

MEETING MINUTES
ZONING BOARD OF ADJUSTMENT PUBLIC MEETING
NEW LOCATION--BARRINGTON MIDDLE SCHOOL

Caferetia

51 HALEY DRIVE (Off Franklin Pierce Hwy)

Barrington, NH

October 13, 2015

7:00PM

Members Present

Karyn Forbes, Chair

George Bailey

Meri Schmalz

Raymond Desmarais

Gerry Gajewski

Members Absent

George Schmalz

Dawn Hatch

ACT ION ITEMS

1. **[238-16.21-TC-15 ZBA Appeal of Decision of The Town of Barrington, New Hampshire Planning Board](#)**

Pursuant to New Hampshire R.S.A. 676:5 (III), 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, appeal the August 18, 2015 Decision of the Town of Barrington Planning Board to grant site plan approval to Barrington Village Place.

Reference case below:

[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) in the Village District. By: Barry Gier, PE; Jones & Beach Engineers, Inc.; PO Box 219; Stratham, NH 03885

K. Forbes explained they would address the joint motion to dismiss first.

John Arnold of Hinckley Allen represented the Three Socios whom had applied for and was approved for the site plan being appealed. The first argument they had was the motion to dismiss was untimely. They were directed as part of site plan in 2013 or 2014 to seek a Variance from 6.2.2.8 from the Barrington Zoning Ordinance. They received a variance for a well to be located in the open space to serve four off site locations; 6.2.2(8) allowed for common open space to be used for individual and community well and the variance was not appealed. The well would service the proposed development, Journey Baptist Church, Milos Pizza, George Calef Fine Foods. Mr. Calef was arguing they now needed a variance from 6.3.1 which they believe would be untimely. The Planning Board only told them they needed a variance from 6.2.2.8 and that decision was not appealed. The second argument they made was that 6.3.1 was under Article 6, Conservation Subdivisions; which are an innovative land use control and appealable to the Superior Court under 674:21. The third argument they made was that the remaining items were statutory claims and the Zoning Board did not have authority to hear statutory claims. For the three reasons they believed the appeal should be dismissed, because the Board lacked jurisdiction.

Jae Whitelaw of Mitchell Municipal Group representing the Planning Board, expressed that the question was allowed use in the open space presented under the delegation of the Planning Board to administer innovative land use controls. The petitioner's argument was that it was not. She would have agreed if the argument was from some section other than Article 6. What was being contested was section 6.3.1. and that was what the petitioner believed a variance was required from. Ms. Whitelaw expressed the petitioner was trying to get around that by also were appealing under Article 18; article defines accessory use. She expressed the Planning Board needed to interpret accessory use as it pertained to Article 6 and article 6 had its own definition of what an accessory use it under 6.2.2(8); which was also an innovative land use control. The petitioner also contended they needed a variance Article 19 Table of Uses. Under Article 19 a conservation subdivision was allowed if it met the requirements under Article 6; Article 19 required they go back to Article 6 which was under innovative land use. She expressed she did not believe the petitioners claims of jurisdiction had any matter and should be dismissed for the reasons given as well as the statutory reasons.

R. Desmaris questioned why the further variances were not needed.

Jae Whitelaw expressed that the Planning Boards determination of the required variances which were needed were satisfied by the Planning Board. The Planning board had determined it was allowed use with the variances which were granted. The petitioner was now saying that there were other variances that were needed. What she was saying was that those provisions the Planning Board interpreted were innovative land use control and appeal of the Planning Board decision was to the Superior Court.

R. Desmaris asked if the original application for relief was under the wrong requirements of the ordinance did it matter.

Jae Whitelaw expressed the Planning Board had determined the applicant had met the requirements under Article 6 of the ordinance and appealable to the Superior Court. The court may find that a variance was required, but the appeal was to the court.

Gregory Wirth represented the Calef Trust. Attorney Wirth expressed he would start with the argument that their appeal was untimely. He contested the argument that because a variance was granted back in late 2013 they should have appealed to the ZBA back in 2013; that missed the reason why they were there that evening. Attorney Wirth argued they were appealing site plan approval to put a commercial well in the open space of the Village Place subdivision. He expressed they could not appeal the site plan earlier because the site plan had not been approved. He expressed that what you would be telling the Calef Trust was that they had no ability to appeal. The request was within thirty days as required by the statute and was timely. Attorney Wirth expressed he was not appealing the variance under 6.2.2. The argument that the appeal was untimely was without basis or fact. Attorney Wirth expressed that 676:5 was being reviewed broadly. Attorney Wirth said Attorney Arnold had filed an appeal with the ZBA in 2013 with similar circumstances. The second argument that the appeal was under RSA 676:21. He read to the list of innovative land uses from the RSA's. Attorney Wirth expressed it was not; a question of timing incentives, phasing, intensity and use incentive, transfer of density and development rights, planned unit development, cluster development, impact zoning, performance standards, flexible and discretionary zoning, environmental characteristics zoning, inclusionary zoning, accessory dwelling unit standards, impact fees or Village Plan alternative subdivision. They were not talking about the granting of conditional or special use permits. Attorney Wirth expressed that the Supreme Court looked at Innovative land Use back in 2005 and they read it much more narrow than the Town and their attorney would have liked the Board to believe. The Supreme Court ruled that the emphasis was much more on conditional and special use permits. They were not appealing a cluster subdivision, what they were appealing was the construction of a commercial well and whether it could be placed in open space. He contended it was an issue under 674:21 that was appealable to the Board. He contended the installation of the well was appealable to the ZBA and if necessary to the Superior Court. The definitions under article 18 & 19 do not allow what happened before the Planning Board on August 18th to go forward without a variance under the Zoning Ordinance. He expressed the motion to dismiss should be denied both on the untimely issues and the innovative land use issue.

K. Forbes asked if the Conservation Subdivision were enacted under 674:21.

M. Gasses expressed that 674:21 was referenced.

K. Forbes reviewed the ordinance and expressed it was adopted under 674:21. She expressed the list in the RSA stated the Innovative Land Use Controls may. Include but are not limited to those listed.

Attorney Wirth expressed the Supreme Court would say they are not limited to those, but similar to those.

K. Forbes expressed it was in October of 2013 when the first Planning Board decision was made. She asked when had their client had become aware of the 2013 decision.

Gregory Wirth expressed he did not know and did not believe it was relevant.

K. Forbes expressed they had raised 6.2.2(8) prior

Gregory Wirth expressed that was not what they were appealing.

K. Forbes expressed they had brought up 6.2.2(8) and 6.2.2(9) in prior appeals.

Attorney Wirth explained he believed they raised them in the pleadings and then waived them at oral argument because he believed they were untimely and he was not going to forward it if it was not based upon law.

K. Forbes suggested they would take the motion to dismiss under advisement and review the appeal on the merits and rule all at once.

Allen Kelly expressed he was acting chair on October 1, 2013 he believed the vote was not directing the applicant to 6.2.2(8) but whether the water rights belonged to the Village Place owners or not. He believes that was the difference from the Board directing them to get a variance. The Board did not direct them to get a variance, but determined the water rights belonged to the lot owners.

K. Forbes expressed she did not have the minutes of the meeting in front of her but the Notice of Decision and read from the Notice of Decision.

K. Forbes asked if Mr. Kelley was still on the Planning Board.

Allen Kelley expressed he was not.

K. Forbes expressed the matter should be addressed with the Attorney for the Planning Board.

Attorney Wirth expressed they were appealing the August 18, 2015 Planning Board decision conditionally approving the application for Three Socios on behalf of Barrington Village Place to construct a proposed well with associated waterline piping and access to serve a non-community water supply. He represented the Calef Trust who had owned property on Route 125 and service by a well on the Tsoukalas property since 1983 and prior to that since approximately 1966. The well was slated to be abandoned as part of the Three Socios project on the abutting parcel. The August 18th site plan application was to install the well on the open space of the Village Place Subdivision. Their argument and appeal was based upon the language of Article 19 of the Zoning Ordinance; he was not appealing Article 6.2.2(8). Article 19 stated that Conservation Subdivisions are allowed provided that such use complies with Article 6 of the Zoning Ordinance entitled Conservation Subdivision Regulations. Article 6 in terms of uses allows under 6.3.1(1) primary uses and read what was allowed under the article 6 in the ordinance and read accessory uses under 6.3.1(2). He believed they were required to look under uses. He expressed a non-community water supply to services off site commercial entities. Their argument was that it was not allowed under Article 6 and article 19 no matter what was done to 6.2.2. The use was not allowed; they needed to come for a variance. He did not get into the statutory references because the court would address those. They had needed to ask for a residential use or accessory use or come to the ZBA.

G. Gajewski asked why it was considered commercial.

Attorney Wirth expressed it was not for residential use.

J. Gajewski asked why Attorney Wirth was referring to the well as a commercial well; his understanding of commercial was for profit.

Attorney Wirth expressed he was looking at the definition on a technical side; it was not residential or serving a residence anywhere.

J. Gajewski asked in what way it was not a community water supply.

Attorney Wirth expressed it was not serving the Barrington Village Place subdivision.

J. Gajewski expressed that would not the four businesses being considered a community.

Attorney Wirth expressed he was looking at the definition from a technical stand point.

K. Forbes asked if he was withdrawing his statutory arguments.

Attorney Wirth expressed he was not withdrawing them; he was not arguing them that evening.

Attorney Whitelaw expressed they are appealing 6.2.2(8) in around about way to get where they wanted to go. They were not looking at the section of the ordinance that did specifically addresses allowed uses in a conservation subdivision. The well was specifically and allowed use if it served the subdivision. The variance was granted to allow it to serve off site properties. There was no basis in article 19 for requiring a variance if a variance was granted from a different section of the zoning ordinance. She believed the Planning Boards determination that the use with the variance meets the terms of the Zoning Ordinance should be affirmed by the Zoning Board.

Attorney Arnold submitted a letter. He expressed that Calef's do not have standing to appeal the decision. He reviewed the four factors required to have standing. The change was a minor proposed change. A well was being installed in the open space and would have underground piping not visible to the Calef's. The third criterion was the immediacy of the injury. The Calef's contended that the Tsoukalas decision to discontinue their well adversely affects them. He expressed even if true does not affect the Planning board decision to allow the well in the open space. The Calef's claim was not a result of the decision being appealed. The fourth criteria was if the appellant was allowed to participate in the proceedings. Mr. Calef had actively participated in the proceedings. The Calef's had not claimed any injury different than anyone else in the community. 6.3.1 defines the use of building lots, not open space. 6.2.2 addressed what was allowed in the open space; that provision provided for community water systems to be installed. Three Socios had come to the ZBA with and appeal and for a variance to allow the well to service an offsite location. The Calef's were notice as abutters to the October 2013 meeting. There was a comment that the well would be shut off. He stated for the record that Mr. Calef would not be shut off from water, they would supply water free of charge other than for maintenance if something needed to be done to the pump. The agreement would run with the land. They tried to work out a written agreement with Mr. Calef but were unsuccessful. Mr. Calef had preferred to keep his arrangement with r. Tsoukalas. They then agreed to supply Mr. Tsoukalas enough water to supply Mr. Calef the well would just be moved a few hundred feet.

Attorney Wirth expressed the appeal brought to this board by Three Socios was not dismissed, they did go on to grant a variance to 6.2.2 so they did not need to rule on the variance. He expressed he did not want to negotiate in public an easement. He was not here to negotiate. He was tire of hearing the Calef's would be provided with free water forever. He wanted the record to reflect the Calef's were not sitting at home trying to develop ways to put the Three Socios out of business. The Calef's just want to maintain a water supply they have had since 1983. The Calef would not make money from the Three Socios development. He expressed they are not abutters but they do have standing. He contended that when the water was repiped to the Tsoukalas property through Barrington Village Place they did not have any. He expressed Article 19 designated what uses were allowed and Article 6.2.2 was design standards.

Attorney Arnold expressed the water would get pumped from Mr. Tsoukalas property and from Mr. Tsoukalas to Mr. Calef's property through existing piping. The lines that ran from the Tsoukalas property to Mr. Calef's property would remain in place. They had provided an agreement to Mr. Tsoukalas; which he had agreed to that would provide him sufficient water in order for him to supply Mr. Calef.

G. Bailey asked for a copy of the easement with George Tsoukalas.

K. Forbes expressed they would place into the record the October 29, 2013 application for a Variance, which list the George and Arvilla Calef, George and Arvilla Trust as an abutter.

K. Forbes opened for public comment.

George Calef wanted to correct the warm and fuzzy idea that it was a community well. By the State definition it was not a community well. The well only served Three Socios; they were the only one benefiting. The proposed were the Journey Baptist Church, The Three Socios, Millo's, and possible him; there were not five or six. The well existed for only one purpose and it was to serve the gas station.

Stephen Jeffery 128 France Road had a letter to be submitted into the minutes. He expressed the Planning Board did not have the authority to approve the development of a well in the open space. The ZBA had no authority to hear appeals regarding conservation subdivisions approved under RSA 674:21. He expressed that the developer did not propose well in the open space as part of the original subdivision. Towns have no authority of grant development of open space. The Supreme Court had determined that the Town had no authority to allow development of open space.

Paul Mausteller 83 Washington Street expressed he was there to support George Calef. He asked if anyone knew where the water supply was for the current Irving. He asked what was innovative about a well in the open space that was meant for a gas station. He expressed the Town attorney had taken the Planning Board, the selectmen, and the ZBA in the wrong direction. He asked the appeal be granted for George. Conservation meant preserve and let nature take its course.

Public comment was closed.

K. Forbes list of what was added to the record.

November 20, 2013 ZBA Minutes

October 1, 2013 Planning Board Minutes

September 24, 2015 ZBA Notice of Decision

The Memo of law submitted by Attorney Wirth July 6, 2014

ZBA Application

Stephen Jeffery Letter October 12, 2015

October 29, 2013 Three Socios Application to the ZBA

Attorney Arnolds letter dated October 13, 2015

Attorney Whitelaw's letter dated October 12, 2015

All the documents submitted at the last Planning Board Meeting

M. Gasses was directed to e-mail the easement to Tsoukalas (Millo's to the ZBA as part of the record.

Attorney Whitelaw expressed for the record that the water supply to the Tsoukalas property would be sufficient to meet the needs of the Calef property as a condition of the approval.

K. Forbes expressed they were addressing the motion to dismiss.

10/29/2013 Notice of the application for the Variances to 6.2.2(8) to the ZBA

10/8/2013 Panning Board NOD that they need a variance to 6.2.2(8)

9/25/2014 Minutes from the ZBA where the applicant withdrew claims 6.2.2(8) & 6.2.2(9)

K. Forbes did not believe it was timely and the time would have run from the September 25, 2014 date.

K. Forbes the issue of appeal to the Superior Court under Innovative Land Use and October 2015 was not timely.

R. Desmaris disagreed with K. Forbes

K. Forbes expressed they were told by the administrative officer that they needed a variance from 6.2.2(8); if they needed a variance from other sections they should have been told at that time. Three Socios had moved forward and it was two years down the road from the beginning of it. She did not believe it was timely.

K. Forbes expressed the seconded issue was the appeal was innovative land use and appealable to the Superior Court.

M. Schmaltz expressed it should go to an impartial body; the court.

K. Forbes expressed that was the statute to go to the court. Attorney Wirth did not argue on the statutes and she believed he was deferring to the Superior Court.

K. Forbes expressed the issues were the timeliness and whether the appeal was straight to the Superior Court and not to the ZBA because it was under the Innovative Land Use Control.

A motion was made by G. Gajewski and seconded by M. Schmaltz to dismiss the appeal because the appeal was untimely. The motion carried 3-2

K. Forbes suggested the Board should discuss the question of Innovative Land Use. She asked if there was a motion to state the appeal was Innovative Land Use and appealable directly to the Superior Court.

K Forbes asked if they should discuss the merits.

Attorney Donovan expressed it would be helpful for the Board to discuss the case on the merits because it prevent the court from sending it back if the appeal fails on the timeliness issue. Should make clear what that attorney Wirth did not discuss Statutory requirement.

G. Gajewski asked “Why when we did not take jurisdiction”.

Attorney Donovan agreed.

K. Forbes stated the Board did not discuss the part of the appeal of the site plan approval which was based upon violations of the State statutes paragraph 34 through 38 which was that. the site plan review violated RSA 674:21-a and RSA 477:45(i) NOD should not include because it was included in the Superior Court appeal.

A motion was made by R. Desmaris and seconded by G. Bailey to adjourn. The motion carried unanimously

Respectfully submitted,

Marcia J. Gasses
Town Planner & Land Use Administrator