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John L. Arnold
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April 18, 2017

Fred Nichols, Chair
Town of Barrington Planning Board
P.O. Box 660
333 Calef Highway (Rte. 125)
Barrington, NH 03825

RE: The Three Socios, LLC/Barrington, NH

Dear Chairman Nichols and Members of the Board:

At the February 21, 2017 hearing on the above-referenced application, there was a discussion regarding the applicable expiration dates of the Conditional Site Plan Approvals issued by this Board for The Three Socios, LLC ("TTS"), Barrington Village Place, LLC ("BVP"), George Tsoukalas ("Tsoukalas"), and the Journey Baptist Church ("Church"). This letter is to set forth the relevant dates and events to demonstrate that none of the Conditional Site Plan Approvals have expired.

The relevant dates are summarized as follows:

- April 15, 2014: Conditional Site Plan Approval for TTS
 - Notice of Decision ("N.O.D.") dated April 24, 2014 - no expiration date (Ex. A)
- May 16, 2014: Writ of Certiorari issued by Superior Court staying all further proceedings on TTS approvals (Ex. B)
- August 18, 2015: Conditional Site Plan Approvals issued for the Church, BVP & Tsoukalas (Ex. C)
 - N.O.D.s each state February 23, 2016 deadline to satisfy conditions precedent
- September 18, 2015: Writ of Certiorari issued staying all further proceedings on BVP approvals (Ex. D)
- October 27, 2015: Court order dismissing Calef appeals of TTS approvals (Ex. E)

- November 30, 2015 letter from John L. Arnold to Jae Whitelaw (cc to Planning Board) inquiring as to lack of expiration date for TTS Conditional Approval (Ex. F)
- December 11, 2015 email from Jae Whitelaw to John L. Arnold confirming no expiration date (cc to Marcia Gasses and John Scruton) (Ex. G)
- February 22, 2016: Planning Board grants extension to BVP and Tsoukalas to satisfy conditions precedent – 6 months after a final decision in pending Calef appeals of BVP Conditional Approval (Court Docket Nos. 368 & 509) (Ex. H)
- March 10, 2016: The Church site plan signed by Planning Board Chair
- May 16, 2016: Court order dismissing Calef appeals of BVP approvals (Docket Nos. 368 & 509) (Ex. I)
- August 17, 2016: BVP and Tsoukalas site plans signed by Planning Board Chair
- October 17, 2016 email from John L. Arnold to Jae Whitelaw (cc to Marcia Gasses and John Scruton) advising that TTS is working with architect to get drawings ready for submittal and re-confirming no expiration date for Conditional Approval (Ex. J)
- October 17, 2016 email from Jae Whitelaw to John L. Arnold (cc to Marcia Gasses and John Scruton) confirming no deadline for TTS Conditional Approval (Ex. K)
- November 16, 2016: Deadline to satisfy conditions of approval for BVP and Tsoukalas (6 months after May 16, 2016 order dismissing Calef appeals)
- February 21, 2017 Planning Board hearing on Three Socios conditions of approval
 - Hearing continued to May 2, 2017

The Three Socios Approval

The Calefs claim that there was a twelve-month deadline to fulfill the conditions of the TTS approval because a **draft** notice of decision discussed at the April 2014 Planning Board hearing contained such deadline. They further claim that the conditions of approval were not satisfied within twelve months, and the approval has therefore expired. Both arguments fail.

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HINCKLEY, ALLEN & SNYDER LLP, ATTORNEYS AT LAW

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This Board issued a written notice of decision on April 24, 2014, conditionally approving the TTS Site Plan. That Notice of Decision lacked any deadline for satisfaction of the conditions. In November 2015, the undersigned sent a letter to Town Counsel, Jae Whitelaw, to confirm that no deadline exists. See Ex. F. This letter was sent prior to the expiration of any twelve-month deadline (if one existed), in light of the tolling of such period by the Superior Court (discussed below). The Planning Board Chair was copied on the letter. Id. By email dated December 11, 2015, Attorney Whitelaw confirmed that the TTS conditional approval was not subject to any expiration date. See Ex. G. The response email copied Town Administrator, John Scruton and Town Planner, Marcia Gasses. Id.

Again, in October 2016, the undersigned emailed Attorney Whitelaw, copying Ms. Gasses and Mr. Scruton, to give an update on the status of the architectural drawings required for final approval, and an anticipated timeframe for submitting designs to the Board. See Ex. J. In that email, the undersigned again sought confirmation that no expiration date applied to the TTS conditional approval. Id. Again, Attorney Whitelaw responded by confirming that there is no expiration date, and copied Ms. Gasses and Mr. Scruton. See Ex. K.

TTS proceeded in good faith in reliance on the lack of expiration date in the Notice of Decision¹, and on the representations from the Town that there was no expiration date. It would be fundamentally unjust to deem the TTS conditional approval expired at this stage of proceedings. Since April 2014, TTS has diligently pursued final approval, which has included successfully defending the Calefs' two (2) appeals to the Zoning Board of Adjustment, and the Calefs' four (4) appeals to the Strafford County Superior Court. See also State Permit Chart and Timeline, previously submitted to the Board. Although substantial time has elapsed since April 2014, TTS has not sat idly by. Instead, it has acted diligently, and expended considerable resources finalizing design elements, obtaining a myriad of State and Local permits and approvals, and defending the Calefs' six (6) separate appeals.

Furthermore, even if there had been a twelve-month deadline to fulfill the conditions of the TTS approval, that period has not yet lapsed. Upon appeal of a Planning Board decision to Superior Court, further proceedings on the decision are stayed until the appeal is resolved. See RSA 677:15, II. This stay tolls the expiration date of an approval because the Board and the Applicant are both prohibited from taking any further action until the stay is dissolved. See id. In this case, the Calefs immediately appealed the TTS conditional approval to Superior Court, and the Superior Court issued a stay of further proceedings pursuant to RSA 677:15. See Ex. B. That stay dissolved in October 2015 when the Court dismissed the Calefs' appeals. See Ex. E. However, by that time, the Court had already issued a second stay in the Calefs' appeal of the BVP approval. See Ex. D. Because that stay prevented any further action on the BVP approval, and the BVP approval was a condition of the TTS approval, it effectively stayed further action on both approvals. The second stay dissolved on May 16, 2016, when the Court dismissed the

¹ See RSA 676:3 (written notice of decision must explicitly state all conditions of approval).
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Calefs' second set of appeals. Thus, to the extent there was a twelve-month expiration date for the TTS approval, that twelve month period did not begin to run until May 16, 2016, when the second stay was dissolved, and will not expire until May 16, 2017.

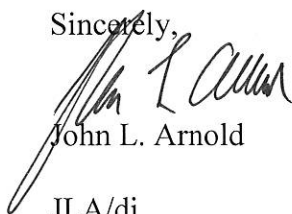
BVP, Church and Tsoukalas Approvals

The Calefs also argued that the conditional site plan approvals for BVP, Tsoukalas and the Church have all expired. However, this argument is untimely. This Board granted final site plan approval to the Church on March 10, 2016, and to BVP and Tsoukalas on August 17, 2016. State law is clear that any challenge to a final site plan approval must be made to Superior Court within thirty (30) days after the approval, or the challenge is forever barred. See RSA 677:15. In other words, if the Calefs wished to challenge those final approvals, they faced an April 9, 2016 deadline for the Church, and a September 16, 2016 deadline for BVP and Tsoukalas. The Calefs did not bring any challenges within those deadlines, so their claims are now barred. See Prop. Portfolio Group, LLC v. Town of Derry, 154 N.H. 610 (2006) (appeal 5 months after site plan approval was dismissed as untimely).

It is also worth noting that the Superior Court has already determined that the Calefs lack standing to challenge the BVP approval because their property does not abut the BVP property, and will not be impacted by the installation of the well. See Ex. I. For the same reasons, the Calefs lack standing to appeal the Church approval. Put simply, burying water lines on the Church property to supply water from TTS's new well will not impact the Calefs' property in the least. As such, the Calefs' claims are improper.

For the foregoing reasons, we urge this Board to grant final site plan approval to The Three Socios.

Sincerely,



John L. Arnold

JLA/dj
Enclosures

cc: The Three Socios, LLC
Jae Whitelaw, Esquire
Barry Gier, P.E.

#56760231

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HINCKLEY, ALLEN & SNYDER LLP, ATTORNEYS AT LAW

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APR 30 2014

10144



Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

barrplan@metrocast.net

barrplan@gmail.com

NOTICE OF DECISION

Office use only	Date certified:	As built received:	Surety returned
<p>"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.</p>			
<p>Proposal Identification: SR 12/410 (Gas Station and Convenience Store) Request by applicant to construct a 5,000 sq. ft. convenience store and gas station on a 1.84 acre site located at 491 Calef Highway (Map 238, Lot 4) in the Town Center (TC) and Stratified Drift Aquifer Overlay (SDAO) Zoning Districts.</p>			
<p>Applicant: The Three Socios, 321 Lafayette Road, Unit D. Hampton, NH 03842</p>		<p>Dated: 4/24/2014</p>	

Dear applicant:

This is to inform you that the Barrington Planning Board at its April 15, 2014 meeting **CONDITIONALLY APPROVED** your application referenced above.

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Conditions Precedent

- 1) The applicant will submit utility clearance letters in accordance with Article 3.9.2 of the Site Plan Regulations.
- 2) Revise the following plan notes
 - a) Note #30 on sheet C4 to read, "All necessary pavement repairs shall be completed by July 1st of each year.

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- 3) Add the following plan revisions to the plans
 - a) Show the location of a bike rack
- 4) Add the following plan notes:
 - a) All Variances shall be listed on the plans
 - b) List Waiver 4.7.7.2 Minimum velocity in Drain Pipe to the plan
 - c) List Waiver 4.7.7.3 Minimum Depth of Cover for a Storm Drain to the plan
 - d) List Waiver 4.12.2(1)b Light trespass beyond the property line
- 5) Town Counsel shall approve all easement language.
- 6) Update the NHDOT Driveway Permit to include any revisions
- 7) The applicant shall attain site plan approval for the installation of the well, well house and connecting infrastructure on lots 238-14, 238-7, and 235-83, including all necessary easements.
- 8) Maintenance Requirements
 - a) Revise the Stormwater Management/Spill Prevention Operation and Maintenance Manual with a last revision of January 27, 2014 to have all inspections to the Stormwater Management Systems and structures occur on a monthly basis.
 - b) Add note 4g. to the Stormwater Management/Spill Prevention Operation and Maintenance Manual, requiring an "Annual Inspection Report shall be filed by January 31st of each year with the Code Enforcement Office."
 - c) For uses requiring Planning Board approval for any reason, a narrative description of maintenance requirements for structures required to comply with the necessary Performance Standards, shall be recorded to run with the land on which such structures are located and recorded at the Registry of Deeds for Strafford County. The description so prepared shall comply with the requirements of RSA 478:4A, as amended. ZO 12.5 The Land Use Department will record the revised document.
- 9) Any outstanding fees shall be paid to the Town
- 10) The applicant will sign an agreement for on-site inspections and provide an escrow amount to be determined by the Planning Board, for inspections to occur on-site during construction of site improvements.
- 11) The applicant must provide exterior architectural drawings with elevations for review by the Planning Board for conformance with the Architectural Standards for Barrington Town Center.
- 12) Prior to certification of the final plan, the applicant will appear before the board for review of compliance with the conditions of approval. The applicant shall submit three (3) complete paper print plan sets and supporting documents as required in Article 3 with a letter explaining how the Applicant addressed the conditions of approval. This shall include final and complete reports for all items submitted during review for the Town of Barrington's file. The final materials will be provided to the board for review at a public hearing. The board will review materials prior to granting final approval and authorizing the chair to sign the plans.
- 13) The Chairman shall endorse three (3) paper copies of the approved plan meeting the conditions of approval upon receipt of an executed bond for all improvements, excluding buildings. The Planning Department shall retain a signed and approved 11" X 17", and PDF format on CD with supporting documents for Town records. The Planning

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Department shall record a copy of the Notice of Decision and Conditions of Approval at the Strafford County Registry of Deeds. The applicant shall pay all recording fees prior to final approval.

General and Subsequent Conditions

- 1) Where no active and substantial work, required under this approval, has commenced upon the site within two years from the date the plan is signed, this approval shall expire. An extension, not to exceed one year, may be granted, by majority vote of the Board so long as it is applied for at least thirty days prior to the expiration date. The Board may grant only one such extension for any proposed site plan. All other plans must be submitted to the Board for review to insure compliance with these and other town ordinances. Active and substantial work is defined in this section as being the expenditure of at least 25% of the infrastructure improvements required under this approval. Infrastructure shall mean in this instance, the construction of roads, storm drains, and improvements indicated on the site plan. RSA 674:39
- 2) Prior to any site disturbance the applicant must provide a copy of the USEPA NPDES Phase II, notice of intent (NOI).
- 3) As-Built Plans shall be provided to ensure that the site is developed in accordance with the approved plans and to accurately document the location of underground utilities. All such as-built plans shall meet the current standards as set forth by the New Hampshire Board of Licensure.
- 4) Final Approval of the Non Community Transient Water System by NHDES shall be provided to the Town prior to construction.

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,



Marcia J. Gasses
Town Planner & Land Use Administrator

cc: Barry Gier, Jones & Beach Engineers

File

John Arnold

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THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

George A. Calef and Arvilla T. Calef, Trustees of The George A. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008
and
Arvilla T. Calef and George A. Calef, Trustees of The Arvilla T. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008

v.

Town of Barrington, New Hampshire

DOCKET NO: 219-2014-CV-166

CERTIORARI ORDER

The Court has reviewed the Petition for Writ of Certiorari and makes the following order:

1. A Writ of Certiorari shall issue.
2. Proceedings upon the decision appealed from are stayed.
3. The Planning Board shall deliver certified or sworn copies of all papers acted on by the Board to the Superior Court Clerk as indicated in the Orders of Notice.

So Ordered.

5/16/14
Date


Presiding Justice

Steven M. Houran
Presiding Justice

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Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

barrplan@metrocast.net

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NOTICE OF DECISION

[Office use only]	Date certified:	As built received:	Surety returned
<i>"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.</i>			
Proposal Identification: 235-83-TC-15-SR (The Journey Baptist Church) Request by applicant for Site Review to connect the Journey Baptist Church building to the proposed water system to be constructed on Map 238, Lot 7 thereby abandoning the existing well on the subject parcel and to connect the subject parcel to Map 238, Lot 4 via a 24' wide roadway and four waivers for 4.9.2(1) and 4.9.3(1) to allow 8 parking spaces to remain in front setback. 4.97(1) Interior Landscaping Standards, 4.9.7(5) Perimeter Shade Trees and 4.10.2 and 4.10.4 General Requirements (Landscaping Design and Screening Standards). The parking area will be expanding on site to increase the capacity of the building. This lot is located on a 2.93 acre site in the Town Center (TC) Zoning District. Berry Surveying & Engineering; 335 Second Crown Point Road, Barrington, NH 03825			
The Journey Baptist Church P.O. Box 707 Barrington, NH 03825			Dated: August 19, 2015

Dear applicant:

This is to inform you that the Barrington Planning Board at its August 18, 2015 meeting **CONDITIONALLY APPROVED** your application referenced above.

List Waivers Granted

- #1 4.9.2(1) All multi-family dwellings and non-residential parking areas shall be located behind the front-yard setback.
- 4.9.3(1) Existing Structures-Any structure or land use lawfully in existence prior to the adoption of this ordinance shall not be subject to the requirements of this Article so long as the kind or extent of use is not changed, and provided further that any parking facilities now serving such structures shall not in the future be reduced below such requirements.

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- #2 4.9.7(1) Interior Landscaping Standards for the front and both sides of the building.
10% on parking areas located to the front, 8% on parking areas to the side of the principal structure.
- #3 4.9.7(5) Perimeter Shade Trees
- #4 4.10.2 and 4.10.4 General Requirements (Landscape Design and Screening Standards)

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by February 23, 2016, the Boards approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board.

Conditions Precedent

- 1) Add the following plan notes
 - a) " The Journey Baptist Church is prepared to institute the reflected Site Plan Review redevelopment actions on their property which would include tying into the abutting community water system if it becomes available, or to continue the use of the existing private well and would include tying into the abutting parking lot if access becomes available, or to continue access exclusively through the easements that are currently available."
 - b) Entrance with Three Socios lot must be posted "No Truck Access"
- 2) Show cross walk location to access open area from rear entrance of building.
- 3) Make the necessary plan revisions called out in the August 13, 2015 letter from Dubois & King.
- 4) Revise the following plan notes
 - a) Revise note #8 on page 4 to clarify 57.3% is the total impervious surface for the lot
- 5) Town Counsel shall approve all easement language
- 6) Add the owner's signature to the final plan.
- #7) Any outstanding fees shall be paid to the Town
- 8) Prior to obtaining Board signature, the Applicant shall submit three(3) complete paper print plan sets and supporting documents as required in Article 3 with a letter explaining how the Applicant addressed the conditions of approval. This shall include final and complete reports for all items submitted during review for the Town of Barrington's file. The Town shall retain a signed and approved reproducible 11"X17", and PDF format with supporting documents for Town records.

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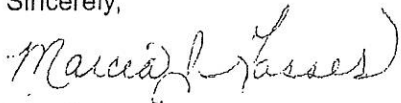
General and Subsequent Conditions

- #1) Where no active and substantial work, required under this approval has commenced upon the site within two years from the date the plan is signed, this approval shall expire. An extension, not to exceed one year, may be granted, by majority vote of the Board so long as it is applied for at least thirty days prior to the expiration date. The Board may grant only one such extension for any proposed site plan. All other plans must be submitted to the Board for review to ensure compliance with these and other Town ordinances. Active and substantial work is defined in this section as being the expenditure of at least 25% of the infrastructure improvements required under this approval. Infrastructure shall mean in this instance, the construction of roads, storm drains, and improvements indicated on the site plan. RSA 674:39

(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,



Marcia J. Gasses
Town Planner & Land Use Administrator

cc: Christopher Berry, Berry Surveying & Engineering
File

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AUG 24 2015



Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

barrplan@metrocast.net

barrplan@gmail.com

NOTICE OF DECISION

[Office use only]	Date certified:	As built received:	Surety returned
<i>"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.</i>			
Proposal Identification: 238-16.21-V-15-SR(Barrington Village Place) Request by applicant for Site Review to construct a well to service a non-community water system with a well easement and waiver from Section 3.2.10(7) requiring parking lot requirements for the proposed project. This is located on a 29.91 acre lot (Map 238, Lot 16.21)			
Applicant: James Mitchell The Three Socios, LLC 321D Lafayette Road Hampton, NH 03842 Barrington Village Place, LLC 7B Emery Lane Stratham, NH 03885 By: Barry W. Gier, P.E. Jones & Beach Engineers, Inc. PO Box 219 Stratham, NH 03885		Dated: August 19, 2015	

Dear applicant:

This is to inform you that the Barrington Planning Board at its August 18, 2015 meeting **CONDITIONALLY APPROVED** your application referenced above.

List Waivers Granted: SR 3.2.10(7) Requiring parking requirements be shown on the plan

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is

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required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by February 23, 2016, the Boards approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board.

Conditions Precedent

- 1) Add the following plan notes
 - a) Add the NHDES Non-Community Water System Permit #
 - b) Add the NHDOT Driveway Permit # to the plan
 - c) Add the NHDES Wetland Permit # to the plan if required
- 2) Town Counsel shall approve all easement language to include Village Place and The Three Socios
- 3) Add the wetland scientist's signature and certification to the final plan
- 4) Add the owner's signature to the final plan
- 5) Any disturbed areas are to be revegetated
- #6) Any outstanding fees shall be paid to the Town
- 7) Prior to obtaining Board signature, the Applicant shall submit three(3) complete paper print plan sets and supporting documents as required in Article 3 with a letter explaining how the Applicant addressed the conditions of approval. This shall include final and complete reports for all items submitted during review for the Town of Barrington's file. The Chairman shall endorse three copies of the approved plan(s) meeting the conditions of approval upon receipt of an executed bond for all improvements, excluding buildings, The Town shall retain a signed and approved reproducible 11"X17", and PDF format with supporting documents for Town records.

General and Subsequent Conditions

- 1) The easement with the final well location must be recorded at the Strafford County Registry of Deeds, once the well is set.
- #2) Where no active and substantial work, required under this approval has commenced upon the site within two years from the date the plan is signed, this approval shall expire. An extension, not to exceed one year, may be granted, by majority vote of the Board so long as it is applied for at least thirty days prior to the expiration date. The Board may grant only one such extension for any proposed site plan. All other plans must be submitted to the Board for review to ensure compliance with these and other Town ordinances. Active and substantial work is defined in this section as being the expenditure of at least 25% of the infrastructure improvements required under this approval. Infrastructure shall mean in this instance, the construction of roads, storm drains, and improvements indicated on the site plan. RSA 674:39

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(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script, reading "Marcia J. Gasses".

Marcia J. Gasses
Town Planner & Land Use Administrator

cc: Barry Gier, P.E. Jones & Beach Engineers, Inc.
File

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AUG 24 2015



Planning & Land Use Department

Town of Barrington

PO Box 660

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Barrington, NH 03825

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<i>"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.</i>			
Proposal Identification: 238-7-TC-15-SR (Millo's Pizza-George Tsoulakas) Request by applicant for Site Review to construct a water system with associated pump house, waterline, and access across the subject property between Map 238, Lot 4 and Map 238, Lot 16.21 and waiver from Section 3.210(7) requiring parking lot requirements for the proposed project. This is located on a 2.26 acre lot (Map 238, Lot 7) in the Town Center.			
George Tsoukalas PO Box 684 Barrington, NH 03825 Barry Gier, P.E. Jones & Beach Engineers, Inc. PO Box 219 Stratham, NH 03885		Dated: August 19, 2015	

Dear applicant:

This is to inform you that the Barrington Planning Board at its August 18, 2015 meeting **CONDITIONALLY APPROVED** your application referenced above.

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by February 23, 2016, the Boards approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board.

Conditions Precedent

- 1) Add the following plan notes

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- a) Property is subject to an unrecorded agreement, titled "Easement" and dated August 2, 2007, between George Tsoukalas, Grantor, and George and Arvilla Calef, Grantees, pursuant to which the Grantees' hold rights set forth in said agreement to obtain water from the subject property to benefit property identified on the Barrington Assessor's Map as Map 238, Lot #5.
- 2) Revise the following plan notes
 - a) Add the NHDES Non Community Public Water System Permit #
 - b) Add the NHDES Septic Approval Number to the plan
- 3) Town Counsel shall approve all easement language; to include the agreement between Three Socios and George Tsoukalas.
- 4) Add pedestrian access easement language to the easement document
- #5) Add the owner's signature to the final plan
- 6) Any outstanding fees shall be paid to the Town
- 7) Prior to obtaining Board signature, the Applicant shall submit three(3) complete paper print plan sets and supporting documents as required in Article 3 with a letter explaining how the Applicant addressed the conditions of approval. This shall include final and complete reports for all items submitted during review for the Town of Barrington's file. The Chairman shall endorse three copies of the approved plan(s) meeting the conditions of approval. The Town shall retain a signed and approved reproducible 11"X17", and PDF format with supporting documents for Town records.

General and Subsequent Conditions

- #1) Where no active and substantial work, required under this approval has commenced upon the site within two years from the date the plan is signed, this approval shall expire. An extension, not to exceed one year, may be granted, by majority vote of the Board so long as it is applied for at least thirty days prior to the expiration date. The Board may grant only one such extension for any proposed site plan. All other plans must be submitted to the Board for review to ensure compliance with these and other Town ordinances. Active and substantial work is defined in this section as being the expenditure of at least 25% of the infrastructure improvements required under this approval. Infrastructure shall mean in this instance, the construction of roads, storm drains, and improvements indicated on the site plan. RSA 674:39

(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,



Marcia J. Gasses
Town Planner & Land Use Administrator

cc: File

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THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

George A. Calef and Arvilla T. Calef, Trustees of The George A. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008 and
Arvilla T. Calef and George A. Calef, Trustees of The Arvilla T. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008

v.

Town of Barrington, New Hampshire

DOCKET NO. 219-2015-CV-368

CERTIORARI ORDER

The Court has reviewed the Petition for Writ of Certiorari and makes the following order:

1. A Writ of Certiorari shall issue.
2. Proceedings upon the decision appealed from are stayed.
3. The Planning Board shall deliver certified or sworn copies of all papers acted on by the Board to the Superior Court Clerk as indicated in the Orders of Notice.

So Ordered.

9/18/15
Date


Presiding Justice

Steven M. Houran
Presiding Justice

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Judith E. Whitelaw, ESQ
Mitchell Municipal Group
25 Beacon Street East
Laconia NH 03246**

Case Name: **George A. Calef and Arvilla T. Calef, Trustees of The George A. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008, et al v Town of Barrington,**
Case Number: **219-2014-CV-00471 219-2014-CV-00166**

Enclosed please find a copy of the court's order of October 27, 2015 relative to:

Court Order re: Zoning Board Appeal and Planning Board Appeal

October 30, 2015

Kimberly T. Myers
Clerk of Court

(273)

C: Gregory D. Wirth, ESQ; John L. Arnold, ESQ

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STRAFFORD, SS.

SUPERIOR COURT

George A. Calef and Arvilla T. Calef,
as Trustees of the George A Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008
and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008
v.

Town of Barrington

Docket No.: 219-2014-CV-00471; 219-2014-CV-00166

ORDER

The plaintiffs, George A. Calef and Arvilla T. Calef, as Trustees of the George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 ("the Calefs"), initiated litigation against the defendant, the Town of Barrington ("the Town"), appealing a decision of the Town's Planning Board. The Calefs later initiated another action against the Town, appealing a related decision of the Town's Zoning Board of Adjustment ("the ZBA"). These two actions were thereafter consolidated. (See ZBA court index #6.)¹ Subsequently, the Three Socios, LLC ("Three Socios"), intervened in this action. (ZBA court index #7.) After hearing, and based on the parties' arguments, the relevant facts derived from the record, and the applicable law, the court dismisses the Calefs' Planning Board appeal and affirms the decision of the ZBA.

FACTUAL AND PROCEDURAL BACKGROUND

The certified record reveals the following relevant facts. The Calefs own property on Route 125 in Barrington, where they operate a convenience store, Calef Fine Foods. (See PB C.R. JJJ at 3.)² The Calefs' lot abuts Route 125 to the west and property owned by the Three

¹ Though the Calefs' two suits have been consolidated, two separate case files and certified records exist. For the sake of clarity, the court will denote a court index or certified record citation to docket number 219-2014-CV-00471 with "ZBA" and a reference to items in docket number 219-2014-CV-00166 with "PB" (e.g. "PB court index #1", "ZBA C.R. at 1").

² The certified record provided in docket number 219-2014-CV-166, the Planning Board docket, is separately tabbed according to document and separately paginated, excluding the final two tabs, III and JJJ. The court will cite to III and JJJ as if they were exhibits in the certified record by citing the tab name and the specific page within the tab.

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Socios to the north. (See PB C.R. JJJ at 2, 3.) Like the Calefs' lot, Three Socios's lot abuts Route 125 to the west. (See PB C.R. JJJ at 2, 3.) Three Socios's lot also abuts a lot owned by the Journey Baptist Church to the north and a lot owned by George Tsoulakas ("Tsoulakas") to the east. (See PB C.R. JJJ at 3.) Tsoulakas's lot, in turn, is abutted to the east by a larger lot owned by the Barrington Village Place, LLC ("Barrington Village Place"). (See PB C.R. JJJ at 3.)

The Calefs' lot has traditionally received water from a well located on Tsoulakas's property and has done so under the terms of an express easement since 2007. (See PB C.R. at 362-63, JJJ at 2; see also ZBA Compl. ¶¶ 9-12; ZBA Answer ¶¶ 9-12.) Tsoulakas's property is located near and to the northeast of the Calefs' property, but does not abut the Calefs' lot. (See PB C.R. JJJ at 3.)

In January of 2012, Three Socios submitted an application to the Planning Board³ for major site plan review for proposed construction of a 5,000 square foot convenience store and gas station on Route 125. (PB C.R. at 1-6.) The proposed project site is located in the Barrington Town Center and Stratified Drift Aquifer Zoning Districts. (PB C.R. at 12.) Three Socios's proposed construction and operation of the gas station will include storage of fuel in several underground fuel storage tanks. (See PB C.R. at 138, JJJ at 4.) New Hampshire Department of Environmental Services ("NHDES") regulations require a certain distance between such underground fuel storage tanks and water supply wells. See N.H. Admin. Rules, Env-Or 407.06; (see also PB C.R. at 362.) Accordingly, the Three Socios's major site plan involved abandonment of several existing private wells, including the well which currently services the Calefs', and others', property. (See PB C.R. JJJ at 2, 3.) In order to provide an alternative water source for the properties serviced by the wells that would need to be abandoned, Three Socios began working with the local Conservation Commission and neighboring landowners to plan construction of a community well within a nearby conservation area. (See PB C.R. at 104, 164.)

³ George Calef was a member of the Planning Board at the time the Three Socios's application was pending and considered by the Planning Board. Mr. Calef recused himself from discussion of the Three Socios's application during each Planning Board meeting on the subject. (See PB C.R. at 12, 26, 41, 51, 65, 76, 84, 96, 106, 146-47, 164, 185, 221, 224, 274, 361.)

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On August 6, 2013, Three Socios representatives provided the Planning Board with an update on the progress of its application and project plans. (PB C.R. at 164-65.) They informed the Planning Board that they had been working "with the Conservation Commission to locate a well on an adjacent conservation area, so that the build out could be more dense as indicated in the Town Center Plan." (PB C.R. at 164; see also PB C.R. at 104.) There was some public discussion regarding the well, including how many hook-ups would be available. (PB C.R. at 165.) George Calef questioned who would be responsible for maintaining the well, and someone explained that the developers and landowners would maintain the well. (PB C.R. at 165.) The Planning Board continued further consideration of the application. (PB C.R. at 165.)

On August 28, 2013, Barrington Village Place, which owns the conservation area upon which the proposed community well would be situated, applied for major site plan review for installation of a community well on its property. (PB C.R. at 172-75.) This application was discussed in conjunction with the Three Socios's application at the Planning Board's September 10, 2013 meeting; further discussion of both applications was continued until a later time. (PB C.R. at 184-87.)

On October 1, 2013, the Planning Board accepted the Three Socios's application as substantially complete during a public hearing on the application. (PB C.R. at 225.) The Planning Board and public also discussed the proposed construction of the community well on Barrington Village Place's property, including whether the proposed location of the community well complied with applicable zoning ordinances. (PB C.R. at 225-26.) The Planning Board voted to conclude that the applicable zoning ordinance, Section 6.2.2(8), did not allow for the location of a community well in open space for service to off-site locations. (PB C.R. at 226-27.) On December 3, 2013, however, the ZBA granted a variance approving construction of the community well in the open conservation area that could be used to serve off-site locations. (PB C.R. at 243.)

Following the ZBA's grant of this variance, the Planning Board held another public hearing on Three Socios's proposed project in March 2014. (PB C.R. at 321-29.) The Planning Board and the public discussed a variety of issues, including water run-off, drainage, and the proposed community well. (PB C.R. at 321-29.) Following this discussion, the Planning Board voted to require Three Socios to submit individual minor site plan applications for three

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properties related to the proposed community well which were not included in the original site plan application—Tsoulakas's property, Barrington Village Place's lot, and Journey Baptist Church's ("Church") lot. (PB C.R. at 329.) The Planning Board determined that minor site plan review was needed for these three properties because they each would house part of the community well infrastructure—Barrington Village Place's lot would house the well itself, the Tsoulakas's lot would house a pump house, and the Church's lot would contain a connection and water line. (See PB C.R. at 232, 321–22.) After this vote, the Town Planner informed Three Socios that she would be recommending to the Planning Board that Three Socios submit a minor site plan for the Calefs' property because of the proposed connective sidewalk and easement between the two properties. (PB C.R. at 331, III at 4.) The Calefs' and Three Socios's agreement regarding connections between the two sites later collapsed. (PB C.R. at 343.) Thereafter, Three Socios submitted updated plans to the Planning Board in April 2014 that eliminated the connection and accompanying easements. (Compare PB C.R. III at 4, with JJJ at 4.)

At some point during the application process, Three Socios requested the Calefs to abandon their existing well service in favor of service from the new, proposed community well. In furtherance of this goal, Three Socios requested the Calefs to enter into an Easement and Water Supply Agreement ("the Agreement") which provided for well service to the Calefs' lot from the new well, among other things. (PB C.R. at 293–301.) The Calefs found the terms of the Agreement to be unacceptable and repeatedly refused to execute the Agreement or enter into any other agreement regarding water supply from the new well.

On April 15, 2014, the Planning Board held another public hearing regarding Three Socios's application after its review of the updated plans. (PB C.R. at 361–64.) The public hearing included extensive discussion regarding the community well and provision of water from that well to the Calefs' property. (PB C.R. at 362–63.) Mr. Calef expressed concerns that he would not receive water from the new well and that he had no guarantee of such service from Three Socios. (PB C.R. at 362–63.) Several Planning Board members and the Planning Board's legal counsel commented that Mr. Calef would continue receiving water from the Millos'

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property as governed by the 2007 private agreement.⁴ They further stated that Mr. Calef's receipt of water through the Millos' property under their existing agreement was a private matter to be resolved by those parties. (PB C.R. at 362-63.) After extended discussion on these and other issues, the Planning Board voted to conditionally approve Three Socios's major site plan review application. (PB C.R. at 363-64.)

On April 24, 2014, the Planning Board issued a notice of decision conditionally approving Three Socios's major site plan review application. (PB C.R. at 366-68.) The notice of decision conditioned approval on a number of conditions precedent listed in the notice:

All of the precedent conditions below must be met by the applicant . . . prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

(PB C.R. at 366.) The notice listed thirteen conditions precedent specific to Three Socios's proposed project. (PB C.R. at 366-68.) Relevant here, the conditional approval required that "[t]he applicant shall attain site plan approval for the installation of the well, well house and connecting infrastructure on the lots 238-14, 238-7, and 235-83, including all necessary easements." (PB C.R. at 367.) The three properties identified in this condition are Barrington Village Place's lot, Tsoulakas's lot, and the Church's lot. (See PB C.R. JJJ at 3, 4.) The notice of decision further required "Final Approval of the Non Community Transient Water System by NHDES shall be provided to the Town prior to construction" as a general or subsequent condition of approval. (PB C.R. at 368.) The Planning Board's conditional approval also required Three Socios to appear before the Planning Board again for review of its compliance with the conditions of approval prior to certification of the final plan. (PB C.R. at 367.)

On May 13, 2014, the Calefs appealed the Planning Board's decision to the ZBA pursuant to RSA 676:5 (Supp. 2014). (ZBA C.R. at 1-8.) The Calefs' appeal asserted that the Planning Board's conditional approval of Three Socios's application was not in conformance with the Barrington Zoning Ordinance ("zoning ordinance"). (ZBA C.R. at 4.) Generally, the Calefs asserted that the Planning Board's decision addressed issues of water supply related to the

⁴ It is not clear who the Millos are, or which property they own. For purposes of this order, the court infers, based on the context of Planning Board discussions and other documents in the certified record, that the Millos are now, or were formerly, the owners of the property now or formerly owned by Tsoulakas. (See e.g., PB C.R. at 362-63.)

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Church's, Tsoulakas's, and Barrington Village Place's properties, but failed to adequately address water service to the Calefs' property. (ZBA C.R. at 4-5.)⁵ Specifically, the Calefs argued that the Planning Board's decision failed to comply with Articles 4.1.2, 4.5, and 4.5.2 of the Barrington Site Plan Review Regulations ("site plan review regulations"). (ZBA C.R. at 6.) They further pointed out that Three Socios's planned construction is dependent upon the Calefs' abandonment of their well. Based on their refusal to abandon, the Calefs argue that the Planning Board's conditional approval was in error because the placement of underground storage tanks in proximity to wells "may not comply with [NHDES] setback requirements for water supply wells." (ZBA C.R. at 6.) Finally, the Calefs asserted that to the extent the Planning Board's decision requires the Calefs to abandon their existing well service, that requirement violates Article 12-A of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution as an unlawful taking of property. (ZBA C.R. at 6.) The Calefs' also alleged generally that "the Planning Board decision, based upon the terms of the Barrington Zoning Ordinance or upon the construction, interpretation or application of the Barrington Zoning Ordinance, is in error and is not in conformance with the Barrington Zoning Ordinance." (ZBA C.R. at 6.)

On May 14, 2014, the Calefs filed an appeal of the Planning Board's decision in the Superior Court under RSA 677:15 (Supp. 2014). (PB Compl. ¶¶ 17-39.) This appeal asserted essentially the same grounds for reversal as the Calefs' appeal before the ZBA. (Compare ZBA C.R. at 1-8 with PB Compl. ¶¶ 18-39.) Specifically, the Calefs again asserted that the Planning Board's decision was unreasonable or illegal in that it: (1) failed to comply with Articles 4.1.2, 4.5, and 4.5.2 of the site plan review regulations; (2) may not comply with NHDES setback requirements for water supply wells if the Calefs' well is not abandoned; and (3) amounted to an unconstitutional taking of private property by requiring the Calefs to abandon their historical water source. (PB Compl. ¶¶ 36-38.) Shortly after the Calefs filed this appeal, Three Socios intervened in that action. (PB court index #7.) In June 2014, the court stayed the Calefs' direct

⁵ The Calefs also aver that the Planning Board's "draft Notice of Decision" of its April 15, 2014 conditional approval of Three Socios's project included different language than its final notice of decision. (ZBA C.R. at 5.) Specifically, the Calefs maintain that the draft notice of decision included a condition requiring minor site plan approval for their property in relation to the community well. (ZBA C.R. at 5.) This draft notice of decision does not appear to be part of the certified record. If the Calefs are referring to the Planning Board's pre-public hearing minutes for April 15, 2014, which include staff recommendations on pending action items, those minutes do not reflect the language the Calefs assert. (PB C.R. at 355-57.)

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appeal of the Planning Board's decision to the Superior Court pending resolution of its appeal to the ZBA. (PB court index #6.)

On June 20, 2014, the Town and Three Socios filed a joint motion to dismiss the Calefs' Planning Board appeal, arguing primarily that the Planning Board's conditional approval of the project was not a final decision subject to appeal under RSA 677:15. (PB court index #10 at 3-5.) The motion also argues that the appeal is inappropriate because it improperly seeks to require the Planning Board to enforce private property rights. (PB court index #10 at 5-6.) The Calefs objected. (PB court index #11.)

The Town and Three Socios also filed a similar motion to dismiss with the ZBA, arguing that the ZBA lacked jurisdiction to hear the Calefs' appeal because the appeal did not challenge the Planning Board's application of the zoning ordinance. (ZBA C.R. at 26-32.) The Calefs also objected to that motion before the ZBA, arguing that their appeal specifically identified that the Planning Board's decision did not conform to certain site plan review regulations, which are incorporated by reference into the zoning ordinance. (ZBA C.R. at 33-38.) The Calefs further argued that the factual allegations contained in the appeal together with the general assertion that the Planning Board decision did not conform with the zoning ordinance, "support a finding that the April 15, 2014 Planning Board Decision is not in conformance with Articles 2.2, 2.2.5, 3.1.5, 3.1.6, 4.2.4(1), 6.2.2(8), 6.2.2(9), 7.1, 7.1(1), 12.1, 12.1(3) and 12.2." (ZBA C.R. at 35-36.)

On August 27, 2014, the ZBA held a public hearing on the Calefs' appeal, including the Town's and Three Socios's joint motion to dismiss the appeal for lack of jurisdiction. (ZBA C.R. at 56-64.) The ZBA first heard arguments and presentation by the public on the issues raised by the motion to dismiss for lack of jurisdiction. (ZBA C.R. at 56-59.) The presentations also discussed whether the ZBA should consider the grounds for appeal raised in the Calefs' appeal petition only, or whether it should consider grounds raised in their objection to the Town's motion to dismiss as well. (ZBA C.R. at 57-59.) The ZBA decided to take the issues raised by the motion to dismiss under advisement and hear the merits of the Calefs' appeal. (ZBA C.R. at 59.) The parties then presented arguments on the merits of the appeal. (ZBA C.R. at 59-62.) The ZBA then considered the merits of the Calefs' appeal by going through each of the Calefs' asserted violations of site plan review regulations and zoning ordinance separately, including the specific zoning ordinance sections raised only in the Calefs' objection to the

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motion to dismiss. (ZBA C.R. at 63–64.) The ZBA concluded that the Calefs' appeal should be denied for the reasons discussed at the hearing. (ZBA C.R. at 64.)

The ZBA issued a notice of decision on September 25, 2014, articulating the reasons for its denial of the appeal. (ZBA C.R. at 76–77.) The ZBA granted the Town's motion to dismiss in part, finding that the Calefs' claims based on the Planning Board's failure to comply with site plan review regulations were not within the ZBA's jurisdiction. (ZBA C.R. at 77.) The decision then specifically addressed each of the zoning ordinance articles and site plan review regulations raised by the Calefs in their appeal and objection to the motion to dismiss. (ZBA C.R. at 76–77.) It noted first that the Calefs had withdrawn any claims based on zoning ordinance sections 6.2.2 (8) and 6.2.2 (9). (ZBA C.R. at 59, 61, 63, 76.) The ZBA then found that the other zoning ordinance sections cited—2.2, 2.2.5, 7.1, and 12.2—were all general statements of purpose and were not appealable. (ZBA C.R. at 76.) It further noted that, to the extent that violations of statement of purpose are appealable, the Calefs did not meet their burden of proving that the Planning Board's decision contravened or misapplied these sections of the zoning ordinance. (ZBA C.R. at 76.) The ZBA also found that the remaining zoning ordinance sections cited—3.1.6, 3.1.5, and 4.2.4(1)—were sections that require compliance with other regulations, such as NHDES regulations and site plan review regulations. (ZBA C.R. at 76.) The ZBA found that if those regulations are violated, an appeal should be taken under the applicable procedures for each regulatory scheme, not to the ZBA. (ZBA C.R. at 76.) Finally, the ZBA also found no violation of zoning ordinance section 7.1, as the Planning Board's approval was conditioned upon approval of site plans for three sites related to construction of the new well, and any water issues would be resolved in that process. (ZBA C.R. at 76–77.) The ZBA denied the Calefs' appeal and affirmed the Planning Board's decision to the extent, if any, it involved application or interpretation of the zoning ordinance. (ZBA C.R. 76–77.)

The Calefs filed a motion for rehearing of the ZBA's decision and, later, an amended motion for rehearing. (ZBA C.R. at 67–75, 93–103.) The Town and Three Socios objected to a rehearing. (ZBA C.R. at 78, 79, 104–05, 106.) On November 19, 2014, the ZBA voted to deny the Calefs' request for rehearing. (ZBA C.R. at 107–08.) It issued a notice of decision to that effect on November 20, 2014. (ZBA C.R. at 114.)

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On December 18, 2014, the Calefs appealed the ZBA's decision to this court. (ZBA court index #1.) That appeal was consolidated with the pending appeal of the Planning Board's decision before the Superior Court on January 26, 2015. (ZBA court index #6.) Three Socios then intervened. (ZBA court index #7.) Appeals of both the Planning Board's decision and the ZBA's decision are now before this court pursuant to RSA 677:15 and RSA 677:4, as are the motions to dismiss. The court will consider each issue in turn.

PLANNING BOARD APPEAL

I. Standard of Review

Any person aggrieved by a planning board decision may appeal to the superior court. RSA 677:15, I (Supp. 2014). "[O]nly a final decision of the planning board is appealable under RSA 677:15, I." Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) (citations omitted). Upon appeal of a final appealable planning board decision, "the burden of proof is on the party seeking to set aside the decision of the . . . planning board to show that the decision is unlawful or unreasonable." Bayson Prop., Inc. v. City of Lebanon, 150 N.H. 167, 169 (2003); see also RSA 677:6 (2008). "The superior court is obligated to treat the factual findings of both the zoning board and the planning board as prima facie lawful and reasonable and cannot set aside their decisions absent unreasonableness or an identified error of law." Bayson Prop., Inc., 150 N.H. at 170 (quotation, internal quotation marks, and brackets omitted). "The review by the superior court is not to determine whether it agrees with the [planning board's] findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 670 (2003) (quotation, internal quotation marks, and brackets omitted). Although "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another [planning board,] [t]his does not mean that either finding or decision is wrong per se." Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994). The burden here, therefore, is on the Calefs to demonstrate by "a balance of probabilities" that the Planning Board's decision was unlawful or unreasonable. RSA 677:6.

II. Analysis

The Calefs' Planning Board appeal focuses on reasons why the Planning Board's conditional approval of Three Socios's project is asserted to have been unlawful or unreasonable.

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They argue that the Planning Board's decision was unlawful or unreasonable because: (1) it failed to comply with site plan review regulations 4.1.2, 4.5, and 4.5.2; (2) it may not comply with NHDES setback requirements for wells; and (3) to the extent the decision requires the Calefs to abandon their existing well, it effectuates an unconstitutional taking of private property. (PB Compl. ¶¶ 36–38.) The Town and Three Socios argue in their motion to dismiss that in the present posture of this case the court lacks jurisdiction to reach the issues raised by the Calefs' appeal. As the motion to dismiss raises a threshold question concerning the court's jurisdiction, the court must take up and resolve that issue prior to considering the merits of the Calefs' appeal.

A. Lack of Jurisdiction

The Town and Three Socios jointly move to dismiss. In that motion, the Town and Three Socios argue that this court has no jurisdiction to consider this appeal under RSA 677:15 because the Planning Board's conditional approval of the Three Socios's project was not a final decision. (PB court index #10 at 3.) The Calefs objected to this motion, but did not specifically articulate why the Planning Board's conditional approval was a final decision. (See PB court index #11 at 1–5.)

The court agrees with the Town and Three Socios. “[O]nly a final decision of the planning board is appealable under RSA 677:15, I.” Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) (citations omitted). Conditional approval of an application does not necessarily preclude a decision from being final; such a determination depends on whether the approval is premised upon conditions precedent or conditions subsequent. Id. “Conditions precedent contemplate additional action on the part of the town, and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay.” Id. (quotation, brackets, and ellipsis omitted). “Thus, a conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I[.]” while a decision imposing conditions precedent is not final and appealable under RSA 677:15, I. Id. (citation omitted); see also, Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 615 (2006), as modified on denial of reconsideration (Jan. 24, 2007) (“We noted that conditions precedent, such as those in Totty, contemplate additional action on the part of the town and, thus, cannot constitute final approval.”); Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 327–28 (1984); Totty v. Grantham Planning Bd., 120 N.H. 388, 389–90 (1980) overruled in part on other grounds in Winslow v. Town of

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Holderness Planning Bd., 125 N.H. 262, 268–69 (1984), (finding planning board’s grant of conditional approval was not final order appealable under previous version of statute).

Here, the Planning Board’s approval of Three Socios’s project was conditioned upon thirteen conditions precedent and four general and subsequent conditions. (PB C.R. at 366–68.) The conditions precedent require extensive work by Three Socios, including revision of construction and maintenance plans, site plan approval for several other sites related to the well, update of its driveway permit, and approval of easement language by town counsel, among other things. (PB C.R. at 366–68.) The Planning Board’s decision clearly distinguishes between conditions precedent and conditions subsequent, and also explicitly states that “[p]rior to certification of the final plan, the applicant will appear before the board for review of compliance with the conditions of approval.” (PB C.R. at 366–68.) Because the Planning Board’s conditional approval of Three Socios’s application was dependent upon the fulfillment of numerous conditions precedent and contemplated further action by the Planning Board, it was not a final decision under RSA 677:15, I. See Sklar Realty, Inc., 125 N.H. at 327; Totty, 120 N.H. at 389. This court, therefore, has no jurisdiction to hear an appeal based on this preliminary decision. See Saunders, 160 N.H. at 564; RSA 677:15, I. The Calefs’ appeal of the Planning Board’s decision must accordingly be dismissed at this point in the planning board process. The motion to dismiss the planning board appeal filed by the Town and Three Socios is granted.

ZONING BOARD APPEAL

Although the conditional nature of the Planning Board’s decision deprives this court of jurisdiction over the Calefs’ appeal of that decision at this point in the process, it does not affect this court’s jurisdiction over the Calefs’ appeal of the ZBA’s decision. The statutory scheme governing planning and zoning does not “require[] that the planning board first complete its consideration of the planning issues involved in a site plan review, or that the applicant satisfy the conditions imposed on a site plan application prior to the zoning board considering the zoning issues on appeal.” Atwater v. Town of Plainfield, 160 N.H. 503, 508–10 (2010); see also, RSA 677:15, I; RSA 676:5, III. The court, accordingly, turns to the issues raised by the Calefs’ ZBA appeal.

I. Standard of Review

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Any person aggrieved by a zoning board of adjustment order or decision may appeal to the superior court. RSA 677:4 (Supp. 2014). “[T]he burden of proof is on the party seeking to set aside the decision of the zoning board . . . to show that the decision is unlawful or unreasonable.” Bayson Prop., Inc., 150 N.H. at 169; see also RSA 677:6. It is the province of the zoning board of adjustment, not the trial court, to resolve conflicting evidence and determine issues of fact. Lone Pine Hunters’ Club, Inc., 149 N.H. at 671. Accordingly, “[t]he superior court is obligated to treat the factual findings of both the zoning board and the planning board as prima facie lawful and reasonable and cannot set aside their decisions absent unreasonableness or an identified error of law.” Bayson Prop., Inc., 150 N.H. at 170 (quotation, internal quotation marks, and brackets omitted). “The review by the superior court is not to determine whether it agrees with the zoning board of adjustment’s findings, but to determine whether there is evidence upon which they could have been reasonably based.” Lone Pine Hunters’ Club, Inc., 149 N.H. at 670 (quotation, internal quotation marks, and brackets omitted). Even though “[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA[,] [t]his does not mean that either finding or decision is wrong per se.” Nestor, 138 N.H. at 634. The burden here, therefore, is on the Calefs to demonstrate “by the balance of probabilities” that the ZBA’s decision was unlawful or unreasonable. RSA 677:6.

II. Analysis

The Calefs allege a number of reasons why the ZBA’s decision is asserted to be unreasonable or illegal. Their claims fall into three categories: (1) violations of site plan review regulations which the Calefs argue are enforceable by the ZBA pursuant to the zoning ordinance; (2) violations of specific provisions of the Town’s zoning ordinance; and (3) a claim that the decision affects an unconstitutional taking. (ZBA Compl. ¶¶ 43, 47.)

A. Site Plan Review Regulations Incorporated by Zoning Ordinance

The Calefs assert that the ZBA’s partial grant of the Town’s motion to dismiss due to lack of jurisdiction was unlawful or unreasonable because the zoning ordinance specifically incorporates the site plan review regulations in Article 2.2.5 and 3.1.6 of the zoning ordinance. (ZBA Compl. ¶¶ 43A–C.) In its decision, the ZBA refused to consider the Calefs’ arguments based on contravention of the site plan review regulations because it found that it does not have

“jurisdiction to review appeals of the planning board’s interpretation, construction, or application of its site plan review regulations.” (ZBA C.R. at 77.)

The court agrees with the ZBA’s conclusion. Articles 2.2.5 and 3.1.6 both state that development under the zoning ordinance should also comply with the Town’s site plan review regulations. (See ZBA C.R. at 118, 120.) The court cannot find, however, under the extensive statutory scheme governing planning and zoning and the zoning ordinance and regulations involved here, that this reference gives the ZBA jurisdiction over the Planning Board’s interpretation or application of site plan review regulations. RSA 676:5, III (Supp. 2014) and RSA 677:15 establish a dual track appeal process for appeals from a planning board decision or determination. See Atwater v. Town of Plainfield, 160 N.H. 503, 507–09 (2010); P. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 33.02 at 593–95 (2010 & Supp. 2014.) If an appellant challenges a planning board decision based “upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer,” that decision must be appealed to the zoning board of adjustment in the first instance. RSA 676:5, III; RSA 677:15, I-a (Supp. 2014). The zoning board of adjustment’s decision regarding the planning board’s interpretation of the zoning ordinance may then be appealed to the superior court. RSA 677:15, I-a. All other appeals of planning board decisions or determinations must be taken directly to the superior court. RSA 677:15, I, I-a.

The Calefs’ interpretation of the zoning ordinance here as incorporating by reference the site plan review regulations wholesale as part of the zoning ordinance would undermine or totally eliminate the dual track appeal process and limited jurisdiction of zoning boards established by the legislature. The Calefs have cited no authority in support of this position, and court declines to interpret the Town’s zoning ordinance to implicate such a result. The court finds the ZBA’s decision finding that it did not have jurisdiction to consider the Calefs’ claims regarding site plan review regulations both lawful and reasonable.

B. Zoning Ordinance

The Calefs also assert that the ZBA erred in finding that the Planning Board’s decision conformed to a number of specific zoning ordinance articles—articles 2.2, 2.2.5, 3.1.5, 3.1.6, 4.2.4(1), 7.1, 7.1(1), 12.1, 12.1(3), and 12.2. (ZBA Comp. ¶ 43.) The court finds no error in the

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ZBA's decision with respect to each zoning ordinance article, and briefly addresses the issues raised in respect to its decision on each.

1. Purpose clauses: articles 2.2, 2.2.5, 7.1, 12.1, and 12.2

The ZBA found that articles 2.2, 2.2.5, 7.1, 12.1, and 12.2 are all general "purpose statements," which do not contain specific regulatory requirements, and are not appealable. (ZBA C.R. at 76.) Additionally, the ZBA also found that, even if appealable, the Calefs failed to present sufficient evidence demonstrating that the Planning Board's decision misapplied these articles of the zoning ordinance. (ZBA C.R. at 76.) The court agrees with the ZBA that these articles of the zoning ordinance establish general principles that should govern interpretation and implementation of the ordinance. (See ZBA C.R. at 63-64, 76, 116-24.) The court also finds that the Calefs failed to provide adequate evidence demonstrating that the ZBA incorrectly decided that the Calefs provided insufficient evidence to show that the Planning Board's decision did not conform to these provisions of the zoning ordinance. See Saunders, 160 N.H. at 568 ("Where [the plaintiffs] made factual allegations in the motion itself, the plaintiffs failed to cite any record support for them, a failure they have not remedied before this court."). The ZBA's decision on this issue was lawful and reasonable.

2. Compliance with other administrative regulations: articles 3.1.5, 3.1.6, 4.2.4(1)

The Calefs argue that the ZBA erred by not ensuring that the Planning Board's decision complied with zoning ordinance articles 3.1.5, 3.1.6, and 4.2.4(1), which all require compliance with site plan review regulations and NHDES regulations. (ZBA C.R. at 120-21.) This argument is essentially a reconfiguration of the Calefs' claims that the Planning Board's decision violated site plan review regulations and NHDES regulations, rather than a claim actually related to the zoning ordinance.

As explained above, the ZBA has limited jurisdiction to hear appeals based "upon any construction, interpretation, or application of the zoning ordinance," upon an administrative official's enforcement of a zoning ordinance, or upon issues related to requests for special exceptions or variances from the zoning ordinance. RSA 674:33 (Supp. 2014); RSA 676:5, III. Any claim that the Planning Board has contravened its site plan review regulations or that the NHDES has failed to enforce its regulations must be taken according to the proper administrative

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appeals process; the ZBA has no jurisdiction over such appeals. The court finds that the ZBA did not err on these issues.

3. *Water supplies: article 12.1(3), 7.1(1)*

Finally, the Calefs assert that the ZBA's decision violates articles 7.1(1) and 12.1(3) because it requires the termination of the Calefs' water supply and fails to ensure them an alternate water supply. (ZBA Compl. ¶¶ 43J, 43L.) To the contrary, the Planning Board's decision did not require termination of the Calefs' water supply, and the Planning Board conditioned approval of Three Socios's project on minor site plan approvals related to installation of a new community well which would serve as an alternate water source. The ZBA's decision affirming that decision was lawful and reasonable. Further, Calefs' rights in continuation of its current private water supply presents a private dispute between property owners over which the ZBA had no jurisdiction, and which is not properly before this court in the context of this ZBA appeal.

C. Taking

Lastly, the Calefs assert that the ZBA's decision is unlawful and unreasonable because it affirmed a Planning Board decision which the Calefs assert effected an unconstitutional taking. (ZBA Compl. ¶ 47.) The Calefs assert that the Planning Board's decision effectuates an unlawful taking of private property by requiring the Calefs to abandon their property rights in their existing well access. (Pls. Mem. Supp. Appeals at 12.) The Town and Three Socios argue, in contrast, that the Town has not required the Calefs to abandon their existing well access, but rather, Tsoukalas has voluntarily agreed with the Three Socios to abandon the current system and connect to the new community well. (Town's Amended Trial Mem. at 11; Three Socios's Trial Mem. at 12.)

The court first addresses the Calefs' argument under the State Constitution, as the Federal Constitution provides no greater protection in this context. Webster v. Town of Candia, 146 N.H. 430, 438 (2001) (citations omitted); State v. Ball, 124 N.H. 226, 231–32 (1983). Part I, Article 12 of the New Hampshire Constitution provides that “[e]very member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property . . . no part of a man's property shall be taken from him . . . without his own consent” See also, Bio Energy, LLC v. Town of Hopkinton, 153 N.H. 145, 156 (2005). A taking of private property in violation

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of this right may be affected by the state through formal condemnation, physical invasion, or inverse condemnation. See J.K.S. Realty, LLC v. City of Nashua, 164 N.H. 228, 234 (2012); P. Loughlin, New Hampshire Practice: Local Government Law, § 824 at 22-22 (2011). When a government body is alleged to have taken property through inverse condemnation,

[t]he interference must be more than mere inconvenience or annoyance and must be sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause [the court] to conclude that fairness and justice, as between the State and the citizen, requires that the burden imposed be borne by the public and not by the individual alone.

J.K.S Realty, 164 N.H. at 234 (quotation omitted).

Here, the asserted interference with Calefs' property rights is forced abandonment of the Calefs' connection to a well. The record, however, undercuts this assertion. Nothing in the Planning Board's meeting minutes or notice of decision mandate, or even imply, that the Calefs must abandon their existing well access based on Planning Board authority or order. Rather, the Three Socios, a private party, has requested that the Calefs abandon their well and enter into an agreement for service from another water source. If Three Socios is unable to convince the Calefs to abandon their well, their application and project may or may not be unable to proceed as currently planned. That, however, is a private matter independent of Planning Board action.

At bottom, the Calefs' well access is governed by their agreement with Tsoulakas (or the current owner of Tsoulakas's lot) or by whatever rights they have acquired in that regard. The Planning Board's decision does not affect that agreement, nor could it. See Short v. Town of Rye, 121 N.H. 415, 416-17 (1981). Accordingly, the court finds that the Planning Board's decision has no direct impact on the Calefs' private property rights such that an unconstitutional taking has occurred. See J.K.S. Realty, 164 N.H. at 234-238 (finding that prolonged government planning and delayed condemnation proceedings did not constitute a taking); Morrissey v. Town of Lyme, 162 N.H. 777, 783 (2011) (finding that Town's lowering of water level in pond which plaintiffs' property abutted did not constitute taking). The Calefs have asserted no basis for finding that the ZBA decision constitutes a taking of private property other than its affirmance of the Planning Board's decision. (See ZBA Compl. ¶ 47.) Consequently, the ZBA's decision affirming the Planning Board's decision does not constitute an unconstitutional taking of private property and was neither unlawful nor unreasonable.

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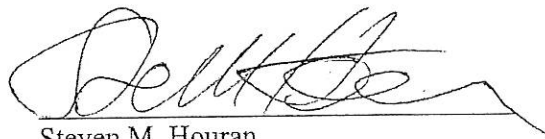
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CONCLUSION

In sum, the court finds that because the Planning Board process is not yet final the court lacks jurisdiction to consider the merits of the Calefs' planning board appeal, and that the Calefs have failed to carry their burden of proving, by a balance of the probabilities, that the decision of the ZBA was illegal or unreasonable. The Planning Board appeal is dismissed and the ZBA's decision is affirmed.

So Ordered.

October 27, 2015



Steven M. Houran
Presiding Justice

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Concord, NH 03301-4846
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hinckleyallen.com

John L. Arnold
jarnold@hinckleyallen.com
(603) 545-6166

November 30, 2015

Jae Whitelaw, Esquire
Mitchell Municipal Group, PA
25 Beacon Street East
Laconia, NH 03246

RE: Conditional Site Plan Approval – The Three Socios, LLC

Dear Jae:

Thank you for your emails regarding the status of the April 15, 2014 Conditional Site Plan Approval granted to The Three Socios, LLC (the “3 Socios Approval”). In light of the number of moving pieces and appeals involved in this project, I wanted to set forth our understanding and intent regarding finalizing that approval.

As set forth in the Superior Court’s October 27, 2015 Order, the 3 Socios Approval is conditional. Unlike the approvals granted to the Church and Millo’s, the Notice of Decision for the 3 Socios Approval does not impose any deadline by which the conditions must be satisfied. Nor is there any deadline imposed by the municipal regulations. Our team is working diligently to satisfy the conditions; however, as you know, one of the conditions was to obtain site plan approval for installation of the well on the Barrington Village Place (“BVP”) Property. Although a conditional approval was granted to BVP on August 18, 2015, the Calefs have appealed that approval, which appeal is currently pending before the Superior Court. Per your November 16, 2015 email, I understand that you do not recommend that the Planning Board grant final approval of the 3 Socios Approval until the BVP appeal is finally resolved.

In light of the foregoing, our intent is to continue to defend the BVP appeal. Upon its final resolution, we will request the hearing required by the Notice of Decision for final approval of the 3 Socios application. In the interim, we will continue to work on the other conditions of approval as appropriate, and plan to have them all addressed in a single hearing before the Planning Board. I will coordinate with you in advance regarding your approval of easement language, as required by condition #5.

On a related note, the conditional site plan approvals granted to the Church and to Millo’s specify that the approvals shall expire if no active and substantial work has commenced within 2 years from the date the plan is signed. Although the Site Plan Regulations

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HINCKLEY, ALLEN & SNYDER LLP, ATTORNEYS AT LAW

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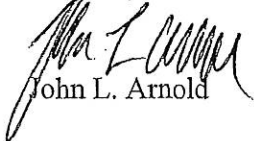
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Jae Whitelaw, Esquire
November 30, 2015
Page 2

provide a period of 1 year rather than two, I understand based on your November 16, 2015 email that the Board will apply the two year period nonetheless. We will ask the Board to also build the 2 year period into the final approval for each respective site plan.

Thank you for your guidance in working through this process. If you have any questions or concerns about our approach, please feel free to contact me.

Sincerely,



John L. Arnold

JLA/dj

cc: The Three Socios, LLC
Anthony Gaudiello, Chair
Barrington Planning Board

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HINCKLEY, ALLEN & SNYDER LLP, ATTORNEYS AT LAW

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Jordan, Diane E.

From: Jae Whitelaw <jae@mittchellmunigroup.com>
Sent: Friday, December 11, 2015 11:33 AM
To: Arnold, John L.
Cc: Marcia Gasses; 'John Scruton'
Subject: Three Socios - Conditional Site Plan Approval

Hi John -

I am in receipt of your letter dated November 30, 2105, in which you describe your understanding of the procedures and timeframes for obtaining final approval of the Three Socios conditional site plan approval. I concur with your understanding. You also acknowledge that the provisions of RSA 674:49 regarding the commencement of active and substantial development sufficient to obtain statutory protection from changes to applicable ordinances and regulations take priority over the current Site Plan Regulations. The statute requires commencement within 2 years of approval and recording; the one year provision in the current Site Plan Review Regulations is not applicable. I concur.

Please do not hesitate to contact me with any questions. Thank you.

Jae

Jae Whitelaw
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
603-524-3885
jae@mittchellmunigroup.com





Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

barrplan@metrocast.net

barrplan@gmail.com

NOTICE OF EXTENSION

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FEB 25 2016

February 23, 2016

George Tsoukalas
PO Box 684
Barrington, NH 03825

Barry Gier, P.E.
Jones & Beach Engineers, Inc.
PO Box 219
Stratham, NH 03885

Re: 238-7-TC-15-SR (Millo's Pizza-George Tsoukalas) Request by applicant for Site Review to construct a water system with associated pump house, waterline, and access across the subject property between Map 238, Lot 4 and Map 238, Lot 16.21 and waiver from Section 3.2.10(7) requiring parking lot requirements for the proposed project. This is located on a 2.26 acre lot (Map 238, Lot 7) in the Town Center.

Dear applicant:

This is to inform you that the Barrington Planning Board at its February 16, 2016 meeting **APPROVED** your application for an extension to meet precedent conditions for the application referenced above.

The new extension date will be for six months from the date the court's order in *Calef v Town of Barrington*, Docket Nos. 219-2015-CV-00368 and 219-2015-CV-0059 becomes final or the stay is lifted, whichever occurs first.

If you have any questions or concerns, please feel free to contact me.

Sincerely,

Marcia J. Gasses
Town Planner & Land Use Administrator

cc: John Arnold
File

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Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

barrplan@metrocast.net

barrplan@gmail.com

NOTICE OF EXTENSION

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FEB 25 2016

February 22, 2016

Applicant:

James Mitchell
The Three Socios, LLC
321D Lafayette Road
Hampton, NH 03842

Barrington Village Place, LLC
7B Emery Lane
Stratham, NH 03885

By: Barry W. Gier, P.E.
Jones & Beach Engineers, Inc.
PO Box 219
Stratham, NH 03885

Re: 238-13.21-V-15-SR(Barrington Village Place) Request by applicant for Site Review to construct a well to service a non-community water system with a well easement and waiver from Section 3.2 10(7) requiring parking lot requirements for the proposed project. This is located on a 29.91 acre lot (Map 238, Lot 16.21)

Dear applicant:

This is to inform you that the Barrington Planning Board at its February 16, 2016 meeting **APPROVED** your application for an extension to meet precedent conditions for the application referenced above.

The new extension date will be for six months from the date the court's order in *Calef v Town of Barrington*, Docket Nos. 219-2015-CV-00368 and 219-2015-CV-0059 becomes final or the stay is lifted, whichever occurs first.

If you have any questions or concerns, please feel free to contact me.

Sincerely,

Marcia J. Gasses
Town Planner & Land Use Administrator

cc: John Arnold, Hinckley Allen
File

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**John L. Arnold, ESQ
Hinckley Allen LLP
11 South Main Street Suite 400
Concord NH 03301-4846**

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MAY 19 2016

Case Name: **George A. Calef and Arvilla T. Calef, Trustees of the George A. Calef Living
Revocable Trust of 2008 u/t/a dated May 21, 2008, et al v Town of Barrington,**
Case Number: **219-2015-CV-00368 219-2015-CV-00509**

Enclosed please find a copy of the court's order of May 16, 2016 relative to:

Order on Joint Motion to Dismiss

May 17, 2016

Kimberly T. Myers
Clerk of Court

(277)

C: Gregory D. Wirth, ESQ; Judith E. Whitelaw, ESQ

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THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

George A. Calef and Arvilla T. Calef,
as Trustees of the George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008
and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008

v.

Town of Barrington

Docket No.: 219-2015-CV-00368; 219-2015-CV-00509

ORDER ON JOINT MOTION TO DISMISS

The plaintiffs, George A. Calef and Arvilla T. Calef, as Trustees of the George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008, and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 ("the Calefs"), appeal a decision of the Town of Barrington ("Town") Planning Board conditionally approving the Three Socios, LLC ("Three Socios") and Barrington Village Place, LLC's ("BVP") site plan application for construction of a non-community well. (PB court index #1.)¹ The Calefs also appeal the Town Zoning Board of Adjustment's ("ZBA") decision dismissing their appeal from the Planning Board's decision. (ZBA court index #1.) These appeals have been consolidated. (ZBA court index #7-8.) Three Socios intervened in both actions as an interested party. (PB court index #5; ZBA court index #3.) The Town and Three Socios now move to dismiss both appeals, arguing that the Calefs lack standing to appeal the Planning Board's and the ZBA's decisions. (PB court index #9, 15, 19.) The Calefs object. (PB court index #10, 18.) The Calefs requested a hearing on this matter. (PB court index #18, Prayer A.) They did not, however, articulate how a hearing would assist the court in deciding the issues presented. See Super. Ct. Civ. R. 13(b). In light of the certified records provided, the court does not find that a hearing would assist it in deciding the issues presented. See id. Based on the parties' arguments, the relevant facts, and the applicable law, the Town's and Three Socios' joint motion to dismiss is granted.

¹ Though the Calefs' two suits have been consolidated, two separate case files and certified records exist. For the sake of clarity, the court will denote a court index or certified record citation to docket number 219-2015-CV-368 with "PB" and a reference to items in docket number 219-2015-CV-509 with "ZBA" (e.g. "PB court index #1", "ZBA C.R. at #1").

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FACTUAL AND PROCEDURAL BACKGROUND

The following facts are derived from the certified records in the respective appeals and from the final order in Calef et al v. Town of Barrington, Strafford County Superior Court, No. 219-2014-CV-00471, 219-2014-CV-00166, (Oct. 27, 2015) (Order, Houran, J.) (hereinafter "October 2015 Order"). The Calefs own property near the intersection of Route 125 and Route 9 in Barrington, where they operate a store, Calef Fine Foods. (See ZBA C.R. at 105.) The Calefs' lot abuts Route 125 to the west, property owned by the Three Socios to the north, and property owned by Citizens Bank to the south and east. (See ZBA C.R. at 105; PB C.R. at 26.) Like the Calefs' lot, Three Socios' lot abuts Route 125 to the west, and abuts a lot owned by the Journey Baptist Church to the north and a lot owned by George Tsoulakas ("Tsoulakas") to the east. (See ZBA C.R. at 105; PB C.R. at 26.) Tsoulakas' lot, in turn abuts a larger lot owned by BVP to the east. (See ZBA C.R. at 105; PB C.R. at 26.) BVP's land is located within the Village Zoning District and is subject to a conservation easement. (See PB C.R. at 29-44; ZBA C.R. at 127-G); see also Barrington, N.H. Zoning Ordinance ("Barrington Ord."), § 2.2.3, 6.1 (2015); RSA 477:45, I (2013) (defining "conservation restriction"); RSA 674:21-:21-a (2008 & Supp. 2015) (governing innovative land use controls). The other properties discussed are located in the Town Center and Stratified Drift Overlay Zoning Districts. (ZBA C.R. at 85); Barrington Ord. § 2.2.5, 12.2.1(1). The properties near Route 125 in this area currently receive water from a patchwork of private wells. The Calefs' lot has historically received water from a well located on Tsoulakas' property and has done so under the terms of an express easement agreement since 2007. (See ZBA C.R. at 160-61.)

In January 2012, Three Socios submitted an application to the Planning Board for major site plan review for proposed construction of a 5,000 square foot convenience store and gas station on Route 125. October 2015 Order at 2. Three Socios' proposed construction and operation of the gas station would include storage of fuel in several underground fuel storage tanks. Id. New Hampshire Department of Environmental Services ("NHDES") regulations require a certain distance between such underground fuel storage tanks and water supply wells. Id.; see also N.H. Admin. Rules, Env-Or 407.06. Accordingly, the Three Socios' major site plan

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involved abandonment of several existing private wells, including a well which currently services the Calefs' and others' property. October 2015 Order at 2. In order to provide an alternative water source for the properties serviced by the wells that would need to be abandoned, Three Socios began working with the local Conservation Commission and neighboring landowners to plan construction of a well within a nearby conservation area. (Id.)

In August 2013, Three Socios and BVP applied for major site plan review for installation of a well on BVP's property in order to replace or supplement the wells that would have to be abandoned in conjunction with Three Socios' proposed gas station and convenience store. See id. at 3. The proposed well would be located on BVP's property in an area designated as "open space" within the conservation restricted area and would be equipped to service several of the properties within the Town Center Zoning District pursuant to the terms of the well and water line easement granted from BVP to Three Socios. (PB C.R. at 19–24; ZBA C.R. at 86, 100.)

In October 2013, the Planning Board interpreted Section 6.2.2 (8) of the zoning ordinance as prohibiting construction of a well in open space for service to off-site locations, thereby finding that Three Socios would have to apply for a variance from § 6.2.2 (8) regarding its proposed well project. (ZBA C.R. at 86–88, 93.) On October 30, 2013, Three Socios appealed the Planning Board's interpretation of the zoning ordinance to the ZBA, and, alternatively, requested that the ZBA grant it a variance from Sections 6.2.2(8) and 6.2.6 of the zoning ordinance. (ZBA C.R. at 94–101, 121, 121-A–147-AA.)² After a public hearing on these requests, the Planning Board granted Three Socios' request for a variance from Section 6.2.2 and 6.2.6 of the zoning ordinance. (See ZBA C.R. at 126–35.) The ZBA issued a notice of decision to that effect on December 3, 2013. (ZBA C.R. at 137; PB C.R. at 108.)

The Planning Board subsequently conditionally approved the Three Socios' major site plan review application for the gas station and convenience store project. October 2015 Order at 4–5; (see ZBA C.R. at 149). One of the conditions of approval required Three Socios to obtain site plan approval for the installation of the well and associated infrastructure on three surrounding properties—BVP's lot, Tsoulakas' lot, and Journey Baptist Church's lot. October 2015 Order at 5. The Calefs appealed the Planning Board's conditional approval to the ZBA.

² Three Socios' variance application was inadvertently not included in the initial certified record produced to the court. The parties assented to a correction of the record by filing a supplement to the certified record, which was separately paginated with the addition of letters to the certified record page numbers. (See PB court index #17.)

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(See ZBA C.R. at 138–150.) The ZBA denied this appeal, affirming the Planning Board’s conditional approval of the gas station/convenience store construction application.³ (ZBA C.R. at 149–52.)

At some point during this application process, Three Socios requested that the Calefs abandon their existing well service in favor of service from the new, proposed well. October 2015 Order at 4. In furtherance of this goal, Three Socios requested the Calefs to enter into an Easement and Water Supply Agreement (“the Agreement”), which provided for well service to the Calefs’ lot from the new well. Id. The Calefs found the terms of the Agreement to be unacceptable and repeatedly declined to execute the Agreement or enter into any other agreement regarding water supply from the new well. Id. In or about December 2014, the Calefs applied for well location approval from DES for installation of a well on their property. (See PB. C.R. at 54, 58–59.) DES refused to approve this application. (See PB C.R. at 58.) The Calefs later renewed their application for well location approval, and DES responded that it believed that a connection to the well proposed by Three Socios was preferable to a well on the Calefs’ land, unless the Calefs could obtain an easement on abutting properties for the protective well radius. (PB C.R. at 58–59.)

In order to comply with the conditions of approval for the gas station/convenience store project, Three Socios and BVP submitted a site plan review application to the Planning Board for construction of a non-community well and associated waterline piping on BVP’s property in April 2015. (PB C.R. at 1–44.) On August 18, 2015, the Planning Board held a public hearing on this application. (PB C.R. at 92–98.) George Calef was present for and participated in this hearing. (PB C.R. at 94.) During the public hearing, the Planning Board discussed whether the well could be properly located in the open space under RSA 674:21-a and RSA 477:45, I. (PB C.R. at 93–94.) George Calef also raised concerns about the conditions for approval and stated that RSA 676:5, III (Supp. 2015) does not allow variances for innovative land use controls. (PB C.R. at 94.) After additional discussion, the Planning Board voted to conditionally approve the project. (PB C.R. at 94–98.) None of the conditions of approval specifically related to the Calefs’ water supply. (See PB C.R. at 96–98.) At the same public hearing, the Planning Board

³ The Calefs appealed these decisions to this court in Calef et al v. Town of Barrington, Strafford County Superior Court, No. 219-2014-CV-00471, 219-2014-CV-00166. On October 27, 2015, the court (Houran, J.) dismissed the Planning Board appeal for lack of jurisdiction and affirmed the ZBA’s decision. See October 2015 Order at 17.

also conditionally approved site plan review applications regarding Journey Baptist Church's and Tsoulakas' connection to the proposed well on BVP's property. (PB C.R. at 87-92, 98-103.) One condition of the Planning Board's approval of Tsoulakas' application required the plan for the project to note that his property is subject to the 2007 water easement for the Calefs' benefit. (PB C.R. at 102.)

The Calefs appealed the Planning Board's conditional approval of BVP's well project application to the ZBA on September 14, 2015. (ZBA C.R. at 1-22.) Their principal argument was that the Planning Board's conditional approval was in error because it failed to comply with Articles 6, 18, and 19 of the zoning ordinance by not requiring Three Socios to obtain an additional variance from Section 6.3.1, and because its decision was contrary to RSA 674:21-a and RSA 477:45, I. (See ZBA C.R. at 14-20.) The Three Socios and the Planning Board filed a joint motion to dismiss this appeal before the ZBA, arguing that the ZBA lacked jurisdiction because, among other things, the appeal was untimely. (ZBA C.R. at 25-31.) The Calefs objected. (ZBA C.R. at 32-36.) Around the same time the Calefs appealed to the ZBA, the Calefs also appealed the Planning Board's decision to this court. (PB court index #1-2.) That appeal was then stayed pending resolution of the Calefs' appeal to the ZBA. (PB court index #4.)

The ZBA held a public hearing on the Calefs' appeal on October 13, 2015. (ZBA C.R. at 62-67.) George Calef and his counsel, Attorney Wirth, appeared and presented arguments and information in support of the Calefs' appeal. (ZBA C.R. at 63-66.) The Three Socios' representative asserted that Three Socios had attempted to work with the Calefs in the past to reach a written agreement for access to the new well, but the Calefs had been uncooperative. (ZBA C.R. at 65.) Three Socios' representative further stated that the Calefs preferred to maintain their agreement with Tsoulakas, so Three Socios agreed to supply Tsoulakas sufficient water for his property and the Calefs' property. (ZBA C.R. at 65.) Following statements in support of and against the Calefs' appeal, the ZBA voted to dismiss the appeal as untimely. (ZBA C.R. at 67.) It noted, however, that it did not discuss the aspects of the appeal alleging violations of RSA 674:21-a and RSA 477:45, I. (ZBA C.R. at 67.) The ZBA issued a notice of decision to this effect on October 20, 2015. (ZBA C.R. at 68.)

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The Calefs thereafter filed a motion for rehearing of the ZBA's decision. (ZBA C.R. at 69–74.) The ZBA denied their request. (ZBA C.R. at 80–81.) On December 16, 2015, the Calefs appealed the ZBA's decision to this court. (ZBA court index #1.) Three Socios intervened as an interested party in both the Planning Board and ZBA appeals before this court. (PB court index #5; ZBA court index #3.) The two appeals were then consolidated. (PB court index #11; ZBA court index #7–8.) In March 2016, the court (Houran, J.) granted the parties' assented-to motion to lift the stay the Planning Board appeal (PB court index #16), making the Town's and Three Socios' joint motion to dismiss both appeals ripe for this court's review.

LEGAL STANDARD AND ANALYSIS

On appeal from the Planning Board's decision, the Calefs allege that the approved well to service off-site commercial properties is not a permitted use—either primary or accessory—within a conservation subdivision as governed by Article 6 of the zoning ordinance. (PB Compl. ¶¶ 26–31.) They argue that the Planning Board's conditional approval of the well project without a grant of a variance from § 6.3.1 of the zoning ordinance was unlawful and unreasonable, as well as violative of RSA 674:21-a, and RSA 477:45, I. (PB Compl. ¶¶ 32–39.) Appealing the ZBA's decisions, the Calefs allege, primarily, that the ZBA's dismissal of their appeal as untimely and its refusal to grant a rehearing were unlawful and unreasonable. (ZBA Compl. ¶¶ 53–54.)

The Three Socios and the Town now move to dismiss both the Planning Board and ZBA appeals before this court, arguing that the Calefs lack standing under RSA 677:4 (Supp. 2015) and the factors established in Weeks Rest. Corp. v. City of Dover, 119 N.H. 541 (1979). (PB court index #9, 15, 19.)⁴ The Calefs object, arguing that they have standing as “persons aggrieved” by the Planning Board's August 2015 conditional approval of Three Socios' and BVP's April 2015 application for siting and construction of a well, and by the ZBA's decisions. (See court index #10, 18.)

⁴ The Town and Three Socios filed a motion to dismiss for lack of standing in November 2015 while the Planning Board appeal was stayed pending the ZBA appeal (PB court index #9), to which the Calefs objected (PB court index #10), also during the stay. The parties both filed renewed pleadings regarding the motion to dismiss after the stay was lifted. (See PB court index #15, 18–19.) The court has reviewed and considered both sets of pleadings and finds them to be substantially the same. For ease of reference, any citations to motion to dismiss pleadings will be in reference to the more recent pleadings filed after the stay was lifted. (See PB court index #15, 18–19.)

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In ruling upon most motions to dismiss, those alleging a failure to state a claim, “the trial court must determine whether the allegations contained in the plaintiff’s pleadings sufficiently establish a basis upon which relief may be granted.” Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010) (citing Provencher v. Buzzell-Plourde Assoc., 142 N.H. 848, 852–53 (1998)). “In making this determination, the court . . . normally accept[s] all facts pleaded by the plaintiff as true and view[s] those facts in the light most favorable to the plaintiff.” Id. at 507 (citations omitted). However, “when the motion to dismiss does not challenge the sufficiency of the plaintiff’s legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff’s unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.” Id. (citations omitted). “A jurisdictional challenge based upon lack of standing is such a defense.” Lynch v. Town of Pelham, 167 N.H. 14, 20 (2014) (quotation omitted).

“Only ‘persons aggrieved’ have standing to appeal planning and zoning board decisions to the superior court.” Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450, 452 (1995) (citing RSA 677:4 (Supp. 2015), :15 (Supp. 2015)). “‘Persons aggrieved’ include any person ‘directly affected’ by the challenged administrative action or proceeding.” Golf Course Inv’rs of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2011) (quotations and citations omitted). “The appealing party must show some direct, definite interest in the outcome of the action or proceeding.” Id. (citing Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006)). Thus, the court must determine whether the Calefs’ interest in the outcome of this action is sufficient to confer standing.

“To determine whether a non-abutter has a sufficient direct, definite interest to confer standing, the [trial court] may consider” a number of factors. Id. (citations omitted). These factors include, but are not limited to: (1) “the proximity of the challenging party’s property to the site for which approval is sought”; (2) “the type of change proposed”; (3) “the immediacy of the injury claimed”; and (4) “the challenging party’s participation in the administrative hearings.” Id. (citing Weeks Rest. Corp., 119 N.H. at 545; Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 99 (2008)). The court “also consider[s] any other relevant factors bearing on whether the appealing party has a direct, definite interest in the outcome of the proceeding.” Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (citation

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omitted). "Standing exists when these factors lead the trier of fact to conclude that the plaintiff has a sufficient interest in the outcome of the proposed zoning decision, but standing will not be extended to all persons in the community who might feel that they are hurt by the board's decision on a site plan approval pertaining to land quite remote from their own." Nautilus of Exeter, Inc., 139 N.H. at 452 (quotation, internal quotation marks, and ellipsis omitted).

The Town and Three Socios argue that, on balance, consideration of the Weeks factors weighs against a finding that the Calefs have standing to pursue this appeal. (Joint Mot. Dismiss ¶¶ 10–16.) The Calefs, in opposition, assert that based on consideration of the Weeks factors, and other relevant factors, they have standing to bring this appeal. (Pls.' Obj. Mot Dismiss ¶¶ 36–46.) The court considers each of the relevant factors in turn.

I. Proximity

The Calefs first argue that their lot is in close proximity to the proposed project, approximately 300 feet from the BVP property. (Pls.' Obj. Mot. Dismiss ¶ 37.) They assert that this distance is sufficiently close to weigh in favor of standing. (*Id.* at 38.) The Town and Three Socios argue, in contrast, that the Calefs' property is not sufficiently proximate to support standing. (Joint Mot. Dismiss ¶¶ 10–11.) They assert that the Calefs' property is approximately 500 feet from the closest possible well location. (*Id.* ¶ 11.) They further note that the Calefs' property is separated from the BVP lot by two other properties and is located in a different zoning district than the BVP lot. (*Id.* ¶ 11.)

On this factor, the court agrees with the Calefs. Based on the surveys included in the certified record, the Calefs' lot is approximately 100 feet from the BVP parcel and approximately 200 to 300 feet from the proposed well location. (See ZBA C.R. at 105 (survey showing Calefs' lot 100 feet from BVP property and between 200 and 300 feet from proposed well location); but see PB C.R. 26 (depicting the Calefs' property approximately 300 feet from the BVP parcel and not designating proposed well location).) The Calefs' lot is sufficiently physically close to BVP's property and the proposed well for proximity to weigh in favor of standing. Compare Johnson, 157 N.H. at 99 (proximity established where plaintiff's condominium unit was located approximately 200 feet from lot line, and 500 feet from the proposed structure), with Hannaford Bros. Co., 164 N.H. at 767 (no proximity where plaintiff's property was located almost four miles from proposed development site), and Nautilus of Exeter,

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Inc., 139 N.H. at 451–52 (no proximity where plaintiffs' properties were between 4,224 feet and six miles from proposed addition). The fact that two properties separate the Calefs' lot from BVP's property does not undermine this conclusion; the Calefs need not be abutters to have standing. See Weeks Rest. Corp., 119 N.H. at 545. However, the Calefs' property is not located in the same zoning district as BVP's property, making the Calefs' interest in the project's alleged failure to comply with zoning ordinance provisions related to conservation subdivisions less substantial. Cf. Thomas v. Town of Hooksett, 153 N.H. 717, 720–21 (2006) (plaintiffs owning property within groundwater conservation district and 1,000 feet from proposed project had standing where appeal concerned impermissibility of gas station construction within that same zoning district). Thus, the court finds that that proximity weighs slightly in favor of recognizing the Calefs' standing.

II. Type of Proposed Change

Next, the Calefs appear to argue that the type of change proposed is substantial because they will be forced to abandon their existing water source and possibly secure a new water source by installing a well on their own parcel. (Pls.' Obj. Mot. Dismiss ¶¶ 40–42.) The Town and Three Socios argue, on the contrary, that the proposed change is minor. (Joint Mot. Dismiss ¶ 12.)

The court finds that the proposed change is not substantial. The change at issue here is installation of a well and associated utility lines on BVP's property, which will provide water service to off-site premises. The Calefs correctly assert that the practical implication of Three Socios' gas station/convenience store and BVP well projects will be abandonment of Tsoulakas' existing well from which the Calefs are supplied with water. This abandonment, however, was not specifically required as a condition of Planning Board approval of either project, but reached through private agreements among neighboring landowners. Furthermore, the Planning Board has taken no action, nor could it, to interfere with the Calefs' private agreement with Tsoulakas for water supply. On the contrary, the Planning Board's approval of Tsoulakas' connection to BVP's proposed well is conditioned upon acknowledgement of the Calefs' easement rights in the water supply from the Tsoulakas property. (See PB C.R. at 102.) Thus, although the ultimate source of the water may change, the terms and conditions of the Calefs' private agreement with Tsoulakas remain the same. The Calefs have not provided any information demonstrating that

the quality, quantity, or other attributes of the water provided will be affected by this change in water source. The court finds the change proposed here in relation to the Calefs—alteration of ultimate water source—is not substantial, thereby weighing against a finding of standing. Cf. Hannaford Bros. Co., 164 N.H. at 767 (finding change substantial when proposed building would be double the size of dimensional restriction); Johnson, 157 N.H. at 99 (finding proposed change substantial where construction of new cottage would increase footprint of dwelling and be located closer to plaintiffs' property line).

III. Immediacy of Injury

With respect to the immediacy of the injury caused by the proposed project, the Calefs assert essentially the same arguments raised regarding the type of change—that the installation of the proposed well on BVP's property will require abandonment of their existing water source and that they must secure an alternative water source by installing a well on their premises. (Pls.' Obj. Mot. Dismiss ¶ 40–42.) The Town and Three Socios, in response, aver that the Calefs have failed to articulate a specific injury to their property as a result of the well. (Joint Mot. Dismiss ¶ 13–14.) They argue that the Calefs' position that the project will require abandonment of their existing well is incorrect and has already been rejected by the court in prior litigation. (Id. ¶ 14.)

On this factor, the court agrees with the Town and Three Socios. As discussed above, the ultimate source of the Calefs' water supply may change as a practical result of the Three Socios' and BVP's proposed projects, but not due to the Planning Board's decisions. The terms of Calefs' private agreement for water supply from the Tsoulakas property remain unchanged. Thus, though the Calefs are correct that they will no longer be receiving water from the well currently used, they have not demonstrated how receiving water under their agreement with Tsoulakas from a source well on the BVP property will cause them injury. Therefore, the court finds that the alleged injury claimed by the Calefs does not support standing. See Nautilus of Exeter, Inc., 139 N.H. at 452 (listing "the immediacy of the injury claimed" as a factor for consideration); cf. Weeks Rest. Corp., 119 N.H. at 545 (finding plaintiff had standing where increased traffic and congestion caused by construction could adversely affect plaintiff's business). This factor, accordingly, weighs against a finding of standing. **LAND USE OFFICE**

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IV. Participation in Administrative Hearings

Next, the Calefs assert that they actively participated in the August 2015 hearing at which the subject application was conditionally approved, and pursued that participation by appealing that decision to the ZBA and this court. (Pls.' Obj. Mot. Dismiss ¶ 43.) The Town and Three Socios concede that the Calefs participated in the underlying Planning Board proceeding. (Joint Mot. Dismiss ¶ 15.) The record supports the parties' assertions. (See, e.g., PB C.R. at 94.) This factor weighs in favor of standing.

V. Other Factors

In addition to the four Weeks factors, the Calefs posit two other factors supporting what they assert to be their direct and definite interest in the proceedings. (Pls.' Obj. Joint Mot. Dismiss ¶¶ 44–45.) First, they assert that they have a direct and definite interest in the proceedings because they owned a portion of the BVP premises at the time the subdivision plan creating the conservation easement and open space areas was approved. (Id. ¶ 44.) Prior ownership, however, is not sufficient to confer standing to non-abutters in land use appeals. See Joyce v. Town of Weare, 156 N.H. 526, 529–31 (2007) (finding plaintiff had no standing where his interest in property under purchase and sales agreement had lapsed and possible future interest in property was purely speculative); Ossipee Auto Parts, Inc. v. Ossipee Planning Bd., 134 N.H. 401, 404 (1991) (upholding trial court's dismissal for lack of standing where plaintiffs had conveyed interest in property to third party after filing of appeal).

Second, the Calefs aver that they have a direct and definite interest in the proceeding based on the fact that they "are to be provided water from the Proposed Well . . . [and] the fact that [the] Proposed Well is in violation of Articles 6, 19, and 20 of the Barrington Zoning Ordinance" (Pls.' Obj. Mot. Dismiss ¶ 45.) The court does not find these factors relevant to standing. As an initial matter, the project's alleged violation of the zoning ordinance is not a "fact," but is instead an alleged basis of the Calefs' appeal here. Furthermore, that the source of the Tsoulakas water, and thus of the Calefs' water, will change does not mean that the Calefs are suffering an immediate injury. See Nautilus of Exeter, Inc., 139 N.H. at 452 (listing "the immediacy of the injury claimed" as a factor for consideration). Consequently, the court finds that neither of the two additional factors posited by the Calefs support their standing in this action.

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VI. Balancing of Factors

Balancing the factors discussed above, the court finds that the Calefs have not established that they have a “direct, definite interest in the outcome of the action or proceeding.” Hannaford Bros. Co., 164 N.H. at 767. Although the Calefs’ property is physically proximate to the proposed project and the Calefs actively participated in the underlying administrative proceedings, the type of change and the potential injury posed are, at best, minimal. See id. (balancing factors and finding no standing where plaintiff established substantial change and participation but failed to establish proximity and injury). The crux of the Calefs’ claims on appeal relate to their concerns that the proposed well installation will spoil the character of BVP’s property as a conservation subdivision and open space area. (See Compl. ¶¶ 26–38.) As such, the Calefs have “alleged no more than a general interest in preventing the planning board from approving plans that would violate the Town’s zoning ordinance.” Golf Course Inv’r of NH, LLC, 161 N.H. at 684 (citation omitted); Nautilus of Exeter, Inc., 139 N.H. at 451–452 (finding no standing where only injuries claimed were increased competition and status as “citizens of the town, property owners, taxpayers, and owners of business within the commercial district”). This generalized interest is insufficient to establish standing. The court, therefore, finds that the Calefs have not established that they are “persons aggrieved” under RSA 677:4 and RSA 677:15.

CONCLUSION

For the foregoing reasons, the court finds that the Calefs lack standing to pursue these consolidated appeals. The Town’s and Three Socios’ joint motion to dismiss for lack of standing is granted.

So Ordered.

May 16, 2016



Steven M. Houran
Presiding Justice

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Jordan, Diane E.

From: Arnold, John L.
Sent: Monday, October 17, 2016 12:31 PM
To: Jae Whitelaw
Cc: Marcia Gasses; John Scruton
Subject: Re: Three Socios

Jae,

They have been working with their architect to get the drawings done. They are expected later this week. Hopefully we will have the materials to the town next week for final approval.

I believe when we spoke shortly after the conditional approval we agreed there wasn't a deadline for final approval. Is there one?

John

John L. Arnold
Associate

Hinckley Allen
11 South Main Street, Suite 400
Concord, NH 03301-4846
p: 603-545-6166 | f: 603-224-8350
jarnold@hinckleyallen.com

On Oct 17, 2016, at 11:25 AM, Jae Whitelaw <jae@mittchellmunigroup.com> wrote:

Hi John -

I understand from Marcia that the town has not heard anything from Three Socios re continuing on with the architectural plan and final approval. I thought I would check in and see what the status is from your end before thinking about whether a deadline is coming up.

Thanks.

Jae

Jae Whitelaw
Mitchell Municipal Group, P.A.
25 Beacon Street East
Laconia, NH 03246
603-524-3885
jae@mittchellmunigroup.com

<image001.jpg>

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Jordan, Diane E.

From: Jae Whitelaw <jae@mitchellmunigroup.com>
Sent: Monday, October 17, 2016 4:26 PM
To: Arnold, John L.
Cc: 'Marcia Gasses'; 'John Scruton'
Subject: RE: Three Socios

John -

Correct, there is no deadline for finishing the conditions precedent. This is unusual in Barrington, as there usually is. That being said, I am glad to hear things are moving along. Thanks.

Jae

-----Original Message-----

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jarnold@hinckleyallen.com<mailto://jarnold@hinckleyallen.com>

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Jae

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