



11 South Main Street, Suite 400
Concord, NH 03301-4846
p: 603-225-4334 f: 603-274-6950
hinckleyallen.com

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

Via email (barrplan@metrocast.net)

January 7, 2014

Alan Kelley, Vice Chair
Barrington Planning Board
P.O. Box 660
333 Calef Highway
Barrington, NH 03825

RE: SR12/410; 491 Calef Highway; May 238, Lot 4; The Three Socios

Dear Mr. Kelley:

I am writing this letter on behalf of The Three Socios, LLC to formally ask that you or another member of the Barrington Planning Board (in accordance with RSA 673:14, II) request a vote on the question of whether Mr. Jeffery should be disqualified from further involvement in the above-referenced site plan application. This letter is being presented to you in advance of tonight's meeting because the applicant is under a legal obligation to raise any issue of disqualification at the earliest possible time in order to give all a full opportunity to come to sound conclusions regarding the need for disqualification.

RSA 673:14, I states:

No member of a ... planning board... shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.

A copy of RSA 673:14 is attached hereto as Exhibit A. Under the "juror standard," a member must be disqualified "if it *appears* that [a member] is not indifferent" RSA 500-A:12; Taylor v. Town of Wakefield, 158 N.H. 35, 39 (2008) (emphasis added). I have attached, as Exhibit B, a copy of RSA 500-A:12 setting forth the standard examination for jurors.

There is another expression of the ethical standard for Planning Board members. Our State Constitution expressly requires that all judges must be "as impartial as the lot of humanity will admit." NH Constitution, part I, article 35. The NH Supreme Court has ruled that planning board

▶ ALBANY ▶ BOSTON ▶ CONCORD ▶ HARTFORD ▶ NEW YORK ▶ PROVIDENCE

HINCKLEY, ALLEN & SNYDER LLP, ATTORNEYS AT LAW

actions are generally quasi-judicial, and therefore the constitutional standard applicable to judges is applicable to planning board members.

At its last meeting, this Board voted that the well needed by the applicant as part of its site plan, to be placed within the open space of Barrington Village Place ("BVP"), is not an allowed use, and that a variance would be required. It directed the applicant to seek relief from the Zoning Board of Adjustment. Since that time, the applicant has appeared before the Conservation Commission and the ZBA. At the Conservation Commission, despite being cautioned by the Town Planner, Mr. Jeffery voiced his opposition to the proposed use of the open space. A copy of the draft meeting minutes are attached hereto as Exhibit C. Specifically, Mr. Jeffery expressed his opinion that the well requires an amendment to the BVP subdivision, and that there is no means to make such amendment. Mr. Jeffery further expressed his opinion that a separate site plan application for BVP would be required to place the well. He generally objected to the use of open space for the well.

At the ZBA hearing, Mr. Jeffery appeared and objected to the requested variances. A copy of his correspondence to the ZBA is attached hereto as Exhibit D. After the ZBA granted the variances to allow the well, Mr. Jeffery requested a rehearing. In so doing, he argued that he has a personal vested interest in the outcome of the matter. A copy of Mr. Jeffery's rehearing request (and follow up correspondence) is attached hereto as Exhibit E. He explicitly stated:

I have a vested interest in ensuring developers cannot propose to develop designated open space. It is well established that land use law and court review includes that a decision to permit a use be considered as if it were applied to all similar properties. Granting the applicants [sic] request for any variance will set precedent that may adversely affect my property in the future. I am one of 20 or so owners of open space in Barrington. I believe that sufficiently distinguishes me from other citizens.

See Dec. 16, 2013 letter, attached hereto as Exhibit E (emphasis added).

Although the ZBA ultimately determined that Mr. Jeffery lacked standing to request a rehearing, his statements that he has a "vested interest," that the development "may adversely affect [his] property," and that his interests in this matter are distinct from "other citizens" indicate that he believes he has a "personal interest in this matter which differs from other citizens." See RSA 673:14, I. Furthermore, after his rehearing request was denied, Mr. Jeffery approached an abutter to the subdivision and convinced him to sign his name to Mr. Jeffery's rehearing request in an effort to overcome the standing issue. A copy of that letter is attached hereto as Exhibit F.

These actions indicate that Mr. Jeffery "expects to gain or lose upon the disposition of the case," see RSA 500-A:12, I(a), that he has "given his opinion or has formed an opinion," see RSA 500-A:12, I(d), "is prejudiced to any degree regarding the case," see RSA 500-A:12, I(f), and is "not indifferent," see RSA 500-A:12, II. The proposed well is a necessary part of the gas station development. Without the well, the development is unlikely to proceed. Without the development, the well is unlikely to be placed in the open space. Mr. Jeffery undoubtedly

▶ ALBANY ▶ BOSTON ▶ CONCORD ▶ HARTFORD ▶ NEW YORK ▶ PROVIDENCE

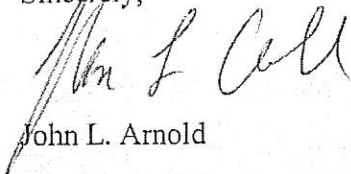
appreciates this, and as a result, cannot participate in an unbiased fashion in the remaining review of the site plan application.

Mr. Jeffery's bias will taint the process and presents the likelihood that the entire review may be voided because of his participation. New Hampshire has long held that "in view of the importance of property rights involved," "mere participation" by a board member who should properly be disqualified is "sufficient to invalidate the tribunal's decision." Rollins v. Connor, 74 N.H. 456 (1908); Winslow v. Town of Holderness Planning Board, 125 N.H. 262 (1984).

We recognize that Mr. Jeffery has the right to be heard, but he should not be heard as a "judge" on the Planning Board. He should be heard as a citizen of Barrington or a representative of others entitled to speak. He should not participate in the review process as a Board member.

We respectfully request that the Board accept this letter as a formal request to take a vote on the disqualification of Mr. Jeffery from sitting in the review of the above-referenced site plan application. The eventual decision on our application and the lengthy process to reach a fair conclusion are at risk. If this Board eventually comes to a decision that is set aside because Mr. Jeffery should have been disqualified, the Town, the landowner, and the community will have expended substantial and unnecessary time and resources.

Sincerely,



John L. Arnold

JLA/dj
Enclosures

cc: Three Socios, LLC

TITLE LXIV PLANNING AND ZONING

CHAPTER 673 LOCAL LAND USE BOARDS

General Provisions

Section 673:14

673:14 Disqualification of Member. –

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairperson shall designate an alternate to act in the member's place, as provided in RSA 673:11.

Source. 1983, 447:1. 1988, 26:1. 1992, 64:9. 1996, 42:11. 2007, 266:6, eff. Aug. 28, 2007. 2008, 391:6, eff. Sept. 15, 2008.

TITLE LI COURTS

CHAPTER 500-A JURORS

Section 500-A:12

500-A:12 Examination. –

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) Has directly or indirectly given his opinion or has formed an opinion;
- (e) Is employed by or employs any party in the case;
- (f) Is prejudiced to any degree regarding the case; or
- (g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

Source. 1971, 456:10. 1981, 527:2. 1988, 76:1, eff. June 14, 1988.

Barrington Conservation Commission
October 17, 2013 7:00 PM
Barrington Elementary School Annex, Professional Development Center

DRAFT MEETING MINUTES

PRESENT: John Wallace, Chair
Pam Failing, Vice-Chair
Fred Bussiere, Selectmen representative
Ken Grossman

ABSENT: Anne Melvin
Peter Sandin, Alternate
Glenn Gould

CALL TO ORDER

Barrington Conservation Commission (BCC) Chair John Wallace called the meeting of October 17, 2013 to order at 7:05.

DELEGATION OF VOTING MEMBERS John Wallace confirmed the presence of members as above.

- 1) Guests: Marika Wilde, Alison Desmaris, Stephen Jeffery, and Marcia Gasses attended to observe the meeting.
a) Barry Gier, Jones & Beach, John Arnold, Jim Mitchell: well on proposed Village Place easement

Mr. Gier mentioned that at a previous meeting (June 20, 2013) the Conservation Commission had agreed to hold the conservation easement which would include the proposed well and proposed well easement. He added that this included the construction of a five car trail head on one of the adjoining lots in the open space. It was later noted that a motion to reconsider this agreement had been made at a subsequent meeting (September 19, 2013) in order to gather more information. Mr. Gier reviewed the plans to start with 8 acres allowed for exploratory drilling, and this would be reduced to 4 acres once the well was complete. Ken Grossman asked why the need for 4 acres, and Mr. Gier responded this is in case something happened with the original well and another drilling is required. Pam Failing asked about the anticipated withdrawal amount, and Mr. Gier said 4,000 gallons a day is the amount that is expected for the (four) uses involved. This could be expanded up to 14,400 gallons per day should more businesses be added to the well, and Mr. Gier added that the 150' well radius allows for this increase. *(I don't think this is true. My understanding was that the 150' radius allows up to 14,400 gal/day).*

Deleted: minimum

Deleted: permitted

Deleted: It is assumed that a permit would be required from DES to increase the withdrawal amount from 4,000 per day.

Formatted

Pam asked who would monitor the well system. The response was that the owners of the lot would operate the system with the water quality being monitored by a water company which would report to DES. It was mentioned that this is a non-community transient well. Pam asked how deep well would be and the amount the aquifer could supply. Mr. Gier did not know the anticipated depth of the well, but did share that well drillers in the area have indicated that the aquifer should be sufficient to supply the withdrawal. Pam asked about refill/recharge rate of the aquifer and said that one concern she has is that given so much withdrawal she wondered what would be the effect on prime wetland. Mr. Gier mentioned that the plan is to drill one well to supply four businesses, and the three existing wells would be replaced with this one. Marcia interjected that this is not considered a large usage well, and the businesses will not be maxing out the 4,000 gallons per day. Ken asked if this is an easement within an easement and wondered if the applicants have to go back to the planning board. Mr. Gier responded that they are now in the process of a site plan with the planning board, and this would include the location of the well. John added that the well easement will be put in place before the conservation easement goes through. The applicants will have to go to the ZBA for approval of the well in the open space. The applicants suggested that verbiage should be in conservation easement to allow the well to go through. Pam brought up that the development was approved as a conservation subdivision and the original intent was to conserve resources. She questioned if this makes a problem or change of approval of the other subdivision (Village Place) since we are now changing the purpose of the open space. Marcia responded that this well would serve the master plan for growth in this area, and in her opinion she doesn't see an issue with the permit as it stands. Pam reiterated that this is after the fact and goes against the zoning. Pam said this is more about principle and a change of intent. There was discussion about the role of various town agencies – planning board, zoning board and how these boards will be concerned with the zoning requirements involved. Mr. Mitchell suggested that the Conservation Commission only needs to concern itself with the conservation aspect of the application, not the zoning impacts or questions as those are the responsibility of the other boards. Pam pointed out the need for the CC to be aware of the zoning regulations to better manage conservation. It was pointed out that a conservation subdivision does not have to have an easement on it. Marcia reiterated that the CC only need to consider the question of whether this well will be detrimental or have any impact on the conservation of this property. Pam spoke of the intent of the conservation land to conserve resources and it is not for commercial purposes. The applicants responded that the water is being used by the existing businesses anyway. Before Mr. Jeffrey spoke Marcia reminded him that as a sitting member of the planning board he needs to be cautious with the type of discussion he participates in as he will be considering the application as it comes before the PB. Stephen Jeffrey (128 France Road) said that he is speaking as a town citizen. He stated that what the applicants are proposing is a change of use and change of subdivision approval and

Deleted: non

Deleted: principal

that there is no statutory means to change the conditions of a subdivision approval beyond the rehearing period. Again, Marcia reminded Mr. Jeffrey that as a member of the PB he needed to be cautious in his remarks. Mr. Jeffrey went on to say that as a non residential use this would require a site plan. He also stated that open space, once it is proposed in a subdivision application, cannot be changed and this is a state law. He added that as proposed the application would require a new subdivision approval. Mr. Jeffrey stated that the proposed well would be in an open space and the use of open space cannot be changed. There was discussion about the role of the CC in this process and John Wallace stated that it was the job of the Planning Board to be concerned with the open space agreement and that the CC was to consider the easement. There was more discussion about the difference of open space and conservation easements. Pam reiterated that the proposal seems to change the original intent of keeping this as open space, and that as proposed it undoes the previous work done by the CC. Ken asked about the impact on the four acres surrounding the well head. Mr. Gier responded that it would be restored and revegetated and the only structure on the conservation land will be the wellhead and the underground lines. Pam asked about water rights and does another person have the ability to give water rights to a third party. Pam stated she does not feel this sets a good precedent. Pam asked if there was contamination who would be responsible for mitigation of the problem. The answer was that whoever caused the contamination would be responsible for the mitigation. It was mentioned again that the well easement would go in first and then there would be language in the conservation easement to include the well easement.

Ken Grossman made a motion that the Conservation Commission reaffirm its vote of June 20, 2013 to allow the drilling of a well on the conservation easement within the Village Place Development. Fred Bussiere seconded the motion. The motion passed with a vote of three (3) to one (1) in favor.

Grossman - aye, Wallace - aye, Bussiere - aye, Failing - nay

Previous to the vote Mr. Bussiere stated as a property owner in the area he had no reason to recuse himself from the vote, since he would have no need to use the proposed well. He also indicated that he has no financial interests in the proposal as presented.

- b) Barry Gier, Jones & Beach: Yellow Dog's Barn wetland buffer impact If it is deemed necessary, this will be heard at a later meeting,
- c) Robert Churchill wetland buffer impact waiver Mr. Churchill (142 Waterhouse Road) would like to build a woodshop on his property and stated he would like to avoid crossing wetlands, but by avoiding the wetlands he would be impacting the wetland buffer (1500 square feet). He is proposing to build on an existing gravel woods road. He feels the proposed spot in the wetland buffer has the least environmental impact. It was pointed out that the site has already been impacted. John expressed concerns with allowing an entire building in a wetland buffer. Moving the building closer to the road would minimize the buffer impact, but Mr. Churchill said his preference is not to have the building within 10' of the road. The BCC agreed to a site walk on Sunday morning at 9:00.

Pam Failing left at 8:25.

- 2) Approval of minutes of Oct. 3 This was tabled until the next meeting.
- 3) Complaints: none
- 4) Old Business:
 - a) George Calef: ~300 acres along Isinglass LCHIP wants to do a site walk Friday the 25th at 2:00.
 - b) Potential new easement from M. Wilde: Marika's application to conservation fund has been received (\$3,500) There was discussion of public access across abutting land. Ken suggested approaching Mr. Muckian (Ham Road) for (temporary) permission to cross his land for access to the easement. Mr. Bussiere said that when considering acceptance of this easement the selectmen stipulated that if in the future an abutting parcel allows for public access, then this parcel should also allow public access. Marika mentioned that SRC, as the proposed secondary easement holder, voted to not have public access. Fred suggested Marika share with the SRC the selectmen's approval indicating public access. John stated that if Mr. Muckian allows (temporary) access now, SRC needs to be aware of this. Marika will follow up with SRC on the issue of public access.
 - c) Village Place/Gas station - proposed well, final easement language
 - d) Conservation Plan The CC will wait for Pam and Anne.
 - e) Treasurer's report - status of Stewardship fund (Pam) This will be covered at a future meeting.
 - f) BCC by laws (rules of procedure) - (Ken) This will be considered at a future meeting.
 - g) Steering committee for Master Plan Marika shared the timeline for the Steering Committee.
- 5) New Business:
 - a) Planning Board
 - i) Tropic Star (gas station) revised plans to review
 - ii) Yellow Dog's Barn wetland buffer impact Possibly no buffer impact
 - iii) Thunder Road subdivision: site walk discussion
This is not a conservation subdivision, but a 20 lot subdivision that was approved earlier but the approval has expired. The applicants are proposing the same subdivision with a few minor modifications. The proposal is for three different parcels of open space. One parcel is along Nippo Brook, one small one in center of cul-de-sac, and one for extraction of gravel (on site) and then reclaimed as turtle habitat. The plan is for the total <20 acres open space to be turned over to town ownership. Possibly there could also be a deed restricted area on some of the lots abutting the brook. There is an ongoing question if SRC would take the easement.
 - iv) Gerrior revision: 268-1 & Additional Lots -GR-13-SUB (Gerrior Lane Trust). \$2000 donation to stewardship fund is still in arrears. There are no updates to the plan.

- b) Intents to cut None Fred had a conversation with Suzanne McNeil about letters going out regarding cutting on prime wetlands. Suzanne said she will insure that the form letter goes out with the approval to cut letter.
 - c) Possible to change meeting dates to 2d and 4th Tuesdays? The meetings will stay on 1st and 3rd Thursdays.
 - d) Marika and Alison expressed a willingness to serve as alternates on the CC.
Ken Grossman made a motion to have Marika Wilde and Alison Desmarais put before the selectmen as alternate members of the Conservation Commission. Should Julia Guimond express an interest she will also be put before the selectmen. Fred Bussiere seconded the motion. It passed unanimously with a vote of three (3) to zero (0) in favor.
Announcements/correspondence:
 - d) NHACC meeting November 2 Anne is attending. Alison and Marika might attend.
 - e) DES: shoreland approval, Duvall, Peabody Way DES approved a shoreland impact on Peabody Way.
 - f) Isinglass Protection Committee This group will want to attend the next meeting to discuss a proposed rights based ordinance.
 - g) Town and City
 - h) Nov 9 John will do a Newhall walk. This is a tree identification/big tree walk with Dick Weyrick joining the group.
- 6) Easements:
a) Easement monitoring: Middle School completed
- 7) Committee reports:
- 8) Next scheduled meeting: Nov. 7, 2013 (John cannot attend)

Deleted: (

Deleted:)

Ken Grossman made a motion to adjourn the meeting at 9:25. Fred Bussiere seconded the motion, which passed unanimously with a vote of three (3) to zero (0) in favor.

Respectfully submitted,
Pat Lenzi

NOTE: THESE ARE SUMMARY ACTION MINUTES ONLY. A COMPLETE COPY OF THE MEETING AUDIO IS AVAILABLE AT THE LAND USE DEPARTMENT.

Stephen Jeffery
128 France Rd.
Barrington, NH 03825

November 20, 2013

Barrington Zoning Board of Adjustment
Barrington, NH 03825

Barrington ZBA,

I wish to have this letter included in the file of the case number 238-4-TC-13-ZBA,
The Three Socios, LLC.

As a resident of Barrington, I have the following concerns with the application
submitted by this applicant to the Barrington Planning Board.

The "well" the applicant is proposing is defined by the NH DES as a Transient Non-
community Water System.

The "well" that the applicant wishes to install in the open space of the Village Place
Subdivision is a change of use which requires a Site Plan application.

The "well" that the applicant wishes to install in the open space of the Village Place
Subdivision is a non-residential use which requires a Site Plan application.

The applicant has not submitted a site review application for this structure and use
as required by RSA 674:43. I do not believe the ZBA has authority to rule on these
variance applications because the applicant has not fulfilled the statutory
requirements.

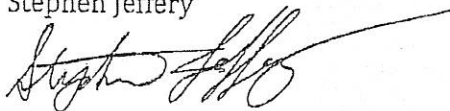
RSA 674:21-a prohibits any and all development in any area designated as open
space. The conservation restriction is further defined by RSA 477:45.

In order to pursue this proposed use, Mr. Falzone, the owner of the Village Place
Subdivision would be required to request the town to revoke the previous
subdivision approval and submit a new subdivision application, subject to the
current Zoning Ordinance, which may include the "well". The minutes of the
Barrington Conservation Commission indicates Mr. Falzone has no intention of
submitting the required applications.

I request that the ZBA deny these variance applications until the required
applications are submitted to the Barrington Planning Board.

Respectfully submitted,

Stephen Jeffery



LAND USE OFFICE

DEC 02 2013

Stephen Jeffery
128 France Rd.
Barrington, NH 03825

RECEIVED

December 1, 2013

Karen Forbes, Chair
Barrington Zoning Board of Adjustment
Barrington, NH 03825

Dear Chairman Forbes,

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

I believe I have standing to appeal this decision because the Village Place subdivision open space allows public access and I am a resident of Barrington and member of the public.

I am appealing this decision pursuant to RSA 677:2 and request and motion the ZBA to rehear their decision for the following reasons:

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

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

RSA 674:33 provides the following:

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

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;
- (4) The values of surrounding properties are not diminished; and
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) no fair and substantial relationship exists between the general public

purposes of the ordinance provision and the specific application of that provision to the property; and

(ii) the proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

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

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

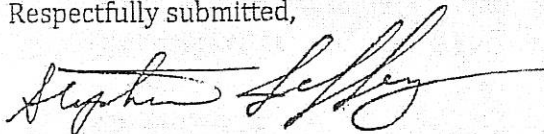
The Village Place subdivision received final planning board approval and has been recorded. This approval cannot be modified. There is no statutory provision to amend that approval without revocation and resubmittal by the owner Falzone.

The open space is a separate lot or parcel for tax purposes 674:37-a. The proposed well and the associated protective well radius and appurtenant structures requires the creation of a subdivided lot or parcel for tax purposes. No such subdivision has been proposed or approved.

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

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

Respectfully submitted,



Stephen Jeffery