



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES WEDNESDAY, APRIL 28, 2021 7:00 P.M.

Board members present: Richard Conescu, Patrick Dwyer, Ben Niles, Rod Buckley, and Lynn Christensen (arrived at 7:09).

Board members absent: Alternate Drew Duffy.

Staff present: Tim Thompson, AICP, Community Development Director

Due to the COVID-19 pandemic, 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](mailto: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.

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### 1. Call to Order

Richard Conescu called the meeting to order at 7:00 p.m. and Rod Buckley read the preamble.

### 2. Roll Call

- **Richard Conescu:** Stated he was participating alone in the room he was in.
- **Ben Niles:** Stated he was participating alone in the room he was in.
- **Rod Buckley:** Stated he was participating alone in the room he was in.
- **Patrick Dwyer:** Stated he was participating alone in the room he was in.
- **Lynn Christensen:** Arrived at 7:09 and stated she was participating alone in the room she was in.

*Agenda item #4 was addressed by the chair before item #3.*

- ### 4. Bilden Properties, LLC (petitioner/owner) – Appeal of Administrative Decision determining that the current use of the property is a “junk yard” per the Town Zoning Ordinance and NH RSA 236:112. The parcel is located at 719 Daniel Webster Highway in the C-2 (General Commercial), R-4 (Residential) and Planned Residential Districts. Tax Map 7E Lot 052. Case # ZBA 2021-07.

Tim Thompson explained that the petition is not able to be heard due to an abutter notification error. The project abuts Society Hill Condominiums and the petitioner notified the management company who was in turn supposed to notify the condo association's Board of Directors. Upon receiving the notice, the management company contacted staff to inform us that they are not the proper group to be notified under state law (it should be the condominium association officers/board) and even if they were eligible they did not have sufficient time to notify the board of directors or individual property owners of the meeting. The abutters will all have to be re-noticed for a future meeting.

3. **BM Investments, LLC (petitioner) and George & Theresa Hadley (owners)** – Variance under Section 3.02 (A) of the Zoning Ordinance to permit a three-lot subdivision with one lot having 80,417 sq. ft. of contiguous non-wetland area whereas 100,000 sq. ft. is required. The parcel is located at 119 Bean Road in the R-1 (Residential, by map), Aquifer Conservation, and Flood Hazard Conservation Districts. Tax Map 6C Lot 141. Case # ZBA 2021-06.

Matt Peterson (Keach-Nordstrom Associates, Inc.) was present to review the project with the Board and began by sharing an overview of the property as it exists today and explaining that the petitioner is proposing a three lot subdivision. He shared the proposed subdivision plan outlining the boundaries of each of the new lots which shows wetlands that fall between two of the lots, making the third lot not have the required 100,000 sq. ft. of contiguous land that is required.

Mr. Peterson also conveyed that the current floodplains in that area leave very little buildable land, however it is their belief that the recent reconstruction of the bridge over Baboosic Brook may have changed the floodplain requirements. The petitioner is proposing to construct a single family home on one of the three lots at this time and will leave the other two vacant as they work through the process of potentially updating the maps with the new floodplain locations with the Federal Emergency Management Agency (FEMA).

Mr. Peterson then then read through the responses to the statutory criteria and a letter realtor, Betsy Levesque, testifying to her opinion that the subdivision will not decrease surrounding property values. A copy of the letter from Ms. Levesque can be found in the project file located in the Community Development Department at Merrimack Town Hall.

Chairman Conescu asked why the petitioner is requesting to subdivide the lot into three parcels if so much of the land is not buildable. Mr. Peterson explained that they believe the other two lots may become buildable with some research into the floodplains. Tim Thompson added that even if the lots remain unbuildable, the owner could also still potentially sell the lots to a different developer for wetland mitigation associated with a different project's wetland permitting from NHDES.

Ben Niles asked how the petitioner knows a septic will fit in the buildable land being proposed for the house. Mr. Peterson stated that his firm has a septic designer on staff so they already know that a septic will fit in the available space. Tim Thompson also commented that the specific details related to the house itself will be included in the subdivision approval process through the Planning Board.

#### Public Comment

Chris and Adriana Mendes (101 Bean Road) submitted an email opposing the variance citing concerns for the underground water supply and wildlife creatures that currently inhabit that

area. The email was read into the record by Chairman Conescu and a copy of the email can be found in the project file located in the Community Development Department at Merrimack Town Hall.

Mr. Peterson explained that even if the three lot subdivision does not get approved, the proposed house can still be built with a two lot subdivision without the need for a variance (as he can design 2 lots each with more than 100,000 square feet of contiguous upland area). He also pointed out that all 3 of the proposed lots are 100,000 square feet or more in size which is in line with the rest of the neighborhood and a residential septic system is not detrimental to the underground water supply because the water gets filtered and put back into the ground.

Mr. Mendes also called into the meeting to testify, and reiterated some of the points made in the email such as disturbance to the aquifer and additional strains on the Merrimack town water supply. He questioned whether or not NHDES has been asked to provide feedback on this project and expressed concerns over the significant difference in the contiguous land that is required vs what is available. Lastly, Mr. Mendes questioned why the land is being subdivided if a house can be built there anyway.

Chairman Conescu explained that even if the petitioner had the 100,000 of contiguous non-wetland area the house would still be built in the same location because that is where the buildable land is. He also explained that a lot of the questions and concerns that were raised would be addressed during the Planning Board approval process when and if the variance is granted. Mr. Mendes asked if he could speak again later if he has additional questions or concerns and Chairman Conescu explained that once the public hearing portion of the ZBA meeting is closed they will vote on the application so there will not be another opportunity to speak.

***The Board voted 5-0-0, on a roll call vote, to grant the variance subject to the following condition, on a motion made by Rod Buckley and seconded by Ben Niles:***

- ***The petitioner shall obtain final subdivision approval from the Planning Board for the proposed three-lot subdivision.***

***Case 2021-06 Findings of Fact:***

1. **The variance would not be contrary to the public interest because:** The applicant is seeking relief from the required contiguous area which the applicant believes is to ensure, (1) that there is adequate area on site to properly locate a residential home and septic, (2) not create disjointed pockets of buildable areas on site, and (3) create consistent lot size throughout the residential zone. The applicant believes the lot configuration that is in front of the board meets all those requirements and as such we feel this layout is not contrary to the public interest.
2. **The spirit of the Ordinance is observed because;** Again, based on the applicants request for relief from the required contiguous area and the applicant belief that the spirit of the ordinance is to ensure, (1) that there is adequate area on site to properly locate a residential home and septic, (2) not create disjointed pockets of buildable areas on site, and (3) create consistent lot size throughout the residential zone. The applicant believes the lot configuration that is in front of the board meets all those requirements and as such we feel this layout is in the spirit of the Ordinance.

3. **Substantial justice would be done because;** Substantial justice would be done as it would allow for two (2) things to occur, (1) the owner would be allowed to subdivide the current only buildable area on the total parcel from the overall parcel, which is also cut off from the rest of the land via a wetland area that runs the length of the property, and (2) it would allow the owners to hold onto the remaining land which at a future date has the possibility to be developed as residential lots via some engineering and as such substantial justice would be done by granting this variance for the applicant.
4. **The values of surrounding properties would not be diminished because:** The proposed reduction in contiguous, but still total area still over 100,000, should not have any impact on surrounding property values because the total lot area is still over 100,000 SF, which is similar if not larger than most surrounding lots in the area.
5. **Literal enforcement of the provision of the ordinance would result in unnecessary hardship if:**
  - A. **Owing to the following special conditions of the property that distinguish it from other properties in the area.**
    - i. **No fair and substantial relationship exists between the general purpose of the ordinance provisions and the specific application of that provision to the property:** The relationship that exists between this property and the ordinance is that the literal enforcement of this provision of the ordinance of 100,000 SF of contiguous, where the applicants lot is approximately 83,850SF with the existing wetlands on-site, would not allow this owner to subdivide this lot out of the current parcel and based on the that and residential layout submitted with this application there is no fair and substantial relationship that the applicant sees would exists between the general purpose of the ordinance provision and the specific application of that provision to this property by granting the variance.
    - ii. **The proposed use is a reasonable one because:** The residential use is allowed, which would make it a reasonable one in the applicant's opinion.

## 5. Discussion/possible action regarding other items of concern

Tim Thompson advised the board that the Town Manager and Town Council have recommended that all boards transition back to in-person meetings. He shared that the Planning Board is holding one last virtual meeting on May 4<sup>th</sup> and will be in-person beginning May 18<sup>th</sup> and asked the Zoning Board members for their thoughts. Patrick Dwyer asked if masks will be required and Mr. Thompson explained that the room setup allows board members to remain socially distant from each other but masks are highly recommended when board members are not speaking, even if the board member is vaccinated. Mr. Thompson also shared the news of Alastair Millns passing with the Zoning Board and explained that before Alastair passed away he was physically unable to attend in person meetings which is part of the reason the Planning and Zoning Boards have remained virtual. The Board discussed the logistics of returning to in-person meetings, including protocol when a Board member is symptomatic.

**The Board, by consensus, will return to in-person meetings starting with the May 26, 2021 meeting.**

## 6. Approval of Minutes – March 31, 2021

**The Board voted 5-0-0, on a roll call vote, to approve the minutes of March 31, 2021, with corrections, on a motion made by Patrick Dwyer and seconded by Rod Buckley.**

**7. Adjourn**

**The Board voted 5-0-0 to adjourn at 7:50 p.m. on a motion made by Patrick Dwyer and seconded by Rod Buckley.**