



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 ZONING BOARD OF ADJUSTMENT
VIRTUAL MEETING APPROVED MINUTES
WEDNESDAY, AUGUST 26, 2020
7:00 P.M.**

Board members present: Richard Conescu, Kathleen Stroud, Patrick Dwyer Rod Buckley and Alternate Ben Niles.

Board members absent: Lynn Christensen, and Alternate Drew Duffy.

Staff present: Assistant Planner, Casey Wolfe

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. 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 read the preamble, and then read the procedures and processes for the virtual meeting.

Richard Conescu appointed Ben Niles to sit for Lynn Christensen.

2. Roll Call

Richard Conescu

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

Kathy Stroud

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

Patrick Dwyer

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

Rod Buckley

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

Ben Niles

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

3. Annual Meeting - Election of Officers and Review of Rules of Procedure

The Board voted 4-0-1 to elect Richard Conescu as Chair, on a nomination made by Patrick Dwyer and seconded by Rod Buckley. Richard Conescu abstained.

The Board voted 4-0-1 to elect Kathleen Stroud as Vice Chair, on a nomination made by Patrick Dwyer and seconded by Rod Buckley. Kathleen Stroud abstained.

- 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 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. This item is continued from the July 29, 2020 meeting.**

Discussion of this item was combined with all variances consisting of agenda items #4-1. See discussion following agenda item #9

The Board voted 5-0-0, on a roll call vote, to grant the variances, with conditions*, on a motion made by Kathy Stroud and seconded by Rod Buckley.

****Conditions outlined after agenda item#9***

- 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 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. This item is continued from the July 29, 2020 meeting.**

Discussion of this item was combined with all variances consisting of agenda items #4-1. See discussion following agenda item #9

The Board voted 4-0-1, on a roll call vote, to grant the variances, with conditions*, on a motion made by Rod Buckley and seconded by Kathy Stroud. Patrick Dwyer abstained.

****Conditions outlined after agenda item#9***

- 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 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. This item is continued from the July 29, 2020 meeting.**

Discussion of this item was combined with all variances consisting of agenda items #4-1. See discussion following agenda item #9

The Board voted 4-0-1, on a roll call vote, to grant the Variances, with conditions*, on a motion made by Rod Buckley and seconded by Kathy Stroud. Patrick Dwyer abstained.

****Conditions outlined after agenda item#9***

- 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 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. **This item is continued from the July 29, 2020 meeting.**

Discussion of this item was combined with all variances consisting of agenda items #4-1. See discussion following agenda item #9

The Board voted 4-1-0, on a roll call vote, to grant the variances, with conditions*, on a motion made by Kathy Stroud and seconded by Rod Buckley. Patrick Dwyer voted in opposition.

****Conditions outlined after agenda item#9***

- 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 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. **This item is continued from the July 29, 2020 meeting.**

Discussion of this item was combined with all variances consisting of agenda items #4-1. See discussion following agenda item #9

The Board voted 5-0-0, on a roll call vote, to grant the variances, with conditions*, on a motion made by Patrick Dwyer and seconded by Kathy Stroud.

****Conditions outlined after agenda item#9***

- 9. 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. **This item is continued from the July 29, 2020 meeting.**

The Board heard agenda items 4-9 together, however, they were voted on separately.

Greg Michael and Brett Allard (Bernstein, Shur, Sawyer & Nelson PA) presented the project to the Board on behalf of the petitioner. Attorney Greg Michael began by reminding the Board members that the subdivision in question (Normandy Estates) is an old grandfathered subdivision (originally approved in 1969) that currently has nine lots left to be built. The applicant is looking to reduce the total lot number by one and only build eight of the nine remaining lots. Mr. Michael continued to explain the history of the roads that were intended to be built when the subdivision was first approved in 1969 and pointed out that the proposed lots are approximately the same size of the lots that have already been developed and none of them meet today's zoning requirements. The new plan calls for the un-dedication of a portion of Squires Drive and Elizabeth

Drive and will result in increased area for four lots (2 existing and 2 proposed). Additionally, the lot that is being eliminated (lot 27) is an effort to redesign the entrance into the new portion of the development and will also result in an increase of land for proposed lot 10. Mr. Michael wrapped up his presentation by stating that the proposed plan increases the size of several lots, removes traffic from the existing portion of Elizabeth Drive, improves the turnaround area at the end of the existing portion of Elizabeth Drive and adds a cul-de-sac on the new portion of the development. Mr. Michael then turned the presentation over to Attorney Brett Allard to read through the application criteria.

Mr. Allard read through the Findings of Fact (outlined below) that apply to agenda items 4-9.

Mr. Allard had commented that one of the reasons it would be difficult to follow through with the original plan that was approved in 1969, is that it is difficult to continue Elizabeth Drive as originally approved because of the rough terrain and ledge at the end of the existing portion of Elizabeth Drive. Chairman Conescu asked if the ledge area that was referenced made it impossible to connect the road or is it a matter of it being cost prohibitive. Attorney Michael responded to the question by stating that it is a little of both and that the proposed plan was the best economically and logically. Chairman Conescu then asked if the current proposal allows enough room for emergency vehicles to get through and Attorney Michael responded that they are confident the proposal will meet the town's requirements but it will be discussed when the plans are reviewed by the Planning Board. Additional concerns were raised about the minimal frontage for lots 13 through 15 and Attorney Michael responded to those concerns by pointing out that the purpose of frontage is to prevent over-crowding however minimal frontage is allowed in a cluster development as well as the Industrial Zone.

Public Comment in opposition of the project was received from John Sauter, 9 Elizabeth Drive (in the form of an email and phone call). The email was read by Chairman Conescu and attached. Mr. Sauter also voiced his concerns about the road not connecting as originally planned stating that completing the road as a horseshoe would allow emergency vehicles access in two directions.

Mr. Michael responded to the Public comments by reiterating that the proposed lots are already approved and the current plan calls for the reduction of lots from nine to eight. He also added that frontage has little to do with density and is really only a means to access the property and pointed out again that several lots will be increased in size as a result of the proposed plan. He also commented that the proposed plan will correct the problem with trucks getting stuck at the end of the existing Elizabeth Drive which was something that was pointed out in the public comments and that if the applicant were to walk away from this project nothing would improve because the town has no plans to correct the turn-around issue that currently exists.

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 Rod Buckley with the following condition:

- 1. The petitioner shall obtain Planning Board approval for the proposed lot line adjustment.**

Cases #2020-10-#2020-15 Findings of Fact:

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

The proposed use on the lots is single family residential, which is a permitted use in the R-1 Zone. The purpose of frontage requirements is to prevent overcrowding and congested development.

There will not be any overcrowding or congested development if these variances are granted. Lot 13 will enjoy driveway access from the westerly side of the proposed Charles Road cul-de-sac layout. Lot 15 will enjoy driveway access from the northerly side of the expanded Elizabeth Drive turnaround area. This area has been identified by the Town as presently insufficient for emergency vehicles to safely and efficiently make turnaround movements. In connection with these variances, this turnaround area will be expanded in order to safely and efficiently facilitate emergency vehicular turnaround movements.

The general public purpose of depth and minimum lot size requirements is so that lots will have sufficient buildable area, proper areas for drainage, and sufficient areas for sanitary facilities. The lots will be serviced by municipal water, so individual wells are not required. There is sufficient area on each lot for construction of a single-family home and private septic system. This is demonstrated by the fact that the nine developed lots along Elizabeth Drive- which are more or less the same size as the lots that are the subject of this application - all have existing single-family homes and septic systems.

Thus, granting the variances would not be contrary to the public interest. In fact, creating a safer and more efficient roadway for emergency vehicles is a benefit to the public interest. Granting the variances will not threaten the public health, safety, or welfare. There will be no adverse impact or injury to any public rights if the variances are granted.

2. The spirit of the ordinance is observed:

Because it is in the public's interest to uphold the spirit of the ordinance, the Courts have held that these two criteria are related. If you meet one test you almost certainly meet the other. See Farrar v. Keene, 158 N.H. 684 (2009). In addition to the above stated reasons, in terms of use, the lots are consistent with the residential character of the neighborhood and will remain as such. Granting the variances will not alter the essential character of the neighborhood. The proposed development is consistent with the area's present use. The Applicant merely seeks to finish development of this vested subdivision. The new lots will be consistent in size and character as the existing developed lots in the neighborhood. Therefore, the spirit of the ordinance is observed.

3. Granting the variance would do substantial justice:

There is no injury to the public if the variances are granted. There is no gain to the public if the variances are denied. Therefore, the loss to the Applicant when balancing public and private rights outweighs any loss or injury to the general public.

Additionally, under Farrar, the economics associated with a variance request are relevant to the substantial justice analysis. Due to the substantial presence of ledge, in addition to the harsh terrain and topography in the area abutting the end of existing Elizabeth Drive to the West (between lots 14 and 24 and immediately east of parcels E and F), it is not economically feasible for the Applicant to construct a contiguous roadway between the northerly end of Elizabeth Drive and the northerly end of the proposed Charles Road layout (as contemplated by the 1969 Subdivision Plan) in order to expand the frontages of lots 13, 14, and 15. However, the lots will have sufficient access onto these roads and the turnaround area on Elizabeth will be expanded to accommodate emergency vehicles. Moreover, the lots will be made less nonconforming in terms of area if these variances are granted, which is a gain to the Applicant, the Town and the public. Therefore, substantial justice is done by granting the variances.

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

All of the lots along the proposed Charles Road layout are undeveloped. If the frontage variances are granted in order to allow lots 13 and 14 to access the cul-de-sac at the end of the proposed Charles Road, the value of lots 10, 11, 12, 25, and 26 will be improved by providing those undeveloped lots with access to the public roadway network. Additionally, if the area variances are granted for all the lots, they will all become larger which will result in more open space for the benefit of the neighborhood as a whole.

For purposes of this application, there are only two other abutters within the neighborhood: Lots 17 and 24. If these variances are granted the Applicant will be un-dedicating the paper street depicted on both the 1969 Subdivision Plan and the Applicant's current plan as Squire Drive. As a result, under the "centerline" theory, title to half of this paper street (Parcel J) will revert to lot 17, thereby increasing the lot by 3,906 square feet. Thus, granting the variances will either (1) not impact the value of lot 24; or (2) improve the value of lot 24 by creating a larger lot.

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 lots are distinguishable from other properties in the area. All the lots along existing Elizabeth Drive are developed and enjoy full access onto Elizabeth Drive. Given the suitable terrain, lots 10, 11, 12, 25, and 26 will enjoy full access onto the proposed Charles Road layout without difficulty. However, the remaining lots in the neighborhood that is the subject of the application for purposes of frontage - 13, 14, and 15 - cannot be improved without the requested variances because of the substantial presence of ledge and the harsh terrain and topography in the area. Lots 13, 14, and 15 are the only lots in the neighborhood that suffer from these conditions. Indeed, it is this harsh terrain and topography that necessitated the redesign of the subdivision, resulting in each lot become larger than they are presently. All of the lots cannot be improved in the current condition because of the topography - they must be larger as proposed.

Owing to these special conditions, among others, relative to other properties in the area, there is no fair and substantial relationship between the general public purpose of the Zoning Ordinance's minimum frontage, depth, and minimum lot size requirements and their application to the lots.

As stated, frontage requirements and mechanisms that aim to prevent overcrowding and congested development. There will not be any overcrowding or congested development if these variances are granted. The proposed construction of the Charles Road layout and the proposed expansion of the Elizabeth Drive, turnaround area are more than sufficient to accommodate driveway access to lots 13, 14, and 15. The substantial existence of ledge and the harsh terrain and topography prevent the Applicant from constructing Elizabeth Drive as a contiguous horseshoe as originally depicted on the 1969 Subdivision Plan, which triggers the need for these variances. The unique hardship inherent in the topography of the land is precisely the type of issue that is properly remediated by the issuance of variances.

There is no fair and substantial relationship between the general public purpose of the Zoning Ordinance's depth and minimum lot size requirements and their application to the lots because each

lot is becoming larger, and thus less nonconforming, with the Zoning ordinance than they are presently. Variances are most often requested to use property in a manner that does not conform with the Zoning Ordinance. Certainly, these variances are justified when granting them will bring lots closer to conformity with the Zoning Ordinance than they are currently.

b) The proposed use is a reasonable one because:

The proposed use on lots 13, 14, and 15 is single family residential which is permitted by right in the R-1 Zone. Permitted uses are per se reasonable. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 107 (2007).

- 10. 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. This item is continued from the July 29, 2020 meeting.**

At the petitioner’s request, the Board voted 5-0-0, on a roll call vote, to continue this item until September 30, 2020, pending completion of the 30-day appeal period for the granting of the variance for ZBA Case #2020-10 through 15 with no appeals being filed, on a motion made by Patrick Dwyer and seconded by Rod Buckley.

- 11. As Life Goes On, LLC (petitioner) and Laura Benson (owner) - Appeal of Administrative Decision that determined an assisted living group home is not exempt from the three-acre minimum lot area requirement of Section 2.02.9(b) (6) of the Zoning Ordinance. The parcel is located at 585 Daniel Webster Highway in the C-1 (Limited Commercial) and R-4 (Residential), Aquifer Conservation, and Elderly Housing Overly Districts. Tax Map 6D-1, Lot 046. Case # ZBA 2020-23. This item is continued from the July 29, 2020 meeting.**

At the petitioner’s request, the Board voted 5-0-0, on a roll call vote, to continue this item until September 30, 2020, pending completion of the 30-day appeal period for the granting of the variance for ZBA Case #2020-22 with no appeals being filed, on a motion made by Rod Buckley and seconded by Patrick Dwyer.

- 12. Brian Labrie (petitioner) and BHL Real Estate Holdings, LLC (owner) – Variance under Section 3.02 of the Zoning Ordinance to permit the construction of a garage 5 feet from the side property line whereas 20 feet is required. The parcel is located at 660 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, and Wellhead Protection Districts. Tax Map 6E-2, Lot 014. Case # ZBA 2020-25.**

Ken Clinton, (Meridian Land Services, Inc.) presented the project of behalf of the petitioner and began by walking the Board through the plans that were submitted to show the layout of the property in question. He then explained that the petitioner owns and operates a landscaping business and is constructing the garage to store his work vehicles in order to keep them out of the winter elements. Mr. Clinton then read through the application and addressed the variance criteria.

Public comment in favor of the project was received via letter from Jerry Hill, 662 Daniel Webster Highway. The letter was read by Patrick Dwyer and is attached.

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

- 1. The petitioner shall obtain Planning Board site plan approval for the proposed site modifications.**

Case #2020-25 Findings of Fact:

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

This will allow the applicant to maneuver a vehicle with a trailer that is used for his landscaping business in a safe and efficient manner vs. having to back up a trailer within the yard and conduct three point turns. The garage will be situated in an area that is currently utilized for the storage of equipment, which is the purpose of the garage, as such there is no material change to the use of the area, other than equipment being stored within a building. Also, the abutting property, lot 6E-2/015, is currently non-conforming with the existing structures within the 20 foot side yard setbacks. For these reasons, granting the variance would not threaten public health, safety or welfare.

2. The spirit of the ordinance is observed because:

The Zoning Ordinance purpose, as indicated is Section 1.01 is ..."To promote the health, safety, convenience, and general welfare of the Town of Merrimack..."As such by allowing the operator to traverse the site more safely and conveniently, the spirit of the ordinance is upheld. Additionally, the character of the existing neighborhood is a dense commercial area with several infringements on side yard setbacks.

3. Granting the variance would do substantial justice because:

There is no harm to the general public by allowing the structure closer to the side yard lot line, as the opposing side of the lot line has a yard that is already infringed upon and the area of the site has several lots with infringing side yard setbacks. As such there is no gain to the public if the variance is denied. Additionally, the abutting property, which has the most impact by granting the request, has no offense to the relief being granted, as indicated in the attached letter from A-Bee Septic. The area where the garage will be situated is also currently being used for the storage of equipment, and the only change would be that the equipment is stored interior to a building. For these reasons there would only be loss to the Applicant in that It would not be able to properly traverse a vehicle in their contractor yard area, and the inability to store equipment within an enclosed heated space.

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

As the request is in the character of the existing neighborhood, where the lots are densely developed, with many features such as parking lots, structures, etc. within close proximity to lot lines.

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:

The existing dimensions, size, and features (i.e. building, parking, etc.) of the lots do not permit the proper turning maneuvers for the equipment (truck with trailer) that the applicant operates, if a building were to be constructed within the required side yard setbacks.

The existing dimensions, size, and features (i.e. building, parking, etc.) of the lots do not permit the proper turning maneuvers for the equipment (truck with trailer) that the applicant operates, if a building were to be constructed within the required side yard setbacks.

- 13. Ultimate Bimmer Services (petitioner) and Sanco Realty Trust (owner) –** Variance under Section 2.02.4 of the Zoning Ordinance to permit an automobile sales use in the I-1 (Industrial) 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 2020-26.

After a discovery that Tax Map 3D-2, Lot 021 is entirely in the C-2 district, this case was determined to be moot and was not heard by the Board.

- 14. Ultimate Bimmer Services (petitioner) and Sanco Realty Trust (owner) –** Special Exception under Section 2.02.3 (C) (1) of the Zoning Ordinance to permit the sale or storage of used and new cars and an automobile service and repair station 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 2020-27.

The Petitioner was represented by Greg Michael and Brett Allard, Bernstein, (Shur, Sawyer & Nelson, P.A.), and Jeff Kevan, (TF Moran). Attorney Greg Michael provided an overview of the parcel including an explanation of the topography and the lot size. He went on to explain the request (as outlined in the agenda) and pointed out that the Petitioner is looking to build a BMW sales and repair business which would be a nice fit for DW Highway. The business is not something that attracts people passing by; it is something that is sought out by specific car owners. Mr. Michael then introduced Attorney Brett Allard to review the application criteria. Mr. Allard then read the Ordinance Criteria into the record.

Chairman Conescu questioned whether or not the traffic would be increased with people needing repairs. Mr. Michael stated that the majority of the clientele will be people that own BMWs, they may do other repairs but are specialized in BMW service and sales.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the special exception, on a motion made by Ben Niles and seconded by Kathy Stroud with the following condition:

- 1. The petitioner shall obtain site plan approval from the Planning Board for the proposed new & used car dealership and automotive service facility.**

Case #2020-27 Ordinance Criteria:

The applicant shall meet the approval criteria set forth Section 2.02.3 (C) (1):

a) The specific site is an appropriate location for such a use or uses in terms of overall community development because:

The proposed automobile dealership will be located just off DW Highway, and is keeping with the mixed uses in the area. Nearby uses include, a firearms retailer, furniture store, bank, and auto body shop.

b) The use as developed will not adversely affect the neighborhood because:

The proposed BMW dealership is a relatively low traffic generator and will not contribute excessive noise or traffic to the neighborhood.

c) There will be no nuisance or serious hazard to vehicles or pedestrians because:

The proposed driveway to the dealership is located along the south-eastern property line. This will encourage traffic associated with the dealership to remain within the southern-most portion of Herrick Street, closest to DW Highway. It is expected that the pedestrian traffic will be most prevalent nearest to the residential properties on Herrick Street. The proposed site layout shifts vehicles entering the dealership as far as possible to the opposite end of the street. With no sidewalks on Herrick Street, or on DW Highway, high levels of pedestrian traffic are not expected in this area. The proposed driveway has been located such that sufficient distance is provided from the intersection with the DW Highway.

d) Adequate and appropriate facilities will be provided for the proper operation of the proposed uses or uses because:

The proposed site layout provided adequate building, parking, and circulation spaces for the business the applicant intends to operate. Because the proposed dealership will attract primarily clientele who are specifically seeking BMW vehicles and related service, traffic impacts are not expected to require any changes to the adjacent roadways. Utilities requires to operate the proposed dealership are present nearby and expected to accommodate the proposed use with no major improvements.

- 15. PMG Northeast, LLC (petitioner/owner)** – Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit the installation of a ground sign within 2 feet of the public right-of-way whereas 20 feet is required. The parcel is located at 1 Continental Boulevard in the C-2 (General Commercial), and Aquifer Conservation Districts. Tax Map 4D, Lot 054-01. Case # 2020-28.

Petitioner was represented by: Jesse Cokeley, (Maser Consulting, P.A.), and Courtney Herz (Sheehan, Phinney, Bass & Green, P.A.). Mr. Cokeley began by providing an overview of the lot in question and advising the Board that the project has already received conditional approval from the Planning Board and a positive recommendation from the Conservation Commission. He then explained that the current ground sign is approximately 3 feet from the right of way but is being repositioned to be perpendicular with Continental Blvd. The application criterion was read by Ms. Herz.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the variance on a motion made by Patrick Dwyer and seconded by Kathy Stroud.

Case #2020-25 Findings of Fact:

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

The New Hampshire Supreme Court in Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005), has held that, “to be contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree conflict with the ordinance such that violates the ordinance’s basic zoning objectives.” In Harborside Associates v. Parade Residence Hotel, 162 N.H. 508, 514 (2011), the Court also noted that “[m]ere conflict with the terms of the ordinance is insufficient. The New Hampshire Supreme Court has determined that a variance violates an ordinance’s basic zoning objectives under two circumstances: (1) where granting the variance would “alter the essential character of the neighborhood; or (2) where granting the variance would “threaten the public health, safety, or welfare.” Harborside, 162 N.H. at 514.

Here, a decision to grant the Applicant’s requested variance would not alter the essential character of the neighborhood. In fact, the approved site plan is to construct an improved gasoline station and convenience store. The neighborhood is solidly commercial, with fast food and pizza restaurants abutting the site.

Moreover, a decision to grant the variance would not threaten the public health, safety, or welfare. The proposed sign is located in almost the same location as the existing sign at the site, which has proven to not raise a threat to the public in any way.

2. The spirit of the ordinance is observed because:

The requirement that the variance not be contrary to the public interest is related to the requirement that [it] be consistent with the spirit of the ordinance.” Harborside, 162 N.H. at 514 (citations omitted; brackets in original). As noted above, granting the variance would not alter the essential character of the neighborhood and would benefit the public health, safety and welfare.

Section 17.01 of the Ordinance provides that “[t]he purpose of this article is to encourage the effective use of signage to direct movement, advertise, and inform the public while protecting public safety, preserving neighborhood character and minimizing visual clutter.” The proposed location of the ground sign, at the corner of the intersection of Continental Boulevard and Camp Sargent Road will do just that - ensuring that drivers on both roads are informed about the location of the gasoline station and convenience store.

3. Granting the variance would do substantial justice because:

The “substantial justice” prong of the variance analysis is met when, without the variance, the Applicant would suffer a loss that is not outweighed by a gain to the general public. Harborside, 162 N.H. at 515. It is also appropriate to consider, when analyzing this factor, whether the proposed use is consistent with the present use. Id.

Here, the public would not enjoy any significant gain as a result of a denial of the requested variance. In fact, signage set back further from the Continental Blvd and Camp Sargent Rd intersection would result in a less clearly marked gasoline station and convenience store, running counter to the purpose of the Ordinance. A decision to grant the variance would not have any significant impact on any other property, in that it represents essentially no change from existing conditions.

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

The site already houses a gasoline station and convenience store, with a ground sign in essentially the same location as is proposed by this variance application. Granting the requested variance will not have any impact on the values of the surrounding lots.

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:

Due to the location of the Property at the corner of Continental Blvd and Camp Sargent Rd, specific application of the Ordinance provision would not promote the public purposes of the Ordinance. As detailed above, the purpose of the provision is "to direct movement, advertise, and inform the public while protecting public safety, preserving neighborhood character and minimizing visual clutter." § 17.01. The proposed sign location - near the corner of the two abutting roads - actually better serves the purpose of the Ordinance than would a sign set back twenty feet from the roads. A sign that was constructed in accordance with the Ordinance would actually leave the public less informed about the location of the gasoline station and convenience store; it is evident that the proposed location is reasonable.

b) The proposed use is a reasonable one because:

Due to the size and location of the Property, compliance with the Ordinance provision would require the ground sign to be set so far back from the roads that the utility of the site would be greatly diminished. As such, it would be unreasonable for the Applicant to utilize the Property in strict conformance with the Ordinance under these circumstances, and a variance is therefore necessary to enable reasonable use of it.

- 16. PMG Northeast, LLC (petitioner/owner) –** Variance under Section 17.10.4 (h) of the Zoning Ordinance to permit the installation of two wall signs on the northern face of a gasoline station canopy whereas one wall sign is permitted. The parcel is located at 1 Continental Boulevard in the C-2 (General Commercial), and Aquifer Conservation Districts. Tax Map 4D, Lot 054-01. Case # 2020-29.

Petitioner was represented by: Jesse Cokeley, Maser Consulting, P.A., and Courtney Herz, Sheehan, Phinney, Bass & Green, P.A. Ms. Herz provided a brief explanation of the request and read the application criteria to the Board. Mr. Cokeley clarified that the second sign is illuminated and will not be electronic.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the variance on a motion made by Patrick Dwyer and seconded by Kathy Stroud.

Case #2020-29 Findings of Fact:

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

The New Hampshire Supreme Court in Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577 (2005), has held that, “to be contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree conflict with the ordinance such that violates the ordinance’s basic zoning objectives.” In Harborside Associates v. Parade Residence Hotel, 162 N.H. 508, 514 (2011), the Court also noted that “[m]ere conflict with the terms of the ordinance is insufficient. The New Hampshire Supreme Court has determined that a variance violates an ordinance’s basic zoning objectives under two circumstances: (1) where granting the variance would “alter the essential character of the neighborhood; or (2) where granting the variance would “threaten the public health, safety, or welfare.” Harborside, 162 N.H. at 514.

Here, a decision to grant the Applicant’s requested variance would not alter the essential character of the neighborhood. In fact, the approved site plan is to construct an improved gasoline station and convenience store. The neighborhood is solidly commercial, with fast food and pizza restaurants abutting the site.

Moreover, a decision to grant the variance would not threaten the public health, safety, or welfare. The proposed sign is located in almost the same location as the existing sign at the site, which has proven to not raise a threat to the public in any way.

2. The spirit of the ordinance is observed because:

The requirement that the variance not be contrary to the public interest is related to the requirement that [it] be consistent with the spirit of the ordinance.” Harborside, 162 N.H. at 514 (citations omitted; brackets in original). As noted above, granting the variance would not alter the essential character of the neighborhood and would benefit the public health, safety and welfare.

Section 17.01 of the Ordinance provides that “[t]he purpose of this article is to encourage the effective use of signage to direct movement, advertise, and inform the public while protecting public safety, preserving neighborhood character and minimizing visual clutter.” The proposed northern canopy signs will not do just that - informing the public about the gasoline station from both ends of the northern canopy façade.

3. Granting the variance would do substantial justice because:

The “substantial justice” prong of the variance analysis is met when, without the variance, the Applicant would suffer a loss that is not outweighed by a gain to the general public. Harborside, 162 N.H. at 515. It is also appropriate to consider, when analyzing this factor, whether the proposed use is consistent with the present use. Id.

*Here, the public would not enjoy any significant gain as a result of a denial of the requested variance. In fact, requiring the Applicant to combine the two small proposed signs into a single sign would result in no appreciable benefit to the public. Moreover, while the proposed signs are not the same as the current canopy signage, as can be seen in the photograph of the existing conditions found on the **Canopy Signage Exhibit** (Page 2 of 4 in accompanying plan set), the proposed signage is consistent with the present canopy signage.*

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

The site already houses a gasoline station and convenience store, with Gulf signage on the canopy façade. Granting the requested variance to permit both Gulf lettering and a Gulf logo sign on the northern canopy façade will not have any impact on the values of the surrounding lots.

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:**

Due to the location of the Property at the corner of Continental Blvd and Camp Sargent Rd, specific application of the Ordinance provision would not promote the public purposes of the Ordinance. As detailed above, the purpose of the provision is "to direct movement, advertise, and inform the public while protecting public safety, preserving neighborhood character and minimizing visual clutter." § 17.01. The proposed canopy sign locations were chosen in an effort to best inform the public passing by the property. In short, the proposed signs actually better serve the purpose of the Ordinance than would strict compliance by allowing the Applicant to separate the Gulf logo from the lettering on the canopy façade, which will better inform the public from different ends of the Property.

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

The proposed sign locations are reasonable because they make the most effective use of the site's location at the busy corner of Continental Blvd and Camp Sargent Rd. The Applicant's proposal to have two small signs on the northern façade of the canopy makes the best use of the space available and, as such, is reasonable.

17. Discussion/possible action regarding other items of concern

None

18. Approval of Minutes – July 29, 2020

The Board voted 3-0-2, on a roll call vote, to approve the minutes of July 29, 2020 as submitted, on a motion made by Rod Buckley and seconded by Kathy Stroud. Patrick Dwyer and Ben Niles abstained.

19. Adjourn

The Board voted 5-0-0, on a roll call vote, to adjourn at 9:10 p.m. on a motion made by Kathy Stroud and seconded by Rod Buckley.

Attachments

Case ZBA #2020-10-#2020-15

Dear Mr. Chairman,

My name is John Sauter. I live at 9 Elizabeth Drive in Merrimack, New Hampshire.

I am writing about ZBA cases 2020-11, 2020-12 and 2020-13 which are on the agenda for August 26, 2020 as items 5, 6 and 7. I have a special concern about these cases because the lots are near my home, which is at tax map 3A lot 017. I am writing because I may be unable to participate in the August 26 meeting in person.

The Normandy Estates subdivision was laid out in 1969 when the only requirements on lots were 40,000 square feet and 150 feet of frontage. Since then nine homes have been built on Elizabeth Drive, leaving eight lots unbuilt on Elizabeth Drive and one unbuilt on Squires Drive. Because of the frontage requirement these homes are well-spaced, and the result is a nice neighborhood. Building houses on the nine unbuilt lots would not change the character of the neighborhood.

The three lots referenced in cases 2020-13, 2020-12 and 2020-11 are adjacent lots 3A-15, on Squires Drive, 3A-14 on the corner of Squires Drive and Elizabeth Drive, and 3A-13 further along Elizabeth Drive. The cases ask to reduce the frontage of 3A-15 to 25 feet, 3A-14 to 59.19 feet and 3A-13 to 50 feet. The reduction of the frontage of

3A-15 to 25 feet means that the frontage of 3A-14 would start 25 feet from the end of Squires Drive instead of the current 150 feet. Lot 3A-

14 would then have its 59.19 feet of frontage entirely on Squires drive, and the 50 feet of frontage for lot 3A-13 would also be on Squires Drive. The result is three adjacent lots with less than 150 feet of frontage between them, tripling the density of houses permitted in this section of Normandy Estates.

Allowing three homes to be built where currently only one is permitted, directly across Squires Drive from my home, diminishes the value of my property by moving it from a neighborhood of low density housing to one of high density housing.

I ask that the Zoning Board of Adjustment reject these three cases for this reason.

Also on the August 26 agenda is case ZBA 2020-16, item 10, which states that adjustments to lot lines should result in lots which conform to current zoning requirements, but asks for an exception for lot line changes which result in the lots becoming less nonconforming. However, that is not the case for lots 3A-13, 3A-14 and 3A-15, which will become more nonconforming, since they each currently have 150 feet or more of frontage. I therefore ask the Zoning Board of Adjustment to reject this case also, for lots 3A-13, 3A-14 and 3A-15.

It may be argued that, due to the slope of the property, it cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property. I would respond that it is not impossible to improve the current slope to conform to Town requirements, though it might be expensive. However, if the slope is not improved and the property owner chooses to build homes on the lots as they are currently laid out, I will permit the Town of Merrimack to install a heavy-duty electric winch on my property, using electricity from my home to power the winch, so that Town trucks can be hauled out of Elizabeth Drive if they get stuck. I would not charge the Town any fee to occupy my property or use my electricity. I feel that the winch will be less

harmful to the value of my property than three homes directly across Squires Drive from it.

I ask that my comments be included in the public record of the August 26, 2020, meeting of the Zoning Board of Adjustment. I also ask that my comments be read aloud during the Public Comment portions of the meeting related to the cases sited.

Thank you,

John Sauter (John_Sauter@systemeyescomputerstore.com)

Case ZBA 2020-25

July 14,2020

To whom it may concern,

Let it be known as an abutter of 660 Daniel Webster Highway, Merrimack, NH 03054, I have no objection to the owner of BHL Real Estate Holdings (Brian Labrie) building a garage within 5 feet of the property line we share. We understand the need for the garage to be close to the property line so trucks and trailer may turn around more easily.

Thank you,

Jerry Hill

662 Daniel Webster Highway,

Merrimack, NH 03054