



Town of Merrimack, New Hampshire

Community Development Department

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Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, JANUARY 29, 2020

Board members present: Richard Conescu, Kathleen Stroud, Patrick Dwyer, Rod Buckley, Lynn Christensen and Alternates Leonard Worster & Ben Niles

Board members absent: Alternate Drew Duffy

Staff present: Assistant Planner Casey Wolfe

1. Call to Order

Richard Conescu called the meeting to order at 7:00 p.m.

2. Roll Call

Richard Conescu led the pledge of allegiance and swore in members of the public who would be testifying. Patrick Dwyer read the preamble.

3. **Streif, LLC (petitioner/owner)** – Variance under Section 3.02, Note 6 of the Zoning Ordinance to permit the construction of a 3,000 sq. ft. building 20 feet from Daniel Webster Highway whereas 50 feet is required. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-39. **This item is continued from the November 20, and December 18, 2019 meetings.**

At the petitioner's request, the Board voted 4-1-0 to continue this item to February 26, 2020, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Richard Conescu voted in opposition.

4. **Streif, LLC (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit the construction of a retaining wall 10.88 feet from the front property line whereas 30 feet is required. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-40. **This item is continued from the November 20, and December 18, 2019 meetings.**

At the petitioner's request, the Board voted 4-1-0 to continue this item to February 26, 2020, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Rod Buckley and seconded by Lynn Christensen. Richard Conescu voted in opposition.

5. **Streif, LLC (petitioner/owner)** – Special Exception under Section 2.02.3 (C) (1) of the Zoning Ordinance to allow for a residential use in the C-2 (General Commercial) District. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-41. **This item is continued from the November 20, and December 18, 2019 meetings.**

At the petitioner's request, the Board voted 3-2-0 to continue this item to February 26, 2020, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Kathleen Stroud and seconded by Rod Buckley. Richard Conescu and Patrick Dwyer voted in opposition.

6. **Linda Raymond (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a two-lot subdivision with one lot having 59.33 feet of frontage whereas 250 feet is required. The parcel is located at 107 Turkey Hill Road in the R-1 (Residential, by soils), and Aquifer Conservation Districts. Tax Map 4C, Lot 229. Case # 2020-02.

Attorneys Greg Michael & Brett Allard, Bernstein, Shur, Sawyer & Nelson, P.A. represented the petitioner. Attorney Michael began by giving a brief history of the property and explaining that back when the property was originally subdivided the zoning requirements for frontage were only 150 feet. According to Attorney Michael, the owner has always intended on subdividing the property again, which is why they ensured the remaining land had over 300 feet of frontage. Attorney Michael also explained that the new parcel that is being proposed will have a shared driveway with the existing lot of record. Attorney Michael concluded by citing a similar frontage court case (*Metzger v. Brentwood*) and clarifying for the Board that no other variances would be needed and that the frontage size was chosen to maintain the conformity of one of the two lots. Before reading the Findings of Fact, (outlined below) Attorney Allard summarized the request and explained that none of the 24 abutting lots are conforming to the current zoning requirements in respect to area and only a handful have conforming frontage.

Chairman Conescu opened the floor for public comments.

Debbra and Bob Uttero (5 Acacia St) spoke in opposition of the project, sharing a written statement with the Board and meeting attendees (a copy of the testimony submitted by Mr. & Mrs. Uttero can be found in the Case File at the Merrimack Town Hall Community Development department).

As the closest rear abutters to the project, they expressed concerns with maintaining the character of the neighborhood and diminished property values of the surrounding properties. They also added to their statement by clarifying that the property in question is no longer heavily wooded and was cleared approximately 2 years ago, making any development very visible.

Kevin and Jackie Mulhern (103 Turkey Hill Road) spoke in opposition of the project explaining that they feel their property value will be diminished if they have a street or driveway right out of their front window.

Becky Dupont (101 Turkey Hill Road) spoke to clarify some of the discussion that was surrounding 97 Turkey Hill Road (which she also owns). Ms. Dupont clarified that the property on 97 Turkey Hill Road did obtain a variance for decreased frontage but it does not have a long

driveway as they intentionally built it in line with the others houses on the street. She also added that when they obtained their variance, they did so with the blessing of their neighbors. Ms. Dupont also commented that the lot is not heavily wooded as Attorney Michael had stated and was logged several years ago. She concluded by stating that although she believes there will be minimal impact to her property, she believes the value of the Mulhern property will be adversely impacted because their house is situated sideways and their window will face the proposed shared driveway.

Attorney Michael responded by clarifying that the request at hand is regarding the frontage variance and if the owner wanted to, they could still seek approval to build a driveway in the same proposed location leading to a large barn and not build a house at all. He also stated that they provided the schematic as a visual to show what the owner has in mind but it has no bearing on the variance request at all. He further explained that drainage, buffering, etc. issues will be dealt with during the Planning Board review and that they intend to meet all required setbacks.

Debbra and Bob Uttero (5 Acacia St) spoke again about the various culverts and catch basins on and around the land in order to debate what they thought was a statement made about being able to build anywhere on the land. Chairman Conescu clarified that Attorney Michael did not mean to imply that you could build anywhere on the land, he was just trying to point out that it does not matter where the house goes because it has nothing to do with the frontage variance being requested.

Chairman Conescu closed the Public Hearing.

Patrick Dwyer expressed concern that granting the variance might set precedent and that he does not agree that the petitioner met the requirements for the substantial justice or diminished value criteria. In his opinion, substantial justice is not met because the gain is all in favor of the petitioner and he also feels that surrounding property values could be diminished because the house is going to be set so far back and not in character with the rest of the neighborhood.

The Board voted 4-0-1 to grant the variance on a motion made by Lynn Christensen and seconded by Kathleen Stroud (Patrick Dwyer abstained) with the following condition:

1. The petitioner shall obtain approval from the Planning Board for the proposed subdivision.

Findings of Fact (Case #2020-02)

1. Granting the variance would not be contrary to the public interest

The proposed use of Proposed Lot 4C/229-2 is single family residential, which is a permitted use in the R-1 Zone. The purpose of frontage requirements is to prevent overcrowding and congested development. Proposed lot 4C/229-2 will be approximately 8.56 acres (372,525 square feet) larger than the Town's minimum lot size requirement in this zone. As such, even though the frontage variance is required, there is sufficient area on Proposed Lot 4C/229-2 for the proposed dwelling and related infrastructure. Moreover, the Applicant proposes a common access easement with Proposed Lot 4C/229-1 so that the two lots can utilize the existing access point on Turkey Hill Road, thereby eliminating the need for a new point of access from Proposed Lot 4C/229-2 to Turkey Hill Road.

No additional variances are necessary and Proposed Lot 4C/229-2 complies with all setback and other requirements. Granting the variances will not threaten the public health, safety or welfare. There will be no adverse impact or injury to any public rights if this variance is granted. Therefore, granting the variance would not be contrary to the public interest.

2. The spirit of the ordinance is observed:

Because it is in the public's interest to uphold the spirit of the ordinance, the Courts have held that these two criteria are related. If you meet one test, you almost certainly meet the other. See Farrar v. Keene 158 N.H. 684 (2009). In addition to the above stated reasons, in terms of use, the lot is consistent with the residential character of the neighborhood and will remain as such, Therefore, granting the variance will not alter the essential character of the neighborhood, and the spirit of the ordinance is observed.

3. Granting the variance would do substantial justice:

There is no injury to the public if the variance is granted. There is no gain to the public if the variance is denied. Therefore, the loss to the Applicant when balancing public and private rights outweighs any loss or injury to the general public, and granting the variance would do substantial justice.

4. The values of the surrounding properties will not be diminished

Proposed Lot 4C/229-2 is densely wooded. There will be substantial distance between the proposed dwelling and the dwellings on abutting properties. The proposed dwelling is set back more than 400 feet from Turkey Hill Road. Therefore, surrounding property values will not be diminished. Moreover, if the variance is granted, the applicant will be required to seek subdivision approval from the Planning Board, which will ensure that any improvements to Proposed Lot 4C/229-2 will not diminish surrounding property values.

5. Unnecessary Hardship

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

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 existing property is distinguishable from other properties in the area. Most importantly, particularly in the context of a variance request to allow for a subdivision, Proposed Lot 4C/229-2 is substantially larger than every other lot in the area. By way of example, Proposed Lot 4C/229-2 will be approximately 8.56 acres. The Applicant's property has 19 Abutters. Only one abutting property is more than two acres (Lot 4C/233 at 2.2 acres). The other 18 abutting properties are all less than two acres, and the majority of those are less than one acre.

Owing to these special conditions, among others, relative to the other properties in the area, there is no fair and substantial relationship between the general public purpose of the Zoning Ordinance's 250 foot minimum frontage requirement and its application to Proposed Lot 4C/229-

2. As stated, frontage requirements are mechanisms that aim to prevent overcrowding and congested development. Due to the substantial area of Proposed Lot 4C/229-2 and its resulting ability to safely and efficiently accommodate the proposed dwelling and related infrastructure, the purpose that frontage requirements aim to achieve are still served if the Board grants the variance. The purpose that the Zoning Ordinance seeks to protect is not in any way threatened if the variance is granted. Moreover, the Applicant proposes a common access easement with Proposed Lot 4C/229-1 so that the two lots can utilize the existing access point on Turkey Hill Road, thereby eliminating the need for a new point of access from Proposed Lot 4C/229-2 to Turkey Hill Road. Accordingly, even though the proposed subdivision requires this variance, the purpose that the Zoning Ordinance aims to protect will be preserved if it is granted.

2. The proposed use is a reasonable one because:

The proposed use is single family residential, which is permitted by right in the R-1 Zone. Permitted uses are per se reasonable. See Malachy Glen Assos., Inc. v. Town of Chichester, 155 N.H. 102, 107 (2007).

7. Discussion/possible action regarding other items of concern

The Board briefly discussed a bill being proposed by the State Legislature that would impose training requirements for land use board members.

8. Approval of Minutes - December 18, 2019

The minutes of December 18, 2019 were approved as submitted, by a vote of 4-0-1, on a motion made by Lynn Christensen and seconded by Patrick Dwyer. Rod Buckley abstained.

9. Adjourn

The meeting was adjourned at 8:27 p.m. by a vote of 5-0-0, on a motion made by Patrick Dwyer and seconded by Rod Buckley.