



Town of Merrimack, New Hampshire

Community Development Department

6 Baboosic Lake Road

Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

603 424-3531

Fax 603 424-1408

www.merrimacknh.gov

MERRIMACK PLANNING BOARD APPROVED MINUTES TUESDAY, SEPTEMBER 5, 2023

A regular meeting of the Merrimack Planning Board was conducted on Tuesday, September 5, 2023 in the Matthew Thornton Room.

Members Present:

- Robert Best (Chair)
- Lynn Christensen (Vice Chair)
- Haleem Mediouni
- Kevin Peters
- Town Councilor Barbara Healey – Ex-Officio
- Nelson Disco – Alternate

Members Absent:

- Jaimie von Schoen
- Neil Anketell
- Maureen Tracey – Alternate

Staff Present:

- Tim Thompson, AICP, Community Development Director

1. Call to Order

Chair Robert Best called the meeting to order at 6:30 p.m. and led everyone in the Pledge of Allegiance. He took a moment to recognize Director Thompson who will be leaving the role of Community Development Director for the Town of Merrimack after more than 12 years of service. He then welcomed new member Kevin Peters to the Board.

Chair Best seated Nelson Disco to vote for Neil Anketell.

2. Consent Agenda

None.

- 3. Dougherty Zibolis, LLC (applicant/owner)** – Continued review for acceptance and consideration of final approval for a site plan to construct a two story, 15,000 SF office/warehouse building with associated site improvements. The parcel is located at 101 Herrick Street in the C-2 (General Commercial), I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 20 Case #PB2023-20. ***This item is continued from the July 18, 2023 Planning Board Meeting.***

At the applicants' request, the Board voted 6-0-0 to continue this public hearing until September 5, 2023 on a motion made by Nelson Disco and seconded by Lynn Christensen.

4. **TC Boston Development, Inc. (applicant) and DRI TCC 50 RMP, LLC (owner)** – Continued consideration of an amendment to a previously approved site plan to waive the requirements of Section 3.04 of the Site Plan Regulations (which requires all proposed utilities to be constructed underground). The parcel is located at 50 Robert Milligan Parkway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 2D, Lot 078. Case #PB2023-22. ***This item is continued from the August 15, 2023 Planning Board Meeting.***

Withdrawn by the applicant.

5. **Continued Public Hearing – Zoning Ordinance Amendments** (as referred by the Town Council) proposing the repeal of Section 2.02.4.D (Mixed Use Developments Permitted in the I-1 District by Conditional Use Permit) and the correction of Section numbers in the remainder of Section 2.02.4. ***This item is continued from the July 18 and August 15, 2023 Planning Board Meetings.***

Barbara Healey recused herself from this item.

Public comment

Gordon Leedy (Tighe & Bond) representing Merrimack Parcel A, LLC stated that he provided testimony at the last meeting and may have more to add after the Board shares their thoughts.

Chair Best provided some background information on the Mixed Use Development section of the Zoning Ordinance stating that it was added to the Zoning Ordinance in 2006 after being voted in during a town election. He then went on to say that this change will render the developments that were constructed under this section of the Ordinance as pre-existing, non-conforming. He stated that he questioned whether or not this status would make it difficult for developers to receive funding because banks typically do not like to lend money to projects with this status for fear that they will not be able to make changes as necessary. He then walked through some of the other questions that he had asked and the advice the Board was given by the Town's Legal Counsel. He indicated the Board was given the direction to make a recommendation to the Town Council, but are not allowed to make any revisions to the proposed zoning amendment. He expressed several concerns including, but not limited to amending something that was voted in by the town, the fact that the change will render the Ordinance inconsistent to the Master Plan and making a change that will cause several properties to become pre-existing non-conforming. He concluded that he is not in favor of the repeal and will not vote in favor of recommending it to the Town Council.

Mr. Thompson added that there is still an opportunity for additional public input when it goes to the Town Council for their process, regardless of the Board's recommendation. The Council will have at least three meetings on the topic, the first will be to introduce the proposal, the second will include a public hearing and the last one would be the vote. During this time, the Council does have the ability to make changes to the proposed amendment language because it was their proposal.

Chair Best stated that he had previously asked if this change would be considered "spot zoning" but was advised by the Town's Legal Counsel that it does not constitute spot zoning. The

discussion then turned to the possibility of interested parties formulating a protest petition which, with enough signatures, would mean that the Town Council would need a super majority to pass the repeal instead of a simple majority.

Mrs. Christensen stated she hopes that the Town Council takes into consideration the feedback given by the Planning Board when voting on the repeal. Mr. Disco commented that he is most concerned with the impact to the properties that have already been granted a Conditional Use Permit (CUP) and will be voting not to recommend the repeal. Chair Best echoed Mr. Disco's concern and stated that it is very common for developments with a CUP to make amendments as they progress through their plans. He also commented that the Council has the option of making an amendment to the Ordinance language instead of repealing the entire section.

The Board voted 5-0-0 not to recommend the proposed Zoning Ordinance amendments which would repeal Section 2.02.4.D (Mixed Use Developments Permitted in the I-1 District by Conditional Use Permit) and the correction of Section numbers in the remainder of Section 2.02.4, to the Town Council for their consideration in accordance with the Town Charter and state law, on a motion made by Lynn Christensen and seconded by Haleem Mediouni.

Barbara Healey returned to the Board.

6. **Susan Wheel (applicant/owner)** – Review for consideration of a Conditional Use Permit to convert an office space in an existing garage into a detached accessory dwelling unit. The parcel is located at 40 Pearson Road in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7D Lot 4. Case # PB2023-21.

Mr. Thompson prefaced the presentation by reiterating that the applicant is seeking approval to turn an existing office space in a detached garage to a detached accessory dwelling unit (ADU). Staff's only remaining question for the applicant is whether or not she will be residing in one of the two units (which is part of the ADU criteria). If the response is yes, staff recommends granting final approval to the CUP.

Susan Wheel (applicant/owner) presented the application to the Board and she began by indicating that she and her husband will be living in the primary dwelling unit. She went on to say that the previous owners of the house used the space as an office but they have been just utilizing it as a space to watch movies so they decided to renovate the space so that her brother can live there. Chair Best asked if they will be adding a kitchen and bath and Mrs. Wheel replied that there is already a bathroom and a galley kitchen but they would need to add a shower stall.

No public comments were received.

The Board voted 6-0-0 to grant final approval to the Conditional Use Permit subject to the following General and Subsequent conditions, on a motion made by Nelson Disco and seconded by Barbara Healey:

1. The applicant shall adhere to the criteria listed under Section 2.02.1.C.2 of the Zoning Ordinance pertaining to conditional use permits for a detached ADU;

2. If this Conditional Use Permit approval is not acted upon within a period of two (2) years from the date of the final endorsement by the Planning Board, then the approval shall be null and void. Issuance of a building permit shall be considered a sufficient action to vest an approval for a conditional use permit for a detached ADU. However, should any building permit expire unused after the conclusion of the two-year validity period provided for herein, the conditional use permit granted shall become void as well. Should the applicant need to extend the two-year validity period, the applicant shall demonstrate to the satisfaction of the Planning Board that it was impossible or impractical to receive the necessary approvals to move forward in reliance on the permit granted within two years. Any renewal/extension application shall be filed with the Planning Board no sooner than 90 days, nor later than 30 days, prior to the expiration of the Conditional Use Permit.
7. **John J. Flatley Company (applicant/owner)** – Review for acceptance and consideration of a three lot subdivision. The parcel is located at 685 DW Highway in the I-1 (Industrial), Aquifer Conservation and Wellhead Protection Districts. Tax Map 6E, Lot 3-4. Case # PB2023-24.

Mr. Thompson prefaced the presentation by explaining that the parcel in question is the site that three flex buildings have been approved and are currently under construction. The applicant is proposing a three lot subdivision of the land for financial reasons so that each flex building will be on its own lot. There is no additional construction being proposed at this time, the request is simply to divide one lot into three so staff recommends that the application be accepted as complete and conditional final approval be granted subject to the conditions outlined in the memo.

Michael Ploof (Fieldstone Land Consultants) presented the application to the Board. He began by explaining that the 45.44 acres lot is located in the Industrial zone and is currently approved for 3 separate flex buildings. One of the flex buildings is nearing completion and the other two have not yet begun construction. He reiterated what Mr. Thompson said about the subdivision being for financial reasons only and no additional construction is being requested at this time. He then shared a copy of the subdivision plan with the proposed lots color coded to show how the lot would be divided. The biggest lot will become 39.611 acres with 639 feet of frontage, the second lot will be 2.97 acres with 375 feet of frontage and the third will be 2.857 acres with 584 feet of frontage.

Mr. Disco asked where the access to the sites will be and Mr. Thompson stated that they will share 2 access points (main entrance on DW Highway and another at the St. Gobain driveway) so several easements, including access easements will be necessary for two of the lots which staff noted in the conditions of approval. Mr. Ploof enlarged the plans to show the access to the site. Chair Best asked what would happen if somewhere down the line they wanted a separate entry for one of the new sites. Mr. Thompson explained that it would require a site plan amendment and approval from NHDOT since that section of the DW Highway is maintained by the State, not the Town.

Chair Best noted that his law firm has represented the Flatley Companies in the past, and out of respect to his previous recusals on Flatley projects, he will abstain from any votes on the subdivision and merely guide the rest of the discussion as the Chair.

The Board voted 5-0-1 to accept the application as complete on a motion made by Lynn Christensen and seconded by Barbara Healey. Robert Best abstained.

Public comments

Ashley Tenhave (75 Shelburne Road) asked if the subdivision would allow Flatley to sell one of the parcels at a later date and could the new owner ask NHDOT for a separate entrance. Mr. Thompson responded that any land owner has the right to sell their land at any time and as for allowing a second entrance, the new owner could request a separate entrance but he does not envision NHDOT approving such a request.

Ken Smith (18 Kimberly Drive) asked if any lot is to be sold, if any new owner would be bound to the terms of the CUP. He also asked if any such new owners will have to replace the trees that Flatley took down. He also encouraged the Board not to approve the request until the trees on the north side of the entrance are replaced. They have replaced the ones on the south side but have not done so to the north yet. The Webster Green residents have suffered from this development and the replanting of the trees should not be put off any further.

Mr. Thompson replied to Mr. Smith's comments by advising him that any new owner would be bound to the conditions of the CUP. As for conditioning the subdivision plan to include landscaping requirements, this is not recommended because landscaping is a Site Plan requirement. The amended site plan already captures the re-planting of the trees and a Certificate of Occupancy will not be granted until all of the requirements are constructed and completed on site.

Ashley Tenhave (75 Shelburne Road) spoke again to say that although she understands Mr. Thompson's argument, the residents of Webster Green have been told other things (such as the main entryway would not be across from their complex) that were never made conditions of approval so they do not have to be adhered to. Now Flatley's main entrance is across from theirs which is going to make it dangerous for them to come and go from their homes. She stressed that she is tired of the Webster Green residents getting promised things that do not happen.

Ken Smith (18 Kimberly Drive) spoke again about the replacement of the trees stating that the Board never agreed to the planting of the trees being phased. He argued that they should not be allowed to plant them whenever they want to because they should not have been taken down to begin with.

Mr. Ploof responded that the subdivision plan is a completely separate application from the site plan and Mr. Thompson agreed and reiterated that landscaping is part of the site plan process and does not belong in a discussion about a subdivision.

Mr. Disco asked if there is an approved plan in place for all of the proposed lots and Mr. Thompson replied that yes, the parcel is one lot at this time and the approved site plan is for the lot as a whole. He also reiterated that Certificates of Occupancy will not be signed for any of the buildings until all applicable site improvements are completed, which includes replanting the trees. Mr. Disco continued to argue that the landscaping is relevant to the subdivision and Mr. Thompson reminded him that they would not be having this discussion if the lot was vacant because it is not germane to a subdivision.

The Board voted 4-1-1 to find that with the proposed conditions of approval, the application meets all applicable regulatory requirements necessary and further, to grant

conditional final approval of the subdivision, subject to the following precedent conditions to be fulfilled within 6 months and prior to signing of the plan, unless otherwise specified, on a motion made Lynn Christensen and seconded by Barbara Healey. Nelson Disco voted in the negative. Robert Best abstained:

1. Final plans and mylars to be signed by all property owners. The appropriate professional endorsements and signatures shall also be added to the final plans and mylars.
2. The applicant shall obtain all required State approvals/permits applicable to the project and provide copies to the Community Development Department, as applicable.
3. The applicant shall note any waivers granted by the Board on the final plans and mylars (including Section, and date granted) as applicable.
4. The applicant shall address any other forthcoming comments from any municipal departments, as applicable.
5. The applicant shall address the following Planning Staff Technical Comments:
 - a. Please add a note indicating that the full plan is on file at the Community Development Department.
 - b. All lots shall be bounded with permanently set granite or precast concrete markers and iron pipes per Sections 4.17.f & 4.18.a of the Subdivision Regulations.
 - c. Applicant shall prepare and submit for review by the Town's Legal Counsel, easement documents that address access, drainage, utilities (and others as may be applicable), such that the site plan for the flex buildings can be properly executed with the introduction of lot lines.
 - d. Applicant shall prepare a plan sheet (not to be recorded) that can be used to evaluate if the proposed lot lines will impact any setback or other dimensional zoning requirements.
 - e. The applicant shall address any conditions imposed by the Planning Board at the hearing, as applicable.

The following general and subsequent conditions are placed on the approval:

1. The applicant is responsible for recording the plan (including recording fee and the \$25.00 LCHIP fee, check made payable to the Hillsborough County Treasurer) at the Hillsborough County Registry of Deeds. The applicant is also responsible for providing proof of said recording(s) to the Community Development Department;
2. The applicant is responsible for recording any proposed easements and/or applicable legal documents at the Hillsborough County Registry of Deeds at the expense of the applicant. The applicant is also responsible for providing proof of said recording(s) to the Community Development Department.

3. The applicant shall address any forthcoming comments from the Fire Department, related to property addressing, as applicable.

8. Planning & Zoning Administrator's Report & Discussion/possible action regarding other items of concern

Mr. Thompson informed the Board that his position has been posted internally and if no internal candidates are found, it will be posted externally.

9. Approval of Minutes — August 15, 2023

The Board voted 6-0-0 to approve the minutes of August 15, 2023 as presented, on a motion made by Barbara Healey and seconded by Lynn Christensen.

10. Adjourn

The Board voted 6-0-0 to adjourn at 7:36 p.m., on a motion made by Kevin Peters and seconded by Barbara Healey.