

Approved: _____

Approved with changes: _____

Effingham Zoning Board of Adjustment
Meeting Minutes
August 4, 2021

Members Present: Theresa Swanick (chair), Tim White (vice chair), Jim Pittman, Nate Williams (out of state, via conference call), and Mike Cahalane (seated for Knute Ogren who is absent).

Others Present: Nate Fogg, Mark and Jacob McConkey, Prince and Neha Garg, Blair Folts, Corey Lane, Tim Otterbach, Tom Hart (selectman), Erik Jones.

Call to order at 7pm

Review of Minutes of July 20, 2021: motion to approve by Mr. Pittman, seconded by Mr. White, all in favor, approved, 5-0.

Discussion of process of obtaining counsel's advice re the issue of abandonment of use.

Review of Minutes of July 29, 2021: motion to approve as changed by Mr. Pittman, seconded by Mr. Cahalane, all in favor, approved, 5-0. After discussion re letter from counsel, it was suggested to add the following after the last paragraph before the motion: It was suggested that the board would communicate with counsel by phone prior to the next meeting.

Continuation of Case Meena Variance Deliberation - 7:34pm

Mr. McConkey asked if he could present his case again for the five Variance criteria. Chair Swanick said no, that is not our procedure, he had his chance to present his case, more than once, and the board members each have a copy of the application, and it was referenced during deliberation.

Mr. Cahalane added it hasn't been this board's practice to go back and have presentation on the five criteria after deliberation. It's hopefully been deliberated long and hard for the whole last meeting.

Mr. Pittman's opinion is that the email from counsel is a suggestion; didn't feel like question was put entirely to rest. Counsel sees the gas station use as separate from the store and advises the use was abandoned. Mr. Pittman noted counsel bases his opinion on that fact that those uses are addressed separately in our zoning ordinance. Do we agree? He is on the fence. Chair Swanick said she is not on the fence; she believes there are discreet uses as the board has discussed.

Mr. Cahalane added that he thinks it is more complicated with a commercial property. He sees it both ways; uses are typically separated out. But here there was a mandate to discontinue a use. Chair Swanick asked how much we really know? There was a mandate for everything to be removed by a certain time. There was also a program to help financially which someone might have willingly made use of to help facilitate removal of old systems. Does voluntary participation in a program that helps pay for that alter the concern? We just don't really know the facts from the time with the prior owner.

Mr. White offered that there was a mandate to change the tanks, and historical record they chose to remove vs replace the tanks, but the ZBA doesn't have record of what went into their decision to discontinue gas service. The economic circumstances of commercial property are a consideration - was it discontinued for no out-of-pocket costs; don't know if hardship related to not reinstating the gas. He said the ZBA makes a decision on what it has before it.

Mr. Pittman accepts there's no way to know intent of prior owner. Without evidence to the contrary, and along with counsel advice, accepts treating uses as separate. Mr. Cahalane willing to as well and let any other considerations fall to another venue, and pick up where we left off last meeting.

Mr. Pittman noted there was substantial discussion before the side journey on Section 703 (just doing due diligence on that). Chair Swanick agreed and noted, in light of that discussion, no need to rediscuss everything, reiterate.

Mr. Cahalane asked if everyone left here with minds pretty well made up? Or is there going to be more reiteration. Personal question to each, are you ready to make a decision?

Mr. Pittman, responded that he did not leave here with a firm decision; he can see merits on both sides of the argument. It's a very difficult deliberation; concerns on the one hand about introducing a point of failure in a groundwater area, but then can also say has a lot of confidence in the technology being applied here in mitigating the risk. In looking at it overall, the five criteria, he had the angel on one shoulder and the devil on the other whispering in his ears over this. Hoping that someone here offers a key bit of wisdom that tips the scales.

Mr. White noted with environmental protection you're dealing with things that haven't happened, don't want to have happen. He looked up information on earthquake from 1940, it was 5.6, epicenter in Tamworth and damage included damage to wells, and pointed out Boyle's market is over the most vulnerable soil type. The system is designed for the expected unexpected, but we're dealing with placing non-potable chemicals in a vulnerable area. It broadens the scope of what constitutes a hazard. And by the cyclic activity, we are overdue for an earthquake. Beyond that, technology is always improving. How much do we trust the technology? We will own a piece of this...

Chair Swanick agreed and said one of the factors for her is beyond the technology. She has a lot of confidence in the technology but there's the human operation – humans who make mistakes and humans that need to perform when accidents happen. Some of the technology has developed precisely because of that. Some of the technology is to mitigate spill when delivery loads are dropped. Still comes down to serving humans and humans are going to take that nozzle. So, she too has vacillated, and can see both sides; she has a strong personal philosophy and feels the charge of this board. She knows this goes to the planning board where it is out of ZBA hands. She wonders about adding conditions, not for design already thoroughly regulated by DES, but there other things that are beyond the technology and she's not sure if they go too much toward site plan and ZBA doesn't have a say there. Mr. White said we are equipped to have a say.

Mr. Cahalane added we can have conditions, it just depends what they are. Mr. White noted site plan is finer screening.

Chair Swanick offered an example – a stormwater management plan. So, I would expect we could ask for that. It is on the DES handout on what municipalities can do to prevent groundwater contamination. The additional sump requirement is already being done; something they are already incorporated into design. Spill containment is already built into their plan; already what they have. But a stormwater management plan, groundwater protection plan – those are two suggestions that DES has for municipalities to require. If those are really the purview of site plan, can we suggest it? Mr. White thought so. Mr. Cahalane noted it's hard to make a suggestion vs a condition.

Mr. Williams asked if the board could put a requirement that have to stormwater runoff plan to be approved by the planning board? Mr. Cahalane noted the ZBA cannot direct the planning board.

Chair Swanick asked couldn't the board require a stormwater management plan to be presented for site plan review. Mr. Pittman agreed it's entirely appropriate; in the past the ZBA has attached conditions for approval for variances. Doesn't mean we are telling planning board what to do, but as long as that is done, then the rest of the decision is valid.

Chair Swanick noted that if the board is on the fence and we are deciding if we are going to allow this use in this case, in this sensitive aquifer area, then these other things are essential because of that circumstance. Mr. Williams added he recalled counsel earlier advising we could require triple wall tanks in allowing the variance, just as an example (he said he is not suggesting triple wall tanks). Ms. Swanick said yes, I guess if we approve then it's the conditions that would satisfy us in that approval to any degree that we can be satisfied.

Mr. Williams sees good points, community business, jobs, but also weighs the environmental aspect.

Chair Swanick raised the issue of conditions for what she would need to approve. Mr. Cahalane asked what a plan would contain? Swanick said it should follow DES guidelines; standard BMPs. Mr. Williams added he had done some research earlier and there are requirements for special drains with cisterns to separate water from contaminating substances. Swanick said that is what she meant.

Mr. Cahalane certainly agrees with everyone that this is not an easy decision. But based on everything presented, all the pros and cons, he is ready. It's a tough decision. When the ZBA went through it, it was the environmental catastrophe that could happen on one side of each criteria, and preponderance of merit on the other side that said these five criteria have been met. He thinks it does really qualify. There is the risk. It's hard to prove a negative until something happens you never know if you made the right decision and if you make a certain decision you'll never know. He felt it will be an unpopular decision no matter what. He noted most of us have sided with environmental issues in town over the years, and it's a tough decision. At this point, because this gas station once existed, its unique situation comes into play, and the discussions we had re technology possibly outpacing our ability as a town to keep up with our ordinances and take in the new technology, he is leaning to approve. Regarding conditions, he thinks it is a reasonable consideration, and would be fine. He said he would not support a new gas station in the area that hasn't been in business. It's the nature of the criteria and how the ZBA functions.

Mr. White offered it was a well-reasoned point of view. He noted a motion to approve... have we settled on conditions? Mr. Cahalane ask about other conditions. Ms. Swanick asked about the idea of getting copied on the reports that go to DES. Mr. White suggested it's the function of the town. She said the board could request that inspection reports get copied to the town. She was thinking that would be generated anyway (for DES) and could be copied to the town.

Mr. Cahalane said state usually sends copies to the town Health Officer (who is Mr. Cahalane). Mr. Pittman suggested maybe Mr. Cahalane is concerned but the next person on that role may not be and does not recommend we set up a system as is being discussed.

Chair Swanick recalled a test of the well there and wondered if testing could be required. Mr. Fogg suggested public water supplies are tested by DES. Mr. Pittman didn't see setting condition in that regard. Chair said she did recall a letter with closure that the water there did need to remain of drinking water quality, so guessed it will be monitored.

Swanick offered that a stormwater management plan is something that is recommended by DES and they have guidelines, and it includes snow removal plan and snow storage.

Mr. Pittman suggested each member reveal, like Mr. Cahalane shared his thoughts, how they are leaning. His immediate reaction is to deny from the environmental element. Just who he is; sees concerns about environment all the time. But he is part of a board charged with whether, on behalf of an applicant, ZBA can provide them with relief. So that's the job and so much hinges on the prohibition in 2011 for a gas station in the area that they're proposing. As discussed, he notes that a gas station in 2011 is not the same thing as a gas station in 2021 technologically so there is room there to ask if the ordinance is overly burdensome based on that change in technology that's likely to provide a different environment than the original adoption of Article 22 was operating in at the time. ZBA can't set aside fact that this isn't virgin land; it's an existing structure with history there. In realm of benefit to public, there are few businesses in Effingham. To turn away the restoration of a business would seem not in the interest of our residents all things being equal. There are so many factors, if I look dispassionately at the ordinance, my needle just has to lean slightly towards approval on this. Despite my personal opinions, feelings about all the environmental elements, I feel duty-bound to look at all these factors and say strictly as a zoning board of adjustment function, I feel justice would be in granting a variance to 2207 in this particular case. He agrees to suggested condition re stormwater. Mr. Pittman made a personal appeal to the owner to, if approved, make an annual contribution to Green Mountain Conservation Group. Mr. Cahalane noted this would be the only gas station in town.

Mr. Williams noted this has been a long case with a lot of good information from both sides. Thinks it's good to have businesses, thinks it's the job of ZBA to allow variances when warranted. The environmental aspect does weigh heavily on him, but he knows the technology is there. The only part, (he noted Theresa mentioned it and as he said before), is the human aspect. He'd definitely support any groundwater management plan - he thinks that would be enough to grant an approval. That's the only thing. Yes, the technology has improved but he thinks if the board can go a little further that's even better; it speaks of us as a board that we are thinking to the future as well, if that's something else that sets basis for another gas station coming into a similar situation in another town. Bodes well for us if we can do something like that.

Mr. White is inclined to deny and not inclined to engage in further persuasion. He noted the supreme court - you have 3-2, 5-4. If nothing else, he feels this case needs to have a dissent. There's no way that if it passes it should pass unanimously because of the other half. So, it's very weighted to approval for one or another slightly heavier, that doesn't mean it just pegs the needle, certainly doesn't for him. Whoever votes to approve has to believe it meets all five criteria, but not all members have to vote for it; it only need a majority. Mr. White said as he stated at the last meeting, strictly speaking it doesn't meet the standard of hardship and the public interest is weighted on both sides. The environmental factor is hampered again by fact you can't prove a negative; every disaster you prevent is another beautiful day in paradise. So, with all that and the fact that approving this gives us a moral piece of ownership.

Chair Swanick offered it is honestly quite challenging for her personally. She is on the fence. In addition to the Stormwater Management Plan there is another plan called Spill Prevention and Control. To address the natural impact which is the weather and storms which could affect potential contamination, and also the human aspect is more directly addressed with a Spill Prevention and Control Plan. Spill Prevention is a sign to alert a customer, Control is the C-level person who gets ongoing training who knows what to do when something happens and they do it and know to do it immediately. She'd feel comfortable doing the things DES says municipalities can do (in their handout) for a little more assurance. They are asking to do this operation in a stratified drift aquifer. There hasn't been a leak in 30 years. This is a much better system. The last system couldn't test to no leakage; it could only test to a certain point and then something undetectable could leak undetected and that would be a release eventually. But this can test – its tightness test at every step of installation. It can test the leaks into containment. So, I think the elements that we can do a little more than that. They already do spill-containment, they already have the additional sumps. A stormwater Management Plan and a Spill Prevention and Control Plan; I am on the middle post on the fence but I would be on the yes side with that.

Mr. Pittman offered that it sounds like the board is ready to vote. Chair Swanick said that what she just mentioned, she would need those in order to vote otherwise she sides with Mr. White. Mr. White added someone needs to craft a motion that envelops all that to put forward an approval. Mr. Cahalane said we can refine terminology for stormwater management plan and spill prevention plan.

Mr. Cahalane moved and Mr. Pittman seconded motion to grant Meena LLC a Variance from Article 22, Section 2207A(8) to operate a gas station, with the following conditions: 1) Submit a Stormwater Management Plan for Site Plan Review, and 2) submit a Spill Prevention and Control Response Plan to Site Plan Review. Roll call: Mr. Williams – aye, Mr. White – no, Mr. Pittman – aye, Mr. Cahalane – aye, Ms. Swanick – aye; motion passed 4-1.

Closed hearing at 8:54pm – short break, Mr. Williams signed off, Mr. Cahalane departed meeting.

Minutes:

Minutes of December 14, 2020: motion to approve by Mr. Pittman, seconded by Mr. White, all in favor, approved, 3-0.

Minutes of December 21, 2020: motion to approve as changed by Mr. White, seconded by Mr. Pittman, all in favor, approved, 3-0. Add the word 'a' after 'was', and remove the words 'of the' in the first line on the last paragraph on page 1. Add the word 'no' before 'reason' in first line of page 2.

Adjournment:

Motion to adjourn by Mr. Pittman, seconded by Mr. White, all in favor. Motion approved 3-0.

Adjourned at 9:11pm