



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, NOVEMBER 30, 2016

Members present: Patrick Dwyer, Tony Pellegrino, Lynn Christensen (arr. 7:27), and Alternate Leonard Worster.

Members absent: Fran L'Heureux and Richard Conescu.

Staff present: Planning and Zoning Administrator Jillian Harris 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

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

3. Buckley-Abbott, LLC. (petitioner/owner) - Variance under Section 2.02.13 (E)(4)(c) of the Zoning Ordinance to permit an addition 19.3 feet from the rear property line whereas 40 feet is required. The parcel is located at 436 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Elderly and Town Center Overlay Districts. Tax Map 5D-4, Lot 007. Case # 2016-39.

Agenda items #3 and #4 were taken up together.

Attorney Brad Westgate, Winer Bennett, said the 546 square foot, 14'x39' addition would be on the fire station side and at the back end. The applicant wants to install new, modern kitchen equipment, expand food preparation space, increase cooler and storage space, and redesign the entire kitchen to allow for preparation of large quantities of bakery and café items more efficiently. There used to be a pond at the back end of the lot. When the dam was removed in 2008, the pond disappeared, but it is still classified as a wetland. The new addition would not materially increase the proximity of the building to the edge of wetlands or the rear property line.

Attorney Westgate read the statutory criteria into the record.

There was no public comment.

The Board voted 3-0-0 to grant the Variances, on a motion made by Tony Pellegrino and seconded by Leonard Worster, with the condition, that the applicant shall obtain full site plan approval or a waiver of full site plan approval from the Planning Board or administrative approval for the proposed structural addition.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the kitchen would not encroach on the 25' wetlands buffer nor increase the building's proximity to the wetlands significantly beyond the location of the existing structure, (2'). The proposed addition meets all other dimensional and setback requirements and would not overcrowd the neighboring properties. Allowing modernization and expansion would show vitality and growth in the Town Center. The Merrimack Conservation Commission (MCC) favors the project;
2. The spirit of the Ordinance is observed because the rear boundary of the premises abuts the existing wetlands, which are not suitable for development. There could never be a structure on the land immediately to the rear, so there is no risk of crowded structures given the wetlands abutting the rear of the premises. The existing building is located inside the 40' wetlands setback, so the proposed addition would not cause any material adverse impact to the existing wetlands. The addition would be only about 2' closer to the edge of wetlands than the existing building is at present. The proposed addition would not encroach on the wetland buffer;
3. Granting this variance would do substantial justice because the expansion would make it possible for the applicant to continue to operate a vital business in the Town Center. It would be relatively small compared to the existing structure and would not significantly change the building footprint with respect to its location on the lot. The proximity to existing wetlands would not be significantly closer to the rear lot line than the existing building. The general public would realize no appreciable gain if the variance is denied;
4. The values of the surrounding properties would not be diminished because the premises are located next door to the Merrimack Fire Department on the south side and Buckley's Great Steaks on the north side. Across the street is the town's public park. To the rear are the wetlands and undeveloped land owned by the Merrimack School District. Neither the Fire Department nor the neighboring restaurant would be adversely affected by the construction of the proposed kitchen addition. Modernizing bakery operations would enhance the value of the premises and increase the vitality of the Town Center District;
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 conditions of the premises. This is a modest-sized lot in the Town Center District with an existing non-conforming structure that does not currently meet the two setback requirements noted above. Due to its location abutting the Fire Department, restaurant and former pond, there is no feasible way to add land to the premises to make it easier to meet the setback requirement. The premises were formerly adjacent to a pond/true body of water, but due to the dam's removal, only a wetland area now exists. The land between the existing structure and edge of current wetlands is a very steep decline, making the separation between the building and the wetlands appear larger and more distant. The rear property line is actually closer to the proposed addition than to the edge of the wetland, not the opposite. With no structure behind the premises, the 40' setbacks become academic. The proposed addition would be added to the side of the existing building, making it substantially similar to the existing structure in terms of the distances from the building to both the rear lot line and the edge of the wetlands. There would be no significant change to the proximity of the building to the wetlands or the rear boundary. The natural resources of the wetland are adequately protected. There is no risk of overcrowding to the rear of the property, which is adjacent to undeveloped wetlands. Denial of the variances would not allow a modest addition to an existing structure to improve its facilities, continue to serve town residents and promote vitality in the town Center;

- 2) The proposed use is a reasonable one because the proposed kitchen addition would provide for the modernization of and improvement to an existing bakery and café that is an asset to the town and fits well within the neighboring properties and the town Center.

4. **Buckley-Abbott, LLC. (petitioner/owner)** - Variance under Section 2.02.7 (A) (6) of the Zoning Ordinance to permit an addition 27.3 feet from the edge of the wetlands whereas 40 feet is required. The parcel is located at 436 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Elderly and Town Center Overlay Districts. Tax Map 5D-4, Lot 007. Case # 2016-40.

See #3 above.

5. **ANMI Milford Realty, LLC. (petitioner/owner)** - Special Exception under Section 2.02.3(C)(1)(d) of the Zoning Ordinance to permit the sale of new/used powersport vehicles. The parcel is located at 736 Milford Road in the C-2 (General Commercial), Aquifer Conservation Districts and Wellhead Protection and 100/500 year Flood Hazard areas. Tax Map 2B, Lot 008. Case # 2016-41.

Lynn Christensen arrived at 7:27 p.m.

Agenda items #5 and #6 were taken up together.

Barry Eisenberg, CEO, National Powersports said that the small facility they currently operate in Pembroke is insufficient and they need a larger location to handle vehicles, including the company's acquisition of the Triumph franchise.

Barry Esienberg read the points of law into the record.

As to #b, affect on the neighborhood, Lynn Christensen asked about fluids in vehicles getting into wells in the area. Barry Eisenberg replied that ANMI is neither a "large quantity handler" nor a "generator" of waste according to NH law. It uses best practices for ground water protection. It would be the same as in the Pembroke location, which has a stellar environmental performance. There would be 6,500 square feet of showroom/ motorcycle display and 2,000 square feet of service/inspection.

Tony Pellegrino asked about traps and drains for oil. Barry Eisenberg said there is an oil separator in the facilities they operate. All drains in the proposed facility would be capped and spills would be cleaned immediately. There were no environmental calls in Pembroke in 15 years. The company invites yearly inspections. The applicant will appear before the MCC on December 5, 2016.

Jillian Harris explained that the Planning Board process would include review and comment from the Merrimack Village District (MVD).

As to #c, nuisance or serious hazard, Barry Eisenberg said the applicant would gut and then remove the drop ceilings. No gas or fuel would be sold; it would just be a service/inspection station. The only oil to be stored would be for oil changes. He repeated that ANMI is neither a "large quantity handler" nor a "generator" of waste according to NH law. This would be an annex to the Pembroke facility.

Lynn Christensen asked where the drains would exit. Barry Eisenberg repeated that all drains would be capped and sealed. Floors would not be hosed.

Public comment

Attorney Patricia Panciocco, Barof & Craven, represents Connections Inc., (formerly PC Connection), which requests a continuance. G&H Post owns the parcel where Connections Inc., is located. Attorney Panciocco gave a history of the parcels. The large chamber septic system under the pavement was tied into a private sewer, from there waste is pumped to Route 101A to the main at the former McDonald's. When a new owner took over in 1994, no one considered where the wastewater went. The building has been empty for three years. This is a private system with no easement to use the pipes to service another property. G&H Post will not allow another property to send sewage to its pump chamber. Therefore this property has no right to connect to the sewer and would have no sewer or wastewater system.

Jillian Harris stated that these are legal matters that require more research.

Barry Eisenberg said he was never told about this situation and became aware of it just now. They are undertaking proper due diligence and; clean title is a provision of the purchase. This must be cleared up first. G&H also wants to purchase this property; it is self-serving to spring it on the applicant at the last moment and eliminate ANMI as potential buyers.

Lynn Christensen stated that this is a Planning Board issue that is not relevant to the Zoning Board of Adjustment (ZBA).

As to #d, adequate and appropriate facilities for proper operation of proposed use, Attorney Panciocco said it cannot be determined. The applicant must prove this is a legal lot that can accommodate a waste facility. She just learned of the situation today and has no intent to subvert ANMI from buying the property. There is no record of an easement to tie into this property.

Patrick Dwyer asked about the noise level. A motorcycle would not pass inspection if it were over 96 decibels, per the licensing process. ANMI would not put a sticker on a vehicle that failed the test. In response to Patrick Dwyer's question, Mr. Eisenberg stated they do not have a dyno machine. He would add a custom pipe only if it were not illegal.

Jillian Harris said abutter notification was sent on November 17, 2016.

Robert Pratt, G&H Post, LLC., said he received notice on November 19, 2016, and called the Community Development Department about timing. Because of the Thanksgiving holiday, an attorney was brought on only this week. He is concerned with future property owner's use of the septic/sewer system on his property. Patrick Dwyer said the ZBA cannot discuss a hypothetical situation or the sewer, only zoning and use. Robert Pratt said the ZBA cannot grant a Special Exception because the applicant does not meet criterion #d. Four drains are directly connected to the septic system. The Pie Shop made a problem for G&H's sump pit because it did not install a grease trap. If a Special Exception is granted, the ZBA must ensure that the applicant isolate and remove the drain piping. There was previous brownfield contamination in this area; G&H is asking the ZBA to avoid the potential for another.

Barry Eisenberg said this is a viable location for this business. Attorney Panciocco's November 28, 2016, letter never mentioned sewer rights. G&H never asked whether ANMI uses chemicals; it does not use adverse chemicals. If ANMI is unable to get a Special Exception, it will not go before the Planning Board. The decision will be made after he appears at the December 5, 2016, MCC meeting. All drains would be capped. Floors would not be pressure washed. There is a 6" curb area around the entire property. G&H has over 700 parking spaces; those cars create more liquid waste than ANMI does. Barry Eisenberg said he must find proof there is no sewage rights. He prefers not to dig a septic system, especially near wetlands and in the Aquifer Conservation District.

This is a seasonal business. To postpone as G&H requests would affect financial aspects of the project. ANMI wants to open in March or April 2017, not in June 2017, and does not want a 60-day delay. Jillian Harris noted that the Planning Board agenda submission date has passed for December. Lynn Christensen said appearing at the December 28, 2016, ZBA meeting would give the applicant time to appear at a January Planning Board meeting. If three ZBA members deny the Special Exception tonight, the

applicant would be further delayed. Leonard Worster noted that the ZBA has the authority to continue an item on its own. Patrick Dwyer repeated that the ZBA must decide only whether this is an appropriate use. Barry Eisenberg asked the Board to vote at this meeting.

Attorney Panciocco explained that she researched the title and learned only today that there is no sewer easement. G&H thought there was a right to use the sewer, but just discovered that is not the case.

Patrick Dwyer noted he can only assume that the toilets work, so there is an adequate facility now, and believes criterion # d to be met.

The Board voted 3-0-1 to grant the Special Exception, with the condition that the petitioner shall obtain site plan approval from the Planning Board for the proposed uses of the site, on a motion made by Lynn Christensen and seconded by Tony Pellegrino. Leonard Worster abstained.

FINDINGS OF FACT

- a. The specific site is an appropriate location for the proposed use in terms of overall community development because the location is highly visible from Amherst Street/Route 101A. This business complements the major automobile dealerships and used car superstores in the area. It would create up to 30 additional jobs in the area, increase the tax base, and clean up and inhabit a currently vacant run-down property;
- b. The proposed use, as developed, will not adversely affect the neighborhood because ANMI is a high-end retailer catering to the populace of the area. It does not engage in human services, controversial or contested uses of any kind. National Powersports Distributors has been recognized by BusinessNH Magazine as a "Top Family-Owned Business" for three consecutive years;
- c. There will be no nuisance or serious hazard to vehicles or pedestrian because the property is set back from Amherst Street, with its main entrance at the light shared with the entrance to PC Connection. The light intersects with Craftsman way. To gain access to 736 Milford Road, one must turn onto the common entrance during the appropriate light leaving the heavily trafficked Amherst Street;
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed uses because National Powersports uses a warehouse-style approach to display vehicles. A complete interior gutting of the property would provide a rectangular showroom of roughly 6,500 square feet and an additional 2,000 square feet for service toward the rear of the building. The property has 55 existing parking spaces, sufficient to handle staff and customer base. All vehicles and services would be kept inside the building with no outside storage required. The existing footprint has loading docks to enable loading.

- 6. ANMI Milford Realty, LLC. (petitioner/owner)** - Special Exception under Section 2.02.3(C)(1)(f) of the Zoning Ordinance to permit the service and repair of powersport vehicles. The parcel is located at 736 Milford Road in the C-2 (General Commercial), Aquifer Conservation Districts and Wellhead Protection and 100/500 year Flood Hazard areas. Tax Map 2B, Lot 008. Case # 2016-42.

See #5 above.

7. Discussion/possible action regarding other items of concern

None.

8. Approval of Minutes — October 26, 2016

The minutes of October 26, 2016, were approved, by a vote of 4-0-0, on a motion made by Tony Pellegrino and seconded by Leonard Worster.

9. Adjourn

The meeting was adjourned at 8:37 p.m., by a vote of 4-0-0, on a motion made by Leonard Worster and seconded by Tony Pellegrino.