



Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

www.merrimacknh.gov

Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, AUGUST 29, 2018

Members present: Patrick Dwyer, Fran L'Heureux, Richard Conescu, Lynn Christensen, Kathleen Stroud, and Alternates Leonard Worster and Drew Duffy

Members absent: Alternate Rod Buckley

Staff present: Assistant Planner Kellie Shamel

1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m.

2. Roll Call

Patrick Dwyer led the pledge of allegiance and swore in members of the public who would be testifying. Richard Conescu read the preamble.

Patrick Dwyer announced that the Town Council gave recognition to retiring Board member Tony Pellegrino for his years of service. Kathleen Stroud is now a full voting member and Drew Duffy is a new alternate member.

- 4. Daniel D. Jesseman (petitioner) & AMPK Ventures, LLC (owner) – Variance under Section 2.02.3.B of the Zoning Ordinance to permit a contractor yard in the General Commercial District. The parcel is located at 702 Daniel Webster Highway in the C-2 (General Commercial). Tax Map 7E, Lot 023-01. Case # 2018-19. This item is continued from the July 25, 2018 Zoning Board of Adjustment meeting.**

This agenda item was considered after agenda item #2.

Leonard Worster recused himself from participating (as a non-voting alternate).

Attorney Greg Michael, Bernstein Shur, Sawyer & Nelson, noted that the Flatley property across the road is industrially zoned and that D.W. Highway is an amalgam of different uses. The proposal is to build a one-story office building with a display in back on the two-acre lot. There would be no retail sales on site. The business is a landscaping service, selling firewood and plowing in winter. The Special Exception that was granted in May 2018 permits the construction of a single-family dwelling unit on the site and will remain valid until a site plan is approved or the two-year time limit lapses, whichever occurs first.

Attorney Michael cited a court case that states the Zoning Board of Adjustment (ZBA) can determine that a "contractor yard" is a retail service that is permitted in the industrial zone. It is an issue of definition. Attorney Michael read the Ordinance into the record.

He stated that this is a form of retail business (e.g., selling loam, mulch and blocks) that is a “regional customary personal service” and a “service incidental to retail sales including construction material”. He argued that the use is permitted in the C-2 District and does not need a variance. A contractor yard is not defined. It is a landscape service.

There is parking for 5-6 company vehicles. Most customers call rather than come to the site. The work is done on their property. There is no showcase. Attorney Greg Michael emphasized this property is the only undeveloped lot in the area with access to D.W. Highway.

Attorney Brett Allard, Bernstein Shur, Sawyer & Nelson, read the statutory criteria into the record.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, with the conditioned upon site plan approval from the Planning Board, on a motion made by Lynn Christensen and seconded by Fran L’Heureux.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because it would not alter the essential character of the neighborhood. It abuts the I-1 Industrial District and a contractor yard is permitted by right in that zone. Traffic to and from the property would essentially be limited to the applicant himself. An existing curb cut on D.W. Highway permits access from an access road on the property. Granting the variance would not threaten public health, safety or welfare. There would be no adverse impact or injury to any public rights and no measurable impact on abutters because of the existing wooded buffer shielding sight lines into the property;
2. The spirit of the Ordinance is observed because granting the variance would not threaten the health, safety or welfare of the public. The property otherwise complies with all dimensional and area requirements. All buffer distances and setbacks are met;
3. Granting this variance would do substantial justice because there would be a loss to the detriment of the applicant if the variance were denied because he would be unable to utilize the property for his proposed use, even though it is permitted by right merely feet away from the property line to the southeast. The loss would not be outweighed by any gain to the general public. There would be no material impact on the public or the abutting properties if the variance were granted;
4. The values of the surrounding properties would not be diminished because a contractor yard is consistent with the character of this area along D.W. Highway. The existing wooded buffer would shield sight lines into the property. The lack of traffic for the proposed use, when coupled with the existing curb cut and access road, will ensure that there would be no adverse impact on traffic levels or safety in the area. The property would appear more or less the same from D.W. Highway as

it currently does, even after the applicant begins utilizing the property to store landscape materials, which is a passive, non-intensive use;

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 distinguishable from others in the area. It abuts a commercial bowling alley property, two residential lots, and an undeveloped lot zoned I-1 that does not have access to D.W. Highway. This property is the only undeveloped lot in the area with access to D.W. Highway. It is also distinguishable by size, being by far the smallest undeveloped lot in the area. Contractor yards are permitted by right in this area. The properties on which they are permitted are all much too large to make the applicant's proposed use economically viable. This property is the only undeveloped lot in the area that is small enough and large enough to facilitate the proposed use perfectly in an economically viable fashion;
- 2) The proposed use is a reasonable one because contractor yards are permitted in this area, even mere feet away directly across D.W. Highway. The undeveloped wooded buffer would shield abutter sight lines and serve as a perfect barrier for the applicant to store landscaping materials. There would be no increase in traffic. The existing curb cut and access road allow access onto the property, which is the perfect size and in a suitable area for the proposed use.

5. Ekaporn Saktanaset (petitioner) & JPM Real Estate, LLC. (owner) – Variances under Sections 2.02.1 & 2.02.11 of the Zoning Ordinance to permit a restaurant in the Residential and Aquifer Conservation Districts. The parcel is located at 80 Continental Boulevard in the R (Residential) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 3C, Lot 040-01. Case # 2018-22.

Leonard Worster returned to the Board.

Attorney Brad Westgate, Winer & Bennett, explained that since completion of the building behind Merrimack Premium Outlets, the 1,956 square foot portion has been operating as a Dunkin Donuts with a drive-thru facility. The 1,500 square foot portion has remained vacant. The petitioner proposes to lease the vacant 1,500 square foot space to use as a 24-seat Thai sushi restaurant. There would be no site improvements, only a change in signs. The applicant will observe NH Department of Transportation (DOT) suggested improvements to egress from the premises (pavement markings to delineate two exiting lanes to the intersection, a centerline separating entering and exiting traffic, and replacement of the single small traffic loop with conventional full-sized loops in each exit lane). The sewer permit and parking are sufficient. Including Dunkin Donuts, 25 parking spaces are required. There would be no conflict with traffic because Dunkin Donuts has a morning focus and the restaurant's focus is lunch and dinner.

Attorney Westgate read the statutory criteria into the record.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, with the condition that the petitioner shall obtain any applicable approvals deemed necessary and applicable by the Community Development Department (either Administrative Approval by staff or site plan approval from the Planning Board), on a motion made by Richard Conescu and seconded by Kathleen Stroud.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the transitional parcel of land is located near non-residential property, abuts one Industrial District and is nearly adjacent to another. It is located on a major thoroughfare at a major intersection. The property has historically been used for non-residential purposes. The current Dunkin Donuts complements the proposed restaurant. The restaurant would be consistent with the commercial/retail nature of the immediate area. No residential uses are present in the immediate vicinity. The Variance would allow the space to be put to a productive use rather than remain vacant as it has been for more than five years;
2. The spirit of the Ordinance is observed because a restaurant is consistent with the non-residential use of the other portion of the premises, which are in the immediate vicinity of a substantial retail complex. The abutting properties are non-residential in character. The property is located on a major thoroughfare at a major intersection. The existing Dunkin Donuts precludes any residential use of the remaining vacant portion of the existing building. Residential is not the best and most appropriate use and is not consistent with the character of the property and its immediate vicinity. Retail uses at Merrimack Premium Outlets and nearby business uses and employment centers render a small restaurant use a viable and more compelling use;
3. Granting this variance would do substantial justice because the premises would remain non-residential in character, consistent with their historical use, and compatible with the uses in the immediate area and the nature of the road system at its location. NH DOT does not object to the proposed use and has provided suggested improvements to egress from the premises. A vacant portion of the non-residential property would be put to a productive, modern use compatible with its immediate surroundings and the retail complex nearby;
4. The values of the surrounding properties would not be diminished because the premises are located in the vicinity of non-residential properties, a major thoroughfare and a major intersection. Abutters are Merrimack Village District and Merrimack Premium Outlets. New commercial uses on major thoroughfares in a non-residential area do not adversely affect surrounding property values;

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 premises have a number of special conditions. They are located on a major thoroughfare at a major intersection that render the premises and the land immediately near it non-residential in character and not compatible with residential uses. The Dunkin Donuts portion of the building makes any residential use of the remaining vacant space in the building impossible. The premises are abutted by non-residential uses and have been used for non-residential purposes since 1979. Continuation of a non-residential use is consistent with the history of the premises and compatible with nearby uses, road system and zoning districts. A small restaurant would be a harmonious use with the existing Dunkin Donuts and compatible with uses in the area;
 - 2) The proposed use is a reasonable one because the use fits the character of the premises, the location and the nature of the immediate area. The premises already contains one restaurant use. The proposed restaurant would complement the Dunkin Donuts in terms of busiest times of operation and give the premises consistency in type of use. There are several restaurant locations in the surrounding area. Retail use is reasonable, given the proximity of Merrimack Premium Outlets, main thoroughfares and access via a signalized intersection.

6. Joseph & Christine Miner (petitioner/owner) – Special Exception under Section 3.09 of the Zoning Ordinance to permit the conversion of an existing single-family dwelling, constructed before June 29, 1953, to a two-family dwelling. The parcel is located at 10 Griffin Street in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 4D-4, Lot 059. Case # 2018 -23.

Chairman Dwyer noted there are multiple petitions on the agenda for this property and that if the Special Exception is granted then agenda items #7 and #8 would be moot and should be withdrawn by the petitioner. Attorney Michael agreed and stated he would withdraw the petitions pending the 30 day appeal period if the Special Exception was granted.

Attorney Greg Michael, Bernstein Shur, Sawyer & Nelson, said the exterior of the house would not change. Both a single- and a two-family dwelling are permitted uses. The dwelling has three grandfathered deficiencies: lot size, frontage and front setback, all of which predate zoning.

Attorney Brett Allard, Bernstein Shur, Sawyer & Nelson, read the special exception criteria from the Zoning Ordinance into the record.

There was no public comment.

The Board voted 5-0-0 to grant the Special Exception, on a motion made by Fran L’Heureux and seconded by Kathleen Stroud.

Findings of Fact

1. The additions, alterations or improvements are for a use currently permitted within the Zoning district. Two-family homes are permitted by right in the R-4 District;
2. The additions, alterations or improvements are ordinarily and customarily associated with existing building and/or use. Alterations from single-family homes to two-family homes are permitted by right, while the demand for affordable housing in NH continues to increase;
3. The additions, alterations or improvements would serve to promote the reuse, restoration, rehabilitation, or otherwise enhance an existing building or structure, especially an historic or potentially historic building or structure. The applicant would replace the electric, plumbing and furnace and update and remodel the entire interior. These renovations would significantly enhance the existing home and add substantial value to the property;
4. The additions, alterations or improvements would not result in increased hazards to vehicles or pedestrians, impair or impede emergency vehicle access or the provision of emergency services, or encroach on planned right of way corridors. There are no current hazards to vehicles or pedestrians nor impediments to emergency vehicle access on the property. No new hazards or safety issues will arise as a result of the strictly interior conversion of the home. There is sufficient parking in the driveway for four vehicles/two per unit;
5. The additions, alterations or improvements would not result in unreasonable impacts to abutting properties by way of increased noise, visual blight, odor, or other nuisance. There would be no increase in noise, visual blight, odor, or other nuisance. The home is sizeable enough to facilitate a second unit yet small enough that it is not likely to be occupied by anything other than a small family;
6. Adequate parking and other necessary support facilities would be provided for the existing building or structure as well as for the proposed addition, alteration or improvement. There is sufficient parking in the driveway for four vehicles/two per unit. The existing home is already hooked into municipal water and sewer. The proposed new unit can easily be hooked into same;
7. The proposed improvement would have been allowed by right prior to the adoption of the zoning ordinance provision at issue. The existing home predates the adoption of the Ordinance;
8. The proposed improvement cannot reasonably be constructed in a differing way or in a differing portion of the property so as to comply with existing setback requirements. The existing home is a pre-existing non-nonconforming (“grandfathered”) structure. It would remain compliant with the front yard setback regardless of whether the proposed alteration were completed. The strictly interior reconfiguration of the home would not result in any expansion of the

existing non-conformity further into the front yard setback. The existing structure cannot be relocated on the property so as to comply with the front yard setback.

- 7. Joseph & Christine Miner (petitioner/owner) –** Appeal of Administrative Decision that the conversion of a single-family dwelling to a two-family dwelling is a permitted expansion of a non-conforming use on a non-conforming lot, and that the dimensional standards of Section 3.02 of the Zoning Ordinance do not apply to such a conversion. The parcel is located at 10 Griffin Street in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 4D-4, Lot 059. Case # 2018-24.

Withdrawn/Deemed moot by grant of Special Exception in agenda item #6 (pending completion of statutory appeal period).

- 8. Joseph & Christine Miner (petitioner/owner) –** Variances under Section 3.02 of the Zoning Ordinance to convert an existing single-family dwelling to a two-family dwelling on a lot having approximately 27,007 s.f. of area whereas 80,000 s.f. is required, 125 feet of frontage whereas 200 feet is required, and a front setback of 28.3 feet whereas 50 feet is required. The parcel is located at 10 Griffin Street in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 4D-4, Lot 059. Case # 2018-25.

Withdrawn/Deemed moot by grant of Special Exception in agenda item #6 (pending completion of statutory appeal period).

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

This agenda item was considered after agenda item #8.

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

The Board voted 4-0-1 to elect Lynn Christensen as Vice-Chair, on a nomination made by Kathleen Stroud and seconded by Richard Conescu. Lynn Christensen abstained.

The Board voted 5-0-0 to adopt the Proposed Rules of Procedure Amendments, on a motion made by Lynn Christensen and seconded by Kathleen Stroud.

9. Discussion/possible action regarding other items of concern

None.

10. Approval of Minutes – July 25, 2018

The minutes of July 25, 2018, were approved as submitted, by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Fran L'Heureux.

11. Adjourn

The meeting was adjourned at 8:07 p.m., by a vote of 5-0-0, on a motion made by Fran L’Heureux and seconded by Lynn Christensen.