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Planning - Zoning - Economic Development - Conservation

MEMORANDUM

Date: July 6, 2016

To: Robert Best, Chairman, & Members, Planning Board

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Public Hearing: Zoning Ordinance Amendments regarding Accessory Dwelling Units & Signs**

Background: As was discussed at the April 19, 2016 Planning Board meeting, please find this memo as a summary of the proposed amendments to the Zoning Ordinance covering Accessory Dwelling Units (ADUs) and Signs. Copies of the staff memos from that meeting, outlining the proposed amendments and background, are attached, as is the proposed ordinance language.

Since the workshop meeting, staff has discussed/reviewed the proposed amendments with the Town's Legal Counsel, and we offer the following:

ADUs: The Board and staff had the question of how to handle the previously required (and now recorded) declarations of covenants that ADU applicants have been required to provide as part of the ZBA's approval process for Special Exceptions under the current ordinance language. Legal Counsel stated that the new state law concerning ADUs applies retroactively, *so any previously filed restrictive covenants are no longer binding*. To hold otherwise would open the Town up to a possible takings claim. So, in short, the Town cannot (and will not) enforce the previously recorded restrictive covenants, and any previously approved ADU can now be occupied in accordance with the new state law (meaning occupancy cannot be restricted to family members only, but that the property owner must live in either the primary dwelling or the ADU).

Signs: Counsel has reviewed the proposed zoning amendments concerning signs and believes that it comports with the *Reed* case. He states further that the focus of any sign regulation really needs to be on those aspects that have nothing to do with content (such as dimensions, height, colors, material etc.). Consistent with *Reed*, these proposed amendments do not treat commercial speech more favorably than non-commercial speech, etc. *so it passes muster*. On that note, commercial speech is afforded less protection than non-commercial speech, such as political speech, so to the extent someone attempted to challenge such a distinction the Town would likely be able to satisfy its burden of showing why the signs are treated differently.

Summary of Proposed Amendments:

- Amend Section 2.02.1.A (District R - Permitted Uses): Insert new subsection #4 establishing the criteria for attached Accessory Dwelling Units (ADUs) to be permitted, renumber old subsection "4" to be "5";
- Amend Section 2.02.1.B (District R - Permitted Uses, Special Exceptions): Delete subsection #2 in its entirety, renumber remaining subsections;

- Amend Section 2.02.1 (District R - Permitted Uses): Insert new subsection C, Conditional Use Permits, and further to establish the criteria for detached ADU's to be permitted by Conditional Use Permit;
- Amend Section 17 – Insert new subsection - 17.02: establishing a severability clause, renumber remaining subsections;
- Amend renumbered subsection 17.03: Include "flags" in the title and specify that flags of national, state, local or historical significance are not regulated by the ordinance;
- Amend renumbered Section 17.04: add language that clarifies signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted;
- Amend renumbered Section 17.06: Insert new 17.06.1 to allow for one (1) sign per each residential property, meeting certain criteria, without regard to content;
- Amend Section 17.05 (2-3): Removed in their entirety based on content bias;
- Amend renumbered Section 17.06.2: currently Section 17.05.1 – reworded to remove content bias;
- Amend renumbered Section 17.06.3: currently Section 17.05.4 – added the language "In order to maintain public safety";
- Amend Section 17.05: Delete subsections 5, 6, 7 ,8, 9, 13, 14, 15, 17, 19, 20, 21, 23, & 24 due to content bias;
- Amend renumbered Section 17.06.4: Remove language regarding sign content in current Section 17.05.10;
- Amend renumbered Section 17.06.5: currently Section 17.05.11 – add language "In order to maintain public safety";
- Amend renumbered Section 17.06.6: currently Section 17.05.12 – remove language regarding sign content;
- Amend renumbered Section 17.06.7: currently Section 17.05.16 – add language "In order to maintain public safety";
- Amend renumbered Section 17.06.8: currently Section 17.05.18 – no change in the language;
- Amend renumbered Section 17.06.9: currently Section 17.05.22 – Remove language regarding sign content;
- Amend renumbered Section 17.08: currently Section 17.07 – add language to allow for one (1) temporary sign per property without regard to content, meeting current criteria for temporary signs. Language includes allowance for an extra temporary sign for properties that are currently for sale, rent or lease;
- Amend Section 17.08 – Holiday and Special Event Signs: Delete subsection in its entirety due to content bias;
- Amend Section 17.09.1 – add language "For public safety";
- Amend Section 17.10.2 – remove language regarding sign content;
- Amend Section 17.10.3(e) – remove in its entirety due to content bias, renumber remaining subsections;
- Amend Section 17.10.7 - remove in its entirety due to content bias, renumber remaining subsections;
- Amend Section 17.11 – Remove "Advertising" from the title and language due to content bias;

- Amend various portions of Section 17 – update "premises" to "parcel".

Required Process for Adoption of Amendments

If the Board wishes to see the amendments adopted, the Board needs to make a recommendation to the Town Council (in accordance with the Charter). From there, the Council will follow their process of 3 readings and a public hearing on the proposed amendments. The final decision on the adoption of any Zoning amendment rests with the Council in accordance with the Town Charter and State law.

Should the Board not want to proceed with the proposed amendments, the Board can either continue the hearing to a future date (to allow staff to make additional changes to the amendments), or vote to deny the changes, which would end the process.

cc: Community Development Staff
Building Division Staff
Zoning Board of Adjustment
File

Packet Contents:

1) This Memo, dated July 6, 2016
2) Language of Proposed Amendments
3) April 7 Staff Memo regarding ADUs (containing SB146 state law language, Master Plan excerpts, and December 2014 Joint Meeting Minutes)
4) April 12 Staff Memo regarding Signs (including Reed v. Gilbert Summary and NHMA Do's and Don'ts Guidance)

Proposed ADU Amendments
For Planning Board Public Hearing
7/19/16

SECTION 2 - ESTABLISHMENT OF DISTRICTS *[revised TBD]*

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2.01 - The Town of Merrimack is hereby divided into twelve districts:

R. Residential District
C-1. Limited Commercial District
C-2. General Commercial District
I-1 Industrial District
I-2. Industrial District
I-3. Industrial District
W. Wetland Conservation District
F. Flood Hazard Conservation District
E. Elderly Zoning District
PRD. Planned Residential District
A. Aquifer Conservation District
SP. Shoreland Protection District

The location and boundaries of districts are and shall be as shown on the Zoning Map, the Wetlands Conservation District Map, the Flood Hazard Conservation District Map, the Soils Limitation District Photo Maps, the Elderly Zoning District Map, and the Planned Residential District Map which are hereby declared to be a part of this ordinance.

2.01.1 - Industrial District - Metes and Bounds, I-1, I-2, I-3

A. From Souhegan River North to Bedford line from Merrimack River to 200 feet west of the railroad tracks and the extension of the industrial zone in the area of the B&M Railroad at the northerly side of the Souhegan River as mapped [including all of Tax Map Parcels 6D-1/75 except for that portion of the parcel south and west of the southwesterly property line of Tax Map Parcel 6D-1/76 and north and west of a line drawn from the southwestern corner of Tax Map Parcel 6D-1/76 to a point at a jog in the southwesterly boundary line of Tax Map Parcel 6D-1/75, said point being approximately 249 feet east of the Front Street Right-of-Way, and all of Tax Map Parcels 6D-1/76, 6E-2/60 and 6E-2/61 but excluding all of Tax Map Parcels 6D-1/69 and 75-4, 6E-1/5, 7, 8, 9, 10, 10-1, 11, 12, 13, 38, 37, 36, 35, 34, 33 and 6E-2/39.

B. Beginning at a point at the intersection of the westerly right-of-way line of Camp Sargent Road and the southerly right-of-way line of Continental Boulevard; thence

1. Westerly along the said southerly right-of-way line of Continental Boulevard, a distance of seven hundred ninety (790) feet, more or less, to a point at the most westerly corner of Lot 4D/54-4 and the most northerly corner of Lot 3D/3; thence

2. Southeasterly along the southwesterly line of said line of said Lot 4D/54-4 and Lot 4D/53 and the northeasterly line of said Lot 3D/3, a distance of three hundred sixty-nine (369) feet, more or less, to a point on the westerly line of Lot 3D/18; thence

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Section 2.02 - Permitted Uses - All Districts (continued)

B. General Prohibitions:

1. No use of any kind shall be permitted in any district, if it in any way would be injurious, noxious, or offensive by way of odor, fumes, smoke, dust, vibrations, noise, light, or other objectionable features or if it would be hazardous to the community on account of fire or explosion or any other cause. The Planning Board shall adopt such standards and regulations as it may deem necessary in order to help ascertain conformance with the above regulations.

2. The underground storage of petroleum, refined petroleum products and organic solvents except with suitable secondary barriers and automatic alarm systems approved by the Planning Board is prohibited in every district. For the purpose of this regulation, storage in basement or cellar spaces shall not be considered as underground storage. This regulation shall apply to all new and replacement storage facilities constructed after the date of its adoption.

   a) The underground storage of petroleum, refined petroleum products and organic solvents referred to in (2) above is not intended to include Liquified Petroleum Gas (LPG).

Section 2.02.1 - District R, Residential - Permitted Uses

A. Only the following uses are permitted in the residential district.

1. Residential uses and customary secondary accessory uses and structures. Note: aircraft takeoffs and landings on private land by the owner of such land or by a person who resides on such land are not valid and permitted accessory uses.

2. Home Occupations: Except as provided in 3 below, requests to conduct home occupations as set forth in this section must comply with the criteria listed below and receive permission from the Planning Board after a public hearing.

   a) No more than one person who is not a resident of the premises is employed therein;

   b) Off-street parking can be provided as specified in Section 18;

   c) There is no external evidence of the occupation or office other than a sign limited to two (2) square feet.

   d) No more than 25% of the inhabitable floor area of the dwelling is utilized by the occupation or office.

   e) Such use shall be personal to the owner of the premises or the occupant with the permission from the owner and shall not survive a transfer of title of the real estate or be transferable to a new occupant.

Section 2.02.1 - District R - Permitted Uses (continued)

f) Home Occupations shall be deemed to include professional offices, such as that of a doctor, dentist, lawyer, accountant, engineer, architect, and the business offices of a variety of similar occupations. They shall also include occupations such as dressmaking, cooking limited to items for off-premise consumption, home crafts, hairdressing and barbering limited to one chair, and family day care homes in accordance with RSA 170-E:2 IV (a).

g) Home occupations expressly do not include commercial kennels, the parking or storage of tractor trailers, auto repair or small engine repair or maintenance, welding, or other uses which involve the visible storage on the property of automobiles or the parts thereof.

h) A contractor or other tradesman may store building materials or construction equipment on his premises only within existing structures.

3. Home Occupations which meet all of the criteria listed below are not subject to site plan review and approval by the Planning Board.

a) There is no external evidence of the occupation or office.

b) There is no individual employed on the premises who is not a resident.

c) The dwelling meets off-street parking requirements Section 18.

d) There are no visitors, customers or solicitations for individuals to visit the premises to conduct business.

e) There is no business sign of any type.

f) No more than 25% of the inhabitable floor area of the dwelling is utilized by the occupation or office.

g) Delivery of goods and materials is limited to step-vans and similar vehicles customarily associated with residential deliveries. No more than two (2) deliveries are permitted daily.

4. To increase housing alternatives while maintaining neighborhood aesthetics and quality, attached accessory dwelling units (ADU) are permitted on any property containing an owner-occupied single-family dwelling, provided that the applicant meets the criteria set forth below:

a) A maximum of one (1) ADU per property is permitted. An ADU shall not be permitted on property where more than one primary dwelling unit (PDU) currently exists;

b) The ADU is contained within or will be an addition to an existing or proposed single family detached dwelling;

Section 2.02.1 - District R - Permitted Uses (continued)

c) Exterior alterations, enlargements, or extensions of the PDU are permitted in order to accommodate the ADU. However, no such change is permitted which would alter the appearance of the PDU to look like a duplex or any other multi-family structure (i.e., the house should not look like it was designed to house more than one family). The construction of any exterior accessways which are required for access to the ADU shall be located to the side or rear of the building whenever possible. The ADU shall also be designed to remain functionally dependent on the PDU and shall not have provisions for separate utilities, garages, driveways, and other similar amenities;

d) The ADU shall contain no more than two bedrooms;

e) The ADU shall not exceed 1,000 square feet in area;

f) The ADU shall be connected internally to the PDU;

g) The property owner must occupy one of the two dwelling units;

h) One parking space for the ADU shall be provided in addition to any parking for the PDU;

h) The PDU, ADU, and lot shall not be converted to a condominium or any other form of legal ownership distinct from the ownership of the single family dwelling. In order to assure compliance with this requirement, the property owners at the time the ADU is established shall be required to execute a restrictive covenant running in favor of the Town, which shall be recorded in the Hillsborough County Registry of Deeds and a copy provided to the Community Development Department and the Assessor prior to the issuance of a Certificate of Occupancy; and

i) Where municipal sewer service is not provided, the septic system shall meet NH Water Supply and Pollution Control Division requirements for the combined system demand for total occupancy of the premises.

5. Co-location of a new telecommunication antenna on Existing Towers, so long as the additional telecommunications antenna(s) is no more than 20 feet higher than the existing tower, is also disguised through the use of camouflage or the color of the antenna(s) blends with the existing structure or surroundings if camouflage was not required with the tower approval. A building permit shall be required.

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Section 2.02.1 - District R - Permitted Uses (continued)

B. Special Exceptions: The Zoning Board of Adjustment may grant a special exception for the following use of lands within the residential district:

1. Churches, provided that it finds that all of the following conditions are met:

   a) The specific site is an appropriate location for such a use or uses in terms of overall community development.

   b) The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area.

   c) There will be no nuisance or serious hazard to vehicles or pedestrians.

   d) That an adequate parking area is provided for motor vehicles on the premises.

   e) A buffer shall be erected and maintained to screen existing residential uses. Buffers may be fence screens, dense plantings of suitable trees and shrubbery, or naturally occurring shrubs and trees.

   f) The use as developed will be restricted for church purposes only. No commercial use of a church within the residential zone will be allowed.

2. Telecommunication Towers, provided that it finds that all of the following conditions are met:

   a) The applicant shall meet the approval criteria set forth in a-e of B.1 above.

   b) The applicant meets the criteria set forth in section 2.02.4.B.22.a (New Towers).

   c) Proposed towers shall be disguised through the use of camouflage technologies such as trees, flagpoles, steeples, etc.

   d) Written evidence demonstrating that no existing structure can accommodate the applicant's proposed antenna if the applicant is proposing to build a new tower. This evidence can consist of an analysis of the location, height, strength, and potential interference which would make co-location impractical.

3. Co-location on Existing Non-Tower Structures, provided that it finds that all of the following conditions are met:

   a) The applicant shall meet the approval criteria set forth in a-e of B.1 above.

   b) The applicant meets the criteria set forth in section 2.02.4.B.22.c.

   c) Proposed telecommunications antenna(s) shall be disguised through the use of camouflage technologies.

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<#>the ADU is contained within or will be an addition to an existing or proposed single family detached dwelling; ¶
<#>the ADU contains no more than one bedroom;¶
<#>the ADU does not exceed 1,000 square feet in area, or fifty percent (50%) of the area of heated living space within the principal dwelling unit in area, whichever is smaller;¶
d) . the ADU is connected internally to the principal dwelling unit;¶
<#>the ADU occupancy is to be restricted to family members only, with the term "family" defined as individuals related by blood, marriage or adoption to the fee simple owner-occupant(s) of the principal dwelling unit; and¶
<#> the ADU is designed to remain functionally dependent on the principal unit and will not have provisions for separate utilities, garages, driveways, yard and other similar amenities.¶
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Section 2.02.1 - District R - Permitted Uses (continued)

C. Conditional Use Permits:

1. Pursuant to the authority provided in RSA 674:21, the Planning Board may grant a Conditional Use Permit for Detached Accessory Dwelling Units (ADU's) in the R District.

2. The following criteria must be satisfied in order for the Planning Board to grant a Conditional Use Permit for a Detached ADU:

a) A maximum of one (1) ADU per property is permitted. An ADU shall not be permitted on property where more than one primary dwelling unit (PDU) currently exists;

b) The Detached ADU shall be located only in the side or rear yard of the property;

c) The Detached ADU shall not exceed 50% of the size of the Principal Dwelling Unit (PDU) or 1,000 square feet in size, whichever is smaller;

d) Lots seeking a Detached ADU shall be comprised of at least 125% of the minimum lot area as required by Section 3.02.A, Table 1;

e) A Detached ADU shall not contain more than two bedrooms;

f) The property owner must occupy one of the two dwelling units;

g) One parking space for the ADU shall be provided in addition to any parking for the PDU;

h) The PDU, ADU, and lot shall not be converted to a condominium or any other form of legal ownership distinct from the ownership of the single family dwelling. In order to assure compliance with this requirement, the property owners at the time the ADU is established shall be required to execute a restrictive covenant running in favor of the Town, which shall be recorded in the Hillsborough County Registry of Deeds and a copy provided to the Community Development Department and the Assessor prior to the issuance of a Certificate of Occupancy;

i) Where municipal sewer service is not provided, the septic system shall meet NH Water Supply and Pollution Control Division requirements for the combined system demand for total occupancy of the premises.

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Proposed Amendments - Signs
For Planning Board Public Hearing
7/19/16

TOWN OF MERRIMACK ZONING ORDINANCE & BUILDING CODE

SECTION 17 - SIGNS *[revised TBD]*

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17.01 - Purpose

The purpose of this article is to encourage the effective use of signage to direct movement, advertise, and inform the public while protecting public safety, preserving neighborhood character and minimizing visual clutter.

17.02 - Severability

If any part of this section, subsection, sentence, clause, or phrase is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The Town Council hereby declares that it would have adopted the Ordinance in each section, subsection, sentence, or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared invalid.0

17.03 - Governmental Signs, Signs Required By Law and Flags

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Nothing in this section shall prevent the erection, location or construction of signs on private property where such erection, construction or location is required by any law or ordinance enacted by the local, state or federal governments, nor shall any village district or municipally operated utility be prohibited from erecting signs on private property when otherwise permitted. This ordinance does not regulate flags of National, State, Local or historical significance.

17.04 - Permit Required

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No sign shall be erected or affixed to any building exterior or placed freestanding on any parcel or altered or moved, without a permit issued by the Building Official and approved by Planning/Zoning Administrator except as otherwise exempted in this ordinance. Signs containing *noncommercial speech* are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs.

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17.05 - Definitions

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The following definitions shall apply throughout these regulations.

1. *Awning*: a removable shelter of canvas, plastic, metal or some other material, extending over a doorway or window and providing shelter from rain or sun.

2. *Awning Sign*: a sign affixed to the surface of an awning but not extending above below or beyond the awning surface.

3. *Banner Sign*: a temporary sign of lightweight material (paper, plastic or fabric) hung either with or without frames. Flags and insignias containing only markings of any government, corporation or business are not considered to be banners.

Section 17.05 - Definitions (continued)

4. *Building Face or Wall*: all window and wall area of a building in one plane or elevation.

5. *Changeable Copy Sign*: a sign on which message copy can be changed through use of attachable letters and numerals excluding electronic switching of lamps or illuminated tubes to form words and numerals. *Changeable copy sign* includes a sign which has automatic switching, limited to time and temperature.

6. *Construction or Project Sign*: a sign erected on a project site prior to or during a construction project.

7. *Directional Sign*: a sign identifying site locations, entrances, exits, parking areas, loading areas, or other messages necessary to direct vehicles or pedestrians to, through or within a site.

8. *Directory Sign*: a sign which identifies or locates the occupants of a building or site.

9. *Electrical Sign*: a sign containing or attached to electrical wiring.

10. *Flashing*: a pattern of changing light illumination where the sign illumination alternates between illuminated and non-illuminated.

11. *Flashing Sign*: a sign containing an intermittent flashing light by means of animation or an externally mounted intermittent light source.

12. *Ground Sign*: a sign erected on a freestanding frame, mast or pole that is not attached to any building.

13. *Illuminated Sign*: a sign lit with either an internal or external artificial light source.

14. *LED*: a Light-Emitting Diode is a semiconductor diode that emits light when a voltage is applied to it.

15. *Marquee*: a permanent roof-like shelter extending from part or all of a building face over a public-right-of-way, and constructed of some durable material such as metal, glass or plastic.

16. *Mobile Signs*: a sign mounted on wheels or a wheeled trailer primarily situated and decorated to display an advertising message.

17. *Nameplate*: a non-electric sign identifying only the name and occupation or profession of the occupant of parcel on which the sign is located. If any parcel includes more than one occupant, nameplate means all names and occupations or professions as well as the name of the building and directional information.

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Section 17.05 - Definitions (continued)

18. *Nit*: a unit of visible-light intensity that is used to describe the brightness of a display; one nit is equal to one candela per square meter (cd/m2). For an LED display it is calculated as the following: nit = candela per pixel times pixels per square meter.

19. *Non-commercial Speech*: Any form of speech conducted for personal use or enjoyment without the intent of realizing a profit or recovering costs through the sale of goods or services.

20. *Off-Premise Sign*: a sign visible from a public right of way identifying or advertising a business, person, activity, goods, products or services not located on the parcel where the sign is installed and maintained.

21. *On-Premise Sign*: a sign visible from a public right of way identifying or advertising a business, person, activity, goods, products or services located on the parcel where the sign is installed and maintained.

22. *Premise*: a lot or number of lots on which are situated a building, or group of buildings designed as a unit, or on which a building or a group of buildings are to be constructed.

23. *Projecting Sign*: a sign, other than a wall sign, which is attached to, and projects more than eighteen inches from a building face or wall.

24. *Real Estate Directional Signs*: real estate signs advertising an open house and located off premises.

25. *Real Estate Sign*: a sign advertising exclusively the sale, rental, or lease of the premises, or a portion thereof, upon which the sign is located. Such sign must be removed within fifteen days after the closing of sale, rental or lease.

26. *Roof Sign*: a sign erected upon, against or directly above a roof, or on the top of or above the parapet of a building.

27. *Rotating Sign*: a sign, or portion of a sign, which moves in a revolving manner.

28. *Scrolling Graphics*: a mode of message transition on an electronic message display sign where the message appears to move across the display surface.

29. *Sign:* a permanent or temporary structure, device, two or three dimensional object or any combination of words, letters, figures, lights, designs, pictures, insignias, emblems, logos, banners, pennants or flags visible to the public from the outside of a building that conveys a message to the public in order to advertise, inform, identify, direct, invite or draw attention to any business, goods, products, facilities, services, activities or events that are available, provided or conducted on or off the premises. "Sign" includes any permanently installed and prominently displayed merchandise and for the purpose of removal also includes the sign structure.

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Section 17.05 - Definitions (continued)

30. *Sign, Electronic Message Display*: an electronic changeable sign capable of displaying text, symbols, figures or graphics, which can be electronically or mechanically changed by remote or automatic means, and incorporates both Electronic Changeable Copy and/or Electronic Graphic Display signs.

    a. *Sign, Electronic Changeable Copy*: a sign or portion thereof that displays electronically non-pictorial, text information in which each alphanumeric character or symbol is defined by some number of matrix elements using different combinations of light emitting diodes (LED's), fiber optics, light bulbs or other illumination devices within the display area. Electronic Changeable Copy includes computer programmable, microprocessor controlled electronic displays. Electronic changeable copy does not include time and temperature signs.

    b. *Sign, Electronic Graphic Display*: a sign or portion thereof that displays electronic static images, static graphics, or static pictures, with or without text information, defined by some number of matrix elements using different combinations of light emitting diodes (LED's), fiber optics, light bulbs or other illumination devices within the display area where the message change sequence is accomplished immediately or by means of fade, re-pixelization or dissolve modes. Electronic Graphic Display Signs include computer programmable, microprocessor controlled electronic displays.

31. *Sign Structure*: a structure which supports or is capable of supporting a sign, including decorative cover. A sign structure may be a single pole and may or may not be an integral part of a building or structure.

32. *Temporary/Portable Sign*: a sign which is not permanently installed or affixed to any sign structure or building.

33. *Transition*: a visual effect used on an electronic message display to change from one message to another.

34. *Wall Sign:* a sign attached to, painted on or erected against any wall of a building or structure so that the exposed face of the sign is on a plane parallel to the plane of the wall. "Wall sign" also includes any sign erected against, installed on or painted on a penthouse above the roof of a building as long as the wall of the penthouse is on a plane parallel to the wall of the building, and a sign attached to, painted on or erected against a false wall or false roof that does not vary more than thirty degrees from the plane of the adjoining elevation.

17.06 - Permit Not Required

The following signs may be erected without a permit and are not included in the maximum sign area allowed unless otherwise indicated, but must comply with all other requirements of this ordinance:

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17.06 - Permit Not Required (continued)

1. In all districts, one (1) sign shall be allowed on a residential property for each residence. Each sign shall have a maximum area of four (4) square feet, shall be a maximum of six (6) feet high and may not be located within ten (10) feet of an abutter or public right-of-way. Additional signage may be permitted per Section 17.09.2.

2. Wall plaques or markers on properties where a structure has been identified as historic by a local, state or federal agency.

3. In order to maintain public safety, directional or directory signs, no greater than four (4) square feet, which are located outside of setback areas and are not visible from the public right-of-way or abutting properties. Other directional or directory signs are governed by section 17.10.

4. Signs affixed to the interior side of a window so as to be visible from the exterior.
5. In order to maintain public safety, utility signs which identify the location of utility lines, cables, or pipes.

6. Lettering, logos or graphics affixed to products or packaging.

7. In order to maintain public safety, nameplate signs, not to exceed two (2) square feet, showing street addresses, property numbers, names of occupants of the premises, or other identification.

8. Signs installed by governmental bodies.

9. Signs for public safety and/or information, including Electronic Changing Signs (Message Centers).

17.07 - Prohibited Signs in All Districts

1. Rotating and Revolving Signs

2. Flashing Signs

3. Billboards

4. Any changes made to the display of any sign which occurs more often than once in a twenty (20) minute period, with the exception of a time/temperature display.

17.08 - Temporary Signs

In all districts, one (1) temporary sign shall be allowed on each property in accordance with the following standards. For properties that are currently for sale, rent or lease, one additional temporary sign is permitted for the duration that the property maintains that status.

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<#>Lettering, logos or graphics which are affixed to the exterior of facilities such as vending machines, gasoline pumps and other similar facilities.¶

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Deleted: Historic plaques or markers no greater than two (2) square feet in area.¶
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2. Contractor job signs (residential districts) no greater than twelve (12) square feet and six (6) feet in height and not illuminated, provided, however, that if the sign is erected pursuant to this provision and actual construction does not begin within six months, the sign shall be removed at the expiration of the six month period and shall not thereafter be erected again until actual construction has begun. There shall only be one such sign on the site and it shall remain only until completion of the project.¶
¶
3. Contractor job signs (commercial or industrial districts) not to exceed 32 square feet and ten (10) feet in height and not illuminated, provided, however, that if the sign is erected pursuant to this provision and actual construction does not begin within six months, the sign shall be removed at the expiration of the six month period and shall ¶
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Section 17.05 - Permit Not Required (continued)¶
¶
not thereafter be erected again until actual construction has begun. There shall only be one such sign on the site and it shall remain only until completion of the project.¶
¶
4. Directional or directory signs, no greater than four (4) square feet, which are located outside of setback areas and are not visible from the public right-of-way or abutting properties. Other directional or directory signs are governed by section 17.10.¶
¶ ...

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¶ ...

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19. Customary signs which give warning, no larger than two (2) square feet in area, such as "Beware of Dog" or "No Trespassing" signs¶
¶ ...

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Deleted: 23. On-site seasonal agricultural signs, not to exceed six square feet in area, that advertise the availability of seasonal produce or product during the season within which said produce is available for sale or harvest. Such signs are exem ...

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17.08 - Temporary Signs (continued)

Temporary signs that comply with the following standards do not require a permit. All signs that do not follow these standards shall be permitted in accordance with Section 17.04.

1. set back not less than ten (10) feet from any public right-of-way;

2. set back not less than twenty (20) feet from any intersection;

3. maintained for a period no longer than thirty (30) days in any consecutive ninety (90) day period whatsoever, and

4. no larger than thirty-two (32) square feet in area.

17.09 - Signs in Residential Zones

Except as provided in subsection 17.06, only the following signs shall be permitted in residential zones:

1. For public safety, Permanent Subdivision Identification Signs: One (1) single or double-faced ground sign per entrance into a development with a maximum of two per development, non-illuminated, in areas set back from vehicle or pedestrian traffic. The signs shall not exceed a total area of 32 square feet per sign, and shall be set back a minimum of twenty (20) feet from any intersection and shall be located on common land or land covered by appropriate easements and maintained by a homeowners association.

2. Home Occupation Signs: One (1) home occupation sign, not to exceed two (2) square feet, in accordance with Section 2.02.1.A.2 of the Zoning Ordinance.

3. Nonresidential Signs: One single or double face sign identifying any nonresidential use permitted in a residential zone. Area may not exceed six (6) square feet and such signs shall not be illuminated, rotate, or flash.

17.10 - Commercial and Industrial Districts

Except as provided for in Section 17.06, only the following signs are permitted in commercial and industrial zones; and no more than two major sign types (ground, roof, wall and projecting) are permitted per parcel.

1. Residential Signs: Residential signs within these zones are subject to the regulations of Section 17.06 and 17.09.

2. Temporary Signs: In addition to signs permitted under Section 17.06, temporary signs for nonresidential uses are permitted, in accordance with the requirements of Section 17.08.

Deleted: Except as otherwise specified within this ordinance, all temporary signs shall be:¶

Deleted: 17.07 - Temporary Signs (continued)¶
¶

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¶
In all zones within the Town of Merrimack, holiday and special event signs temporarily displayed on traditionally accepted civic, patriotic or religious holidays and for charitable, church or school events including periodic events sponsored by nonprofit organizations, are permitted subject to the following:¶
¶
1. Signs must be set back at least ten (10) feet from the edge of any right-of-way and twenty (20) feet from any intersection.¶
¶
2. No more than two (2) signs per premises.¶
¶
3. Signs may not flash, rotate or revolve.¶
¶
4. No individual sign may exceed thirty-two (32) square feet in area.¶
¶
5. Signs may not be maintained longer than thirty (30) days.¶
¶

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¶

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17.10 - Commercial and Industrial Districts (continued)

3. Ground Sign: One (1) ground sign is permitted for each site with three-hundred (300) feet of contiguous frontage or less. Where a parcel has more than three-hundred (300) feet of contiguous frontage along the same right-of-way, it may have two ground signs, or the occupant may elect to combine the allowable area of two ground signs into one ground sign with a maximum allowable area of 64, 96, 96 or 150 square feet (corresponding to Table 17-1, below.) All ground signs shall display the property address number. Numbers shall be a minimum of 6 inches in height.

TABLE 17-1

Traffic Speed Allowed	No. of Traffic Lanes	Maximum Area in Sq. Ft.
0-35	2	32
40-50	2	48
0-35	4 or more	48
40-50	4 or more	100

a) For corner or double frontage lots, one additional ground sign is permitted for each additional street or road from which frontage and access to the site is provided, however, the area of such additional signs shall not

exceed fifty (50%) percent of the maximum sign area allowed for the site's principal ground sign(s) and such additional signs may not be located within fifty (50) feet of any intersection.

b) Ground signs must be set back at least 20 feet from the edge of any public right-of-way except as in such instance as the zoning ordinance shall require a greater setback. The maximum permitted area of any ground sign shall not exceed the figures shown in Table 17-1 for each face of a multi-face sign or for the sole face of a single face ground sign:

c) No ground sign may exceed in height the distance of any portion of the sign to the center of the adjoining public right-of-way, and the maximum height of any portion of any ground sign or sign structure shall be 40 feet from street grade regardless of location. (See figure 5, Appendix to this section.)

d) Two or more owners of adjacent separate parcels zoned for commercial use may combine their street or highway frontages and erect one ground sign. No other ground signs shall be permitted on either of the adjacent parcel if the owners make such an election, and the ground sign may not exceed in area or height the maximum allowable by all other provisions of this subchapter.

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e)

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17.10 - Commercial and Industrial Districts (continued)

e) Where parcels zoned for commercial or industrial use are within one-hundred (100) feet on the same public right-of-way of any parcel zoned for single-family use, ground signs erected and maintained on the commercial or industrial property may not exceed 20 feet in height above the ground at the base of the sign structure or the base of the building, and ground signs must be set back from the public right-of-way the same distance as is required for residential structures on the adjacent residentially zoned property. This provision affects only signs on commercial or industrial property on the same block and on the same right-of-way as the residential property.

4. Wall Signs:

a) If there is no ground or projecting sign, the maximum area shall be two times the length of the side of the building on which the sign is to be located in square feet. (See figure 6, Appendix to this section.)

b) If there is a ground sign or projecting sign, the maximum area shall be one times the length of the side of the building on which the sign is to be located in square feet. (See figure 7, Appendix to this section.)

c) If there is a projecting but no ground sign, the maximum area shall be one times the length of the side of the building on which the sign is to be located in square feet. (See figure 8, Appendix to this section.)

d) Wall signs consisting of non-illuminated letters up to but not exceeding three inches high are not restricted provided that they are in compliance with the total area designations as outlined in (a), (b) and (c) above.

e) Any building with an actual or false roof varying not more than 30 degrees from a vertical plane, or any building with a portion or all of a wall built not more than 30 degrees from a vertical plane, shall have such a mansard-type wall or roof considered wall space for the purpose of determining allowable
1. sign placement.

f) Wall signs may not project more than three feet above the top of a parapet wall or the roof line at the wall, whichever is higher.

g) For a parcel with or proposing more than one business establishment, each discrete business establishment within the parcel shall be entitled to one wall sign. The maximum area of each shall be two times the length of that portion of the total building length occupied by the individual business on which the sign is to be located in square feet. If a discrete business establishment also has a ground sign the maximum area of their wall sign shall be one times the length of that portion of the total building length occupied by the individual business per Section 17.10.4(b) above.

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17.10 - Commercial and Industrial Districts (continued)

h) Businesses having more than one exterior wall shall be entitled to one wall sign per wall sized according to the formula in 4(a), (b) and (c) above.

i) The total sign area of a wall sign or awning sign or any combination of a wall sign and awning sign shall not exceed the total wall sign area permitted herein.

5. Directional Signs: One directional sign may be placed on either side of each driveway entrance. The area of each sign may not exceed four square feet.

6. Changeable Copy Signs: Any of the types of signs permitted by this section may be permitted as changeable copy signs.

7. Roof Signs: Roof signs may be used instead of, but not in addition to, wall signs.

Roof signs are subject to the following restrictions:

a) Roof signs may not project over a public right-of-way or public property.

b) All roof signs shall be set back a distance of at least three feet from the outside of the building on or over which they are located.

c) Roof signage may have the same maximum allowable areas as Section 17.10.4.

d) Height of roof signs:

TABLE 17-2

Building Height	Maximum sign height (including any space required under the sign for clearance) above top of roof or parapet wall, whichever is higher.
0-15'	6'
16-20'	7'
21-25'	8'
26-30'	9'
31-35'	10'
36-40'	11'
41-45'	12'
46-50'	13'

e) Roof signs shall be limited to identification of a business or industrial concern only.

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17.10 - Commercial and Industrial Districts (continued)

8. Projecting Signs:

a) The two types of projecting signs, a vertical projecting sign, where the vertical dimension is greater than the horizontal dimension, and a horizontal projecting sign, where the horizontal dimension exceeds the vertical dimension, are permitted instead of, but not in addition to, ground signs. Any one parcel is permitted to have one projecting sign along any one public right-of-way. The projecting sign may be used instead of, but not in addition to, a ground sign. Where a parcel is allowed two ground signs, the occupant may elect to substitute a projecting sign for one of the ground signs.

b) The maximum allowable area for a projecting sign shall be:

TABLE 17-3

Traffic Speed Allowed	Number of Traffic Lanes	Area Each Face (Sq. Ft.)
0-35	2	20
40-50	2	48
0-35	4 or more	32
40-50	4 or more	75

c) Projecting signs must have a minimum clearance between the bottom of the sign and the ground of 10 feet, except signs which project no more than thirty inches, which must have a minimum clearance of eight feet six inches.

d) Where a sign projects above a traffic area, such as a driveway, the minimum clearance between the bottom of the sign and the ground may be no less than 14 feet.

e) Projecting signs may not extend more than three feet above the roof line at the wall or the top of a parapet wall, whichever is higher.

f) Permanent copy of each face of a projecting sign in commercial and industrial zones may include only the name of the occupant and the principal activities, goods, products or services located on the premises.

9. Marquee Signs:

a) Marquee signs are allowed to be on, under or part of a permanent marquee, but always attached thereto. Only theaters, gymnasiums, auditoriums, athletic facilities, motels, conference centers, and similar uses for which a marquee is a common part of said use are permitted.

b) A marquee sign may not project more than ten inches beyond the marquee, and never closer than two feet to a curb.

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c) Marquee signs must have a minimum clearance between the bottom of the sign and the ground of not less than eight feet six inches.

d) Where the sign is attached above or below or to the face of the marquee, the same maximum allowable area for projecting signs on the same parcel is allowed. The marquee itself shall not contain animation or flashing lights.

e) Permanent copy on each face of a marquee sign in commercial and industrial zones may include only the name of the occupant and the principal activities, goods, products or services located on the premises.

10. Sign, Electronic Message Display: Signs permitted in section 17.10.3 & 17.10.4 shall be permitted as electronic message display subject to the following:

a) Electronic Message Displays shall display static messages for a period of a minimum of 20 minutes;

b) Transitions from one static message to the next static message may include the use of frame effects, so long as such effects do not utilize flashing, scrolling or in any manner imitate movement;

c) Electronic Message Displays shall have automatic dimming technology which automatically adjusts the sign's brightness levels as specified in Section 11.10 Subdivision Regulations of the Town of Merrimack; and

d) The owner/installer of Electronic Message Displays shall certify as part of the application that signs will not exceed the brightness levels specified in Section 11.10 Subdivision Regulations of the Town of Merrimack.

11. Signage Requirements for Alternative Treatment Centers

a) In addition to the requirements of Section 17.10, Alternative Treatment Centers that have received a Conditional Use Permit and Site Plan approval from the Planning Board shall be subject to the applicable requirements of the NH Health & Human Services Department (DHHS) Administrative Rules (He-C 400, as most recently published or amended by DHHS) pertaining to Advertising Restrictions.

17.11 - Off-Premise Signs

Off premise signs may be erected on parcels of real estate only within the Commercial and Industrial zones. Off premise signs shall be limited to Ground Signs conforming to the regulations provided in Section 17.10.3. A parcel may contain either an On-Premise sign or an Off-Premise sign, but not both, unless it has enough frontage to display two signs (as described in 17.10.3) in which case one sign may be devoted to on-premise advertising and one sign devoted to off-premise advertising.

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17.12 - Site Plan Review

A building permit for any ground sign at a nonresidential or multi-family site shall be issued only after approval by the Planning Board in accordance with the Site Plan Review regulations of the Town of Merrimack.

17.13 - Area and Dimensional Calculations

1. Area: The area of a sign is considered to be the area, on the largest single face of a sign, within a perimeter which forms the outside shape of a sign. If the sign consists of more than one module (i.e. Section) the total area of all modules shall constitute the sign area. The area of a sign having no such perimeter or border shall be computed by enclosing the entire copy area within the outline of either a parallelogram, triangle, circle or any other easily recognized geometric shape and then computing the area. Where a sign is of a three-dimensional, round or irregular shape, the largest cross section shall be used in a flat projection for the purpose of computing sign area (figures 1-4, Appendix to this title). If a sign is lettered on both sides back to back only one side shall be counted as the total sign area. All appendages or riders are calculated within the area of the sign to which they are appended.

2. Height: The height of a sign is the vertical distance measured from the adjacent undisturbed grade of the sign to the highest point of the sign.

Appendix to Section 17 follows.

17.14 - Appendix

MEASUREMENT OF SIGN AREA –
SINGLE SIGN
(AREA = L X H)

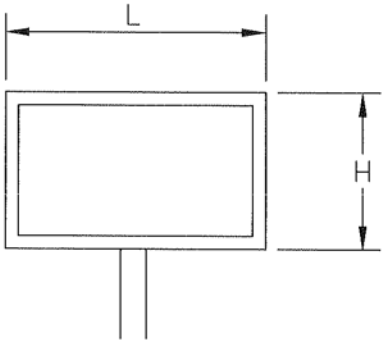

FIG. 1

MEASUREMENT OF SIGN AREA –
MULTIPLE MODULES
(AREA = [A X B] + [C X D] + [E X F])

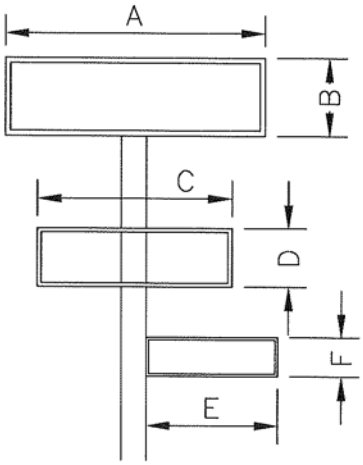

FIG. 2

MEASUREMENT OF SIGN AREA –
3D, ROUND, OR IRREGULAR SHAPED SIGNS
(AREA = USE FORMULA APPROPRIATE FOR SHAPE)

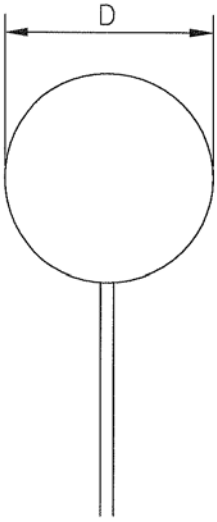

FIG. 3

17.14 Appendix (continued)

MEASUREMENT OF SIGN AREA – IRREGULAR SHAPED SIGN
(AREA = L X H)

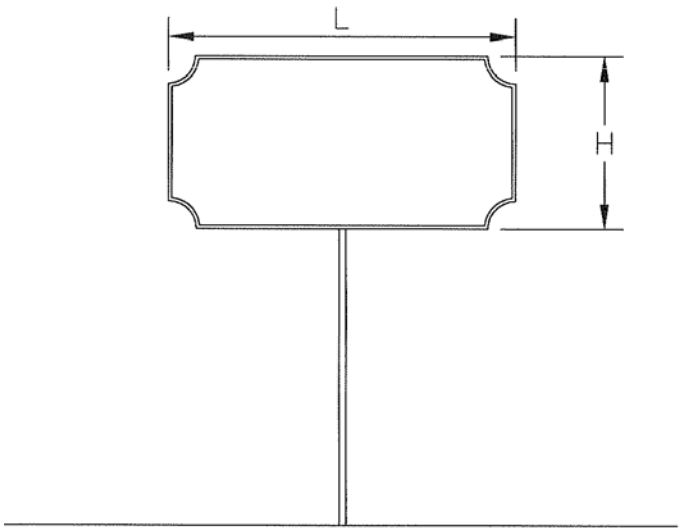

FIG. 4

MAXIMUM HEIGHT OF GROUND SIGN
(MAXIMUM HEIGHT = X; IN NO EVENT GREATER THAN 40 FT.)

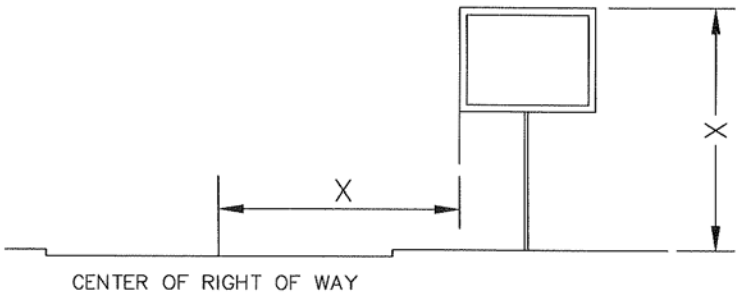

FIG. 5

17.14 Appendix (continued)

MAXIMUM AREA OF WALL SIGN – NO GROUND OR PROJECTING SIGN
(EXAMPLE: 50' X 2 = 100 S.F ALLOWED)

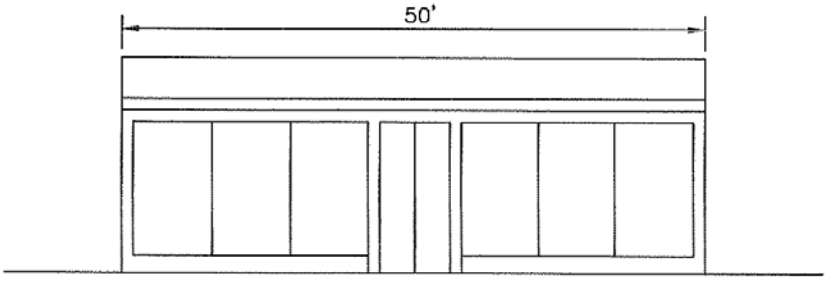

FIG. 6

MAXIMUM AREA OF WALL SIGN –
WITH A GROUND SIGN OR PROJECTING SIGN
(EXAMPLE: 50' X 1 = 50 S.F ALLOWED)

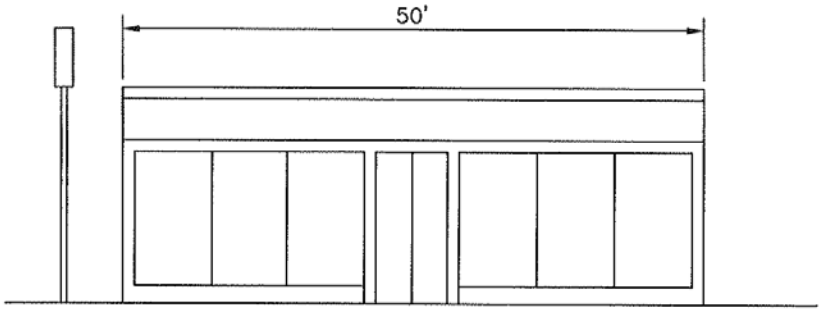

FIG. 7

MAXIMUM AREA OF WALL SIGN –
WITH A PROJECTING SIGN BUT NO GROUND SIGN
(EXAMPLE: 50' X 1 = 50 S.F ALLOWED)

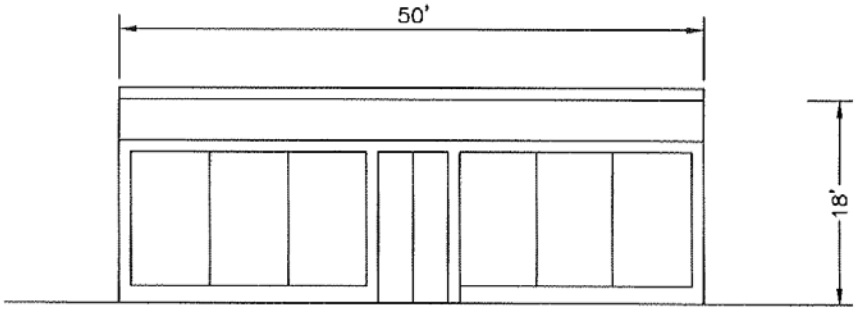

FIG. 8

Town of Merrimack, New Hampshire
Community Development Department 603 424-3531
6 Baboosic Lake Road Fax 603 424-1408
Town Hall - Lower level - East Wing www.merrimacknh.gov
Planning - Zoning - Economic Development - Conservation

MEMORANDUM

Date: April 7, 2016

To: Robert Best, Chairman, & Members, Planning Board

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Workshop Discussion: Zoning Ordinance Amendments regarding Accessory Dwelling Units**

Background: As the Board may recall, at a joint meeting with the Zoning Board in December 2014, the topic was raised about amending the Zoning Ordinance regarding how the Town deals with accessory dwelling units (ADU), which are commonly referred to as "in-law apartments." At the time, the ZBA was only interested in amending the process of how ADU's are approved, whereas the Staff and Planning Board were interested in a more comprehensive look at the topic, in order to implement one of the 2013 Master Plan recommendations.

As staff set out to put together amendments to the ordinance, the State Legislature began the process on a proposed bill that would change the way the State allows municipalities to deal with ADU's. While the legislative process was unfolding, staff put the zoning amendment project on the back burner until the bill reached a resolution.

That resolution has now taken place, as the Legislature passed, and the Governor has signed a bill that sets forth new statutory requirements for ADU's. The new law becomes effective on June 1, 2017, but nothing prevents the Town from moving forward with changes before then. Attached to this memo, after the draft of the proposed ordinance amendments, is a copy of the new state law. The new law correlates nicely with the recommendations from the Master Plan (also attached), in that municipalities will no longer be able to restrict occupancy of ADU's to family members only.

The proposed amendments to the ordinance would set forth 2 different processes for ADU's. The first (and most common) would be to change "attached" ADU approvals from a Special Exception requiring ZBA approval to a permitted use, with criteria that would be administered by the Community Development Department and Building Department. The second process would be to allow for "detached" ADU's to be permitted by Conditional Use Permit by the Planning Board. It is staff's belief that these proposed amendments address the issue the ZBA was desirous of "fixing" (the process required for Special Exceptions), and the Master Plan/State Law goals of assisting with meeting the needs of a diversified housing stock to address a limited part of the workforce housing needs for the community.

Summary of Proposed Amendments:

- Section 2.02.1.A (District R - Permitted Uses): Insert new subsection #4 establishing the criteria for attached ADU's to be permitted, renumber old subsection "4" to be "5";

- Section 2.02.1.B (District R - Permitted Uses, Special Exceptions): Delete subsection #2 in its entirety, renumber remaining subsections;

- Section 2.02.1 (District R - Permitted Uses): Insert new subsection C, Conditional Use Permits, and further to establish the criteria for detached ADU's to be permitted by Conditional Use Permit.

Required Process for Adoption of Amendments

These proposed Zoning Ordinance amendments will require a public hearing with the Planning Board, after which (if the Board wishes to see the amendments adopted) the Board will make a recommendation to the Town Council (in accordance with the Charter). From there, the Council will follow their process of 3 readings and a public hearing on the proposed amendments. The final decision on the adoption of any zoning amendment rests with the Council in accordance with the Town Charter and State law.

Recommendations:

1. Review and comment on the proposed amendments to the Zoning Ordinance. Staff will then make any necessary changes to address Planning Board feedback;

2. Schedule a public hearing for the proposed amendments at an upcoming Planning Board meeting (for a recommendation to the Town Council).

cc: Community Development Staff
Building Division Staff
Zoning Board of Adjustment
File

Attachments: ~~Draft Ordinance Amendments~~
SB146 Language (new state law)
Master Plan Excepts re: ADU's
12/2/14 Joint PB/ZBA Meeting Minutes Excerpt

CHAPTER 6
SB 146 - FINAL VERSION

03/12/2015 0740s
03/12/2015 0832s
7Jan2016... 2424h
02/11/2016 0375EBA

2016 SESSION

15-0314
03/05

SENATE BILL ***146***

AN ACT relative to accessory dwelling units.

SPONSORS: Sen. Boutin, Dist 16; Sen. Cataldo, Dist 6; Sen. Feltes, Dist 15; Sen. Fuller Clark, Dist 21; Sen. Little, Dist 8; Sen. Reagan, Dist 17; Sen. Watters, Dist 4; Rep. Hunt, Ches 11; Rep. Matthews, Rock 3

COMMITTEE: Public and Municipal Affairs

ANALYSIS

This bill establishes requirements for local regulation of accessory dwelling units.

- - - -

CHAPTER 6
SB 146 - FINAL VERSION

03/12/2015 0740s
03/12/2015 0832s
7Jan2016... 2424h
02/11/2016 0375EBA

15-0314
03/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Sixteen

AN ACT relative to accessory dwelling units.

Be it Enacted by the Senate and House of Representatives in General Court convened:

6:1 Findings. The general court declares that:

I. There is a growing need for more diverse affordable housing opportunities for the citizens of New Hampshire.

II. Demographic trends are producing more households where adult children wish to give care and support to parents in a semi-independent living arrangement.

III. Elderly and disabled citizens are in need of independent living space for caregivers.

IV. There are many important societal benefits associated with the creation of accessory dwelling units, including:

(a) Increasing the supply of affordable housing without the need for more infrastructure or further land development.

(b) Benefits for aging homeowners, single parents, recent college graduates who are saddled with significant student loan debt, caregivers, and disabled persons.

(c) Integrating affordable housing into the community with minimal negative impact.

(d) Providing elderly citizens with the opportunity to live in a supportive family environment with both independence and dignity.

6:2 New Subdivision; Accessory Dwelling Units. Amend RSA 674 by inserting after section 70 the following new subdivision:

Accessory Dwelling Units

674:71 Definition. As used in this subdivision, "accessory dwelling unit" means a residential living unit that is within or attached to a single-family dwelling, and that provides independent living facilities for one or more persons, including provisions for sleeping, eating, cooking, and sanitation on the same parcel of land as the principal dwelling unit it accompanies.

674:72 Accessory Dwelling Units.

I. A municipality that adopts a zoning ordinance pursuant to the authority granted in this chapter shall allow accessory dwelling units as a matter of right or by either conditional use permit pursuant to RSA 674:21 or by special exception, in all zoning districts that permit single-family dwellings. One accessory dwelling unit shall be allowed without additional requirements for lot

size, frontage, space limitations, or other controls beyond what would be required for a single-family dwelling without an accessory dwelling unit. The municipality is not required to allow more than one accessory dwelling unit for any single-family dwelling.

II. If a zoning ordinance contains no provisions pertaining to accessory dwelling units, then one accessory dwelling unit shall be deemed a permitted accessory use, as a matter of right, to any single-family dwelling in the municipality, and no municipal permits or conditions shall be required other than a building permit, if necessary.

III. An interior door shall be provided between the principal dwelling unit and the accessory dwelling unit, but a municipality shall not require that it remain unlocked.

IV. Any municipal regulation applicable to single-family dwellings shall also apply to the combination of a principal dwelling unit and an accessory dwelling unit including, but not limited to lot coverage standards and standards for maximum occupancy per bedroom consistent with policy adopted by the United States Department of Housing and Urban Development. A municipality may require adequate parking to accommodate an accessory dwelling unit.

V. The applicant for a permit to construct an accessory dwelling unit shall make adequate provisions for water supply and sewage disposal for the accessory dwelling unit in accordance with RSA 485-A:38, but separate systems shall not be required for the principal and accessory dwelling units.

VI. A municipality may require owner occupancy of one of the dwelling units, but it shall not specify which unit the owner must occupy. A municipality may require that the owner demonstrate that one of the units is his or her principal place of residence, and the municipality may establish reasonable regulations to enforce such a requirement.

VII. A municipality may establish standards for accessory dwelling units for the purpose of maintaining the aesthetic continuity with the principal dwelling unit as a single-family dwelling. A municipality may also establish minimum and maximum sizes for an accessory dwelling unit, provided that size may not be restricted to less than 750 square feet.

VIII. A municipality may not require a familial relationship between the occupants of an accessory dwelling unit and the occupants of a principal dwelling unit.

IX. A municipality may not limit an accessory dwelling unit to only one bedroom.

X. An accessory dwelling unit may be deemed a unit of workforce housing for purposes of satisfying the municipality's obligation under RSA 674:59 if the unit meets the criteria in RSA 674:58, IV for rental units.

674:73 Detached Accessory Dwelling Units. A municipality is not required to but may permit detached accessory dwelling units. Detached accessory dwelling units shall comply with the requirements of, and any municipal ordinances or regulations adopted pursuant to, RSA 674:72, IV through IX. If a municipality allows detached accessory dwelling units, it may require an increased lot size.

6:3 Innovative Land Use Controls. Amend RSA 674:21, I(l)-(o) to read as follows:

(l) [~~Accessory dwelling unit standards.~~

~~(m)~~] Impact fees.

[~~(n)~~] ***(m)*** Village plan alternative subdivision.

[~~(o)~~] ***(n)*** Integrated land development permit option.

6:4 Innovative Land Use Controls; Accessory Dwelling Units. Amend RSA 674:21, IV to read as follows:

IV. As used in this section:

(a) "Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.

(b) [~~"Accessory dwelling unit" means a second dwelling unit, attached or detached, which is permitted by a land use control regulation to be located on the same lot, plat, site, or other division of land as the permitted principal dwelling unit.~~

~~(c)~~] "Phased development" means a development, usually for large-scale projects, in which construction of public or private improvements proceeds in stages on a schedule over a period of years established in the subdivision or site plan approved by the planning board. In a phased development, the issuance of building permits in each phase is solely dependent on the completion of the prior phase and satisfaction of other conditions on the schedule approved by the planning board. Phased development does not include a general limit on the issuance of building permits or the granting of subdivision or site plan approval in the municipality, which may be accomplished only by a growth management ordinance under RSA 674:22 or a temporary moratorium or limitation under RSA 674:23.

6:5 Effective Date. This act shall take effect June 1, 2017.

Approved: March 16, 2016

Effective Date: June 1, 2017

income is $50,070 adjusted for a family of three.[13]

- New Hampshire Housing estimates that the affordable purchase price for a home in Merrimack is $295,000 and the estimated affordable rent is $1,250 per month. The estimated affordable purchase price assumes that no more than 30 percent of household income is spent for housing after a 5 percent down payment, a 30 year mortgage at a 4.81 percent interest rate, private mortgage insurance, taxes and homeowners insurance. The estimated affordable rent is based upon an expenditure of no more than 30 percent of household income that includes the monthly rental cost and utilities.
- Based upon those figures and the current median home price of $220,000 and the median monthly rent cost of $1,217, there is no housing affordability gap in Merrimack at this time.
- In 2009, 71.3 percent of the homes units sold were priced at or below, the estimated affordable purchase price. In 2011, 60.1 percent of the two-bedroom dwelling units were rented at the estimated affordable rental cost. These figures are for the Nashua HFMA, not just Merrimack.
- Given that median household income is projected to drop slightly over the next few years and the expectation that housing prices will recover, it is still important to look for ways to ensure that the housing stock remains diverse and affordable into the future in order to avoid an affordability gap. The recession resulted in a disruption of housing prices, but this has created an opportunity for the Town to foster housing affordability in the future by proactively employing the strategies described below that help to diversify the housing stock. If housing prices continued to rise at the pre-recession rate and if household income stayed steady, there would likely have been an affordability gap.
- Demographically, Merrimack is a growing community. As is true for many communities in NH and around the country, the growth is more heavily weighted towards the older population segments. Additional options for housing the growing elder population should be considered. Merrimack is also a community of predominantly family households, and Merrimack's housing stock is predominantly single-family dwellings. Merrimack has infrastructure issues that present a challenge to denser development (sewer and water), but also has areas of town where both town sewer and water are available.

3.8 Housing Recommendations

While there may not be any identifiable housing affordability gap based upon the housing needs assessment, it is important for Merrimack to create new opportunities to diversify and preserve its existing housing stock. The following recommendations are made to establish housing policies that achieve the housing goals set forth in this Plan.

13 New Hampshire Housing Finance Authority 2011 Workforce Housing Purchase and Rent Limits, RSA 674:58 – 6. [http://www.nhhfa.org/rl_docs/WrkfrcHsngPurchaseAndRentLimits_current.pdf]. Accessed August 2012.

In order to strengthen the Town's commitment to housing diversity and affordability, it should establish a Housing Commission that can advocate for the development of affordable workforce housing. A Commission can act as a resource to other Town boards and commissions on issues that arise relating to housing. It is not a regulatory body. However, a Housing Commission can also receive gifts of money or property to create an affordable housing fund. It can acquire and dispose of real property interests, subject to Town approval, in order to preserve or enhance housing affordability.

Consider establishing

H-1 ~~Establish~~ a Housing Commission that can advocate for the development of affordable workforce housing. A Commission can act as a resource to other Town boards and commissions on issues that arise relating to housing. It is not a regulatory body. However, a Housing Commission can also receive gifts of money or property to create an affordable housing fund. It can acquire and dispose of real property interests, subject to Town approval, in order to preserve or enhance housing affordability.

Goal 1: Encourage high-quality housing in attractive neighborhoods through development of innovative land use controls, regulations and programs, such as incentive bonuses to encourage features in site plans/New Hampshire Revised Statutes (RSA).

H-2 Encourage more mixed-use and infill development where appropriate along the Daniel Webster Highway corridor. This encourages the reuse of vacant or underdeveloped parcels and can allow for development at higher densities where the infrastructure can support it. Mixed-use development helps to diversify the housing stock by creating dwelling units that tend to be smaller and more affordable, either as rental or for-sale units.

H-3 Allow for smaller lot sizes in selected areas where water and sewer infrastructure is available.

H-4 Utilize substandard lots in certain areas by allowing subdivision of a lot into two lots – one with reduced area and width requirements. These new smaller lots could be developed with a goal of providing an alternative means for reducing housing costs.

H-5 Revise the zoning ordinance to encourage the development of more duplex and townhouse dwellings.

Goal 2: Maintain the Town of Merrimack's compliance in meeting the housing affordability goals pursuant to the Workforce Housing Law.

H-6 Consider adopting an Inclusionary Zoning ordinance. Many communities have enacted inclusionary zoning to designate a certain percentage of new housing units as affordable units that meet the requirements of the Workforce Housing Law. Setting aside a certain percentage of units as affordable would be done on a voluntary basis by developers if incentives are provided such as density bonuses, relief from specific dimensional regulations, or the exemption from paying certain fees, for example.

H-7 Consider revisions to the zoning regulations to allow for accessory apartments to make them more viable housing options, especially for senior citizen households. Do not

restrict accessory units to only family members and consider them as a by-right use rather than requiring a special permit. However, owner-occupancy of either the principal or the accessory unit can be one way in which to ensure greater neighborhood stability.

H-8 Inventory town-owned land and tax title property to identify potential parcels for use as affordable housing sites, which can be developed/rehabilitated by the Town or private developers.

H-9 Prepare a detailed and updated housing needs assessment that allows the Town to realistically achieve the creation of new affordable units to meet the needs of current and future Merrimack residents. This will be important given the changing demographics of the Town, especially the increasing population over 65 years of age, and the housing market that is still in a state of flux in the aftermath of the housing collapse during the recent recession. An emphasis should be placed on establishing housing for senior citizens, including assisted living facilities, and creating entry level housing opportunities for younger residents. This effort should be coordinated by the Merrimack Housing Commission, if established.

Goal 3: Ensure that housing choices are available to meet the needs of current and future generations in Merrimack.

H-10 Continue to look for ways to meet the needs of the growing elderly population. The Town currently has a couple of housing developments for senior citizens, although they are for market rate units. Others have been proposed but did not proceed because of market conditions. One option that is gaining more attraction around the country is for so-called senior cottage housing that provides for small single-family housing units clustered around a common building and other amenities.

H-11 Create incentives for open space residential development to enhance protection of open space while providing for a more diverse range of housing types. Construction costs can be reduced through lower infrastructure expenditures and lower maintenance costs by clustering dwelling units as a means to preserving larger contiguous open space resources.

Table 10-1: Plan Recommendations – Priority and Responsible Party

HOUSING AND POPULATION ELEMENT

	Housing Recommendations	Time Period for Implementation				Responsible Party
		1-2	3-5	6-10	Ongoing	
H – 1	Consider establishing a Housing Commission that can advocate for the development of affordable workforce housing.			✓		**TC**
H – 2	Encourage more mixed-use and infill development where appropriate along the Daniel Webster Highway corridor.	✓				**PB,** TC
H – 3	Allow for smaller lot sizes in selected areas where water and sewer infrastructure is available.	✓				**PB,** TC
H – 4	Utilize substandard lots in certain areas by allowing subdivision of a lot into two lots – one with reduced area and width requirements.		✓			**PB,** TC
H – 5	Revise the zoning ordinance to encourage the development of more duplex and townhouse dwellings in selected areas of the Town.	✓				**PB,** TC
H – 6	Consider adopting an Inclusionary Zoning ordinance to respond to the state Workforce Housing Law.		✓			**PB,** TC
H – 7	Consider revisions to the zoning regulations to allow for accessory apartments to make them more viable housing options, especially for senior citizen households as a Workforce Housing option. Consider them as a by-right use without the need for a special permit.	✓				**PB,** TC
H – 8	Inventory town-owned land and tax title property to identify potential parcels for use as affordable housing sites.				✓	**CD**
H – 9	Prepare a detailed, updated housing needs assessment that allows the Town to realistically achieve the creation of new affordable units to meet the needs of current and future Merrimack residents.	✓				**CD**
H – 10	Continue to look for ways to meet the needs of the growing elderly population, including senior cottage housing.		✓			**CD**
H – 11	Create incentives for open space residential development to enhance protection of open space while providing for a more diverse range of housing types. See recommendation LU-9.		✓			**PB**

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MERRIMACK PLANNING BOARD
APPROVED MINUTES
TUESDAY, DECEMBER 2, 2014

Planning Board members present: Robert Best, Alastair Millns, Tom Koenig, Michael Redding, Lynn Christensen (arrived 7:35 p.m.), and Desirea Falt.

Planning Board member absent: Alternate Nelson Disco.

Zoning Board of Adjustment members present: Fran L'Heureux, Patrick Dwyer, Phil Straight, Tony Pellegrino, Richard Conescu, and Alternate Leonard Worster.

Staff present: Community Development Director Tim Thompson, Planning and Zoning Administrator Jillian Harris, Assistant Planner Donna Pohli, and Recording Secretary Zina Jordan.

1. Call to Order

Robert Best called the meeting to order at 7:30 p.m. Fran L'Heureux led the pledge of allegiance.

2. Joint Meeting of the Planning Board and Zoning Board of Adjustment – Discussion of topics of concern for both Boards and presentation from Karen Dudley of Natural Resources Conservation Service (USDA).

Lynn Christensen arrived at 7:35 p.m.

Soil Mapping. Karen Dudley, Research Soil Scientist, Natural Resources Conservation Service, described how soils are mapped for general land use. The maps are not site specific. Elements in soil mapping are landform, topography, parent material, water table depth, and slope. A sample usually contains 80% of one type of soil, but other types are included. Soils differ according to age, climate, topography, glaciers, and human activity. The oldest soils change more from the surface down, with wetter soils on the bottom and dryer soils on top. Soils are residues of scraping by ancient glaciers. Karen Dudley described the types of soils and where they are found.

Planning Board Chairman Best asked how the Planning and Zoning Boards could use this information. Karen Dudley replied that the information can help to decide appropriate locations for building foundations, drainage and locating wetlands. A lot should be able to clean a leach field before it goes into the groundwater. The information can help to determine whether a leach bed should be raised. Site-specific soil mapping provides information when building a house or a subdivision to see where to put a runoff/detention basin, whether the land can absorb water, and how to size a culvert. Nothing should be built on a steep slope. The NRCS has information about what types of trees to plant on certain soils and the best use for each type of soil. The public website, "Web Soil

Survey", gives soil ratings for various districts in Merrimack. Karen Dudley read a list of resources available to the public.

Pete Gagnon, 130 Bedford Road, explained that new innovative technology is being used for mapping and has corrected previous mapping errors. It is helpful in locating on-site disposal systems. The document that describes each soil type and what can be done with them is invaluable. Development professionals use NRCS information, which is also useful for boards whose mandate is to "protect public health, safety and welfare".

Although Patrick Dwyer suggested that the ZBA could hire soil scientists to measure setbacks, Tim Thompson pointed out that a consultant's work could not be duplicated by the Planning Board. The developer is responsible for correct mapping and usually hires the soil scientist. The need for the Town to hire a soil scientist is extraordinarily slim. Karen Dudley said the NRCS soil maps are 1:24,000', whereas soil-specific maps are 1:10'.

Michael Redding said that soil mapping is useful for controlling erosion. It shows slopes, which have impacts on drainage, basements, and settling foundations during construction. Karen Dudley said that erosion is factored into each soil and provides information about what problem would result from cutting into it. Sands must be considered when laying pipe, for instance.

Karen Dudley left brochures on site-specific standard mapping and soil-based lot sizing.

Accessory Dwelling Units (ADUs). Chairman Best wondered if there could be fewer requirements and suggested removing the blood relative/family member and one-bedroom restrictions. The goal is to avoid turning a single-family home into apartments. Tim Thompson explained that ADU requests appear frequently before the ZBA, which thinks it would be more efficient if staff made an administrative decision rather than the ZBA granting a Special Exception. ZBA Chair Fran L'Heureux said staff could easily make most decisions about whether a petition must go to the ZBA. Tim Thompson asked whether an ADU needs a formal public process and what to do if the decision is not clear-cut. He noted that the Master Plan recommends meeting Workforce Housing goals by removing the family member restriction.

Patrick Dwyer was concerned about apartments popping up all over Merrimack and wanted oversight that an ADU is being used for its original purpose, whereas Richard Conescu thought "related by blood" is wasted verbiage because it cannot be enforced. Patrick Dwyer wondered about someone who buys a home with an unwanted ADU and must pay to remove it. Robert Best replied that the person would factor that into the decision to buy the home. He asked what difference it would make, from a planning perspective, for a non-relation to live in an ADU. There would still be someone living in it, parking in the driveway, etc. Alastair Millns surmised that ADUs are being used for non-family members. Robert Best noted the contradiction that a homeowner needs a Special Exception from the ZBA for an ADU, but needs no permission to rent a room to anyone. Tim Thompson explained that Merrimack zoning allows up to five unrelated people to live in a single-family dwelling. Robert Best said providing Workforce Housing is important. Tim Thompson explained that it refers to standards based on HUD fair market rent areas and is not subsidized or low-income rents. Leonard Worster opined that, if anyone could live in an ADU, every home would become a duplex.

ZBA members said that they wanted only to expedite the process and make it easier for petitioners by handling an ADU request administratively. They do not want to change the criteria. Tim Thompson agreed, but said he had to remind the Boards about the Master Plan recommendation to allow non-family members to live in an ADU. Lynn Christensen explained that, in order to change the ADU guidelines, the Planning Board must vote to change an ADU into a Permitted Use and then seek Town Council approval for the change. Tim Thompson recommended that, if the Ordinance were changed to address the Master Plan recommendation, language directing applicants to go to the Planning Board for a Conditional Use Permit (CUP) would be his preference. Robert Best noted that the boards had the same discussion at their joint meeting five years ago. Tim Thompson said the Planning Board has more flexibility than the ZBA and could decide whether to grant a CUP.

Tim Thompson will draft two separate zoning amendments for future discussion: 1) administrative approval for an ADU and 2) changes in the ADU criteria to address the Master Plan recommendation.

Residential Lot Requirements The ZBA also raised a question regarding residential lot requirements. Donna Pohli listed the frontage requirements in residential districts R-1, R-2, R-3 and R-4 by minimum lot size and soil type. Tim Thompson explained that, because R-1 has the most limited soils, it has the largest required lot size in order to have sufficient soils for a septic system, etc. Since R-4 already has water and sewer, it has the smallest required lot size. Phil Straight noted that some septic systems have evolved into aerobic digestion systems that no longer require 2½ acres. A good septic system can now be placed on a much smaller area than was the case 30 years ago. He suggested leaving the regulations alone, but that the boards could be more lenient about interpreting them. Chairman Best suggested requiring a Special Exception rather than a Variance. Alastair Millns said that, if a septic system would work on a smaller area and still meet the five criteria, the ZBA rather than the Planning Board, could give relief. Tim Thompson suggested postponing discussing soils-based lot size until the next time the Planning Board considers possible zoning changes. He agreed with Richard Conescu that such an application does not fit the ZBA's five statutory criteria, but would fit a Planning Board CUP process. It makes more sense for an applicant to go to the Planning Board once than to go to the ZBA and wait another month to go to the Planning Board also.

3. Discussion of Planning Board process for determining "Regional Impact" of projects under RSA 36:56

This agenda item was considered after agenda item #4.

Tim Thompson explained that the Planning Board does not currently make a determination about regional impact for all projects, as the statutes require. He suggested that, as part of the "Planning and Zoning Administrator's Report" on the agenda, the Planning Board review with staff any applications for site plans and subdivisions that have been received by Community Development since the most recent previous Planning Board meeting and vote on a determination of regional impact. Staff recommends criteria to determine regional impact based on those developed by the Southern NH Planning Commission. Affected communities and the Nashua Regional

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MEMORANDUM

Date: April 12, 2016

To: Robert Best, Chairman, & Members, Planning Board

From: Jillian M. Harris, AICP, Planning and Zoning Administrator

Subject: **Workshop Discussion: Zoning Ordinance Amendments regarding Sign Regulations**

Background

As the Board may recall, at the February 2, 2016 meeting the topic was raised about amending the Zoning Ordinance to remove content bias from sections dealing with signs. A June 2015 U.S. Supreme Court decision in Reed v. Town of Gilbert regarding content-based speech restrictions established that sign codes cannot make distinctions based on the message of the speech. In this case, the Town of Gilbert, AZ sign code placed stricter limits on temporary events' signs but more freely allowed ideological and political signs, despite the fact that all three sign types have the same effect on traffic safety and community aesthetics. Therefore, the code failed the narrow tailoring requirement of strict scrutiny judicial standard applied by the Supreme Court.

As a result of Reed, a sign code that makes any distinctions based on the message of the speech is content based. It has been widely recommended nationwide that municipalities review sign codes carefully, with an eye toward whether the code is truly content neutral.

A review of the current sign regulations for Merrimack indicated that there are certain sections of the ordinance that need to be amended in light of the recent case law, particularly within Section 17.05 – Permit Not Required, where several content-based sign types are listed. The proposed amendments to the ordinance seek to remove any content bias and to simplify the process of regulating temporary signs, in order to protect the town from litigation resulting from the decision in the Reed v. Gilbert case.

While not proposed now, staff recommends that the Board take a comprehensive examination of Section 17, and that a re-write is likely needed at some point in the future.

Summary of Proposed Amendments

- Section 17 – Insert new subsection - 17.02: establishing a severability clause, renumber remaining subsections;
- Renumbered subsection 17.03: Include "flags" in the title and specify that flags of national, state, local or historical significance are not regulated by the ordinance;
- Renumbered Section 17.04: add language that clarifies signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted;
- Renumbered Section 17.06: Insert new 17.06.1 to allow for one (1) sign per each residential property, meeting certain criteria, without regard to content;

- Section 17.05 (2-3): Removed in their entirety based on content bias;
- Renumbered Section 17.06.2: currently Section 17.05.1 – reworded to remove content bias;
- Renumbered Section 17.06.3: currently Section 17.05.4 – added the language "In order to maintain public safety";
- Section 17.05: Delete subsections 5, 6, 7 ,8, 9, 13, 14, 15, 17, 19, 20, 21, 23, & 24 due to content bias;
- Renumbered Section 17.06.4: Remove language regarding sign content in current Section 17.05.10;
- Renumbered Section 17.06.5: currently Section 17.05.11 – add language "In order to maintain public safety";
- Renumbered Section 17.06.6: currently Section 17.05.12 – remove language regarding sign content;
- Renumbered Section 17.06.7: currently Section 17.05.16 – add language "In order to maintain public safety";
- Renumbered Section 17.06.8: currently Section 17.05.18 – no change in the language;
- Renumbered Section 17.06.9: currently Section 17.05.22 – Remove language regarding sign content;
- Renumbered Section 17.08: currently Section 17.07 – add language to allow for one (1) temporary sign per property without regard to content, meeting current criteria for temporary signs. Language includes allowance for an extra temporary sign for properties that are currently for sale, rent or lease;
- Section 17.08 – Holiday and Special Event Signs: Delete subsection in its entirety due to content bias;
- Section 17.09.1 – add language "For public safety";
- Section 17.10.2 – remove language regarding sign content;
- Section 17.10.3(e) – remove in its entirety due to content bias, renumber remaining subsections;
- Section 17.10.7 - remove in its entirety due to content bias, renumber remaining subsections;
- Section 17.11 – Remove "Advertising" from the title and language due to content bias;
- Throughout Section 17 – update "premises" to "parcel";

Required Process for Adoption of Amendments

These proposed Zoning Ordinance amendments will require a public hearing with the Planning Board, after which (if the Board wishes to see the amendments adopted) the Board will make a recommendation to the Town Council (in accordance with the Charter). From there, the Council will follow their process of 3 readings and a public hearing on the proposed amendments. The final decision on the adoption of any zoning amendment rests with the Council in accordance with the Town Charter and State law.

Recommendations

1. Review and comment on the proposed amendments to the Zoning Ordinance. Staff will then make any necessary changes to address Planning Board feedback;

2. Hold off on scheduling a public hearing until Staff has reviewed the draft with Legal Counsel;

3. Upon review by Legal Counsel, hold 1 additional workshop discussion prior to scheduling a public hearing (unless there are no significant changes recommended by Legal, in which case the amendments could go for a Planning Board public hearing).

Cc: Community Development Staff
Building Division Staff
Zoning Board of Adjustment
File

Attachments: ~~Draft Ordinance Amendments~~
Reed v. Town of Gilbert Decision Summary
NHMA Do's & Don'ts Guidance, November 2015

Signs of Trouble:

Your Town's Sign Ordinance is Probably Unconstitutional

October 2015

Agnieszka A. Pinette

Aga Pinette focuses her legal practice on municipal and land use matter, public finance and bond counsel work. Before joining the law firm of Drummond Woodsum, Aga was a senior planner at the Maine Land Use Regulation Commission where she coordinated comprehensive planning projects, rulemaking initiatives, and regulatory reviews of significant and controversial development projects. Aga has done extensive legal research on the intersection of government regulation and free speech rights, and has advised municipal clients on how to draft sign regulations that achieve planning goals and are constitutionally sound.

This past June, in a relatively brief and seemingly mundane opinion, the U.S. Supreme Court invalidated a municipal sign ordinance that gave less favorable treatment to signs that advertised church services than signs promoting other messages. The case may not appear remarkable at first glance, but its implications are far-reaching: By many accounts, the opinion calls into question the constitutionality of virtually every municipal sign ordinance in the country.

In *Reed v. Town of Gilbert*,[1] the Supreme Court considered a sign ordinance that allowed the display of temporary outdoor signs without a permit, so long as the signs met certain restrictions enumerated in the ordinance. Not unlike many sign codes, the Town's sign ordinance imposed different size, quantity, and length-of-display requirements on different types of signs. Under the Town's ordinance, "ideological signs" that communicated a message or idea could be up to 20 square feet in size, whereas "political signs" designed to influence the outcome of an election could be up to 32 square feet in size—although political signs could only be displayed during an election season. In contrast, "temporary directional signs" that directed the public to assemblies, gatherings, or meetings sponsored by religious or non-profit organizations were limited to a maximum of four signs per advertised event, each of which could not exceed six square feet in size and could not be displayed more than 12 hours before the event or one hour after the event.

The case arose when the Good News Community Church displayed a dozen or so temporary directional signs bearing the Church's name and the time and location of the next service. Members of the Church would install the signs around town on Saturday morning and would remove them around midday Sunday. The Town cited the Church for exceeding the time limits for displaying temporary directional signs and for failing to include the date of the event on the signs. In turn, the Church challenged the constitutionality of the Town's sign ordinance, contending that the ordinance unlawfully allowed some groups wide latitude to communicate messages through signage while stymying the ability of other groups to do so. In other words, the Church argued that because the ordinance

One of the signs that was posted around town by members of the Good News Community Church.

established rules for temporary directional signs that were more restrictive than the rules for other categories of temporary signs, the ordinance abridged the Church's right of free speech guaranteed under the First Amendment.

Under the First Amendment, a government may not restrict expression because of its message, its ideas, its subject matter, or its content.

Under the First Amendment, a government may not restrict expression because of its message, its ideas, its subject matter, or its content. When a regulation singles out specific subject-matter for differential treatment, courts will therefore presume that the regulation is unconstitutional. So-called content-based laws are justified only if they satisfy the most rigorous judicial test called strict scrutiny—that is, the law must further a compelling governmental interest using the least restrictive means possible. This is a steep judicial hurdle. As Adam Liptak succinctly explained in a recent New York Times article discussing the case, "strict scrutiny, like a Civil War stomach wound, is generally fatal."[2]

In *Reed*, the Supreme Court determined that because the Town's sign ordinance defined the categories of directional, political, and ideological signs on the basis of their messages and then subjected each category to different restrictions, those restrictions "depend[ed] entirely on the sign's communicative content" and were therefore content-based. Although the Town offered two long-recognized compelling governmental interests in support of its sign ordinance—preserving the Town's aesthetic appeal and traffic safety—it could not explain why temporary directional signs posed a greater threat to aesthetics or safety than other types of temporary signs. Because the Town failed to justify its more restrictive rules for directional signs, the Court concluded that the sign ordinance failed the strict scrutiny test and was unconstitutional.

Notably, the Supreme Court struck down a previously-applied judicial rule that might have saved the Town's sign ordinance from its unconstitutional fate. Before *Reed*, a rule restricting "who" is speaking (say, a realtor versus a political candidate) or "what event" is occurring (say, a community supper versus a mattress sale) was usually deemed content-neutral so long as the rule paid no regard to the message itself. Content-neutral laws are constitutional if they further an important governmental interest by means that are substantially related to that interest—a judicial test far less demanding than strict scrutiny. The Supreme Court rejected this analytical approach, however, and instead adopted a novel theory: Whenever a law treats different categories of public expression differently, the law discriminates against those *entire categories* of speech and only passes constitutional muster if it survives strict scrutiny. Consequently, a sign code based on who is speaking about what event, without regard to the substance of the message, is no longer safe from a free speech challenge.

Even though the Supreme Court clearly raised the bar on constitutionally permissive sign regulations, the Court stressed that its decision would not prevent governments from enacting effective sign laws. The Court noted that sign regulations might well survive strict scrutiny if they are "narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses." The Court also acknowledged that governments have "ample content-neutral options available to resolve problems with safety and aesthetics" by regulating aspects of signs—such as size, building materials, lighting, moving parts, and portability—that have nothing to do with a sign's message.

Indeed, in a concurring opinion, three of the Supreme Court Justices enumerated the following rules that would likely be lawful:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be placed, including rules that distinguish between freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on temporary signs.

While a concurring opinion is not binding on courts, it does signal that a sign ordinance in keeping with these rules would likely satisfy the heightened *Reed* test—at least in the view of three Supreme Court Justices.

In sum, while the *Reed* decision instructs courts to be highly skeptical of codes that impose different standards for different categories of signs, the ruling is not intended to prevent governments from regulating signs in a way that protects public safety and serves other legitimate governmental objectives.

Post-*Reed* Pointers For Municipal Officials

The *Reed* decision implicitly calls on municipal officials to reexamine their sign ordinances in light of the Court's expansion of what constitutes a content-based sign regulation. This is not an simple task. Determining whether a rule is content-based involves complex legal analysis, even with the guidance provided in the concurring opinion. But municipal officials can quickly spot whether their sign ordinance is at risk based on a relatively straightforward question:

> *Does your code enforcement officer need to classify a sign in order to figure out if it violates your sign ordinance?*

Put another way, does your sign ordinance make reference to *types* of signs (for example, real estate signs, political signs, business relocation signs, construction signs, open house signs, farm stand signs, or community events signs) and does the ordinance establish rules (such as dimensional requirements, quantity limits, or restrictions on the time of year or duration when a sign may be displayed) that *vary* based on those sign types? If so, then your ordinance is probably content-based.

Just because an ordinance is content-based does not mean it is per se unconstitutional. But a municipal official who answers the above question in the affirmative should not wait to take action. There are many ways to fix a sign ordinance so that it does not run up against *Reed,* and towns do not necessarily need to abandon the common practice of regulating signs based on categories to be on the right side of the First Amendment. The key to avoiding a legal challenge is to spot the issue early and consult with a qualified legal professional on ways to safely enforce your existing sign ordinance while making revisions that pass constitutional muster.

Endnotes

1. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218 (2015).
2. Liptak, Adam, Court's Free-Speech Expansion Has Far-Reaching Consequences (August 17, 2015), available at http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html.

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Municipal Sign Ordinances after *Reed v. Town of Gilbert*

Because the Town of Gilbert sign code placed stricter limits on temporary events signs but more freely allowed ideological and political signs—despite the fact that all three sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

As a result of *Reed*, a sign code that makes *any* distinctions based on the message of the speech is content based. Only after determining whether a sign code is neutral on its face would a court inquire as to whether the law is neutral in its justification.

Municipalities should review their sign codes carefully, with an eye toward whether the code is truly content neutral. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems.

Check to be sure your sign code has all of the "required" elements of a sign code.

- The code should contain a purpose statement that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
- The code should contain a message substitution clause that allows the copy on any sign to be substituted with noncommercial copy.
- The code should contain a severability clause to increase the likelihood that the code will be upheld in litigation, even if certain provisions of the code are not upheld.
- In preparing the purpose statement, it is always best to link regulatory purposes to data, both quantitative and qualitative. For example, linking a regulatory purpose statement to goals of the local master plan, such as community beautification, increases the likelihood that the code will survive a challenge.
- If traffic safety is one of the purposes of the sign code (it should be), consult studies on signage and traffic safety to draw the connection between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above, planners and lawyers should look to whether the code contains any of the sign categories that most frequently lead to litigation. For example, if the code creates categories for political signs, ideological or religious signs, real estate signs, construction signs, temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule, the more complicated a sign code is—i.e., the more categories of signs the code has—the higher the risk of a legal challenge.

Sign Code Guidance from the Court (Alito's Concurrence):

A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny.

The requirements of your ordinance may distinguish among signs based on any content-neutral criteria. Here are some specific standards the Court might uphold:

- Rules regulating the size of signs.
- Rules regulating the locations in which signs may be freestanding signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Possible Sign Code Changes:

Increase the overall allotment of temporary signs to accommodate the maximum demand for such signage at any one time, and allow that amount of temporary signs. A regulation that singles out off-premises signs that does not apply to a particular topic, idea, or viewpoint is probably valid because it regulates the locations of commercial signs generally, without imposing special burdens on any particular speaker or class of speakers.

Define government signs and Traffic Control Devices as signs, but specifically authorize them in all districts. Provide a base allotment of signs, and allow additional signs in relation to activities or events. Every property has a designated amount of square feet of signage that they can use for any temporary signs on their property, year round. For example: [x] square feet per parcel, in a residentially-zoned area, with a limit on the size of signs and perhaps with spacing of signs from one another. All properties get additional noncommercial signs at certain times, such as before an election or tied to issuance of special event permit. They key is to tie the additional sign allowance to the use of the property, rather than the content of the sign. Consider the following:

- Allow an extra sign on property that is currently for sale or rent, or within the two weeks following issuance of a new occupational license (real estate or grand opening signs).
- Allow an extra sign of the proper dimensions for a lot that includes a drive-through window, or a gas station, or a theater (drive thru, gas station price, and theater signs).
- Allowing additional sign when special event permit is active for property (special event signs). Key: not requiring that the additional signage be used for the purpose the sign opportunity is designed for, or to communicate only the content related to that opportunity.
- Grant an exemption allowing an extra sign on property that is currently for sale or rent.
- Grant exemptions allowing an extra sign (<10 sq. ft., < 48 inches in height, and <six feet from a curb cut), for a lot that includes a drive-through window.

Every parcel shall be entitled to one sign <36 sq. inches in surface area to be placed in any of the following locations: On the front of every building, residence, or structure; on each side of an authorized United States Postal Service mailbox; on one post which measures no more than 48 inches in height and 4 inches in width.

Provide a content-neutral application process: Citizens can apply, by postcard or perhaps online, for seven-day sign permits, and receive a receipt and a sticker to put on the sign that bears a date seven days after issuance, and the municipality's name. The sticker must be put on the sign so that enforcement officers can determine whether it's expired. Because the expiration date is tied to the date of issuance, there is no risk of content-discrimination. The sticker itself would be considered government speech.