



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, APRIL 27, 2016

Members present: Patrick Dwyer, Tony Pellegrino, Richard Conescu, Lynn Christensen, and Alternate Leonard Worster.

Member absent: Fran L'Heureux.

Staff present: Assistant Planner Robert Price and Recording Secretary Zina Jordan.

1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m. and designated Leonard Worster to sit for Fran L'Heureux.

2. Roll Call

Tony Pellegrino led the pledge of allegiance. Richard Conescu read the preamble. Lynn Christensen swore in members of the public who would be testifying.

3. **Bernstein, Shur, Sawyer & Nelson, PA. (petitioner) and 427 DW Highway, LLC. (owner)** - Variance under Section 3.02 to permit the creation of a third dwelling unit in an existing detached garage on a property with 15,200 square feet whereas 120,000 square feet is required. The parcel is located at 427 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Elderly and Town Center Overlay Districts. Tax Map 5D-4, Lot 76. Case #2016-011. **This agenda item is continued from the February 24, 2016 and March 30, 2016 meetings.**

Attorney Gregory Michael, Bernstein Shur, said the property is abutted by a multi-family residential building, Rivet's Funeral Home, and vacant land and is across the street from Prime Gas Station. The three spaces in the existing garage plus eight new spaces would create 11 parking spaces, which is more than the required 10.2 spaces. There would be no new construction. Proposed is a two-bedroom rental apartment over the garage. The space is now vacant and no longer needed for storage. The lower level is used for funeral home operations. This is a grand-fathered lot of record. The Town Center Overlay District was intended to allow residences over commercial buildings. The Ordinance is contradictory because it requires a minimum lot size of 20,000 square feet but also allows residential uses anywhere in the district. This proposal does not conform to the square footage requirement. A more intense mixed use was originally intended. This one is in walking distance of commercial uses and fits the intent of the Ordinance.

Attorney Michael Klass, Bernstein Shur, read the statutory criteria into the record.

Lynn Christensen liked having more rental space in the Town Center. Leonard Worster said a clean, safe unit whose tenant could walk to amenities makes sense.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, with the condition that the applicant shall obtain site plan approval from the Planning Board for the proposed multi-family residence, on a motion made by Lynn Christensen and seconded by Richard Conescu.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because no building envelope would be changed. While the total residential density of the property would increase slightly, no additional infrastructure is required. The proposed two-bedroom unit would be serviced by Town water and sewer. The property's use would not change significantly. It would simply allow the applicant better to utilize a portion of the garage that was originally intended to be used for storage. Residential uses are encouraged in this part of town. The Town Center Overlay District allows residential uses and encourages mixed land uses. There are five multi-family dwellings in the neighborhood. The proposal seeks to add a two-bedroom dwelling unit to space that is already constructed and is currently underutilized. The application would allow for the safe and reasonable use of the space in a manner that promotes convenience by adding needed housing stock to the Town's inventory;
2. The spirit of the Ordinance is observed because the proposed third dwelling unit is serviced by Town water and sewer and located in the Town Center Overlay. The proposal would not expand the garage's building envelope. Rather it would allow the applicant to use certain storage space above the existing garage in a safe and reasonable manner and in a way that is consistent with the existing diverse neighborhood, which contains various multi-family properties;
3. Granting this variance would do substantial justice because denial would not results in an appreciable gain to the public, given that the proposed dwelling unit is designed to use existing, underutilized space in the property's garage. It would be used consistently with the district's permitted uses and in line with the surrounding neighborhood, which includes various multi-family properties (one of which is directly next door). The proposed unit would not threaten public safety, health or welfare, as this part of Town and the property can safely support another dwelling unit. The property is serviced by Town sewer and water. Traffic concerns are not a problem, given that the property is adjacent to D.W. Highway. Denying the application would result in a substantial loss to the applicant by preventing the safe and reasonable use of what is currently storage space in an existing building. The loss of denial greatly exceeds any public gain;
4. The values of the surrounding properties would not be diminished because the requested relief would not diminish the character of the neighborhood, which includes various multi-family dwellings in addition to a mixed and diverse variety of uses in the Town Center. The proposed dwelling unit would be used in a manner consistent with

these neighboring lots and should not produce different or significant traffic, noise, odors, or other detrimental impacts to the surrounding area;

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 the intent of the minimum lot area requirement is to ensure residential development of reasonable densities. This unique location, which is serviced by Town water and sewer, combined with the property's size and existing improvements, supports higher densities than what would otherwise be appropriate. There would be a modest increase of one additional dwelling unit in the free-standing garage. This configuration would allow three dwelling units to exist on the property safely and reasonably. This proposal is consistent with the existing character of the neighborhood, which contains other multi-family dwellings and various commercial and industrial uses;
- 2) The proposed use is a reasonable one because it contemplates residential use, which is allowed in the Town Overlay District. The adjacent multi-family dwelling contains five units and there are other multi-family structures in the neighborhood. The property is serviced by Town water and sewer, which ensures safe utility service.

4. 17 Outlets, LLC. (petitioner/owner) - Variance under Section 2.02.4 of the Zoning Ordinance to permit a retail use in an Industrial-2 (I-2) District. The parcel is located at 17 Premium Outlets Boulevard in the I-2 (Industrial), and Aquifer Conservation Districts, and Wellhead Protection Area. Tax Map 3C, Lot 191-03. Case # 2016-18.

Christopher Csendes, Architect, 17 Outlets, LLC, said the applicant seeks to lease the vacant unit to a Sprint cell phone provider as a retail use. It is in an industrial area on a commercially developed outparcel at the entrance of and abutting the Merrimack Premium Outlets (MPO) that was approved for a restaurant.

Christopher Csendes read the statutory criteria into the record.

As to #3, substantial justice, Lynn Christensen and Patrick Dwyer did not consider Fidelity Investments to be an abutter, but Robert Price stated that it is.

As to #5.A.2, Richard Conescu said that people do not shop where there are empty stores, so it is reasonable that this would help MPO to be successful.

There was no public comment.

Lynn Christensen noted that the intensity of use on this small parcel would be less than a permitted restaurant. Tony Pellegrino opined that the #5, hardship, could have been more strongly worded. Richard Conescu said that it is stronger than the way the Ordinance is worded. He questioned why a restaurant but not retail would be permitted, since it has food, sewage, etc. Retail use has less environmental impact than a restaurant. Leonard Worster said every possible use cannot be identified. This property is commercial and would use the existing footprint.

The Board voted 5-0-0 to grant the Variance, on a motion made by Richard Conescu and seconded by Lynn Christensen.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the site is at the entrance to one of the largest retail centers in the area. Allowing retail businesses at this location minimally increases the amount of retail space available to the neighborhood. It would not noticeably increase traffic to the site, if at all. The parking required is less than that of a restaurant. The store would not be open earlier or close later than the adjacent restaurants. The store is of a benign nature. The use of the space as retail would not negatively affect the surrounding properties;
2. The spirit of the Ordinance is observed because mobile communications have become a vital part of daily life, both personal and commercial. Providing a closer outlet for such services that many find indispensable allows people and companies more easily to access the services and equipment they need. I-2 zoning allows for support uses (restaurants, bars, offices, hotels). Mobile communications could be considered a new support use. For instance, some peoples' primary interaction with their bank is through their mobile phone;
3. Granting this variance would do substantial justice because mercantile use (MPO) is the primary component of the closest abutter. MPO appears to approve of and prefer that the property be used for retail rather than most uses allowed by I-1 zoning. The other abutter is Fidelity Office Park. Given the nature of the abutters, I-1 zoning may not be as appropriate for this site as it once was;
4. The values of the surrounding properties would not be diminished because the property has already been constructed. The exterior appearance and site improvements would not change, except for signage. Local ordinances would be observed. The covenants limit the nature of any retail business to one that would likely be considered acceptable in any location that allows mercantile uses. The nature and volume of traffic to the site should not noticeably change due to the change in use;
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 the closest abutter, MPO, is almost entirely retail in nature. It has its own Conditional Use Permit (CUP) that greatly changed the use of that property from the previous I-2 zoning. The other abutter, Fidelity Investments, is a large office campus with probably no industrial use and only accessory storage use, if at all. The structures on that site are not visible from this site;

- 2) The proposed use is a reasonable one because this property is adjacent to one of the largest retail centers in the state. Since the applicant necessarily has to traverse their property to enter his, it seems reasonable that his should have similar zoning restrictions. If the property were to be used as an allowed use, it would detract from the MPO experience, potentially making it a less successful mall (which is why the covenants exist). The other abutter is across a six-lane boulevard. Their buildings are substantially set back from the road.

5. Jessica Lott (petitioner) and Timothy Lott (owner) - Variance under Section 3.02 of the Zoning Ordinance to permit the construction of an enclosed porch within 23.50 feet of the front property line whereas 30 feet is required. The parcel is located at 17 Miriam Road in the R (Residential) District. Tax Map 6A-2, Lot 042. Case # 2016-19.

Jessica Lott, 17 Miriam Road, who wants to add an enclosed porch in front of her home, read the statutory criteria into the record.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, on a motion made by Tony Pellegrino and seconded by Lynn Christensen.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because there would be no impact on Town water, property, sewage or other contamination management or sensitive Town lands. The proposed porch would enhance the overall look of the home, increase its property value and be constructed commensurate with “construction best practices” to fit with other property improvements in the area;
2. The spirit of the Ordinance is observed because the proposed enclosed porch would not impact the criteria and would have the overall “look and street appeal” of the home, increase the property value, improve the use of the home, and be constructed commensurate with construction best practices to fit with other property improvements in the area;
3. Granting this variance would do substantial justice because the enclosed porch would enhance the property value. It would enable the owner to realize better living conditions through less heat loss through the front entrance as it is currently constructed; eliminate front door interference from snow load on the current awning over the front entrance; and provide an area for storing muddy and snowy boots, shoes, and wet clothing that otherwise must reside inside the front entrance in a severely constrained space. It would complement the neighborhood, as many of the homes display various enhancements. It would provide a level and direct access to the home’s front entrance for a wheelchair. The applicant has been diagnosed with MS and may require wheelchair assistance in the future to the front entrance, which is currently not the case. It would also entail changing out the currently proposed steps to a ramp in the

4. The values of the surrounding properties would not be diminished because it would enhance the overall “look and street appeal” of the home, increase the property value, improve the use of the home, and be constructed commensurate with “construction best practices” to fit with other property improvements in the area. The exterior of the finished enclosed porch would mesh with the existing home exterior. Attractive windows would be installed looking out toward Miriam Road as well as laterally;
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 the proposed enclosed porch would meet the criteria and have the net effect of enhancing the property value and street appeal of 17 Miriam Road. The overall lot size severely limits what a homeowner can do to enhance the utility, economy and curb appeal of the property and necessitates a variance to perform these necessary changes;
 - 2) The proposed use is a reasonable one because access to the front entrance needs to be enhanced. The proposed enclosed porch accomplishes these needs with a much more economical and weather resilient access to the front entrance, added storage for foul weather gear, enhanced property value and curb appeal, and future wheelchair accommodation should that become necessary. Denial would create a hardship for the owner by denying the use and reasonable utilization, enhanced economies and enjoyment that this addition would provide.

6. Joshua Naughton, Trustee (applicant) for 53 Pearson Street Realty Trust (owner) - Equitable Waiver of Dimensional Requirements under Section 2.02.7(A)(4) of the Zoning Ordinance to permit a 4 foot encroachment of front stairs and porch in the 40 foot wetland setback. The parcel is located at 53 Pearson Road in the R (Residential) and Wetlands Conservation Districts. Tax Map 7D, Lot 011-01. Case # 2016-20.

Jeffrey Burd, Agent, RJP Engineering, realized that the steps and porch were constructed in the wetland buffer. On November 18, 2015, the applicant received a variance for the rear portion of the home to encroach within the wetland setback, but not for the stairs in front of the home. It was the applicant’s oversight not to realize that the porch and steps would not fit into the setback.

Jeffrey Burd read the statutory criteria into the record.

As to #1, discovery of the nonconformity, he did not realize how far up the house was from the ground and that it would need steps in addition to a landing. Patrick Dwyer said he should have known about the wetland. Leonard Worster noted that, in many towns, steps are not part of the house and need not be in the setback. Jeffrey Burd agreed. It was a communication problem. This is a tight lot despite its size. Lynn

Christensen opined that, if there were just steps and no landing, there would not be a 4' encroachment. However the landing benefits the house. Patrick Dwyer asked what else could be in the buffer, such as a walkway. Lynn Christensen said that is not a Zoning Board of Adjustment (ZBA) concern. Richard Conescu's concern was that it is hard to prove there was no "ignorance of the law" or "failure to inquire". The applicant did not pay attention to the Ordinance. It is not a matter of inches but of 4'. If the applicant did not understand what a setback is, that is "ignorance of the law". Jeffrey Burd said he misjudged the distance to the setback and the size of the steps and landing. Richard Conescu suggested that it would have been easy to stop and get a variance during construction. Lynn Christensen suggested that no variance would be needed if the applicant built steps without a landing or built them sideways. Patrick Dwyer said it was a "failure to inquire". When he raised the foundation, the applicant should have known there was a problem. Jeffrey Burd said the issue is just three stairs to a landing. It would not look right to place them sideways.

Jeffrey Burd opted for the ZBA to vote on the Equitable Waiver rather than withdraw the application.

Lynn Christensen asked if steps count in the setback. Robert Price explained that a "structure" is something permanently located or attached to something permanently located and counts in a setback. Jeffrey Burd asked if the stairs could be detached and put on the walkway. He could install precast stairs that rest on a metal bracket and on the dirt. Robert Price noted that the applicant did discover a problem. There was no deliberate attempt to hide. He admitted his error. Jeffrey Burd said it was not done intentionally. He discovered the error when he did a survey to create a certified plot plan in order to apply for a Certificate of Occupancy (CO). He thought he would have more distance/room on the original plan. It was an innocent error.

There was no public comment.

The Board voted 4-0-1 to grant the Equitable Waiver, on a motion made by Lynn Christensen and seconded by Richard Conescu. Richard Conescu abstained.

Findings of Fact

The nonconformity was discovered after the structure was substantially completed by the builder upon seeking a Certificate of Occupancy from the Town Building Department.

- 1. The violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith,** but was instead caused by good faith error in measurement made by the builder and builder's agent by not realizing how close the building is to the setback line and not anticipating the size of the stairs, including the landing, that is needed to provide suitable access to the front door. The finished floor elevation is approximately 36" above the finish grade, which requires four steps with a landing in order to overcome the grade differential. The stairs are approximately 7' deep, where there is 3'-5' distance from the setback line to the main house. The applicant had received a variance from the Zoning Board of Adjustment on November 18, 2015, at which time they

would have included the front stairs in that application had they anticipated the need for the larger front entry stairs and the limited area in order to fit the stairs;

2. **The physical or dimensional violation does not constitute a public or private nuisance nor diminish the value of other property in the area nor interfere with nor adversely affect any present or permissible future uses of any such property** for similar reasons that were outlined in the original variance request made last year. The request would not alter the central character of the neighborhood nor would it threaten public health, safety or welfare and would therefore have no impact on the surrounding area or any abutters. Since this encroachment is very small, there would be no impact to the wetland area associated with the requested setback. This is a rural lot in a rural neighborhood with substantial buffers to adjacent properties and would not interfere with or adversely affect any present or permissible future uses of any surrounding properties;
3. **The cost of correction far outweighs any public benefit to be gained**, since the encroachment is very small and there would be no adverse impact to the wetlands, but merely within the 40' setback.

7. Discussion/possible action regarding other items of concern

Lynn Christensen, noting that several cases like Naughton have come before the ZBA, suggested that the Community Development Department emphasize that applicants should look more closely at plans and not come for an equitable waiver after the fact. Patrick Dwyer wanted anyone building near a wetland to be warned. Richard Conescu was concerned about the ZBA debating equitable waivers and administrative appeals. It would be a good idea for an applicant to be ready with a variance as an alternative. Unless it is cut and dry, Community Development should have the discussion when an applicant gets the paperwork. Patrick Dwyer wanted Community Development to take the extra time/step to remind/warn about what the applicant faces. Lynn Christensen wanted it to be more proactive when advising applicants and warn them that they might not get a waiver. Leonard Worster suggested looking at regulations in other communities that do not count steps as part of the living space. Tony Pellegrino agreed with Lynn Christensen and Leonard Worster. Patrick Dwyer wanted to instruct applicants to go to the Merrimack Conservation Commission (MCC) first if they are near a wetland. That would take some pressure off the ZBA. Richard Conescu suggested distributing a copy of construction best practices.

Robert Price explained that the Community Development Department does not review building plans, only previous variances. There is no opportunity to be involved.

Lynn Christensen said that is too late. Patrick Dwyer suggested that the ZBA meet with the relevant Town departments. Lynn Christensen disagreed; it is a matter for engineers and architects. She agreed with Leonard Worster about looking at the definition of a "structure".

Robert Price said that, legally, the ZBA should not focus on anything other than what is presented to it. It should not be considering and negotiating alternative placements.

Tony Pellegrino disagreed. The ZBA is at the end of the chain. Staff could stop an application before it gets to the ZBA. Richard Conescu suggested that staff draft a “good to know” information sheet because builders may not know that Merrimack’s ordinances differ from those in abutting towns. Lynn Christensen suggested that the Planning Board consider changing the regulation. Tony Pellegrino suggested a staff presentation for the next meeting.

8. Approval of Minutes - March 30, 2016

The minutes of March 30, 2016, were approved as submitted, by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Leonard Worster.

9. Adjourn

The meeting adjourned at 8:37 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Richard Conescu.