

Effingham Zoning Board of Adjustment
Meeting Minutes
February 1, 2023
Effingham Town Hall
A Zoom link was provided.

Members Present: Jim Pittman (Chair), Tim White (Vice Chair), Mike Cahalane, Lawrence Edwards, Alan Taylor

Others Present: Nate Fogg (Land Use Clerk) Mr. Fogg confirmed that the Zoom link was active with five participants, however, there were issues with the video portion resulting in it being an audio only connection.

Meeting called to order: 7:00 PM

Review of Agenda: Ken and Pam McGovern requested the Board accept their application for a variance. The Chair added consideration of their request to the end of the agenda.

Review of Minutes of the January 4, 2023, meeting: Mr. White observed that that an attendee's name needed to be corrected from "Fay" to "Fhay". Mr. Cahalane moved to accept the minutes with the one correction. The motion was seconded by Mr. White. The motion passed unanimously.

Continuation of Deliberations: Commencing at 7:06 PM, deliberations on Case 102, regarding the Appeal to Administrative Decision in regard to the Planning Board's decision to not require a Special Use Permit for the Meena LLC gas station, resumed.

The Chair noted the presence of Attorney Bedard, representing the applicants, Attorney Boldt, representing the Planning Board, and Attorney Johnson, representing Meena LLC. He also recognized a number of other interested parties in attendance. He remarked that though he made reference to their presence, as the Board was engaged in deliberations, there would be no input accepted from any of those in attendance as the public hearing phase had been closed at the January 4th meeting.

The Chair began by recognizing that, since the last meeting, the Superior Court had issued a ruling on the "parallel" case that had been submitted concurrent with the application to the ZBA. He noted that the Court had dismissed the applicants' appeal to the Planning Board's decision regarding the Special Use Permit. He continued that, normally such an appeal would first come to the ZBA, and if not granted, could then go to the Court for reconsideration. In this case, though both motions commenced at the same time, in his opinion, the position of greater authority embodied by the Superior Court was still maintained.

Mr. Cahalane opined that the "final decision" lies with the Court, and that we could not make a decision that would change the outcome of the Court's action as they are the "final arbiters".

Mr. Taylor disagreed, stating that the people of Effingham should have the last word because they voted for a groundwater ordinance, and the ZBA should not have granted a variance. The Chair reminded that the sole issue before the ZBA was whether the Planning Board had erred in their decision to not require a Special Use Permit.

Mr. White offered that the townspeople voted for the ordinance without a comprehensive knowledge of all possible impacts in all locations. He maintained that one of the responsibilities of the ZBA was to look at situations where the letter of the ordinance might not be strictly applicable.

Mr. Taylor continued to insist that the Special Use Permit was required to provide protection in the Groundwater District. Mr. White offered that the variance essentially called for the same requirements as would be required in a

Special Use Permit and speculated that the Planning Board may have reasoned that the Permit would not have provided any additional benefit beyond that already rendered by the conditions of the variance.

Mr. Cahalane steered the conversation to the question of whether, had the Planning Board required the Special Use Permit, would that result in recognizing the gas station as a permitted use, and open the door to unintended consequences such as potentially expanding the size of the gas station. He believed by avoiding the requirement for the Special Use Permit, the gas station remains a non-permitted use with the constraints of the variance effectively defining the limits of its current and future use.

Mr. Edwards said he did not know why we were discussing the case if the Court had already decided it. He and Mr. Cahalane engaged in a discussion of how the question of requiring the Special Use Permit had gone from the Planning Board to the ZBA. Mr. Cahalane offered that the Planning Board still had control because of their Site Plan Review process, which was ongoing.

The Chair read selected portions of the 7-page Court decision. He summarized that the Court went on at length regarding how they regarded “Permitted” and “Prohibited” use to reach their decision, concluding with the text “Upon review, the Court finds that because the applicant’s use is a Prohibited Use, it is not required to secure a Special Use Permit.”

The Chair stated that, as Mr. Cahalane and Mr. Edwards had said, that the Court had decided the case, and as the higher authority, any effort on the part of the ZBA to render a contrary decision would likely result in another round of legal wrangling. He offered that the responsible action of the Board would be to dismiss the applicants’ appeal.

Mr. Cahalane moved to “Dismiss the Appeal to Administrative Decision.” Mr. White seconded the motion. After a brief discussion, the Board voted to approve the motion to dismiss at 7:30 PM.

The results of the vote were:

Michael Cahalane	Yes
Lawrence Edwards	Yes
James Pittman	Yes
Alan Taylor	No
Timothy White	Yes

Leona Simon, an attendee, asked the Board about the submission of letters and emails to the Board stating their thoughts and concerns. The Chair explained that communications received after the public hearing was closed were not permitted as “input” and had not been distributed to the Board. She protested that they were public property and should be available for examination. The Chair offered that he would investigate how that might be accomplished.

(Referenced Court Case: Superior Court No. 212-2022-CV-00102, Elizabeth M. Leonard, Presiding Justice.
Notice of Decision – January 27, 2023)

Annual Report of ZBA for 2022: The Chair shared the ZBA 2022 Annual Report that would appear in the Town’s Annual Report. There were no questions on the report. The Chair read the last line of the report that stated, “The members of the ZBA are deserving of our thanks for their service to the community, and for their ability and willingness to render sometimes complex and difficult decisions.”

Request for acceptance of application for a variance: Ken and Pam McGovern presented the Board with an application for a variance regarding their residence at 30 Henry Drive, Map 404, Lot 43, requesting relief from a side setback to build a garage. The Chair complimented the applicants for providing five copies, which were well organized, to the members of the Board. He impressed upon the applicants that the Board would only be attempting to verify the completeness of the information provided and proper payment of fees, and no discussion of its merits would occur.

Mr. Fogg had done a review of the abutter list to assure it was complete based on examination of the tax map. Mr. Cahalane offered that he thought there was one "extra" abutter, lot 27, that was not required because of its relationship to the McGovern's property. After a short discussion, it was decided that the physical relationship was close, and it was better to err on the side of caution and keep them on the list.

A brief review by the Board revealed no questions or deficiencies in the application, and the fees of \$190.00 were accepted as correct based on the information provided.

Mr. Cahalane moved to accept the application as complete, with Mr. Taylor seconding the motion. The motion was approved unanimously.

The application was assigned case number 103. A public hearing was scheduled for the next regular monthly meeting, March 1, 2023, with the hearing to start no sooner than 7:15 PM.

Adjournment

Motion to adjourn made by Mr. Cahalane. Seconded by Mr. Taylor. All in favor.

Meeting adjourned at 7:50 PM.

DRAFT