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Via email and Hand Delivery

October 21, 2015

Karyn Forbes Chair
Zoning Board of Adjustment
Town of Barrington
P.O. Box 660
333 Calef Highway
Barrington, NH 03825

Re: ***Case No. 238-5-TC/SDAO-15 Appeal; Calef's Find Foods***

Dear Chairperson Forbes and Members of the Zoning Board:

This law firm represents The Three Socios, LLC ("TTS"), which owns property abutting Calef's Fine Foods. This letter sets forth TTS's objections to the above-referenced appeal.

The Planning Board correctly determined that the Calefs' well violates the setback requirements. Section 4.1.1 of the Barrington Zoning Ordinance provides:

> **No building or structure shall be erected, enlarged, altered or moved...except in accordance with Table 2, Table of Dimensional Standards or as otherwise specified herein.**

Table 2 provides that the rear yard setback for properties in the Town Center Zoning District is 15 feet. As such, no "structure" may be erected within 15 feet of the Calefs' rear property line.

The ordinance defines a "structure" very broadly as:

> **Structure: Anything constructed, installed, placed or erected, whether above or below grade.**

A well falls squarely into this definition, as it is something "constructed, installed, placed or erected...below ground." The definition goes on to exempt several specific items from the definition of a "structure," as follows:

> **Unless otherwise stated in this Ordinance, the following structures are exempt from the building permit requirements set forth in Section 15.4.1 and shall not be construed as structures for purposes of setback requirements, but shall be so**

construed for all other purposes. Sheds may require an Administrative Zoning Permit, see Article 9.4.5.

(a) Signs,
(b) Stonewalls,
(c) Septic systems,
(d) Driveways, sidewalks, parking lots,
(e) Home propane and heating oil tanks,
(f) One story detached accessory structures used as tool and storage sheds, playhouses, and similar uses, providing the floor area does not exceed 200 square feet,
(g) Retaining walls that are not over four feet in height measured from the bottom of the footing to the top of the wall, unless supporting a surcharge,
(h) Water tanks supported directly upon grade if the capacity does not exceed 5000 gallons and the ratio of height to diameter or width does not exceed 2 to 1,
(i) Prefabricated swimming pools that are less than 24 inches deep,
(j) Swings and other playground equipment,
(k) Window awnings supported by an exterior wall that does not project more than 54 inches from the exterior wall,
(l) Heating or cooling equipment, and
(m) Fences.

The well does not fall within any of these exemptions, and therefore remains subject to the required 15' setback.

The Calefs argued that the Town has not treated wells as "structures" in the past, although they presented no evidence to support that argument. Nonetheless, their argument is essentially that the Town should apply the administrative gloss doctrine. That doctrine provides that where a Town has interpreted an ambiguous provision of a zoning ordinance consistently in the past, it must continue to follow that interpretation. Nash Family Inv. Properties v. Town of Hudson, 139 N.H. 595, 602 (1995). However, where a provision of the ordinance is unambiguous, the doctrine does not apply. Id. Here, the definition of a "structure" is plain and unambiguous. Therefore, the Town's interpretation of that provision in the past has no bearing on its application to the present well.

The Calefs also argued that the well constitutes a "public utility structure," and is therefore not subject to the setback requirements. That argument is flawed because Calefs' Fine Foods is not a "public utility." To the extent the Calefs supply water to their customers, that is merely incidental to the commercial operations conducted on site. The Calefs' reading of that definition would render every single restaurant or business which supplies water to customers as part of its commercial operations, a public utility. Moreover, "public utility structures" are still "structures," and the ordinance does not exempt them from the setback requirements. This is not a situation where a gas or electric line must cross a front yard to reach a building from the public street. This is a well installed by a business approximately 8 feet from the rear property line for no valid reason.

The Town is bound to follow the provisions of the Zoning Ordinance as they are written, and may not substitute its own preferences for what has been voted on and approved by the residents of Barrington. For these reasons, the Board should deny the Calefs' appeal.

Sincerely,

John L. Arnold

JLA/dj

cc: The Three Socios, LLC
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