



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES TUESDAY JULY 29, 2020

Board members present: Richard Conescu, Kathleen Stroud, Rod Buckley and Alternate Drew Duffy.

Board members absent: Patrick Dwyer, Lynn Christensen, and Alternate Ben Niles.

Staff present: Planning and Zoning Administrator, Robert Price and Assistant Planner, Casey Wolfe

Due to the COVID-19 crisis, and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, the Zoning Board of Adjustment is authorized to meet electronically.

As stated on the agenda, the meeting was aired live on Merrimack TV. Telephone access was available for members of the public wishing to speak during the Public Hearing or provide public comment. Also identified on the agenda was the opportunity for general public comment to be submitted leading up to the start of the meeting via email to CommDev@MerrimackNH.Gov.

Members of the Board and Town Staff were participating via Zoom. In accordance with RSA 91-A:2 III, each member of the Board was asked to state, for the record, where they were, and who, if anyone, was with them.

1. Call to Order

Richard Conescu called the virtual meeting to order at 7:00 p.m. and read the preamble and the procedures and processes for the virtual meeting.

2. Roll Call

Richard Conesco

Stated he was participating alone in the room he was in.

Kathy Stroud

Stated she was participating alone in the room she was in.

Drew Duffy

Stated she was participating alone in the room she was in.

Rod Buckley

Stated he was participating alone in the room he was in.

Richard Conescu appointed Drew Duffy to sit for Patrick Dwyer.

- ### **3. Governors Hill Corp. (petitioner) and Richard & Marilyn Brown & Governors Hill Corp (owners)-**
- Appeal of Administrative Decision that determined pre-existing nonconforming lots of record are required to conform to current zoning requirements upon the modification of the lot following a lot line adjustment even though such adjustments would result in no change to the lots area, depth, or frontage. The parcels are located at 31 & 33 Constance Street in the R-1 (Residential, by soils) District. Tax Map 6D, Lots 137 and 136. Case # ZBA 2020-19. **This item is continued from the June 24, 2020 meeting.**

This item was withdrawn by the petitioner.

4. **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 42,996 square feet of lot area whereas 80,000 square feet is required, and 186.77 feet of depth whereas 200 feet is required. The parcel is located at 21 Elizabeth Drive in the R-2 (Residential) District. Tax Map 3A, Lot 010. Case #ZBA 2020-10.

Richard Conescu announced that there were only 4 members of the Board present and in order for a request to be granted, a minimum of three affirmative votes out of the four members present would be required. He noted that petitioners have the right to request a continuance of their hearing(s) until the next meeting where a full Board may be present.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Kathy Stroud and seconded by Rod Buckley.

5. **RCL Realty, LLC (petitioner/owner)** – **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 41,268 square feet of lot area whereas 80,000 square feet is required, 182.89 feet of depth whereas 200 feet is required, and 50 feet of frontage whereas 200 feet is required. The parcel is located at 15 Elizabeth Drive in the R-2 (Residential) District. Tax Map 3A, Lot 013. Case # ZBA 2020-11.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Rod Buckley and seconded by Kathy Stroud.

6. **RCL Realty, LLC (petitioner/owner)** – **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 50,174 square feet of lot area whereas 80,000 square feet is required, 155.68 feet of depth whereas 200 feet is required, and 59.19 feet of frontage whereas 200 feet is required. The parcel is located at 11 Elizabeth Drive in the R-2 (Residential) District. Tax Map 3A, Lot 014. Case # ZBA 2020-12.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Kathy Stroud and seconded by Rod Buckley.

7. **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 49,524 square feet of lot area whereas 80,000 square feet is required, and 25 feet of frontage whereas 200 feet is required. The parcel is located at 4 Squires Drive in the R-2 (Residential) District. Tax Map 3A, Lot 015. Case # ZBA 2020-13.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Rod Buckley and seconded by Kathy Stroud.

8. **RCL Realty, LLC (petitioner/owner)** – **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 48,258 square feet of lot area whereas 100,000 square feet is required, and 185 feet of depth whereas 300 feet is required. The parcel is located at 14 Elizabeth Drive in the R-1 (Residential, by soils) District. Tax Map 3A, Lot 025. Case # ZBA 2020-14.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Rod Buckley and seconded by Drew Duffy.

9. **RCL Realty, LLC (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 61,913 square feet of lot area whereas 100,000 square feet is

required, and 185 feet of depth whereas 300 feet is required. The parcel is located at 18 Elizabeth Drive in the R-1 (Residential, by soils) District. Tax Map 3A, Lot 026. Case # ZBA 2020-15.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Kathy Stroud and seconded by Drew Duffy.

- 10. RCL Realty, LLC (petitioner/owner)** – Appeal of Administrative Decision that determined pre-existing nonconforming lots of record are required to conform to current zoning requirements upon the modification of the lot following a lot line adjustment even though such adjustments would result in each lot becoming less nonconforming than presently constituted. The parcels are located at Elizabeth Drive, Charles Road and Squires Drive in the R-1 (Residential by soils) and R-2 (Residential) Districts. Tax Map 3A, Lots 010, 013, 014, 015, 025, and 026. Case # ZBA 2020-16.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item to August 26, 2020, on a motion made by Drew Duffy and seconded by Rod Buckley.

- 11. As Life Goes On, LLC (petitioner) and Laura Benson (owner)** - Variance under Section 2.02.9(b) (6) of the Zoning Ordinance to permit an assisted living group home on a lot with 1.37 acres whereas 3 acres is required. The parcel is located at 585 Daniel Webster Highway in the C-1 (Limited Commercial) and R-4 (Residential), Aquifer Conservation, and Elderly Housing Overlay Districts. Tax Map 6D-1, Lot 046. Case # ZBA 2020-22.

The petitioner opted to proceed with the hearing despite there only being four Board members present.

Greg Michael and Brett Allard, (Bernstein, Shur, Sawyer & Nelson, P.A.) represented the petitioner and Mr. Michael began by giving a summary of the lot size, location and zoning. This particular lot has split zoning, the front half of the lot is in the Commercial zone and the back is Residential. The variance being requested is to allow the building to be redeveloped into an assisted living facility with 24 beds on a lot having less than three acres (the lot has 1.37 acres). He went on to explain that there are plenty of parking spaces available, no adverse impact to the neighborhood and this type of facility has very little traffic coming and going. Mr. Michael also argued that there is only one parcel within the Elderly Housing Overlay District that meets the 3 acre minimum, which isn't necessary for this project because the desired use can be achieved without the additional acreage. Brett Allard then read through the findings of fact (outlined below) and paused for questions from the Board. Chairman Conescu asked for clarification on whether or not any modifications will be made to the existing building and Mr. Michael explained that they may close in the current covered drive-up awning (porte cochere) but it will not change the current footprint of the building or encroach on any setbacks. He also noted that the site has multiple existing curb cuts, which would likely be reduced as part of the site plan process.

There was no public comment.

The Board voted 4-0-0, on a roll call vote, to grant the variance, on a motion made by Kathy Stroud and seconded by Drew Duffy with the following condition:

- 1. The petitioner shall obtain site plan approval from the Planning Board.**

Case #2020-22 Findings of Fact:

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

Lot size requirements are mechanisms designed to prevent overcrowding and density issues. There will not be any overcrowding or density issues if this variance is granted because the Applicant is proposing to contain all living units within the existing building and is not proposing separate detached living units. This

is not a situation where the Applicant is attempting to squeeze numerous detached living units on an undersized lot. To the extent Section 2.02.9(B)(6) of the Zoning Ordinance, requires that lots be three acres even when separate living units are not proposed, this appears to be an unintended oversight or anomaly in the literal language of the Zoning Ordinance because the Ordinance clearly intends to exempt such proposals from regulations pertaining to density as evidenced by Section 2.02.9(B)(12). Moreover, there will be no adverse impact on public rights if the Variance is granted. Thus, granting the variance will 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 which are incorporated herein by reference, since all living units will be within the existing building, the proposal will not alter or change the essential character of the area. Additionally, the proposed use is permitted, and the spirit of the Zoning Ordinance is to allow these types of proposals on this property, the spirit of the Zoning Ordinance is to exempt such proposals from density regulations that would otherwise apply if separate living units were proposed. Therefore, 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, when balancing public and private rights, the loss to the Applicant if the Variance is denied outweighs any harm to the public if the Variance is granted. Indeed, given that New Hampshire has one of the oldest populations in the country and that there is presently a shortage of available senior housing in the state, granting the variance would be a great benefit to both the Applicant and the community.

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

Since all living units will be within the existing building, there will not be any overcrowding or density issues by way of multiple detached units that could potentially affect surrounding property values. This is a relatively mixed-use area which the Applicant's proposal will compliment. Further, if the Variance is granted, the Applicant is planning various landscaping and parking improvements (as shown on the plan) which will increase the aesthetic value of the property. Therefore, the values of surrounding properties will not be diminished.

5. Unnecessary Hardship

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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 property has special conditions that distinguish it from the other properties in the area. The property is bounded on three sides by public streets and has a total of five paved or gravel curb cuts (two on DW Highway and three on Maple Street). The property is also improved with two fairly large structures which are connected by a porte cochère. Other properties in the area do not share these conditions.

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 three acre minimum lot size requirement of Section 2.02.9(B)(6) and its application to the property. If the Variance is granted, the Applicant will be removing all three of the somewhat depilated Maple Street curb cuts in favor of one new curb cut to serve as the primary point of access for the site. Additionally, given the size of the existing

building and layout of the proposed parking and access ways, the property can adequately accommodate a 24 bed assisted living facility.

Moreover, as stated above, minimum lot size requirements are mechanisms designed to prevent overcrowding and density issues. There will not be any overcrowding or density issues if this Variance is granted because the Applicant is proposing to contain all of the living units within the existing building and is not proposing separate detached units. To the extent Section 2.02.9(B)(6) of the Zoning Ordinance requires that lots be three acres even when separate living units are not proposed this appears to be an unintended oversight or anomaly in the literal language of the Zoning Ordinance because the Ordinance clearly intends to exempt such proposals from regulations pertaining to density as evidenced by Section 2.02.9(B)(12).

Finally, there is no common sense reason to require a three-acre or greater lot when separate living units are not proposed. Accordingly, the purpose that the Zoning Ordinance seeks to protect is not in any way threatened if the Variance is granted. To the extent, this Variance is required, the purpose that the Zoning Ordinance aims to protect will be preserved if it is granted.

b. The proposed use is a reasonable one because:

The proposed use is permitted on the property and permitted uses are per se reasonable. See Malachy Glen Assocs, Inn v. Town of Chichester, 155 N.H. 102, 107 (2007).

- 12. As Life Goes On, LLC (petitioner) and Laura Benson (owner)** - Appeal of Administrative Decision that determined an assisted living group home is not exempt from the three-acre minimum lot area requirement of Section 2.02.9(b) (6) of the Zoning Ordinance. The parcel is located at 585 Daniel Webster Highway in the C-1 (Limited Commercial) and R-4 (Residential), Aquifer Conservation, and Elderly Housing Overlay Districts. Tax Map 6D-1, Lot 046. Case # ZBA 2020-23.

At the petitioner's request, the Board voted 4-0-0, on a roll call vote, to continue this item until August 26, 2020, pending completion of the 30-day appeal period for the granting of the variance for ZBA Case #2020-22 with no appeals being filed, on a motion made by Rod Buckley and seconded by Kathy Stroud.

- 13. Lora Philp (applicant/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit the razing and reconstruction of a deck 9 feet from the side property line whereas 15 feet is required. The parcel is located at 83 Wilson Hill Road in the R-1 (Residential, by map) and Aquifer Conservation Districts. Tax Map 4B, Lot 123. Case # ZBA 2020-24.

The petitioner opted to proceed with the hearing despite there only being four Board members present.

Lora Philp (applicant/owner) explained that she is seeking a variance to replace an existing deck on her house that will encroach into the side setback. She went on to explain that when the house was originally constructed the surveyor made an error which resulted in the house being built within 9 feet of the side property line instead of the required 15. She is now looking to tear down the existing deck and rebuild it in the same location but was advised that a variance would be needed. Ms. Philp also clarified that the new deck will be larger than the current deck before reading through the findings of fact (outlined below).

There was no public comment.

The Board voted 4-0-0, on a roll call vote, to grant the variance, with conditions, on a motion made by Rod Buckley and seconded by Kathy Stroud.

Case #2020-24 Findings of Fact:

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

There is no issue with being contrary to public interest; the abutter most affected is my neighbor to the west of the property who is aware of the project. Grown hemlock trees line the border creating privacy.

2. The spirit of the ordinance is observed:

The spirit of the ordinance is observed as the affected abutter does not object to the project. The building of the deck and enhancing the landscaping in the back area will increase the attractiveness of the property.

3. Granting the variance would do substantial justice:

There is no reason to believe that the re-building of the deck which is an improvement would affect the property value of my neighbor.

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

The deck does not affect our neighbor's living situation one way or the other and the neighbor on the other side cannot even see it because the houses are set far enough apart.

5. Unnecessary Hardship

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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:

This property is part of a Wilson Hill subdivision built in 1974 or 1975. All of the properties have about the same amount of land and the same shape, which is long and narrow. Some properties have more land on Wilson Hill Road. I do not know when there were created.

b. The proposed use is a reasonable one because:

At the time the property was built the survey was done by a local surveyor who did not do an accurate survey. He placed the property line approximately another 10 feet or so from the current property line where my neighbor's garage now stands. The original deck was built at the same time and was the only exit (and will be the only exit) to the back door.

14. Discussion/possible action regarding other items of concern.

None.

15. Approval of Minutes – June 24, 2020

The Board voted 3-0-1, on a roll call vote, to approve the minutes of June 24, 2020 as submitted, on a motion made by Rod Buckley and seconded by Drew Duffy. Rod Buckley abstained.

16. Adjourn

The Board voted 4-0-0, on a roll call vote, to adjourn at 8:02 p.m. on a motion made by Drew Duffy and seconded by Kathy Stroud.