



# Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

WEDNESDAY, AUGUST 27, 2014

Members present: Fran L'Heureux, Patrick Dwyer, Phil Straight, Tony Pellegrino, and Alternates Leonard Worster and Richard Conescu.

Staff present: Planning and Zoning Administrator Jillian Harris and Recording Secretary Zina Jordan.

#### 1. Call to Order

Fran L'Heureux called the meeting to order at 7:00 p.m.

#### 2. Roll Call

Phil Straight led the pledge of allegiance, Fran L'Heureux swore in members of the public who would be testifying, and Richard Conescu read the preamble.

3. **ConvenientMD Urgent Care (petitioner) and KJB Ventures, LLC. (owner)** – Variance under Section 17.10.4(a) of the Zoning Ordinance to allow a 172.7 sf. wall sign whereas 134.50 sf. is permitted. The parcel is located at 4 Dobson Way in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 3D, Lot 003-03. Case # 2014-32. ***This item is continued from the July 30, 2014 Zoning Board meeting.***

Tim Sullivan, Barlo Signs, read the points of law into the record. He confirmed that the sign would face Continental Boulevard and would be located on the façade, which is taller than the first story and would create a sight line.

There was no public comment.

Tim Sullivan said there would be two 89 square foot signs on the sides, whereas 200 square feet are allowed. There would be no sign in the rear. The signage would total 350.7 square feet, or half of the 668 square feet that are allowed if one totals allowed square feet for all sides. The small end of the building is the most important one.

Max Puyanik, ConvenientMD Urgent Care, explained the nature of the business, which is not hospital affiliated. The professional emergency care staff treats non-life threatening events. Most patients can be treated in the facility. Many come from long distances.

**The Board voted 3-2-0 to grant the Variance, on a motion by Patrick Dwyer and seconded by Richard Conescu. Phil Straight and Tony Pellegrino voted in the negative.**

#### Findings of Fact

1. There would not be a diminution of value of surrounding properties as a result of the granting of this variance because there would be a clean, clear identification of a business located in a highly commercial area;

2. The granting of this variance would not be contrary to the public interest because it would help the public find the destination easily. The Exit 11 area is congested. The business faces the corner of Dobson Way and Camp Sargent Roads, but traffic can go through to the Continental Boulevard intersection;
3. The granting of this variance would result in unnecessary hardship to the petitioner due to the following:
  - a) The following special conditions of the property make an area variance necessary in order to allow the development as designed: The setback of the main fascia from Dobson Way and beyond make it difficult for motorists to locate the facility easily;
  - b) The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because the business cannot change its building setback or its surroundings to identify its location better;
4. By granting this variance substantial justice would be done because it would allow ConvenientMD to identify its new location properly while also providing signage that will aid the public to find the facility;
5. The use contemplated by the petitioner as a result of obtaining this variance is not contrary to the spirit and intent of the ordinance because the proposed sign would direct, advertise and inform and would in no way negatively impact adjacent properties.

- 4. Shawn Pacheco Professional Martial Arts Academy (petitioner) and G&G Scully, LLC. (owner)** – Special Exception under Section 2.02.3(C)(1) of the Zoning Ordinance to allow a commercial recreational use in the C-2 (General Commercial), PRD, Elderly and Aquifer Conservation Districts. The parcel is located at 370 D.W. Hwy. Tax Map 4D-3, Lot 001-01. Case # 2014-33. ***This item is continued from the July 30, 2014 Zoning Board meeting.***

Shawn Pacheco, 370 D.W. Highway, read the Ordinance criteria into the record.

Outside activity would consist of physical fitness, i.e., jogging behind Shaw's Plaza. The business would open at 7:00 a.m., before the Northeast Credit Union does, then it would close all day until 5:00 p.m. The building is completely sound proof; a sound test determined that nothing could be heard at the Credit Union.

There was no public comment.

**The Board voted 5-0-0 to grant the Special Exception, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.**

#### **Findings of Fact**

1. The specific site is an appropriate location for the proposed use in terms of overall community development because it will attract other businesses to this location. Excellent visibility and good frontage make the business easily accessible;
2. The proposed use, as developed, will not adversely affect the neighborhood. There will be no nuisance or serious hazard to vehicles or pedestrians because it is a safe, controlled environment that is always supervised by at least one adult owner, and most of the time by 1-3 adult owners/instructors. The owner has 10 years of experience;
3. There will be no nuisance or serious hazard to vehicles or pedestrians because the noise level was tested and the Credit Union could not hear it. The business would operate from 5:00 p.m.-9:00 p.m. when banking hours are over. Parking and traffic will not be an issue;

4. Adequate and appropriate facilities will be provided for the proper operation of the proposed use because the owner has operated this martial arts school on D.W. Highway in Merrimack for approximately 10 years.

5. **Jesse Fraser (petitioner/owner), Bluebird Enterprises** – Variance under Section 2.02.1(A) of the Zoning Ordinance to allow a personal service (critter control) business in the R (Residential) and Aquifer Conservation Districts located at 144 Wire Road. Tax Map 7C, Lot 019. Case # 2014-34.

Jesse Fraser, 144 Wire Road, read the points of law into the record. The Community Development Department has determined that the applicant must appear before the Planning Board for site plan review for a Home Occupation if deemed necessary for the adjacent lot (Fraser residence). Jesse Fraser stated that the subject premises are strictly for storing tools and supplies. There will be no customers on the property.

#### **Public comment**

Paul Pelsinski, 132 Wire Road, had three objections: a) On April 19, 2014, there was a vehicle fire on the property. If chemicals or toxins were involved, it would be a danger to the community. b) What if there was a chemical spill that contaminated ground water? Wire Road is a limited salt route because of its proximity to Baboosic Brook. c) This would establish a precedent for a dangerous business in a residential neighborhood.

Jesse Fraser responded that he uses no chemicals or poisons; he is not an exterminator. Bluebird is a trapping firm. The fire was in his 2006 truck; it can happen to anyone. He is not looking for retail. It is a service-based business only, like the others around the corner. He, too, uses well water. This is the only company in New Hampshire that is legally allowed to relocate animals. He does not euthanize them. If Jesse Fraser traps an animal late in the day, he keeps it overnight in a vehicle. Most of the time, he uses a one-way valve rather than physically trapping an animal. He usually takes an animal first thing in the morning and releases it by noon.

Phil Straight explained that the ZBA considers each case on its merits, none of which creates a precedent.

Patrick Dwyer noted that there is a janitorial supply and a landscape company in the neighborhood, both of which use chemicals that could spill more than this business does. Bluebird uses no chemicals and follows humane trapping methods.

**The Board voted 4-1-0 to grant the Variance, with the following conditions, on a motion made by Patrick Dwyer and seconded by Richard Conescu. Fran L'Heureux voted in the negative.**

1. The Petitioner to receive Planning Board Site Plan Approval for the storage trailer, including review by the Merrimack Conservation Commission, if deemed necessary, and satisfaction of any comments;
2. The Petitioner to receive Planning Board Site Plan Approval for a Home Occupation, if found applicable by the Planning and Zoning Board Administrator;
3. Should the level of intensity of the Critter Control use exceed current representations made to the ZBA (# of clients, days/hours of operation, # of vehicles stored, etc.), the Petitioner shall return to the ZBA to request a new variance;
4. Petitioner further to annotate the plan to include the purpose of the plan, owner's signature, date, number of employees, vehicles, parking areas, etc.

### Findings of Fact

1. The granting of the variance would not be contrary to the public interest because public health and safety will not be a concern by following Town regulations. The use will not alter the character and feel of a residential area; it will conserve the rural character of Wire Road. It is proposed to restore the once fully wooded lot to a more rural feel with plenty of vegetation across the front of the property;
2. The spirit of the ordinance is observed because the primary use of the storage trailer and nominal vehicle parking is to assist the operation of Wildlife Damage and Repair, which fixes houses where critters damaged them;
3. Granting this variance would do substantial justice because it would easily allow the parcel to be used for a business that controls animals and provides rehabilitation services in and around Merrimack for residents and commercial property owners and is a contractor for the Merrimack Public Works Department and the Waste Water Division;
4. The values of the surrounding properties would not be diminished because trees will be added to obscure the storage trailer from roadway view; the neighbor at 138 Wire Road cannot see the storage trailer because of existing vegetation; no signage will be used; the storage trailer has been painted a woody brown and matches an adjacent residential house color; and the existing stockade fence obscures all but the upper 3' of the storage trailer;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) No fair and substantial relationship exists between the general public purpose of the Ordinance provision and the specific application of that provision to the property because the property is a vacant lot and is accessed adjacent to the residential lot. There is truck access to the existing 38' storage trailer and 24' small equipment trailer, which are within the setback and partially obscured by vegetation. No one would visit the 8'x10' part of the house used as an office. There would be a maximum of 2-3 service vehicles;
  - 2) The proposed use is a reasonable one because the empty lot is in a more rural area. The storage trailer is partially obscured by trees. The storage trailer is set back farther compared to existing homes in the area and does not detract from them. There are five similar home-based businesses adjacent to the lot. Denial would mean having to move the business at additional expense and time.
6. **Wayne Doyle (petitioner), Payless Used Car Sales and Frank Twardosky (owner) –** Variance under Section 2.02.4(B) of the Zoning Ordinance to allow a used car sales in the I-1 (Industrial) and Aquifer Conservation Districts located at 759 D.W. Highway. Tax Map 7E, Lot 042-01. Case # 2014-35.

Leonard Worster recused himself from discussing this item.

The applicant did not appear.

**The Board voted 5-0-0 to postpone this item to September 17, 2014, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Phil Straight and seconded by Patrick Dwyer.**

- 7. Ken Clinton, Meridian Land Services, Inc. (petitioner) and Robert & Susan Lavoie (owners)** – Equitable Waiver of Dimensional Requirements under Section 2.02.7.7(b) of the Zoning Ordinance to permit existing improvements (retaining wall, paved driveway and propane tank) located within the 25' wetlands buffer to remain on a parcel located at 11 Briann Drive in the R (Residential) and Aquifer Conservation Districts. Tax Map 6C, Lot 144-05. Case # 2014-36.

Leonard Worster recused himself from discussing this item.

Ken Clinton, President, Meridian Land Services, said he could not claim that all improvements were in place for over 10 years. The buffer is integral to relief. The original 2003 plan created the Lavoie lot. The flags delineating wetlands have disintegrated over time, so Ken Clinton did not see them. The subdivision plan showed a 25' no-cut buffer, but regulations allow a cut within the 25' buffer. Therefore the 25' no-cut buffer is erroneous. The approved road plan design shows no wetland buffer or setbacks. The wetland was disturbed. The Town signed the road design plans with a buffer disturbance. The septic system was designed prior to the Lavoie purchase. They constructed a stone retaining wall on land already disturbed that did not show a wetland buffer. The Lavoies did not know anything about the buffer or wetland. The proposed driveway that the Town and State approved would have been in the buffer. When the Lavoies began construction, it was understood that the silt fence was the limit. When the home and driveway were substantially finished and a Certificate of Occupancy was sought, the Community Development Department said the improvements were in the 25' buffer. This was an unintended consequence. The "no disturb buffer" was placed on the plan only at the very end of the process. The improvements on the property are not shown correctly. Most of the propane tank is outside the buffer. It is hard to define the wetland limits. If it is difficult for Ken Clinton to identify the wetland, it would be even more so for the Lavoies.

Phil Straight explained that, in 2003, a wetland was delineated by a hodge-podge of criteria and the RSA was rewritten. No wetland foliage is visible next to the rock wall. Under the new rules, he believes that it would not be a wetland.

Ken Clinton read the points of law into the record.

There was no public comment.

**The Board voted 5-0-0 to grant the Equitable Waiver, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.**

### **Findings of Fact**

- 1. The violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value:* The non-conformity was discovered after the home was substantially done and the infrastructure improvements were completed, during a review of the Certified Plot Plan required as part of the Certificate of Occupancy;
- 2. The violation was not an outcome of ignorance of the law or Ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner or owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in Ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority:* The violation was caused by good faith errors made by previous consultants (missing buffer lines and proposed improvement locations on

development/design plans), an error in Ordinance interpretation by previous consultants (incorrect text labeling on development plans), and applicability made by municipal officials in the process of issuing a permit over which they had authority (Planning Board and various Town departments);

3. *The physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property:* The retaining wall was constructed at the toe of the road slope in front of the former silt fence and actually acts to prevent any disturbance to the adjacent wetland; the paved driveway is a standard amenity for a house and is therefore not a nuisance; the underground propane tank is a common utility and therefore not a nuisance. The improvements are standard necessities or amenities of homes within the subdivision. The improvements enhance permissive uses while adding substantial protection to the adjacent wetland;
4. *Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained that it would be inequitable to require the violation to be corrected:* Removal would require substantial site work that would eliminate the physical protection to the adjacent wetland while substantially disturbing the stable buffer area. Removing improvements would require not only a significant cost to the Lavoies, but would also require major house reconstruction, as the side entry garage could not be reasonably accessed in its current configuration. A new driveway would need to be installed to access a front entry garage. This would require modification of other utilities such as underground power, cable, telephone and water lines. The improvements do not adversely affect the interests of public health, convenience, safety and welfare.

## **8. Annual Election of Officers and Review of By-Laws**

Leonard Worster returned to the Board.

**The Board voted 4-0-1 to elect Fran L'Heureux as Chair of the ZBA, on a motion made by Tony Pellegrino and seconded by Phil Straight. Fran L'Heureux abstained.**

**The Board voted 4-0-1 to elect Phil Straight as Vice Chair of the ZBA, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux. Phil Straight abstained.**

The Board did not make any By-Laws changes.

## **9. Discussion/possible action regarding other items of concern**

Fran L'Heureux announced that a joint meeting with the Planning Board would be held in December 2014 and asked ZBA members to submit suggested agenda items. Phil Straight noted that both boards had previously agreed to meet annually.

Fran L'Heureux announced a training session with Legal Counsel would be scheduled and asked ZBA members to submit suggested agenda items. Phil Straight suggested that it include regular reports on Court decisions, Internet communications, Right to Know Law, communications among ZBA and staff, staff approval of ADUs, and updating older zoning laws.

Richard Conescu asked whether the ZBA could limit the time for petitioners' presentations. Phil Straight said that, in some towns, staff presents the points of law and the petitioners are present to answer questions. That would correct professional presenters from using trickery. Patrick Dwyer opposed the suggestion, stating that residents have the right to speak, no matter for how long. They may ask for the option to have a proxy or for Community Development to make their presentation. The suggestion would preclude all lawyers from making presentations. Petitioners

may ask staff to do the presentation for them, but it should not be required. Fran L'Heureux, noting that petitioners have the right to speak for their petition, stated that, at the last meeting, she gave each person three minutes to speak during the public hearing. Richard Conescu agreed with Patrick Dwyer that residents should have time to speak, but added that the ZBA must ensure there is time for every presentation on the agenda. Leonard Worster noted that, because staff help with the application process, they should not represent the applicant. It is the applicant's/attorney's job to prove the case. Phil Straight said improvements should be made. A vote is not required, only a consensus. Patrick Dwyer suggested stating in the preamble that the petitioner should begin by reading the points of law. He agreed with Leonard Worster that it is the petitioner's job to make the presentation. The Board should be consistent. Fran L'Heureux said that only a few speak too long. Each case is individual. Patrick Dwyer wanted the ZBA to be clear about what it wants to accomplish. Two ideas were suggested: to begin a meeting with the points of law and to limit presentations. Phil Straight stated that, because each petition is different, presentation time could not be limited. Patrick Dwyer countered that the ZBA does not need to hear an attorney's long-winded history that is not always relevant. Tony Pellegrino said the chair must control the presentations. Staff should discuss the agenda with the ZBA chair before a meeting.

Phil Straight stated that the ZBA had previously stated its willingness to meet twice a month if there are too many agenda items. Leonard Worster noted that the ZBA receives written responses to the points of law five days in advance of a meeting. It is simple work to read them. The petitioner reads them at the meeting as a matter of record. Richard Conescu said the ZBA explains the process well, but petitioners do not always reciprocate. Fran L'Heureux said it is rare for a Board member to see a petitioner when visiting the property in question. A meeting allows petitioners to answer ZBA questions in their own words. Phil Straight suggested having regular meetings with staff about agenda questions. Jillian Harris said staff is available at all times to answer questions.

Jillian Harris will discuss the topic with Community Director Tim Thompson and add it to the list of agenda items to discuss.

#### **10. Approval of Minutes – July 30, 2014**

**The minutes of July 30, 2014, were approved, with one change, by a vote of 4-0-1, on a motion made by Richard Conescu and seconded by Tony Pellegrino. Patrick Dwyer abstained.**

#### **11. Adjourn**

**The meeting adjourned at 8:50 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.**