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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES TUESDAY JUNE 24, 2020

Board members present: Richard Conescu, Kathleen Stroud, Patrick Dwyer (joined virtual meeting at 7:04 p.m.), and Alternates Drew Duffy and Ben Niles.

Board members absent: Lynn Christensen, Rod Buckley, and Alternate Leonard Worster.

Staff present: Planning and Zoning Administrator, Robert Price

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 and the Merrimack TV Facebook Live page (<http://www.facebook.com/merrimacktv>). 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.

Ben Niles

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

Patrick Dwyer

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

Richard Conescu appointed Ben Niles to sit for Rod Buckley and Drew Duffy to sit for Lynn Christensen.

3. **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.
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 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.
5. **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.
6. **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.
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 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.
8. **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.
9. **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.

Richard Conescu opened the floor to Robert Price to share any staff information on the RCL Realty projects before hearing from the petitioners. Robert informed the Board that due to a defect with the abutter notification, all of the RCL Realty agenda items (agenda numbers 3-9) cannot be heard. Robert confirmed that the project will be tabled until the next meeting (July 29, 2020) and the petitioner will supply a new abutter list so that all abutters can be properly notified prior to that meeting.

- 10. Governors Hill Corp. (petitioner) and Richard & Marilyn Brown (owners)** – Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 23,885 square feet of lot area whereas 100,000 square feet is required, 150 feet of depth whereas 300 feet is required, and 150 feet of frontage whereas 250 feet is required. The parcel is located at 31 Constance Street in the R-1 (Residential, by soils) District. Tax Map 6D, Lot 137. Case # ZBA 2020-17.

Richard Conescu asked Robert Price if there is any information staff would like to add regarding the Governor Hill agenda items. Robert took the opportunity to remind the Board and viewing audience that the petition is for a lot line adjustment only and nothing more.

Greg Michael (Bernstein, Shur, Sawyer & Nelson, P.A.) and Matt Peterson, (Keach-Nordstrom Associates, Inc.) were present to represent the petitioners and owners. Mr. Michael began by explaining that the lots in question are in the Level Acres development which was approved in 1970 and is currently undergoing some new construction. During the process of the new construction the land was surveyed and it was discovered that a shed that was built for the property located on 31 Constance Street (owned by Richard & Marilyn Brown) was encroaching on the property of 33 Constance Street (owned by Governors Hill Corp.). The variances are being requested to correct the encroachment in a manner that is acceptable to both parties. If approved, a Lot Line Adjustment will be submitted to the Planning Board and that will not change the size of the lots or the amount of frontage each parcel has. The owners will merely be swapping an equal amount of land to allow the Browns to keep their shed and Governors Hill Corp to avoid any messy title issues. Mr. Michael went on to explain that they believe they have met the criteria for the variances but have also filed an Appeal of Administrative Decision in case it is denied. If the variances are accepted, the Appeal of Administrative Decision will be withdrawn once the thirty day variance appeal window has expired. Mr. Michael concluded by reiterating that the lots in question are non-conforming lots of record and if the variances are granted, will continue to be non-conforming lots because there is no way to add land to them. He then turned the microphone over to Matt Peterson to review the variance criteria.

Matt Peterson shared the plans and supporting photographs for everyone to see and gave some history of the issue. Mr. Peterson explained that the Browns were originally told by staff that they just needed to apply for a Lot Line Adjustment and then were later told they needed to obtain the variances due to an interpretation from the Town's Legal Counsel on a similar matter regarding lot line adjustments on non-conforming lots. Mr. Peterson then read through the variance criteria, pausing only to clarify that the frontage will not change if the Lot Line adjustment is granted.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the Variances on a motion made by Patrick Dwyer and seconded by Drew Duffy with the following condition:

- 1. The petitioner shall obtain approval from the Planning Board for the proposed Lot Line Adjustment.**

Case #2020-17 Findings of Fact:

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

Based on the current request by the Applicant to swap 700 square feet of land between 2 non-conforming lots of record, we do not believe this request is contrary to the public interest

because the land swap between the two lots will result in the same lot area, lot depth, and lot frontage before and after the proposed lot line adjustment so there is no effect to the public with this request. Also the general public interest of lot area, lot depth, and lot frontage is to ensure lots will have sufficient buildable area to construct a residential home with infrastructure which these lots will have based on the existing homes that exist today along Constance Street.

2. The spirit of the ordinance is observed:

The Applicant feels that the spirit of the ordinance would be observed with the granting of the variance in that the proposed new lots would have the same lot area, lot depth, and lot frontage before and after the lot line adjustment which ensures consistent lot areas, lot depth and lot frontage in the area of this proposed application.

3. Granting the variance would do substantial justice:

By allowing the Applicant to swap 700 square feet of land between the two lots, there would be no injury to the public if the variances are granted and there is no gain to the public if the variances are denied, therefore the Applicant believes substantial justice would be done for the Applicant by granting the variance.

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

Again, this Applicant is requesting to be allowed to swap 700 square feet of land between two non-conforming lots of record and as such we cannot find any reason that creating two new lots that have the same lot area, lot depth, and lot frontage before and after this lot line adjustment would have any effect on the surrounding property values again because nothing will be different if the application is approved.

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:***

There is no fair and substantial relationship between the general public purpose of the Zoning Ordinance's lot area, lot depth, and lot frontage because all three of these will be the exact same before and after the proposed lot line adjustment. The unnecessary hardship can be seen in the enclosed photos that outline the encroachment for the existing shed, pavement, fence and retaining wall that would have to be relocated if the variance was not granted for this property.

- b. The proposed use is a reasonable one because:***

Again, the request is to allow a 700 square foot land swap between two non-conforming residential lots which are zoned residential and are similar in lot size, lot depth, and lot frontage as are all the surrounding lots in the area as such the Applicant believes the request is a reasonable one.

- 11. Governors Hill Corp. (petitioner/owner) –** Variances under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 26,689 square feet of lot area whereas 100,000 square feet is required, 150 feet of depth whereas 300 feet is required, and

150 feet of frontage whereas 250 feet is required. The parcel is located at 33 Constance Street in the R-1 (Residential, by soils) District. Tax Map 6D, Lot 136. Case # ZBA 2020-18.

Greg Michael asked the Board to incorporate all of the statements made for Case # ZBA 2020-17 to Case # ZBA 2020-18.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the Variances on a motion made by Patrick Dwyer and seconded by Kathy Stroud with the following condition:

- 1. The petitioner shall obtain approval from the Planning Board for the proposed Lot Line Adjustment.**

Case #2020-18 Findings of Fact:

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

Based on the current request by the Applicant to swap 700 square feet of land between 2 non-conforming lots of record, we do not believe this request is contrary to the public interest because the land swap between the two lots will result in the same lot area, lot depth, and lot frontage before and after the proposed lot line adjustment so there is no effect to the public with this request. Also the general public interest of lot area, lot depth, and lot frontage is to ensure lots will have sufficient buildable area to construct a residential home with infrastructure which these lots will have based on the existing homes that exist today along Constance Street.

2. The spirit of the ordinance is observed:

The Applicant feels that the spirit of the ordinance would be observed with the granting of the variance in that the proposed new lots would have the same lot area, lot depth, and lot frontage before and after the lot line adjustment which ensures consistent lot areas, lot depth and lot frontage in the area of this proposed application.

3. Granting the variance would do substantial justice:

By allowing the Applicant to swap 700 square feet of land between the two lots , there would be no injury to the public if the variances are granted and there is no gain to the public if the variances are denied, therefore the Applicant believes substantial justice would be done for the Applicant by granting the variance.

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

Again, this Applicant is requesting to be allowed to swap 700 square feet of land between two non-conforming lots of record and as such we cannot find any reason that creating two new lots that have the same lot area, lot depth, and lot frontage before and after this lot line adjustment would have any effect on the surrounding property values again because nothing will be different if the application is approved.

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:

There is no fair and substantial relationship between the general public purpose of the Zoning Ordinance's lot area, lot depth, and lot frontage because all three of these will be the exact same before and after the proposed lot line adjustment. The unnecessary hardship can be seen in the enclosed photos that outline the encroachment for the existing shed, pavement, fence and retaining wall that would have to be relocated if the variance was not granted for this property.

b. The proposed use is a reasonable one because:

Again, the request is to allow a 700 square foot land swap between two non-conforming residential lots which are zoned residential and are similar in lot size, lot depth, and lot frontage as are all the surrounding lots in the area as such the Applicant believes the request is a reasonable one.

- 12. 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.

At the petitioner's request, the Board voted 5-0-0, on a roll call vote, to continue this item until July 29, 2020, pending completion of the 30-day appeal period for the granting of the variances for ZBA Cases #2020-18 & #2020-19, on a motion made by Patrick Dwyer and seconded by Kathy Stroud.

- 13. Herrick Flats, LLC (petitioner) and Sanco Realty Trust (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 106 Herrick Street in the C-2 (General Commercial), I-1 (Industrial), and Aquifer Conservation Districts. Tax Map 3D-2, Lot 021. Case # ZBA 2020-20.

Kyle Worth (Herrick Flats, LLC) and Jeff Kevan (TF Moran) were virtually present to represent the petitioner and owner. Mr. Worth began by explaining the request is a Special Exception to allow for a residential use in the C-2 (General Commercial) District. Mr. Worth then walked the Board through a PowerPoint presentation to explain why the project meets the requirements for a Special Exception (see Case # ZBA 2020-20 Findings of Fact below). The presentation cited reasons such as the current mixed uses within the neighborhood and no increase in traffic. Patrick Dwyer challenged the statement that there would be no increase in traffic because the lot is vacant now and when people start to live there, the traffic will automatically increase. Jeff Kevan clarified the statement by saying that there will be an increase in traffic but nothing more than if a commercial business was located there. Patrick Dwyer still disagreed with the statement and Ben Niles added his traffic concerns as well, stating that Daniel Webster Highway is already heavily congested and adding an additional 80 cars will only make it worse. Mr. Kevan countered that a traffic study would be done as part of the Planning Board approval process. Robert Price clarified that a traffic study can be requested by the Zoning Board if they feel it is necessary to render a decision. Ben Niles asked if by approving the Special Exception it sets a precedent that 40 units are allowed in a one acre lot and Robert advised the Board that no action of the Zoning Board can set a precedent

as everything is considered on a case by case basis, and that the Special Exception would only address whether residential use is permitted on the lot, the related variance request is related to the proposed density. Ben Niles then asked for the unit breakdown and Mr. Worth confirmed that the plan calls for 32 studio apartments and 12 two bedroom apartments.

Chair Conescu opened the hearing to public comment.

Nathaniel Durgin, owner of Map 3D-2, Lot 020-1 (currently not addressed by the Fire Department), Map 3D-1, Lot 002-1 (currently not addressed by the Fire Department), and 111 Herrick Street, spoke in opposition of granting the Special Exception because he owns land that abuts the property in question and is in the process of clearing it for an Industrial use. He feels that adding a residential use will impact his ability to market and develop his land for Industrial use. Mr. Durgin also expressed concerns with the safety of Herrick Street as it is very narrow with a downhill slope that tractor trailers already frequent because of the industrial uses in the neighborhood. Adding additional passenger vehicles to the area would raise safety concerns especially since the petitioner's proposed sidewalk does not connect to Herrick Street, where the entrance to his site is planned. Mr. Kevan responded to Mr. Durgin's comments by reiterating that the traffic would be no different than if any other use was in that space and that the safety concerns will be addressed during the Planning Board approval process.

Amy Annable, 64 Sentry Way, also spoke in opposition of the project stating that all of the new developments that have already been added to the area have increased traffic considerably and adding 44 units will make it worse. Ms. Annable also added concerns that the town has a water shortage and residential units use more water than commercial units do. Mr. Kevan responded to Ms. Annable's comments by reiterating what was already said about the traffic and addressed the water concerns by stating they would need to get a letter from Merrimack Village District indicating they are able to service the parcel.

A motion to grant the Special Exception made by Kathy Stroud and seconded by Patrick Dwyer failed after the Board voted 2-1-2, on a roll call vote. Ben Niles voted in opposition, Drew Duffy and Patrick Dwyer abstained.

The Board voted 3-2-0, on a roll call vote, to deny the Special Exception because the petitioner failed to satisfactorily demonstrate that the use as developed would not adversely affect the neighborhood and that there would be no nuisance or serious hazard to vehicles or pedestrians, on a motion made by Ben Niles and seconded by Patrick Dwyer. Kathy Stroud and Rich Conescu voted in opposition.

- 14. Herrick Flats, LLC (petitioner) and Sanco Realty Trust (owner) – Variance under Section 3.02 of the Zoning Ordinance to permit a density of 44 multi-family residential units on a lot containing 65,992 square feet in the C-2 (General Commercial) District whereas 1 unit per 40,000 square feet is allowed. The parcel is located at 106 Herrick Street in the C-2 (General Commercial) and I-1 (Industrial), and Aquifer Conservation Districts. Tax Map 3D-2, Lot 021. Case # ZBA 2020-21.**

Withdrawn by the petitioner.

15. Approval of Minutes – June 2, 2020

The Board voted 5-0-0, on a roll call vote, to approve the minutes of June 2, 2020 as submitted, on a motion made by Drew Duffy and seconded by Patrick Dwyer.

16. Adjourn

The Board voted 4-0-1, on a roll call vote, to adjourn at 8:24 p.m. on a motion made by Drew Duffy and seconded by Ben Niles. Kathy Stroud abstained.