



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK PLANNING BOARD

APPROVED MINUTES

TUESDAY MAY 2, 2023

A regular meeting of the Merrimack Planning Board was conducted on Tuesday, May 2, 2023 in the Matthew Thornton Room.

Members Present:

- Robert Best (Chair)
- Brian Dano
- Lynn Christensen
- Town Councilor Barbara Healey - Ex-Officio
- Maureen Tracey – Alternate
- Nelson Disco – Alternate
- Haleem Mediouni – Alternate

Members Absent:

- Paul McLaughlin (Vice Chair)
- Jaimie von Schoen
- Neil Anketell

Staff Present: Robert Price, Planning & Zoning Administrator

1. Call to Order

Chair Robert Best called the meeting to order at 6:30 p.m. and led everyone in the Pledge of Allegiance. He then seated Alternates Maureen Tracey, Nelson Disco & Haleem Mediouni for Paul McLaughlin, Neil Anketell & Jamie von Schoen respectively.

2. Consent Agenda

- a. Extension request: 106 Herrick Street Site Plan (#PB2022-39)

The Board voted 7-0-0 to approve the consent agenda, on a motion made by Lynn Christensen and seconded by Barbara Healey.

3. Annual Meeting – Election of Officers & Review of Rules of Procedure

The Board voted 7-0-0 to approve the proposed amendments to the Rules of Procedure on a motion made by Barbara Healey and seconded by Brian Dano.

The Board voted 6-0-1 to re-elect Robert Best as Chair and Paul McLaughlin as Vice Chair on a motion made by Barbara Healey and seconded by Lynn Christensen. Robert Best abstained.

4. **Merrimack Parcel A, LLC (applicant) and Merrimack Parcel A, LLC and Slate Merrimack Acquisition, LLC (owners)** – Continued review for consideration of an amendment to a previously approved Mixed Use Development Conditional Use Permit, calling for the replacement of 93,720 s.f. of office space, 37,400 s.f. of retail, 15,800 s.f. of restaurant space and a 5,000 s.f. event center as part of Phase II with 178 multi-family residential units, 5,000 s.f. of office space, 7,400 s.f. of retail space, 8,000 s.f. of restaurant space, and an increase of the 7,600 s.f. of restaurant space approved as part of Phase I to 8,000 s.f. as well as a reduction of the 120-room hotel approved as part of Phase I to 110 rooms. The parcels are located at 1, 2, 3 and 4 Lexington Court in the I-2 (Industrial) & Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 3C, Lots 191-2U1-191-2U4. Case # PB2023-05. This item is continued from the April 4, 2023 Planning Board Meeting.

Mr. Price prefaced the presentation by reminding the Board that the plans have been revised since they were first submitted and since the applicant requested a continuance from the April 4th meeting, this is the first meeting in which the new plans will be shared. The revised proposal to amend the CUP can be summarized as follows:

- The number of proposed additional residential units was reduced from 208 to 178.
- The hotel was increased from 100 rooms to 110 rooms.
- The total square footage of proposed non-residential development (excluding the hotel building, described by the number of rooms above) was modestly increased by 5,500 square feet (from 14,500 square feet to 20,000 square feet).

Mr. Price concluded that even with the changes to the plan that were just described, Staff still does not support approving the amendment to the CUP as they feel it does not meet the criteria outlined in the Zoning Ordinance.

Morgan Hollis (Gottesman & Hollis, P.A.) Gordon Leedy (Tighe & Bond), David Fenstermacher (VHB) Mark Fougere (Fougere Planning & Development), and Tom Monahan (Merrimack Parcel A, LLC) presented the application to the Board. Mr. Hollis began by providing a detailed history of the project, including all of the prior approvals that have been issued and explaining how the project has changed since the original plan was shared in 2015. He shared that both Town Staff and the Planning Board feedback has been consistent that the number of residential units being requested is too much for the site but expressed his frustration in the fact that no one will provide a number of units that will be acceptable. The revised plan that Mr. Leedy is going to present contains 178 residential units, which is 30 less units than the previous plan, 10 additional hotel rooms and an increase of 5,500 square feet in commercial space. Mr. Hollis conveyed that he feels the two sections of the Ordinance that Staff and the Board are the most concerned about are sections 2.02.4.D.1 and 2.02.4.D.4.

Mr. Hollis read Section 2.02.4.D.1 and stated that this proposal is certainly outside the traditional residential district and does comply with the provisions listed in this section of the ordinance. He argued that the staff memo states the proposal does not comply with this section of the ordinance but does not specifically call out which provisions it does not comply with. He then read section

2.02.4.D.4 of the Zoning Ordinance (which is regarding density) and argued that the applicant feels this section of the Ordinance does not apply to the applicant because a variance was granted by the Zoning Board of Adjustment (ZBA) to allow up to 208 additional units. He added that the only section of the Ordinance that should be considered for this proposal is the Conditional Use Permit (CUP) section and that the staff memo refers back to the residential density requirements which should not apply. He also argued that staff is encompassing density under dimensional requirements whereas he believes that they are separate and distinct and should not be considered the same. The applicant feels that the density concern is off the table because the applicant was granted a variance by the ZBA. Mr. Hollis requested that the Board look at this request based on whether or not it meets the requirements for the CUP and not to consider how it has changed since its inception because they realize it has changed but they have listened to the feedback provided by the Board and revised the plan accordingly.

Mr. Leedy then shared a copy of the revised plans with the Board and pointed out that the Board's concerns were addressed by the following changes that were made:

- Reduced residential density in Phase II by 14%
- Increased Open Space in Phase II area by 25%
- Reduced building height along the northerly side of Phase II by 20%
- Modified building configuration on the North side of proposed residential building to eliminate balconies
- Amended the Fiscal Impact Study to reflect modified program
- Amended the Traffic Memo to reflect modified building program
- Confirmed Utility availability from Merrimack Village District Water Works (MVD) and the Town regarding wastewater

Mr. Leedy expanded upon the MVD availability by explaining that when the Merrimack Premium Outlets (MPO) was developed they were allocated a specific number of gallons per day for the whole site and the proposal will fall well within the agreement that was put in place when MPO were approved. He further added that the discussion of water usage should be held during site plan approval process and not the CUP. He shared some renderings of the site and a slide that shows how the open space plan has evolved since 2019, with the newest plan iteration having 37% of open space allotted. He also shared a slide that shows a comparison of the parking garage that was approved in the original CUP plan versus what is being proposed now and pointed out that garage was approved to be 65 feet tall and the residential building will only be 45 feet on the side that faces the existing neighborhood. Mr. Leedy then continued to review the remaining slides in the PowerPoint presentation which included sections of the Conditional Use Permit Criteria and how the applicant meets the criteria.*

**A copy of the complete presentation can be found in the Case project file located within the Community Development Department at the Merrimack Town Hall.*

Maureen Tracey asked about the reduction in parking because she feels that the prior iterations of the plans showed more parking than what is being proposed now. Mr. Leedy explained that

they did reduce the number of parking spaces slightly because they reduced the number of units by 30.

David Fenstermacher spoke in detail about how VHB determined that the water allocation granted when MPO was approved (which was 137,000 gallons per day) is more than sufficient for the current proposal. He added that MVD has provided a letter stating that they have no concerns meeting the needs of the proposed development and that items like hydrants and water pressure are things that will be addressed during the site plan approval process. Chair Best asked what will happen if the testing done during the site plan phase reveals that the pipe is not large enough. Mr. Fenstermacher replied that they would have to mitigate via some sort of off-site improvements and there are a variety of solutions that could come into play. Nelson Disco asked if the water calculations take into account the unbuilt portion of MPO as there is a second phase that has not been constructed. Mr. Fenstermacher responded that their calculations did not take into account the unbuilt portion of MPO and Mr. Disco stated that he feels they should reserve that capacity for their growth. Mr. Fenstermacher added that there is a surplus of water even with this proposal and feels that it would be plenty to allow for the growth of MPO but restated that it was not factored into the calculation that was provided.

Mark Fougere provided an overview of the Fiscal Report and touched on some key points that were raised in the staff memo such as the projection of school aged children cited in the report. The calculation in the report (which showed an increase of 9 school aged children) was derived from current data using the results of both the Gilbert Crossing and Executive Drive developments. The Staff Memo encourages the use of the NH Housing data which was not used because it is over 10 years old however if it was to be applied to this project, the number would increase from 9 to 22 which in the applicant's opinion, is still not a significant change. The school impact still remains fiscally positive.

Chair Best asked Mr. Fougere how the developments he used his report compare to the proposed units at Park Place. Mr. Fougere replied that he did not have the data with him but can provide it at a later time. He did supply the breakdown of units for the proposal as 68 one bedroom and 110 two bedroom units and similar to the developments used in the calculation, there are no three bedroom units. Lynn Christensen added that she feels that the price of the apartments plays into the equation too because families with children cannot typically afford the higher rents. Mr. Fougere responded in agreement that what he is seeing is that young adults and retirees are more drawn to the mixed use developments.

Mr. Hollis concluded the presentation by stating that he feels that they have demonstrated that the proposal meets all of the requirements of the CUP and the one criteria that has not been met (density) is covered through the variance that was granted by the ZBA. He added that they have listened to the Board's feedback and added more open space and as much commercial square footage as possible without adding the need for more parking. He implored the Board to strongly consider approving the request and added a reminder that that a denial would require that a particular provision within the CUP be cited as the reason for the denial. He also referenced a recent case from the town of Amherst, NH that went to the Housing Appeals Board and was overturned because the town's Zoning Ordinance was unclear on the term "rural." Mr. Hollis cautioned the Board about denying the application due to the Ordinance's purpose as there is nothing in the purpose that talks about density. He added that the Town's Ordinance is also missing a definition of "mixed use" so similar to the Amherst case for the term "rural", there is no way of knowing what makes something mixed use or not without a clear definition. The Amherst case referenced the fact that there needs to be clear criteria established and defined for an

applicant to be able to read and understand. The Amherst development proposed 54 units, but during the site plan approval process 54 units was deemed too intense. The Housing Appeals Board overturned this because nothing in their Ordinance referenced why this would have been too intense. He then restated the changes that have been made to the plan based on the feedback from the Board and added that the decision of the Board should not be based on whether or not the plan is dramatically different than what was first proposed but whether or not they meet the CUP criteria outlined in the Zoning Ordinance.

Chair Best took a moment to clarify with Mr. Hollis that he understands his argument so that he could ensure the Board's discussion remains focused on the issues at hand. That is to say, the conflicts between staff and the applicant appear to be in two parts. Once is the notion that staff's analysis of density was treated as a dimensional value outside of the CUP ordinance criteria whereas the applicant believes that analysis should not have existed outside of the CUP analysis. However even if it did, the applicant believes density is a separate legal concept within the Town's own regulations. Mr. Hollis confirmed, adding that he supported that position by stating the Outlet Village Shops section of the Zoning Ordinance specifically contains language that reads "The Outlet Village Shops shall have the following density, dimensional and parking requirements" which illustrates that the Town's own Ordinance differentiates between the two terms. Additionally, with the variance having been granted, the Board now has to look at density within the confines of the variance, not within the provisions of the PUD or any other zoning regulation.

Mr. Hollis then clarified that his other position is that the Board's analysis for the applicant's presented 178 units must be rooted in the CUP criteria as well, as the variance permits them to have up to 208 units by right. With a confirmed understanding of the applicant's argument he led the Board in a discussion regarding the issues of this proposal starting with density. He began by stating that the Zoning Ordinance has both Density and Dimensions called out separately so therefore they should be treated as such. He encouraged the Board to keep the density discussion in line with the CUP criteria and focus on how the site will function rather than looking at density as just a number.

Barbara Healey commented that she questions the quality of life for the residents of the parcel because 402 residential units on 13.167 acres of land equates to 30.53 units per acre. She stated that her single family home sits on an acre of land and when she imagines 30.5 residential units on her land along with all of the cars and people that would come with it she feels that there would be no quality of life because it would be overcrowded.

Brian Dano expressed that he believes it comes down to how people choose to live. Some people are happy living in a crowded city like New York while others like to live in the middle of nowhere in Montana and it's all a personal choice.

Mrs. Christensen remarked that she looks at this as if it were a new project and whether or not she would vote to approve it with what is being presented and she does not feel that she would because in her opinion it is not mixed use. She went on to say that she fully supported the original proposal and was looking forward to having a hotel in town with an event space because it is something we need but the project has changed so much since the first iteration and now it is nothing more than a residential development with a few other buildings surrounding it. She added that there is a need for more apartments in town but not apartments that cost more than \$2000 a month.

Mr. Disco echoed Mrs. Christensen's comments about how the project was pitched as a place someone could live, work and play and the new proposal has gotten away from that and is no longer what was originally approved.

Maureen Tracey commented that the original plan called for 130,000 square feet of nonresidential space and that number has since been decreased to 15,000 which is a huge difference. She agreed that she too was looking forward to the amenities that the first plan promised and feels that the new plan is all residential and not the type of residential we need. We need more affordable housing and not high end luxury apartments, Ms. Tracey also questioned whether or not these luxury apartments would be sustainable over time and referenced a development in Nashua that was once high end and is now defined by its run down aesthetic.

Mr. Hollis remarked that the Board members that commented on how many units are crammed on one acre should also be considering the surrounding land as "the back yard" just as they would consider it for a single family dwelling on an acre of land. He also added that the applicant is also disappointed that he cannot build what was originally proposed but has come up with a plan that can work and does meet the CUP criteria.

Chair Best referenced each CUP criteria individually and whether or not the staff and the Board has concerns with them. Robert Price interjected at section 2.02.4.5.e (regarding adequate public infrastructure) and stated that the Community Development Director wanted it known that there is no way of ensuring this criterion is met until the appropriate tests are done to determine if the pipes can sustain the increase in use. Chair Best asked if this would be done during the site plan process like some of the others and Mr. Price stated that Mr. Thompson felt it should be addressed during the CUP process. Chair Best concluded that the staff's concerns are centered on sections 2.02.4.5.a (regarding the parcels being reasonable suited for the proposal) and 2.02.4.5.h (regarding continuity of open space) and based on previous public testimony, they have concerns about 2.02.4.5.j (regarding impacts to adjoining properties). Chair Best clarified that all criteria can be discussed but the exercise of going through them to clarify which ones have known issues or concerns was to focus the conversation if the Board so chooses to do so.

Public comment

Mike Mills (7 Arbor Street) spoke against the proposal referencing an article from the Union Leader in 2018 when 192 residential units were projected to be built. The current building already includes those 224 units (as a result of a previously approved amendment) mentioned in the 2018 article and now the applicant is requesting another 208. This is not anywhere close to what was originally approved for this site and certainly not what the abutting neighborhood was expecting. The process has been overwhelming to the neighbors and he feels that promises that were made are not being kept as he has not seen any progress on the construction of the restaurant or roundabout. He spoke at length about the concerns that the exiting neighbors have about the light pollution they are going to have to endure when the new building is constructed because the existing building (which is much farther away) is already illuminating the abutting neighborhood and the one being proposed will only be a mere 240 feet from the closest abutters' backyards. He stressed that a building that is 400 feet wide and 45 feet tall does not belong 240 feet away from an existing neighborhood. Mr. Mills expressed concerns that the water allocation calculation did not include the unbuilt phase of the Outlets and that it should have because you cannot claim someone else's water as your own; he cannot use his neighbor's water to maintain his lawn. He remarked that if their neighborhood is not protected and their lifestyle cannot be maintained, the neighbors are ready and willing to take action.

Nancy Harrington (11 Spruce Street) asked about the buffer and whether or not it can be used by the residents or if it is protected space that should not be used. She understands that nothing can be built in the buffer but asked if it could be used as a picnic area. She also expressed concerns that up until now, all of the presentations for this project have all been led by the Engineering firm but this one was led by an attorney so it feels as if they are setting the stage for a case against the Town if they are denied. Ms. Harrington encouraged the Board members to rely on the recommendation of Staff as they have written several very thorough memos on this project.

Barbara Asketh (1 Spruce Street) submitted a letter* opposing the project along with some photographs to the Board members and Staff, Chair Best read the letter into the record.

**A copy of the letter can be found in the Case project file located within the Community Development Department at the Merrimack Town Hall.*

Beth Burns (5 Spruce Street) spoke in opposition to the project stating that she feels that the changes made to the plan are not significant enough and there is too much being proposed on a small lot. She expressed concerns with the proximity of the new building to the existing neighborhood, clarifying that the 240 foot distance that Mr. Mills spoke about includes the buffer space. She shared her feelings that there must be a compromise that will work for both parties and the proposed plan is still not a significant enough change for the existing neighbors.

Mr. Monahan addressed some of the public comments and began by clarifying that the roundabout that was mentioned is not slated to be completed until the end of phase II. He added that the construction of the roundabout will impact the outlets too, so they need to work closely with the management company to schedule the construction. Chair Best asked if all of the apartments in the existing building are occupied and Mr. Monahan replied that 80 units are occupied and 50% of the units are leased. They anticipate that they will be at full capacity within the next few months. Chair Best then asked if there will be any activity allowed in the buffer. Mr. Monahan responded that it will be passive recreation only and they are not going to do anything that would create “traffic” in that area. He then asked about the trees that were planted in the buffer that did not survive. Mr. Monahan clarified that the Board did not require him to plant the trees, he did so at the request of the neighbors. He added that he is going to wait until the site plan process to make any changes so that they can mitigate a better solution for both parties involved. He spoke at length about the need for housing in NH and the various Boards he is part of that are focused on addressing the housing needs in this state. He shared his feelings of pride for this project and mentioned several of the changes that have been made at the request of the Board or the neighboring residents.

Mr. Hollis commented that several residents spoke about the size of the building and the light pollution but the building being proposed now is shorter than the parking garage that was originally approved. He also pointed out that the parking garage lights would stay on all night so in his opinion, they are improving the impact to the neighbors with this proposal. He also addressed the concerns that he is preparing for a legal case by informing the Board that he makes a lot of presentations to planning boards and always presents them with all of the evidence as if they may end up in court. He reiterated that they disagree with the staff's interpretation of density and that he feels one cannot go down the dimensional path when considering density.

Mr. Leedy commented that he disagrees with Staff's assessment about needing to know the impact on sewer now. The applicant's engineer is confident that it can be researched at the time

of site plan approval and mitigated if necessary. Mr. Leedy feels that the bigger issue is whether or not the wastewater treatment plant can handle the additional flow and they have been assured that it can. He also argued that in the other phases of the development, the sewer component has occurred during site plan approval. Chair Best asked Mr. Leedy if he knows the square footage of the buildings and he did not have the information on hand but offered that the location of the building in comparison to the buffer has not changed much over time.

Chair Best reviewed the Amended Site Plan Development totals (bulleted below) and asked Mr. Leedy to show the location of Commercial and office space on the plan. They also spent a fair amount of time discussing the changes in the square footage from the different plans and the loss of the event space at the hotel. Mr. Monahan stated that he was leaving the second floor of the restaurant building as office space because he thought that is what the neighbors would prefer. He indicated that he has had restaurants that have shown interest in having a function space on the second floor but he has turned them down because he thought the neighbors would prefer the office space.

- 178 Proposed Apartments
- 224 Existing Apartments
- 402 Total Apartments
- 7,000 SF Clubhouse/Mgmt. Office
- 110 Room Hotel
- 5,000 SF Office
- 7,400 SF Commercial
- 8,000 SF Restaurant

Councilor Healey asked Mr. Price if he knows how many feet of the sewer line is an area of concern. Mr. Price did not know the footage and a discussion ensued about whether or not the sewer discussion should occur now or during the Site Plan process. Mr. Leedy continued to contend that regardless of the result there will be a resolution reached to remediate any issues.

The Board walked through each of the CUP criteria individually and shared whether or not they felt like the project meets the criteria. They spent a fair amount of time discussing the buffers and whether or not it's sufficient. Staff has no concerns with the buffer as it meets the Town's requirements but the neighbors are not satisfied with it. Mr. Disco shared his feelings that he does not believe it is adequate and Mrs. Christensen feels that the buildings should be swapped to move the residential building further away from the existing neighborhood. They also discussed the possibility of adding a fence, changing the lighting and adding more trees.

The Board continued to discuss issues such as lighting and open space, with various Board members sharing their thoughts on each topic.

The Board voted 7-0-0 to continue the public hearing to May 16, 2023 at 6:30 p.m. in the Matthew Thornton Room, with no further written notice to abutters, on a motion by Nelson Disco and seconded by Lynn Christensen.

- 5. Discussion/possible action regarding other items of concern**
- 6. Approval of Minutes — April 18, 2023**

The Board voted 7-0-0 to approve the minutes of April 18, 2023 as written on a motion made by Lynn Christensen and seconded by Barbara Healey.

7. Adjourn

The Board voted 7-0-0 to adjourn at 10:17 p.m., on a motion made by Barbara Healey and seconded by Brian Dano.