment/> (last accessed Feb. 25, 2022), <https://www.effinghamnh.net/planning-board/> (last accessed Feb. 25, 2022).

Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination in each case. The trial court may consider factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings.

Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544–545 (1979).

Importantly, the “improper granting of a variance can affect a larger area than the immediate area where the property is located and it can affect more than just the immediate neighbors.” N.H. Practice: Land Use Planning and Zoning, Loughlin § 25.01 at 439 (4th Ed. 2010). “In severe cases, it could threaten the integrity of the ordinance. In less severe cases, it could certainly affect the quality of life of citizens of the community who work in the area or regularly visit it.” Id.

While courts must be mindful of appeals filed just to harass a landowner or delay a project, they must be mindful of the fact that litigation costs frequently prevent an individual landowner from appealing a land use decision, even if it is wrong. Environmental groups and citizen watchdog groups are frequently the only ones who are in a position to adequately defend the position of those “aggrieved” by a land use board decision. Surrounding property owners may have many reasons why they cannot appeal a ZBA decision and it is often left to a citizen's watchdog group to provide an independent voice to protect the integrity of the land use scheme for the benefit of the citizens of the entire community.

Id.

Here, 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 ZBA's decision. (See C.R. at 9, 25.) Similarly, Tammy McPherson resides at 5 Blueberry Road in Center Ossipee and, as an abutter, is likewise directly affected by the ZBA's decision. (See C.R. at 9, 25.)

OLA was formed in 2003 and is a charitable volunteer organization dedicated to preserving and protecting Ossipee Lake and the surrounding waters as a unique recreational, environmental, and economic resource, and promotes the careful stewardship and shared

enjoyment of the lake. (C.R. at 26.) Its mission includes the defense of the Ossipee Aquifer, which is the source of drinking water for the Ossipee Lake community, which includes the Towns of Effingham and Ossipee, among others. (Id.) Its members are directly affected by the ZBA's decision here. (Id.)⁶

GMCG was founded in 1997 and is a community-based, charitable organization dedicated to the protection and conservation of natural resources in the Ossipee Watershed in central Carroll County, including the Towns of Effingham and Ossipee, among others. (Id.) The group promotes an awareness of and appreciation for clean water and the wise use of shared natural resources across the Ossipee Watershed while advocating strategies to protect them. Its members are likewise directly affected by the ZBA's decision here. (Id.)⁷ Additionally, GMCG recently acquired land in close proximity to the Property at issue here.⁸

All four petitioners have been actively involved in the ZBA hearing, through counsel or otherwise, and were parties to the motion for rehearing. There can be no doubt that they all have standing here.

II. The ZBA's decision was unlawful and unreasonable

“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. “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. Here, despite numerous hearings and many opportunities to make the right

⁶ See <https://www.ossipeelake.org/about/> (last accessed Feb. 25, 2022).

⁷ See <https://www.gmcg.org/mission/> (last accessed Feb. 25, 2022).

⁸ See <https://data.avitarassociates.com/default.ASPX> (last accessed Feb. 25, 2022); <https://www.effinghamnh.net/wp-content/uploads/2019/02/406-4119.pdf> (last accessed Feb. 25, 2022).

decision in this matter, the ZBA came to an illegal and unreasonable decision in granting Meena's variance request and denying the petitioners' motion for rehearing.

Meena seeks a variance from Article 22, Section 2207(A)(8) of the Effingham Zoning Ordinance in order to develop and operate a gas station within the Town's groundwater protection district. Under Article 22, Section 2207(A)(8) of the Zoning Ordinance, the development and operation of gas stations are specifically prohibited in the Town's groundwater protection district. Thus, in order for Meena to operate a gas station in its proposed location, it would need a variance.

Under RSA 674:33, the ZBA has the power to authorize a variance from the terms of the zoning ordinance if:

- (A) The variance will not be contrary to the public interest;
- (B) The spirit of the ordinance is observed;
- (C) Substantial justice is done;
- (D) The values of surrounding properties are not diminished; and
- (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

RSA 674:33, I.

The granting of Meena's variance application does not satisfy these prongs. In order to grant a variance, the application must satisfy each individual prong. N.H. Practice: Land Use Planning and Zoning, Loughlin § 24.08 at 388 (4th Ed. 2010). Additionally, satisfactory compliance with one prong cannot be used to justify granting a variance when other prongs are not satisfied. Id. Similarly, satisfaction of a majority of the prongs does not justify the granting of a variance. Id. The applicant bears the burden of satisfying the criteria for a variance, which Meena has failed to do here. See id.; see also Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 243 (1992) ("The party seeking a variance . . . bears the burden of establishing each of the requirements for a variance.").

A. The variance is contrary to the public interest

In regards to the first prong, the variance here is contrary to the public interest. To be “contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 (2005) (quotations omitted). “One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. As the fundamental premise of zoning laws is the segregation of land according to uses, [a] variance must be denied if the proposed use will alter the essential character of the neighborhood.” Id. (internal citations and quotations omitted). “Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.” Id.

Here, the residents of Effingham specifically voted to prohibit the very type of activity Meena seeks to conduct on the Property in order to protect its invaluable water resources in that area. Although there had been a gas station on the Property in the past, there has not been one there for many years and the residents of Effingham, through the enactment of their groundwater protection ordinance, have specifically prioritized their health, safety, and general welfare over the ability of a new gas station to operate there. See Nine a, LLC v. Town of Chesterfield, 157 N.H. 361, 368 (2008) (emphasizing the need “to preserve a unique natural resource”).

To grant a variance here, with a potentially devastating impact to the State’s largest stratified drift aquifer, would create a dangerous precedent in New Hampshire and negatively impact the 108 towns in the State that have groundwater protection ordinances. (See C.R. at

106.) It would also alter the essential character of the neighborhood. Thus, the first prong of the variance test is not satisfied.

B. The spirit of the ordinance is not observed

For similar reasons, the spirit of the ordinance is not observed by the granting of a variance here. Rather, the variance directly contradicts the spirit of the ordinance. The Town's Zoning Ordinance has specific protections in place for its groundwater and is designed to protect health, safety, and general welfare by preserving, maintaining, and protecting "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. Gas stations are specifically prohibited from the Town's groundwater protection district as part of that purpose. *Id.* at § 2207. The fact that a gas station used to sit on the Property is of no import.

Allowing a gas station at the Property at issue here when it is within the groundwater protection district in Effingham, sits over the State's largest stratified drift aquifer, and is in close proximity to Phillips Brook, which runs directly into Ossipee Lake, is in direct contradiction of the spirit of the Ordinance.

Moreover, the public water supply well here is within 175 feet of the tanks on the Property, which is in violation of New Hampshire regulations for both public and non-public water supply wells. In particular, ENV-OR 407.06 specifies the minimum distance from gasoline UST systems to a public water supply well is 500 feet and 250 feet for a non-public water supply well.

Additionally, the ZBA spent considerable time discussing whether or not the technology in regards to underground storage tanks has advanced in the approximately ten years since the Town adopted its groundwater protection ordinance; thereby implicating the merits of the

Ordinance.⁹ (See C.R. at 48, 51, 57–60.) The ZBA should not have entered into such a discussion, however, since it “cannot change or rewrite an ordinance.” N.H. Practice: Land Use Planning and Zoning, Loughlin § 24.12 at 396 (4th Ed. 2010). Rather the “wisdom of a particular ordinance provision is a consideration for the legislative body and not for the ZBA. . . .” Id.

Although members of the ZBA appear to believe that the technology Meena states it will be using has outpaced the ordinance and is fool proof, that is not supported by the record. For example, the Environmental Fact Sheets provided by the New Hampshire Department of Environmental Services in 2012 and 2020 state, in pertinent part, as follows:

As the environmental risks associated with gas stations— particularly the risk of gasoline leaked from underground storage tank (UST) systems— have become increasingly clear, vast improvements have been made in the design, construction, and operation of UST systems. Unfortunately, federal and state regulators and UST system designers and installers have *not* succeeded in engineering *all* of the groundwater contamination risk out of these systems.

(C.R. at 70, 74.) The Environmental Fact Sheets go on to state that “given the limits of [NH]DES’s oversight and the state of the art [spill prevention technology], local officials need to ensure that the appropriate restrictions and oversight are in place on the local level, to the extent that communities want to ensure protection of their groundwater resources.” (C.R. at 70, 74.)

Most of the technology Meena relies upon to support the contention that the system is leak proof is mentioned and identified in the Environmental Fact Sheets. There is nothing new or novel about the equipment to support a proposition that technology outpaced the ordinance.

Thus, based on the information in the record, the second prong of the variance test is not satisfied.

⁹ This discussion did not include any mention of spills and accidents that occur and lead to groundwater contamination.

C. The variance does not promote substantial justice

Likewise, granting the variance does not promote substantial justice. “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.” Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 515 (2011).

Although Meena has argued that it purchased the Property with the assumption that it could operate a gas station on it, its unfamiliarity with the Town’s zoning laws is no excuse for it to have prematurely and illegally installed underground storage tanks and no reason to disregard the regulations in place to protect the residents of the area (both in Effingham and the surrounding towns) and their water. There has been no provision made as part of the variance for knowing if or when their water is contaminated. No provision for testing has been imposed on the applicant. No notice has been sent to many of these residents that there is an impending gas station. Thus, the third prong of the variance test is not satisfied.

D. The values of surrounding properties will likely be diminished

In regards to the fourth prong of the variance test— the values of surrounding properties— there is a strong likelihood that the gains in property values that residents surrounding the Property have achieved since the gas station operation was removed in 2015 would be diminished if there is groundwater contamination from the gas station. As Dr. Newton opined, the Ossipee Aquifer is a highly productive groundwater resource and any contaminants that enter the ground in the area will rapidly infiltrate and move into the groundwater system.

Dr. Newton further informed the ZBA that gas stations have a long history of contaminating groundwater in the State and have resulted at times in significant aquifer contamination with large impacts to local residents, which is particularly troubling here given the

fact that the homes close to the Property rely on domestic wells for their water supply and that there are approximately 20 homes located within just 1,000 feet of the proposed gas station.

In addition, Meena is fundamentally changing the character of the neighborhood by creating a gas station and adding a third apartment in a zone where gas stations and multi-family housing are not permitted as a matter of right. See Zoning Ordinance at Table 1 (page 16 of 65). To suggest that will not negatively affect property values without empirical evidence to the contrary is irresponsible. Not to mention that the apartments are supplied with water from the public water supply well that is located too close to the tanks at issue. Thus, the fourth prong of the variance test is not satisfied.

E. Enforcement of the ordinance would not result in unnecessary hardship

Nor is the fifth prong of the variance test satisfied as literal enforcement of the provisions of the Ordinance would not result in an unnecessary hardship. For purposes of the statute, “unnecessary hardship” means that “owing to special conditions of the property that distinguish it from other properties in the area: (A) 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 (B) The proposed use is a reasonable one.” RSA 674:33, I(b)(1). “If the criteria in subparagraph (1) 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)(2).

Again, although Meena allegedly bought the Property thinking it could convert it back into a gas station and was under the impression it had done everything required to reinstate the

gas operation, ignorance of the law is no excuse and does not create a legal hardship. (See C.R. at 7.) Moreover, any belief Meena may have had that the gas station use on the Property had not been abandoned was erroneous as further evidenced by Town counsel's opinion that such use had been abandoned.

Meena failed to do its due diligence here and the residents of Effingham, the abutters to the Property, and those who use, rely upon, and appreciate the area's water should not be punished for it. The Property has been used without a gas station on it for many years and can be reasonably used without one. For instance, it has recently been used for a market, laundromat, and apartments.

Meena and the ZBA have described the Property as unique because it once had a gas station on it. There is nothing unique about that. There are many other places in town where a gas station can be located. What is unique is the location of the Property and its proximity to the state's largest stratified drift aquifer, which is itself a truly unique natural resource and a geologically sensitive area.

Moreover, Meena interestingly raises in support of its hardship argument an allegation that when the old tanks on the Property were removed there was no groundwater contamination discovered. (Id.) However, the closure report that Nobis Engineering prepared for Boyles Market found soil samples with naphthalene levels of 19 ppm, which is nearly four times greater than the state limit of 5 ppm. (C.R. at 81.) "The analytical results for soil samples indicate that petroleum contamination exceeding the applicable NHDES soil standards have been identified beneath the eastern half of the pump island." (Id.) Thus, there is clear evidence of a spill on the Property, even if it has since dissipated.

Accordingly, Meena has not met the variance standard here and the ZBA should not have granted its application.

III. The ZBA should have declared regional impact

In addition to the fact that the variance here does not comply with RSA 674:33, the ZBA's decision not to declare regional impact was unreasonable given the wide impact the Ossipee Aquifer has on the area and the Property's location on the border of Effingham and Ossipee. "A local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact." RSA 36:56. "Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact." *Id.* It is clear that there are regional impacts here, and the ZBA should have found accordingly.¹⁰

IV. Not all abutters appear to have been properly noticed

Moreover, all the abutters to the Property at issue do not appear to have been properly noticed in this case. For example, the most recent abutter list Meena submitted to the Planning Board now includes Tax Map 406, Lot 75 owned by Erin and Amy Hartley.¹¹ This lot appears to be across the street from the Property, but was not included on the abutter list to the ZBA. (See C.R. at 9, 121.)

Every abutter must receive proper notice under RSA 676:7. An "abutter" is defined as "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board." RSA 672:3. "A

¹⁰ Contrary to the Town's arguments, the petitioners preserved this argument on page 4, including footnote 3, of their motion for rehearing. C.R. at 28.

¹¹ See <https://www.effinghamnh.net/wp-content/uploads/2019/02/406-4119.pdf> (last accessed Feb. 25, 2022); <https://data.avitarassociates.com/default.ASPX> (last accessed Feb. 25, 2022).

necessary prerequisite to a zoning board of adjustment's jurisdiction to consider a request for a variance is that any statutory notice procedure be satisfied." Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). "In order for the ZBA to have jurisdiction to consider the [applicant's] request for a variance, it is therefore necessary that each and every abutter be given the notice prescribed by RSA 676:7." Id. at 232.

Here, because certain abutters were not given proper notice, the ZBA lacked jurisdiction and thus, the variance that was granted is invalid and of no effect as "it was void from the very date on which it was issued." See id.; see also Daniel v. B & J Realty, 134 N.H. 174, 176 (1991) (noting that the issue of jurisdiction "may be raised at any time"); N.H. Practice: Land Use Planning and Zoning, Loughlin § 24.08 at 440 (4th Ed. 2010) ("The issue of whether the ZBA has jurisdiction to entertain a particular application or appeal may be raised at any time in court and is not waived if it was not included in a motion for rehearing."). As a result, the Court should declare that the ZBA acted illegally and/or unreasonably.

V. There is a conflict of interest regarding the chair of the ZBA

Additionally, the ZBA should have also granted a rehearing since the Town had the same person, Theresa Swanick, sitting simultaneously as both the chair of the ZBA and the chair of the Planning Board. Chairwoman Swanick engaged in discussions and votes regarding Meena at both the Planning Board level and at the ZBA, which poses a conflict of interests.¹²

Even Chairwoman Swanick seems to be aware of this conflict. During the ZBA's September 28th meeting, ZBA member James Pittman¹³ "asked to discuss at the next meeting the

¹² See, e.g., <https://www.nhmunicipal.org/town-city-article/multiple-board-memberships-serving-more-one-board-same-time> (last accessed Feb. 25, 2022).

¹³ Mr. Pittman is now the chair of the ZBA. See <https://www.effinghamnh.net/zoning-board-of-adjustment/> (last accessed Feb. 25, 2022).

chairmanship of the ZBA.” (C.R. at 62.) In particular, he “wondered if there was merit to the current chair stepping down.” (Id.) “She readily agreed there was.” (Id.)

Although RSA 673:7 allows Planning Board members to sit on other local boards, they must still comply with RSA 673:14, which disqualifies a member, among other things, “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.” Chairwoman Swanick’s discussions and votes regarding Meena at both the Planning Board level and at the ZBA create such a disqualification.

CONCLUSION

Based on the foregoing, it is clear that all the petitioners have standing to bring this appeal and that the Court should find that the ZBA acted illegally and/or unreasonably in granting Meena’s request for a variance. The variance is contrary to the public interest. The spirit of the ordinance is not observed by the granting of the variance. The variance does not promote substantial justice. The values of surrounding properties will likely be diminished. Enforcement of the ordinance would not result in an unnecessary hardship to Meena. Moreover, there is a conflict of interest regarding the chair of the ZBA; the ZBA should have declared regional impact; and not all abutters appear to have been properly noticed.

The Property at issue here sits upon an important and unique natural resource. It is vitally important that the Court find that the ZBA acted illegally and/or unreasonably, which would be a decision the record supports.

WHEREFORE, William Bartoswicz, Tammy McPherson, Ossipee Lake Alliance, and Green Mountain Conservation Group 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, Tammy McPherson,
Ossipee Lake Alliance, and Green Mountain
Conservation Group**

By and through their counsel,

RANSMEIER & SPELLMAN, P.C.

Date: February 25, 2022

By: /s/ Biron L. Bedard
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded via the Court's electronic filing system to all parties of record.

Date: February 25, 2022

/s/ Biron L. Bedard
Biron L. Bedard