



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

Memorandum

Date: November 9, 2015

To: Fran L'Heureux, Chair, & Members, Zoning Board of Adjustment

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

Subject: **Morgan Hollis of Gottesman & Hollis on behalf of Ralph & Jeanne Reed and Sunrise Homes, LLC (owners)** – Request for Rehearing regarding Case # 2015-35, in which the Board voted to deny a Variance under Section 3.02 of the Zoning Ordinance to permit a subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and 43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required). The parcel is located at 50 Wilson Hill Road in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 4B, Lot 105. Case # 2015-40.

The following information is provided to aid in your consideration of the above referenced case. The written request for a rehearing by Attorney Hollis is in your packet. Additionally, my memo for the Variance and the meeting minutes of the September 30, 2015 hearing are also included in your packet.

Background:

On September 30, 2015, the Board denied the petitioner's request for a variance under Section 3.02 of the Zoning Ordinance to permit a subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and 43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required).

On October 29, 2015 the petitioners, through their attorney, filed a request for a rehearing, pursuant to RSA 677:2, citing the following primary reasons for justifying the request:

- ◆ That the ZBA used and applied incorrect standards in determining whether the variance would violate the spirit of the ordinance;
- ◆ That the ZBA did not find the variance to be contrary to the public interest and therefore is inconsistent with the ZBA's finding that the variance was contrary to the spirit of the ordinance;
- ◆ That the ZBA used incorrect standards and unlawfully applied them in determining that surrounding properties "could" be diminished by granting of the variance. Further that the ZBA denied the petitioner due process by refusing to accept evidence from the petitioner's expert regarding impact to property values; and

- ◆ That the ZBA failed to recognize the character of the existing neighborhood in relation to the requirements of the ordinance, particularly that 38 nearby properties are existing non-conforming lots with relation to lot size, frontage or both lot size and frontage.

As per RSA 677:2, a request for a rehearing shall be made within 30 days from the date the Board voted to approve or disapprove the application. Under RSA 677:3, upon the filing of a motion for a rehearing, the Board shall consider whether to grant or deny the motion for a rehearing within 30 days, or the next available regular meeting of the Board. The decision of the Board on a request for a rehearing is based solely upon the written request made by the Petitioner. ***No public testimony (including from the petitioner) is to be accepted at the meeting***, however "the Board may consult with town staff, legal counsel or any other necessary party in reaching its decision as deemed appropriate by the Chair" (Sec. VI B, 3 of the By-Laws of the Merrimack Zoning Board of Adjustment, last revised 7/22/10). If the rehearing request is granted by the Board, the rehearing is to be held in conformance with the procedures and rules that would apply to a new appeal.

RSA 677:3 states that the applicant "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The ZBA should limit its discussion of whether to grant the rehearing only to the contents of the petitioner's written request for a rehearing (i.e. the contents of Attorney Hollis' October 29, 2015 letter). Furthermore, should the Board grant the request for a rehearing, the Board may choose to limit the scope of the rehearing to issues raised by the moving party in the motion for a rehearing (a rehearing would take place at the next available ZBA meeting that the petitioner submits application materials in time for). Should the Board deny the request for a rehearing, the petitioner may then follow the procedures set forth in RSA 677:4 and file an appeal with the Superior Court within 30 days of the Board's decision.

Standard of Review:

To grant the request for the rehearing, the Board must determine that the decision complained of was unlawful or unreasonable (RSA 677:3).

cc: Correspondence & Zoning Board File

ec: Sunrise Homes, LLC, Owner/Petitioner
Ralph & Jeanne Reed, Original Petitioners/Owners
Morgan Hollis, Gottesman & Hollis
Fred Kelley & Carol Miner, Building Department

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the enclosed porch would provide more seating for patrons and customers. This would allow higher volume of turnover and result in a positive increase in revenue and tax collection for the Town of Merrimack. It would allow customers to have a more enjoyable experience and provide scenery of the public greenway across D.W. Highway;
2. The spirit of the Ordinance is observed because the proposed porch would accommodate the seating arrangement and would not directly affect D.W. Highway traffic patterns. It would re-use a pre-existing non-conforming structure. The paving and landscaping would create curb appeal. The atrium would be on the same level as the floor area;
3. Granting this variance would do substantial justice because it would double the dining space and provide a pleasant atmosphere;
4. The values of the surrounding properties would not be diminished because the improvements, including landscaping and an attractive exterior, will increase the value of this property and of the surrounding properties and positively impact property tax revenues;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property. The front encroaches on the setback and the property is a pre-existing non-conforming property.
 - 2) The proposed use is a reasonable one because it will increase Merrimack tax revenue.

The Board voted 5-0-0 to take up agenda item #6 before agenda item #4, on a motion made by Richard Conescu and seconded by Patrick Dwyer.

6. Sandford Survey and Engineering, Inc. (petitioner) and Ralph & Jeanne Reed (owners) – Variance under Section 3.02 of the Zoning Ordinance to permit a subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and 43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required). The parcel is located at 50 Wilson Hill Road in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 4B, Lot 105. Case #2015-35.

Tim Thompson explained that two frontage size and two lot size variances are requested. As of 2000, the lot is in the R-1 (Residential) District by map. If soil standards for the previous R District were applied, the applicant would not have had to appear before the Zoning Board of Adjustment (ZBA).

Earl Sandford, Land Surveyor and Professional Engineer, Sandford Surveying and Engineering, said the open area could have been developed without a Variance into a uniform rectangular lot based on the zoning at the time the house was built. He read the statutory criteria into the record and corrected the frontage footage on the agenda from 133.03' to 158.38'. He showed the lot sizes of other lots on Wilson Hill Road.

As to #2, spirit of the Ordinance, Lynn Christensen said nothing prevents the Boy Scouts from developing their land. Earl Sandford said they would need variances, but it is neither practical nor feasible because of the terrain and the wetland.

Regarding #5, Richard Conescu stated that the applicant presented a good explanation of unnecessary hardship.

Patrick Dwyer asked the reason for the subdivision, which Earl Sandford said is to build a second house. Fran L'Heureux asked if the second lot would be sold. Earl Sandford replied that the owners would do whatever would give them value for their retirement.

Public comment

Patrick Dwyer read a letter from Joseph Herlihy, 49 Wilson Hill Road, into the record. Mr. Herlihy opposes the Variance because the houses on Wilson Hill Road are on wells and septic with a minimum of 2.25 acres to protect groundwater. The applicant's is one of the smallest lots and barely conforms to regulations. The Variance would create two non-conforming lots, which would be the smallest in the neighborhood. There is not enough road frontage. A precedent should not be set for future development. The owners will leave town and the new owners are investors who may not have the best interests of the neighborhood in mind. It will have a negative impact on property values.

David Elliott, 54 Wilson Hill Road, agreed with Mr. Herlihy. The subdivision does not fit the neighborhood's design. Other neighborhood homes are designed to fit at the edge of the woods. This house will be on top of other houses. By this standard, Joseph Herlihy could fit five lots on his property across the street.

Joseph Herlihy said that, in 2000 the zoning changed to make the neighborhood less dense. Earl Sandford showed how small the neighboring lots are, based on the Town's GIS map, which Tim Thompson stated is an accurate representation of the lots existing in the area.

Richard Conescu asked if more variances would be needed for the side setbacks. Earl Sandford replied in the negative. Lynn Christensen asked whether the lots would be consistent with others on the street. Tim Thompson explained that the Variance would allow a subdivision that would be the same as any other on the road could have been prior to 2000. He stated that many of the lots in the area are non-conforming from a frontage standpoint, but that he did not confirm any information about lot sizes of other lots in the area. Earl Sandford said there are 38 non-conforming lots on Wilson Hill Road, 20 of which are also non-conforming in area. The ZBA granted a similar variance before. Tim Thompson said that a similar variance was granted for a different lot in August 2015, but variances do not set a precedent, as each case is decided on the individual circumstances of the lot.

Richard Conescu asked Joseph Herlihy about the statement in his letter that investors would purchase the house. Is he concerned about the dimensions of the house or the future buyers? Joseph Herlihy replied that his concern is the integrity of the development, which would be like a cluster development. He did not want to use the old standards. On that basis, he could put four new homes on his lot. David Elliott said that he was told when he bought his home that no more houses would be built on Wilson Hill Road. Joseph Herlihy said his neighbor was denied a variance for a two-acre lot in 2000. The Reeds would have to build a small house to meet the setbacks. Richard Conescu understood Joseph Herlihy's issue to be the size of the property in comparison with other properties, but the ZBA wants to know whether this lot looks like other lots. Joseph Herlihy warned against two non-conforming lots rather than one. Richard Conescu said the issue of future owners is irrelevant.

Tim Thompson said the buildable area is approximately 200' x 100', so there is a significant building envelope that can easily accommodate a single-family home.

Patrick Dwyer opposed the Variance on the grounds that it does not meet the spirit of the Ordinance because the new lot size would be almost 60,000 square feet less than required and because the cluster appearance would diminish the values of the surrounding properties.

A motion to grant the variance, with one condition, failed 1-4-0, on a motion made by Richard Conescu and seconded by Fran L'Heureux. Fran L'Heureux, Tony Pellegrino, Patrick Dwyer, and Lynn Christensen voted in the negative.

The Board voted 4-1-0 to deny the Variance, based on the reasons listed below, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino. Richard Conescu voted in the negative.

Findings of Fact

1. The spirit of the ordinance was not observed as the proposed lots would be less than 40% of the minimum required size under the requirements of the ordinance; and
 2. The value of surrounding properties could be diminished by the introduction of smaller lots into the existing neighborhood.
- 4. Peter Stoddard of S&H Land Services, LLC. (petitioner) and MDR Rehab and Development, LLC. (owner) – Variance under Section 3.05 of the Zoning Ordinance to permit a single-family home to be built 9 ft. from the front property line whereas 30 ft. is required and 9 ft. from the side property line whereas 15 ft. is required. The parcel is located on 1 Donald Road in the R (Residential) District. Tax Map 6A-1, Lot 138. Case # 2015-33.**

Peter Stoddard, S&H Land Services, LLC., read the statutory criteria into the record.

Tim Thompson explained that there are no rear setbacks because the property has dual frontage. The house is non-conforming. The lots were platted in the 1940s, many years before there were zoning laws in Merrimack.



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Memorandum

Date: September 22, 2015
To: Fran L'Heureux, Chair, & Members, Zoning Board of Adjustment
From: Timothy J. Thompson, AICP, Community Development Director
Subject: **Sandford Survey and Engineering, Inc. (petitioner) and Ralph & Jeanne Reed (owners)** – Variance under Section 3.02 of the Zoning Ordinance to permit a subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and 43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required). The parcel is located at 50 Wilson Hill Road in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 4B, Lot 105. Case # 2015-35.

The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

Background:

The subject parcel is located at 50 Wilson Hill Road in the R-1 (Residential, by map) and Aquifer Conservation Districts. The parcel is surrounded by similar single family residential development and Camp Whip-O-Will, owned by the Boy Scouts of America. The existing lot and proposed lot are proposed to be serviced by on-site wells and on-site septic systems.

The proposed subdivision does not conform to the requirements of the R-1 District under Section 3.02 of the Ordinance, as the proposal calls for the following:

- Creation of a lot (proposed lot 105) with less than the required 100,000 square feet of lot area (approximately 70,385 square feet is proposed);
- Creation of a lot (proposed lot 105-2) with less than the required 100,000 square feet of lot area (approximately 43,571 square feet is proposed);
- Creation of a lot (proposed lot 105) with less than the required 250 feet of frontage (150 feet is proposed);
- Creation of a lot (proposed lot 105-2) with less than the required 250 feet of frontage (133.03 feet is proposed).

Standard of Review: It is the burden of the Petitioner to demonstrate that the five requirements for the granting of a Variance under Section 3.02 of the Zoning Ordinance have been met to permit subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and

43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required).

Staff recommends that should the Board vote to grant the variance that it be granted with the following condition:

- The applicant shall obtain subdivision approval from the Planning Board for the proposed 2-lot subdivision.

cc: Correspondence & Zoning Board File

ec: Sandford Survey and Engineering, Inc., Petitioner
Ralph & Jeanne Reed, Owners
Carol Miner and Fred Kelley, Building Department