



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, AUGUST 25, 2021

Board members present: Richard Conescu, Patrick Dwyer, Ben Niles, Rod Buckley, Lynn Christensen and alternate Chuck Mower.

Board members absent: None

Staff present: Casey Wolfe, Assistant Planner

1. Call to Order

Richard Conescu called the meeting to order at 7:02 p.m.

2. Roll Call

Patrick Dwyer led the pledge of allegiance and Rod Buckley read the preamble. Chairman Conescu swore in the individuals that will be speaking during the meeting.

The Board took up item 5 prior to items 3 & 4.

5. **Keith Pasquale (petitioner) and KTK Realty Trust, LLC (owner)** – Variance under section 2.02.4.B of the Zoning Ordinance to permit sales and storage of used automobiles in the Industrial District. The parcel is located at 20 Star Drive in the I-1 and Aquifer Districts. Tax Map 3D-1, Lot 012. Case # ZBA 2021-30.

Since a recent Planning Board decision on this property was recently appealed to Superior Court by an abutter, and there is an existing Stay Order from the Judge in place as part of that appeal, Chairman Conescu recommended that the Board table this project indefinitely until the appeal has been heard & resolved by the Court.

The Board voted 5-0-0 to table the variance petition indefinitely with abutter re-notification required on a motion made by Lynn Christensen and seconded by Patrick Dwyer.

3. **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. This item is continued from the July 28, 2021 Zoning Board meeting.

Dennis Stephens, (owner) and Frank Mesmer, Esq were present to discuss the appeal with the Board. Attorney Mesmer began by explaining that Mr. Stephens does not operate the business in question, and is just the property owner. The business (Catco Recycling) is owned and operated by Donald Belisle and they recycle small car parts (i.e. catalytic converters, alternators, brake pads

etc.). Mr. Belisle gathers the parts until he has enough inventory and then ships it to regional distributors.

Mr. Mesmer added that the operation of the business is all done indoors and does not include stripping cars. This issue began with a complaint that the location was being used as a junkyard but the business and property owners disagree with the junkyard classification as the business does not have any of the characteristics of a traditional junkyard. Catco Recycling does not sell parts and has no customers visiting the site. Mr. Mesmer referenced the New Hampshire Department of Environmental Services Vehicle Salvage Yard Environmental Compliance Manual to demonstrate that most of the DES concerns on junkyards have to do with oils and fluids which do not come into play in Mr. Belisle's business, which is another reason they disagree with the junkyard classification. The classification of a junkyard brings with it many regulations such as monitoring wells and buffers to hide stacks of cars from neighbors however the petitioner does not feel this is necessary because the business is more of a distribution center and not a junkyard. Mr. Mesmer argued that it does not seem fair to hold the property owner to these regulations that would cost him thousands of dollars in engineering fees for a business that in their opinion is not a junkyard and they have no need to hide stripped cars from sight because they do not have any. He added that they are open to applying for a variance if necessary but are hoping to work with the town to come up with a solution that is satisfactory to everyone involved.

Chairman Conescu asked if Community Development had suggested that they apply for a variance and Mr. Mesmer stated that they will apply for one if necessary but were hoping to avoid the expense if they could because they do not feel that the business is being classified correctly. He reiterated that they feel it is a distribution business and not a junkyard. Chairman Conescu explained that the Board is very cautious about overturning administrative decisions because there is a downstream impact that impacts not only the property in question but how junkyards are handled for all properties. Because of this, they would rather see a variance granted than overturn an appeal because a variance only applies to the subject property.

Assistant Planner Casey Wolfe interjected to clarify that the lot in question is split zoned, with the back portion of the lot being residential so a variance would not be necessary as long as the business is conducted in the commercial portion of the property (a variance would only be necessary in the residential portion of the lot if the criteria listed under Section 5 of the Zoning Ordinance could not be adhered to). Ms. Wolfe added that although a variance is not necessary, a site plan and Town Council licensing would still be required. Chairman Conescu asked for further clarification and Ms. Wolfe explained that junkyards are a permitted use in the commercial and industrial zones so a variance would not be needed. Patrick Dwyer asked which portion of the property is commercial and Ms. Wolfe explained that most of the property is commercial and only the back 25% of the lot is residential. She referred them to a print out of the property that was included in their meeting packets to get an idea of where the residential zone is located on the property. She further clarified that the petitioner is appealing the staff's determination that the business is a junkyard.

Patrick Dwyer asked for clarification on what the back building is used for and Mr. Mesmer explained that the building is used to refurbish the parts that they receive. He also added that if Mr. Belisle's business is going to be classified as a junkyard then we are setting a precedent that anyone in town that stores recycled auto parts is running a junkyard. Chairman Consescu asked for clarification on if the town is deeming the business a junkyard because the material is being stored in storage containers. Ms. Wolfe responded that the storage containers were not even considered in the interpretation and it's about the use of the property regardless if it is done internally or externally. She added that the town feels that the use classifies the business as a junkyard, based on not only the Zoning Ordinance but the state statute as well. Several Board members expressed concerns about over-turning the decision because the definition from the state statute and not just the town ordinance. Mr. Mesmer quoted the state statute and explained

that they feel that the town ordinance is broader than the state's and includes anyone that has used car parts. He feels that by overturning the appeal, they would not be overriding the state statute or even the ordinance but adding clarity to what is allowed.

Ben Niles expressed concerns with challenging the state law and feels that the decision should not be overturned. Mr. Mesmer responded if the Board is not able to grant the appeal they would like to request that staff not enforce all of the regulations of a typical junkyard. Mr. Dwyer reiterated the fact that if the appeal is overturned it changes the way junkyards are interpreted for everyone and not just this one parcel. Mr. Stephens asked if the appeal could be limited to the parts that are important to them and Mr. Dwyer explained that it does not work like that and they need to look at it as a whole. Mr. Stephens argued that Mr. Belisle's business is not operating like the other junkyards in town and do not have customers that come in searching for parts, they deal with very specific parts and ship them out to be refurbished and reused.

Mr. Mesmer asked if the decision of staff is upheld, if they can get relief from some of the requirements that apply to a traditional junkyard. Ms. Wolfe responded by explaining that the site plan regulations are a function of the Planning Board so waivers can be requested through them and if a variance is needed for something other than the use that would need to be handled separate from the appeal.

Chairman Conescu reiterated that when the ZBA overturns an appeal they are saying that the staff got it wrong and it changes how that particular section of the ordinance is interpreted for the entire town and not just the parcel in question. Mr. Stephens said he was hoping that the ZBA could help clarify the intent of the ordinance for the staff because he feels that it is intended more to regulate actual junkyards and not what Catco is doing. Mr. Dwyer asked for clarification on if the appeal was filed due to the classification of the business as a junkyard and Mr. Mesmer responded yes and explained that there are a lot of requirements from the state and town when you operate a junkyard and his client does not agree with the classification. Mr. Stephens added that there are a dozen other businesses in town that also store parts like they do.

Lynn Christensen asked Ms. Wolfe what the business will be required to do if they uphold the decision that it is in fact a junkyard. Ms. Wolfe indicated that site plan approval would be needed through the Planning Board and read through the criteria outlined in the ordinance. Mrs. Christensen asked if site plan approval will be necessary and Ms. Wolfe confirmed that it was.

Public Comment

Regina Sullivan (6 Bernards Road) stated that she is the president of the Board at Society Hill which abuts the property in question and is speaking on behalf of the residents at Society Hill. She went on to say that she has concerns with how the business is being portrayed by Mr. Mesmer and Mr. Stephens because they hear a lot of noise coming from that location that sounds like someone is cutting through metal and the noise happens throughout the entire day and into the night. She stated it is defiantly more than just collecting parts and shipping them out. Ms. Sullivan also added that with the water concerns that are impacting the town, they also want to ensure that the business is operating within the requirements of the Department of Environmental Services as well as the town.

Mr. Mesmer responded by explaining that the business used to salvage parts from used cars but no longer does this. The only other noise could be from the equipment used to move the pallets of parts. He suggested that perhaps the noise is coming from a neighboring business that is an industrial use and that this is the first time his client is hearing of a noise complaint.

Mr. Dwyer read through the ordinance language again and concluded that he believes the junkyard classification is accurate. Someone from the audience voiced an objection that there are other

businesses in town doing similar work and Rod Buckley responded that the Board can only address the business at hand and suggested that a Service Request be submitted for any businesses not adhering to the town's regulations.

Lynn Christensen asked about the storage containers and large dumpsters that are in the pictures that were shared with the Board. She questioned why such large dumpsters would be needed for the business as described. Mr. Stephens responded by indicating that there are no longer dumpsters on the site and the storage containers are used for parts. Mrs. Christensen then asked Ms. Wolfe if a re-examination of the site would be warranted if changes have been made since the original violation. Ms. Wolfe explained that a re-evaluation has already occurred and directed the Board to a letter from the Planning and Zoning Administrator (Robert Price) that was included in their packets. Mr. Stephens responded to clarify that they are not disputing that they are storing auto parts on site, they are disputing the classification that the business is a junkyard.

Chuck Mower commented that he feels that staff and legal counsel are paid a lot of money to uphold the interests of the town so therefore does not feel that the board should override a decision that they made.

Mr. Dwyer re-read paragraph "a" from RSA 236:112 and concluded that he agrees with the junkyard classification and feels that the appeal should not be granted. Chairman Conescu asked if there were any further questions and there were not so he called for a motion.

The Board voted 5-0-0 to deny the Appeal of Administrative Decision (and uphold the Community Development Staff's determination) on a motion made by Patrick Dwyer and seconded by Rod Buckley.

4. **Kerry Falzone (petitioner/owner)** – Variance under Section 2.02.1.A.3.e of the Zoning Ordinance to permit an unpermitted existing Accessory Dwelling Unit to remain as 1,020 s.f. whereas 1,000 s.f. is allowed (and obtain necessary permits). The parcel is located at 9 Profile Drive in the R-1 (Residential, by soils) District. Tax Map 6B, Lot 176. Case # ZBA 2021-29.

Kerry Falzone (petitioner/owner) was present to discuss the project with the Board. She explained that she and her husband purchased the house at 9 Profile Drive approximately 4 years ago and her parents moved into an addition that was already part of the house when they bought it. They later added an additional bedroom and kitchen to that existing space and did not realize any of this was not permitted until they tried to refinance and the appraiser brought it to their attention. In speaking with the Community Development staff to get the necessary approvals, they learned that the ADU is 20 square feet larger than what is allowed so they are now seeking a variance. She read through the responses to the statutory criteria (outlined below) and paused after each question to answer questions from the Board.

Several Board members asked for clarification on what was being requested and Ms. Wolfe explained that the existing ADU is 20 square feet larger than what is allowed in the ordinance so therefore it cannot be administratively approved by the staff unless a variance is granted allowing the additional 20 square feet. If the variance is granted, the petitioner will still need to get administrative approval from staff for the actual ADU.

There was no public comment.

The Board voted 5-0-0 to grant the variance, subject to obtaining Administrative Approval for the Accessory Dwelling Unit from the Community Development Department and obtaining any required permitting from the Building and Fire Departments, on a motion made by Patrick Dwyer and seconded by Rod Buckley.

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

The additional 20 square feet has no impact on the visual character of the neighborhood. The structure already exists from prior owners and we simply added to the back of it. The use remains the same, residential.

2. The spirit of the ordinance is observed because:

The prior owners initially added the space with the town's approval. We added to the space also with the town's approval. It is now the combined unit that we wish to seek approval for.

3. Granting the variance would do substantial justice because:

It would bring full property disclosure to all town departments to assess value and accurate taxation of the property.

4. Granting the variance would not diminish the values of surrounding properties because:

There are no changes to the existing property, therefore would have no negative impact to the abutters and all those involved.

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 decision would likely go unnoticed by the public as the space remains unchanged and the ADU usage is still residential.

b. The proposed use is a reasonable one because:

The initial addition by the prior owners was within these limits, the space we added was within the limits as well. It is now the combined space, with a kitchen, that we are looking to obtain approval on as a whole combined unit. A disapproval would cause unnecessary construction to the existing space at no benefit to anyone allowed.

Patrick Dwyer recused himself from Item #6. Richard Conescu designated Charles Mower to sit for Patrick Dwyer.

6. Marc Bourbeau (petitioner/owner) - Variances under Section 3.05 of the Zoning Ordinance to permit the construction of a garage 8 feet from the side property line whereas 15 feet is required and 39 feet from the rear property line whereas 40 feet is required. The parcel is located at 30 Joppa Road the R-4 (Residential) and Aquifer Districts. Tam Map 5C/232. Case # ZBA 2021-31.

Kathy Bourbeau (owner) was present to discuss the project and explained that her and her husband are hoping to construct a 20'x30' garage and are in need of setback relief in order to do so. She then read through the responses to the statutory criteria (outlined below) and paused after each question to answer questions from the Board.

There was no public comment.

The Board voted 5-0-0 to grant the variances on a motion made by Rod Buckley and seconded by Lynn Christensen.

Case #2021-31 Findings of Fact

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

The proposed garage addition is an improvement to a substandard lot created in the mid 1960's. Adding the garage is consistent with surrounding properties in the area and therefore would not be contrary to the public interest.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance is to provide reasonable yard setbacks to abutting properties. The direct abutter to the proposed addition currently has an existing non-conforming garage which also encroaches the side setback. These complimentary garage used would not necessitate the full yard setback and therefore the spirit is observed.

3. Granting the variance would do substantial justice because:

The property is currently developed and based on the house and driveway position, as well as the property topography, there is no way to accommodate a garage onsite without the variance. This would provide substantial justice to the applicant in allowing improvement to their property with an addition that is consistent and complimentary to the existing surrounding neighborhood.

4. Granting the variance would not diminish the values of surrounding properties because:

The proposed addition would enhance the existing home, improving the property and adding value. This added value would have no adverse effect on surrounding properties.

5. Unnecessary Hardship

- a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property (this criterion utilized because the petitioner did not meet the criteria in subparagraph (1) of RSA 674:33):**

The existing property is an existing substandard lot created in the mid 1960's. The existing home is currently constructed onsite and is positioned as such to not reasonably allow the addition of a garage on the property. The house, driveway location and existing site topography are special conditions of this property which require a variance to reasonably allow expansion of the house to accommodate a garage.

Patrick Dwyer returned as a voting member.

- 7. Innovation Acquisition, LLC (petitioner) and Solon Properties, LLC and Innovation Acquisition, LLC (owners) – Variance under section 2.02.4.B of the Zoning Ordinance to permit multi-family residential use in the Industrial District. The parcel is located at 1 Innovation Way in the I-1 (Industrial) and Aquifer Districts. Tax Map 2D, Lot 041-15. Case # ZBA 2021-32.**

At the petitioner's request, the Board voted 5-0-0 to continue the public hearing to September 29, 2021, on a motion made by Patrick Dwyer and seconded by Rod Buckley.

- 8. Patricia M. Panciocco, Esquire (petitioner) and Lori F. and Rodd R. Ruland Trustees of the Lorie F. Ruland Revocable Trust** – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a house 13.6 feet from the side property line whereas 15 feet is required. The parcel is located at 312 Baboosic Lake Road in the R-2 (Residential) District. Tax Map 6A-2, Lot 159. Case #ZBA 2021-33.

Petitioner was represented by Attorney Patricia M. Panciocco, Esq. & Rodd R. Ruland (owner). Ms. Panciocco began by asking the Board if they received the abutter letters and Ms. Wolfe confirmed that they were received and included in the Board's packets. Ms. Panciocco explained that the parcel in question was recently part of a voluntarily lot merger and is a non-conforming lot within the R2 zone. She went on to explain that the lot has no legal frontage but is accessed through a private road off of Baboosic Lake Road. The existing house was built in the sixties and has gone through many renovations. The current owners would like to demolish the house and replace it in the same footprint, which does not comply with the current setbacks. The owners are hoping to minimize the disturbance of the site since it is in the Shoreland Protection area and believe that keeping the same footprint will help. Ms. Panicocco then read through the statutory criteria (outlined below).

Mrs. Christensen asked if Site plan approval is necessary if the variance is granted. Ms. Wolfe responded that site plan approval is not needed but since this lot has no frontage on a class V road or better, they do need a recommendation from the Planning Board and permit approval from Town Council in accordance with RSA 674:41.

There was no public comment.

The Board voted 5-0-0 to grant the variance, subject to obtaining approval for issuance of a building permit on a lot without frontage on a Class V or better roadway, per the requirements of RSA 674:41 (recommendation from the Planning Board, permit approval from the Town Council), on a motion made by Rod Buckley and seconded by Patrick Dwyer.

Case #2021-33 Findings of Fact

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

The Owners recently merged Lots 6A-2, Lots 156 and 159 to bring their lot size into conformity with the Ordinance. They now wish to remove and rebuild the existing single family home located on their lot but wish to maintain the existing 13.6 southerly side setback. Granting this request is not contrary to the public interest because doing so will allow the dwelling replacement without unnecessary disturbance to mature trees located on the site and the existing topography in addition to being consistent with RSA 674:19.

2. The spirit of the ordinance is observed because:

Granting this variance request to maintain the status quo is not contrary to the spirit of the ordinance because the Owners have made their best efforts to bring the lot size into conformity with the Ordinance and wish to avoid the disturbance of mature trees and the existing topography by maintaining the existing setback which is consistent with RSA 674:19 and not be more nonconforming.

3. Granting the variance would do substantial justice because:

Substantial justice requires the public benefit gained by strict enforcement exceed any loss to the owner. Granting this variance will be substantially just because limiting the disturbance of existing vegetative growth and unnecessary disturbance of the site does not benefit the public and would be contrary to the owners' and the public interest. No added public benefit to the public.

4. Granting the variance would not diminish the values of surrounding properties because:

Granting the variance will not diminish surrounding property values. The existing home is in dire need of repair and its replacement and replacing it within its existing footprint without unnecessary disturbance will not diminish surrounding property values.

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 special conditions of the property are its unique shape, its preexisting conditions and that it is almost entirely within the Shoreland Protection District ("SPD") which discourages the removal of vegetation and unnecessary earth disturbances requiring the building's replacement remain within its existing footprint and every square foot being of paramount importance.

Since setbacks are intended to preserve proper spacing between dwelling units, and building a replacement home within the existing side setback will not only preserve the existing spacing, it will help to avoid any unnecessary changes to the existing earth surface. There is no fair and substantial relationship between the strict application of the 15-foot side setback and its general public purpose by allowing the existing side setback to remain the same.

b. The proposed use is a reasonable one because:

Since a preexisting single family is permitted and its nonconforming setbacks are protected by RSA 674:19, they are presumed to be reasonable.

9. Discussion/possible action regarding other items of concern

10. Approval of Minutes - July 28, 2021

The minutes of July 28, 2021 were approved as submitted, by a vote of 4-0-1, on a motion made by Patrick Dwyer and seconded by Rod Buckley. Chairman Conescu abstained.

11. Adjourn

The meeting was adjourned at 8:44 p.m. by a vote of 5-0-0, on a motion made by Ben Niles and seconded by Lynn Christensen.