

LAND USE OFFICE

DEC 23 2013

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Gerald Cote  
PO Box 105  
Barrington, NH 03825  
Tax map 235 Lot 39

December 23, 2013

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

Dear Chairman Forbes,

This letter is an appeal pursuant to RSA 677:2 regarding the ZBA decision for case number 238-4-TC-13-ZBA-Variance (The Three Socios), LLC). On November 20, 2013 the Barrington ZBA granted a variance from Article 6, Section 6.2.6 to allow open space of the Village Place subdivision to be used for a well, and to allow gravel access and appurtenant underground utility lines to be located within the perimeter buffer of the conservation subdivision.

I believe I have standing to appeal this decision because I am an abutter the Village Place subdivision. I believe there were errors in law regarding the ZBA's previous approval to grant a variance to The Three Socios, LLC, map 238 lot 4, which follow below. There are other provisions of the Barrington Zoning Ordinance that prohibit this proposal that must also be considered by the ZBA when reaching a decision.

I am appealing this decision pursuant to RSA 677:2 and request and motion the ZBA to rehear their decision for the following reasons and any other reasons previously submitted to the ZBA by Stephen Jeffery:

The conservation subdivision was approved as authorized by RSA 674:21. RSA 676:5 provides appeals from any planning board decision pursuant to RSA 674:21 be made not to the ZBA but to the Superior Court as provided by RSA 677:15. Therefore the ZBA has no statutory jurisdiction in this matter.

In addition, the ZBA did not base their decision on the necessary criteria of RSA 674:33. The five criteria were not deliberated nor voted in favor by the ZBA members.

RSA 674:33 provides the following:

(b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;

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(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 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 one.

(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.

The definition of "unnecessary hardship" set forth in subparagraph (5) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

RSA 677:33 requires the ZBA to make a finding of hardship. The Village Place subdivision has no hardship for which a variance is required. The RSA's provide no authority for a claim of hardship on one lot justifies seeking a variance on a different lot. There is no statutory provision to transfer hardship from one lot to another lot. Furthermore a reasonable use of property currently exists on the 3 Socios lot, and no variance is required for a reasonable use.

An unnecessary hardship referred to in the statute must have related to the owner and not to an option holder. *Welch v. Nashua*, 108 NH LEXIS a32 (1971)

The unnecessary hardship referred to in the statute must have been one to whom the provision was designed to protect, and the statute was not designed to afford relief to a mere option holder of land as to which use variance was sought. *Conery v. Nashua*, 103 NH 16, 164 A.2d 247, 1960 NH LEXUS 3 (1960)

Barrington Village Place was permitted an increase in density pursuant to ZO 6.4.3(2) which states - This increase in density may be granted in accordance with State Statute 674:21, Innovative Land Use Controls.

The appeals from regulations subject to 674:21 go to superior court. See RSA 676:5 III ... If in the exercise of subdivision or site plan review, the planning board makes any decision, ... which would be appealable to the board of adjustment ... provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates **administration**, ... to the **planning board**, then the planning board's decision pursuant to that delegation

**cannot be appealed to the board of adjustment**, but may be appealed to the superior court as provided by RSA 677:15.

The Barrington Zoning Ordinance 15.1.2(1) gives the ZBA power to hear appeals except for sections that provide for the appeals, administration, or enforcement by another board as designated within that section. Conservation subdivisions are administered by the Barrington planning board. The Open Space in the Barrington Village Place subdivision was a condition of approval that cannot be changed by a variance granted by the ZBA.

The Village Place subdivision received final planning board approval and has been recorded. This approval cannot be modified. There is no statutory provision to amend that approval without revocation and resubmittal by the owner Falzone.

A change of use such as the transient non-community water system proposed by 3 Socios requires a site plan review application. The proposed well is also a nonresidential use that requires a site plan review application. The decision by the ZBA is premature in that the applicant has not filed the required site plan review application.

RSA 674:21-a Development Restriction Enforceable deems open space to be a conservation restriction as defined by RSA 477:45 which prohibits all development. The ZBA has no authority to make decisions in violation of either RSA.

I authorize Mr. Stephen Jeffery to represent me at the rehearing of this case.

Respectfully submitted,

Gerald Cote



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