



# 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](http://www.merrimacknh.gov)

Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

WEDNESDAY, SEPTEMBER 25, 2013

Members present: Patrick Dwyer, Phil Straight, Tony Pellegrino, Kevin Shea, and Alternates Leonard Worster, Nathan Barry and Richard Conescu.

Members absent: Fran L'Heureux.

Staff present: Planning and Zoning Administrator Nancy Larson and Recording Secretary Zina Jordan.

#### 1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m.

#### 2. Roll Call

Patrick Dwyer led the Pledge of Allegiance. Kevin Shea read the preamble. Patrick Dwyer swore in members of the public who would be testifying and designated Nathan Barry to sit for Fran L'Heureux.

**3. The Lynda Tomasian Revocable Trust, Lynda Tomasian, Trustee & The Stephanie Tomasian Revocable Trust, Lynda & Warren Tomasian, Trustees (petitioners/owners) –** for a Request for a Re-Hearing of an Appeal of an Administrative Decision under Section 3.02 of the Zoning Ordinance (Case # 2013-22) which determined that lot area on one side of a prescriptive roadway cannot be used to satisfy the minimum contiguous area requirements. The parcels are located at 35 Tomasian Drive & 1 Tomasian Drive respectively, in the R-1 (Residential) & Aquifer Conservation Districts. Tax Map 4B, Lots 009 & 012. Case #2013-28.

On July 31, 2013, the Zoning Board of Adjustment (ZBA) denied the appeal of an administrative decision under Section 3.02 of the Zoning Ordinance that determined that lot area on one side of a prescriptive roadway cannot be used to satisfy the minimum contiguous upland area requirements. Attorney Chris Aslin, Bernstein Shur, asked that the Board take up agenda items #3 and #4 in reverse order. Nancy Larson explained that, if the request for a rehearing were denied, the ZBA would hear the request for a variance. If the request for a rehearing is granted, the ZBA will not hear the request for a variance. That explains the order of the two Tomasian items on the agenda. Attorney Aslin stated that, if the request for a variance were granted, he would withdraw the request for a rehearing. The request to reorder the agenda was denied.

Phil Straight and Kevin Shea supported granting the variance. Patrick Dwyer asked if overturning the request for a rehearing would set a precedent. Nancy Larson replied that this is just a request for a rehearing. The vote does not determine the outcome of a rehearing or overturn an administrative decision. The petitioner filed the request citing the following reasons to justify it: That the ZBA's decision was contrary to the spirit and intent of the Ordinance; that the denial of the Appeal of Administrative Decision creates a "dangerous precedent for property owners in Merrimack"; and that there was unnecessary concern regarding the site's soils. Tony Pellegrino

still supported denial. Nathan Barry stood by the Board's decision to deny, stating that there are no new facts to warrant overturning the administrative decision.

**A motion made by Kevin Shea and seconded by Phil Straight to grant the request for a rehearing failed, by a vote of 2-3-0. Patrick Dwyer, Tony Pellegrino and Nathan Barry voted in the negative.**

Phil Straight would deny the rehearing request because the ZBA did not want to set precedent for future requests about a non-prescriptive road.

**The Board voted 3-2-0 to deny the request for a rehearing, on a motion made by Phil Straight and seconded by Tony Pellegrino. Patrick Dwyer and Kevin Shea voted in the negative.**

**4. The Lynda Tomasian Revocable Trust, Lynda Tomasian, Trustee & The Stephanie Tomasian Revocable Trust, Lynda & Warren Tomasian, Trustees (petitioners/owners) –** Variance under Section 3.02 of the Zoning Ordinance to permit a lot with 76,325 square feet of contiguous non-wetland uplands where 100,000 square feet is required and with approximately 235 feet of lot depth where 300 feet is required. The parcel is located at 1 Tomasian Drive in the R-1 (Residential) & Aquifer Conservation Districts. Tax Map 4B, Lot 012. Case # 2013-29.

As to the variance for inadequate contiguous upland area, Attorney Chris Aslin, Bernstein Shur, said the 8-acre lot would be subdivided into three lots. Two meet the contiguous upland requirement and are classified as severe soils. The third lot does not meet the requirement. There is a significant wetland area on the two legal lots; the third non-legal lot is completely uplands and dry and actually the best lot on which to build. As to the variance for inadequate lot depth, test pits dug in 2012 by Meridian Land Services determined that they are moderately drained soils. The discrepancy is that town USDA maps say the soils are severe. Nancy Larson stated that, if a surveyor and soil scientist submit a subdivision plan that says the soils are moderate, the Community Development Department would use that determination. Phil Straight opined that it might be the answer to getting a variance. Attorney Aslin said no soil analysis was done, so the severe type is based on the town USDA map, which Phil Straight said is known to be inaccurate.

Attorney Aslin proposed that the third lot is appropriate for a septic system, which is the purpose of the area and depth requirements. Based on actual soil conditions, the lot is more than adequate to satisfy the septic system requirement. It is a standard, rectangular shaped lot. The applicant would grant an area easement to lot that he originally proposed to be merged, making it 100,000 square feet. Nancy Larson clarified that the applicant would grant the easement from the centerline portion of Lester Road to the north into Lot 4B-9 and would add more area to Lot 3. It is not usable, however, because a septic system cannot be put in the middle of Lester Road. Attorney Aslin said it would not be part of Lot 3, just an easement.

Attorney Aslin read the points of law into the record.

Tony Pellegrino asked why the easement would be granted if a variance were approved. Attorney Aslin said how much of a variance to grant is up to the ZBA. It can make the easement a condition of approval if necessary.

Nathan Barry noted that the ZBA has no paperwork about the soil test, which Attorney Aslin said he could provide. Nancy Larson said the test pit report does not designate soil type, just depth to the water table.

Phil Straight suggested that the applicant bring soil samples to staff to show how well drained the soil is, explaining that the ZBA needs backup to grant a variance. Nancy Larson said that, if someone pays to map soil type and it is determined to be moderate, a variance would not be

necessary. If the petitioner does not want to do that, a variance is needed. Staff cannot determine soil type. Attorney Aslin said the water table is 24"-36" deep. It is a hardship to require everyone in town to pay for a soil analysis because the soil maps are inaccurate. Phil Straight stated that, in the future, the ZBA needs proof.

There was no public comment.

Kevin Shea said the answer is clear and the request well presented, but he did not want to overturn an administrative decision. Phil Straight agreed, but he has reservations about the soil type.

**The Board voted 5-0-0 to grant the variance for inadequate contiguous upland area, on a motion made by Kevin Shea and seconded by Nathan Barry.**

**The Board voted 5-0-0 to grant the variance for inadequate lot depth, on a motion by Tony Pellegrino and seconded by Kevin Shea.**

### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because the proposed lot is comprised entirely of uplands with no wet areas and has moderately well draining soils and more than adequate area and depth to support a single-family septic system. There will be no adverse impact on the health safety or welfare of the public;
2. The spirit of the ordinance is observed because the proposed lot has adequate uplands to support a single-family septic system. There would be no change to the character of the neighborhood and there will be no adverse impact on the health safety or welfare of the public;
3. Granting this variance would do substantial justice because denial would cause a substantial loss to the applicants by preventing a reasonable subdivision of their property with no appreciable gain to the public;
4. The values of the surrounding properties would not be diminished because the essential character of the neighborhood would not be substantially altered.
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 because of the special condition of the proposed lot. Although it contains moderately well draining soils, they are designated as "severe" soils under the Ordinance, which applies the most stringent lot area and depth requirements. If the soils were appropriately considered moderate, the proposed lot would nearly satisfy the lot area requirement (80,000 square feet for moderate soils) and would exceed the lot depth requirement (200' for moderate soils);
  - 2) The proposed use is a reasonable one because it is a permitted use and the lot has sufficient contiguous non-wetland areas to support a single-family septic system.
5. **Robert K. Spitz Revocable Trust, Robert Spitz, Trustee (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a garage (24'x24') 18 feet from the front property line whereas 50 feet is required and the construction of a front porch (8'4"x4') to 16 feet from the front property line whereas 50 feet is required. The parcel is located at 106 Seaverns Bridge Road in the R-1 (Residential) & Aquifer Conservation Districts. Tax Map 3A, Lot 060-1. Case #2013-30.

Robert Spitz, 106 Seaverns Bridge Road, said he has a very small older home of 1,200 square feet. He wants to expand it to make it more livable, by adding an attached garage with a bonus room above it, a steeper roof to shed snow, and a front porch to protect against ice and snow when residents enter the house. Because the house is in the 100-year flood plain and Shoreland Protection District, its use is limited. It is located closer to the front setback than current zoning allows, as do other properties in the area.

Robert Spitz read the points of law for both the garage and front porch setbacks. Nancy Larson pointed out that the agenda item incorrectly lists the distances, which are 15' from the property line for the garage and 14' for the front porch.

There was no public comment.

Nathan Barry and Tony Pellegrino said the request is reasonable and in line with the rest of the neighborhood. Phil Straight said other houses are crowded up to the road, so this one would not look out of place. Kevin Shea noted that the house could not be moved. Patrick Dwyer said it would look nice.

**The Board voted 5-0-0 to grant the variance for the garage to be constructed 15' from the front property line, with the condition that the applicant shall obtain all appropriate permits from the NH Department of Environmental Services, on a motion made by Nathan Barry and seconded by Kevin Shea.**

**The Board voted 5-0-0 to grant the variance for the front porch to be constructed 14' from the front property line, with the condition that the applicant shall obtain all appropriate permits first from the NH Department of Environmental Services on a motion made by Nathan Barry and seconded by Tony Pellegrino.**

#### **Findings of Fact (garage)**

1. The granting of the variance would not be contrary to the public interest because the location of the garage addition would not impact traffic flow, plowing, road maintenance, visibility, public drainage, or police and fire access;
2. The spirit of the Ordinance is observed because the proposed addition would enhance and improve a residential home;
3. Granting this variance would do substantial justice because expanding this small house with an attached garage structure allows for an overhead bonus room to accommodate a larger family. Several family members have physical and health issues. An attached garage on the main level is important during long winter months. Substantial portions of the property are within a 100-year flood zone and also have Shoreland Protection restrictions. Construction of the garage addition on higher ground utilizing existing foundations and primarily on existing impervious surfaces minimizes adverse environmental impact as well as provides adequate protection of the living area against flood hazards;
4. The values of the surrounding properties would not be diminished because the addition will increase the value of the homeowner's property and provide features that are common in neighboring houses. Many abutting homes have been renovated. Renovations to this 1950s-era house will contribute to enhancing the neighborhood and increase the value of the overall neighborhood. Many nearby homes on this rural older street also have similar limited front setbacks. There would be no effect on the space or privacy of neighbors;
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 because, due to the presence of a 100-year flood plain and Shoreland Protection

limitations, the options for expanding the main house structure are limited. Building closer to the river or on lower ground entails the risk of flood damage. Due to the curve in Seaverns Bridge Road along the front property line, it is located in the far side of the right-of-way. Ample space between the current dwelling with garage addition and Seaverns Bridge Road will still exist. The addition will be approximately 30' from Seaverns Bridge Road;

- 2) The proposed use is a reasonable one because the proposed garage addition offers a needed attached garage as well as additional finished living space above it. It will have negligible impact on the Shoreland Protection while allowing the expansion of a small (1,200 square foot) 1950s-era house into a much more reasonable modern residential property.

- B. If the criteria in subparagraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property. Due to the unique limitations with property flood plain and Shoreland Protection restrictions, the owner will be unable to expand adequately and use his house as enjoyed by other members of the community.

#### **Findings of Fact (front porch)**

1. The granting of the variance would not be contrary to the public interest because the proposed location would not impact traffic flow, plowing, road maintenance, visibility, public drainage, or police and fire access. The porch is small, 4' x 8' in size, and would not negatively impact the views of any abutting properties;
2. The spirit of the Ordinance is observed because the proposed addition is to enhance and improve a residential home;
3. Granting this variance would do substantial justice because adding a covered front porch will provide protection from the elements for family and guests entering the house;
4. The values of the surrounding properties would not be diminished because the addition will increase the value of the homeowner's property and provide features that are common in neighboring houses. Many abutting homes have been renovated. Renovations to this 1950s-era house will contribute to enhancing the neighborhood and increase the value of the overall neighborhood. Many nearby homes on this rural older street also have similar limited front setbacks. There would be no effect on the space or privacy of neighbors;
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 because, due to the presence of a 100-year flood plain and Shoreland Protection limitations, the options for expanding the main house structure are limited. The original house was placed at this location prior to current zoning. Due to the curve in Seaverns Bridge Road along the front property line, it is located in the far side of the right-of-way. Ample space between the current dwelling with porch addition and Seaverns Bridge Road will still exist. The addition will be approximately 30' from Seaverns Bridge Road;
  - 2) The proposed use is a reasonable one because the proposed porch addition will provide a safer entry to the home during inclement weather and replace an existing front stoop. It will require only a small additional footprint and will still remain approximately 30' from Seaverns Bridge Road pavement.

B. If the criteria in subparagraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property. Due to the unique limitations with property flood plain and Shoreland Protection restrictions, the owner will be unable to expand adequately and use his house as enjoyed by other members of the community.

**6. Discussion/possible action regarding other items of concern: Request for 3<sup>rd</sup> Party Review of Traffic – Aoude Special Exception (Case #2013-25).**

Nancy Larson explained that, at the August 28, 2013 ZBA meeting, during discussion of traffic for a proposed car wash at Mobil on the Run, the traffic engineer stated that there has been a significant reduction in the number of trips on D.W. Highway. The petitioner has requested third party review of the submitted traffic information. Community Development Director Tim Thompson informed the petitioner that he could not authorize third party review without authorization from the Zoning Board. Tim Thompson suggested a written request from the petitioner to the ZBA, which is the request before Board tonight. Although State law allows the ZBA to ask for third party review, it does not allow redundant third party review. If the ZBA wants third party review, then CLD will not review traffic for the Planning Board meeting. Nancy Larson asked whether the ZBA wishes staff as its designee to authorize the study or whether it feels that it needs such a review to make an informed decision.

Richard Conescu said the data are a few years old. Since then, a highway was constructed to connect Route 3 to the airport. It is another way to dodge the tollbooth and it might have an impact on D.W. Highway. Kevin Shea said it is not the ZBA's business. The Planning Board should do the study. Nancy Larson said the site plan might evolve before final submission to the Planning Board, who may determine that the study submitted to the ZBA last March is sufficient. Nathan Barry asked whether the ZBA could make the Planning Board's traffic study a condition of its approval. Nancy Larson said they would do it anyway. Kevin Shea said it is known that D.W. Highway is a busy road. Leonard Worster said nothing in the report is earth shattering. There is no value in spending the applicant's money for third party review. The State traffic count numbers are what they are. He has no issue with the road traffic; the issue is internal traffic. Let the Planning Board do the study. Tony Pellegrino and Nathan Barry agreed. Phil Straight had no problem approving the car wash conditional on Planning Board approval. Nancy Larson said the applicant would either submit the same study to the Planning Board or an updated study. Patrick Dwyer added that the Planning Board would look closely because D.W. Highway is a main road. He agreed with Leonard Worster that the ZBA does not need a study. Phil Straight also agreed.

**By 5-0-0, it was the consensus of the Board not to authorize a 3<sup>rd</sup> party review of the traffic study.**

**7. Discussion on adopting a policy in the ZBA Bylaws on absences**

Phil Straight said it is common for the chair to ask a member to resign after three unexcused absences and to declare the seat vacant after five. Richard Conescu saw no policy in the by-laws. Patrick Dwyer said it must be known ahead of time whether there would be a quorum. Not having a full Board is unfair to petitioners. He prefers a cap of three unexcused absences. A member is responsible for informing the ZBA whether s/he will attend. Kevin Shea said a member would know if s/he is needed for a quorum if everyone replies about attending a meeting. Members should try to organize their schedules around ZBA meetings as a professional and

personal courtesy. The extra work of making policy is unnecessary. If a member were not serious, s/he would resign, and should not have to be asked to. Phil Straight was concerned about having a meeting with too few people and wanted a policy in the by-laws. An excuse can be sent via e-mail to staff and the chair. Tony Pellegrino did not think that three absences is stringent. It is a courtesy to other members. If there are only four members at a meeting with no majority, the petitioner is given the option of returning at another meeting. Nancy Larson informed the ZBA that it could only recommend the removal of a member to Town Council, who has the only authority to remove a member. Kevin Shea preferred less government. He repeated that someone should quit if s/he cannot fulfill the obligation rather than be asked to leave. Leonard Worster requested an updated list of members. Nancy Larson informed the Board that the membership list with appointment dates is on the town website, but she will provide hard copies. Nathan Barry considered the proposed policy reasonable. Richard Conescu wanted to communicate with rather than "criminalize" a member. Phil Straight clarified that he meant the three absences to be consecutive. Patrick Dwyer opined that a member would probably leave after too many absences, but preferred that everyone have the policy in writing. The ZBA defined "unexcused" as "failure to notify staff". Phil Straight noted that only the chair could excuse a member.

**The Board voted 3-1-1 to adopt a policy that the chair would confer with a member after three consecutive unexcused absences and would recommend to the Town Council that the member be removed after five annual unexcused absences, on a motion made by Phil Straight and seconded by Tony Pellegrino. Nathan Barry voted in the negative. Kevin Shea abstained.**

#### **8. Discussion/possible action regarding other items of concern**

None.

#### **9. Approval of Minutes – August 28, 2013**

**The minutes of August 28, 2013, were approved as submitted, by a vote of 4-0-2, on a motion made by Tony Pellegrino and seconded by Phil Straight. Kevin Shea and Nathan Barry abstained.**

#### **10. Adjourn**

**The meeting adjourned at 8:25 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Kevin Shea.**