



Town of Merrimack, New Hampshire

Community Development Department

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Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, AUGUST 30, 2023

Members Present:

- Richard Conescu (Chair)
- Ben Niles
- Lynn Christensen
- Patrick Dwyer
- Brian Dano
- Charles Mower (alternate)

Members Absent:

- Wolfram von Schoen (alternate)

Staff Present

- Robert Price, Planning & Zoning Administrator

1. Call to Order & Roll Call

Chair Conescu called the meeting to order at 6:30 p.m. Patrick Dwyer read the preamble. Chair Conescu then led the Pledge of Allegiance and swore in members of the public who would be testifying.

2. Armada Realty, LLC (Petitioner/owner) – Special Exception under Section 2.02.2.C.1 (a) of the Zoning Ordinance to permit a restaurant with a drive-thru in the C-1 (Limited Commercial) District. The parcels are located at 632 & 634 Daniel Webster Highway in the C-1 (Limited Commercial), Aquifer Conservation, Elderly Housing Overlay Districts and the Wellhead Protection Area. Tax Map 6E-2, Lots 6 & 7. Case # ZBA 2023-25.

Matt Peterson (Keach-Nordstrom Associates) & William Heng (Petitioner/Owner) presented the petition to the Board. Mr. Peterson began by introducing Mr. Heng as the owner of Hot Rize Café which is an established restaurant that has been operating at its current location on DW Highway for many years. He then provided an overview of the property in question and shared an aerial view to demonstrate the location of the property, as well as the surrounding businesses and residences. Mr. Peterson then shared that the petitioner purchased the lot next to the existing café that currently has a single family home on it, and would like to merge the two lots together. Once the lots are merged, the plan would be to demolish the existing house and construct a new building with a drive-thru to move the café into. A Special Exception is being requested because restaurants are only allowed by Special Exception in the C-1 district. Mr. Peterson shared a preliminary plan that shows the anticipated size and location of the new building. He spoke about the need for a drive-thru because since COVID-19, a lot of customers prefer take out. He voiced

his understanding that there will be things such as traffic circulation and screening that will need to be worked through during the Planning Board process.

Mr. Peterson then read through the responses to the Ordinance criteria (outlined below).

Patrick Dwyer asked why the size of the building is so large if the owner anticipates a lot of drive-thru traffic and Mr. Peterson explained that they are expanding the size of the kitchen and storage area. He also asked about the proposed traffic flow of the site and Mr. Peterson walked through the preliminary plan which includes narrowing the existing entrance/exit and adding a right turn only exit from the drive-thru lane. Ben Niles asked how many seats the existing restaurant has and how many they anticipate in the new one. Mr. Heng replied that there are 38 seats now and it will most likely double in the new building. He explained that during the week, a lot of people order take out but the eat-in area gets busier on Saturdays and Sundays.

Chuck Mower provided some history of 632 DW Highway which was the original site of the Number 3 School in Reeds Ferry.

Public comment

James Drapeau (630 DW Highway) expressed concerns that the drive-thru exit will be right next to his property. He also stated he has other concerns such as noise and the location of dumpsters on the property. Mrs. Christensen clarified that the concerns raised would be addressed at the Planning Board meeting(s) and encourages Mr. Drapeau to watch for notice of that meeting so that he could attend.

Susan Proulx (8 Hilton Drive) asked if a traffic study would be done as she has concerns with the new building being across the street from Hilton Drive. She indicated that the traffic in that area is already bad and Hilton Drive residents have a hard time exiting the street in the morning and late afternoon hours. Chair Conescu pointed out that Hot Rize is only open until 3:00 p.m. so he doesn't feel that this project would adversely affect any of the afternoon traffic. Mrs. Christensen added that traffic will be addressed during the Planning Board site plan review of the project. Ms. Proulx asked if the café could extend their hours beyond 3:00 and Chairman Conescu stated that they could extend their hours. He also clarified that the Petitioner is seeking a Special Exception and not a Variance which means the use is allowed within the zone.

Katie Poirier (11 Kimberly Drive) echoed the concerns about the traffic coming out of the Hilton Drive neighborhood and stated that she experiences traffic delays in both the AM and PM hours.

Mr. Peterson commented that he made notes of the concerns and will address them during the site plan approval process.

The Board voted 3-2-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the special exception under Section 2.02.2.C.1(a) of the Zoning Ordinance to permit a restaurant with a drive-thru in the C-1 (Limited Commercial) District, conditioned upon the applicant obtaining site plan approval from the Planning Board for the proposal, on a motion made by Lynn Christensen and seconded by Ben Niles. Rich Conescu and Patrick Dwyer voted in opposition.

Findings of Fact:

1. The specific site is an appropriate location for such a use or uses in terms of overall community development because: *The project proposal includes the consolidation of the two abutting parcels of differing use. To date, Lot 6 is residential. However, the surrounding area has become largely commercial in nature with abutting uses such as restaurant, salon, chiropractic care, doggy daycare, offices, and childcare. Some of these uses which currently exist on Lot 7. The restaurant/cafe, Hot Rize, is currently a tenant of the mixed-use commercial building on Lot 7, and the intended user of the proposed standalone restaurant building with drive-thru. Hot Rize is a well-established and popular restaurant at this location. Using this property in this manner is a better use for the area than a residential property. Therefore, the property is an appropriate location for the proposed use and accessory use.*

2. The use as developed will not adversely affect the neighborhood because: *The proposed restaurant use and accessory use is consistent with and/or complements the existing uses of both the mixed-use commercial development onsite and the surrounding uses which include but are not limited to restaurant, salon, chiropractic care, office space, doggy daycare, etc. This area has become largely commercial in nature. A commercial use in this location is more desirable therefore, eliminating the residential use is appropriate for the neighborhood. The proposed restaurant building is intended to be utilized by Hot Rize which is an established and popular restaurant at this location. Therefore, the use as developed is not expected to adversely impact the neighborhood.*

3. There will be no nuisance or serious hazard to vehicles or pedestrians because: *The lots have a total of three (3) existing curb cuts along Daniel Webster Highway. The project proposes to eliminate one of these curb cuts for safer access and egress. Site circulation, most specifically regarding the drive thru area, will be clearly marked with signage, arrows, and other pavement markings as appropriate. The drive thru has ample space for stacking of vehicles onsite to ensure no back-up onto D.W. Highway. A walk, with handicap accessibility, is being proposed along the entire length of the front of the proposed restaurant for pedestrian safety. These measures were implemented with vehicular and pedestrian safety in mind. Therefore, no nuisance or serious hazards to vehicles or pedestrians are anticipated.*

4. Adequate and appropriate facilities will be provided for the proper operation of the proposed uses or uses because: *The application will be required to obtain site plan approval from the Town of Merrimack Planning Board. Therefore, the site will be designed in accordance with the Town regulations and general good engineering practice. The proposed site design will include all of the necessary provisions required for the proper operation of the restaurant such as, but not limited to, parking, access and circulation, utility connections (water, sewer, gas, etc.), landscaping, lighting, and stormwater management provisions.*

Lynn Christensen left the room. Richard Conescu took a brief recess but then seated Alternate Charles Mower in her place so that the meeting could continue.

3. Nathan Stone & Andrea Martel (petitioners/owner) – Variance under Section 3.05 of the Zoning Ordinance to permit a building addition 1.5 feet from the side property line whereas a setback of 15 feet is required. The parcel is located at 38 Valleyview Drive in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 5C, Lot 178. Case # ZBA 2023-26.

Lynn Christensen returned to her seat as a voting member. Alternate Charles Mower resumed Alternate status.

Nathan Stone & Andrea Martel presented the petition to the Board. Mr. Stone began by explaining that the side of the house they want to place the addition on is currently right on the side setback line and the other side of the house is not buildable due to wetlands. He then read through the responses to the Ordinance criteria (outlined below).

Chair Conescu asked Mr. Stone to expand upon the substantial justice criterion and Mr. Stone explained that they need to move the master bedroom from the second floor to the first floor because the child that is now in the first floor bedroom is the only one downstairs and does not like it.

Chair Conescu asked the petitioner if they researched placing the addition to the rear of the house or above the garage. Mr. Stone responded that they did look into it but the septic tank is in the rear of the property and the garage foundation is not structurally sound enough to build above it.

Mr. Dwyer expressed concerns because based on the aerial photo provided by staff, it looks like the addition will go over the lot line. Mr. Price clarified that the GIS is likely not accurate and the plot plan, which was stamped by a Licensed Land Surveyor, shows that the addition will not be over the line.

There was no public comment.

The Board voted 5-0-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.05 to permit a building addition 1.5 feet from the side property line whereas a setback of 15 feet is required, on a motion made by Patrick Dwyer and seconded by Brian Dano.

Findings of Fact:

- 1. Granting the variance would not be contrary to the public interest because:** *The addition would still remain on our property and not the abutters. The addition would be tastefully done and not an eyesore to the neighbors. There would be no harm to the public interest if granted.*
- 2. The spirit of the ordinance is observed because:** *It is made to prevent possible overcrowding, but in this case our residence is next to a corner lot and if allowed to build, will still be about 88 feet from the house on the corner of 18 Courtland.*
- 3. Granting the variance would do substantial justice because:** *The variance would not diminish the value of the surrounding properties.*
- 4. Granting the variance would not diminish the values of surrounding properties because:** *In looking at the Town's Assessor site, property values range from about \$350, 000 to almost \$700,000.*
- 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:*** *We purchased this home back in February as our forever home. We have three children combined and want this house to be one they grow up in forever. Currently, two of the kids are on the second floor and the other is on the first. Our hope is to extend the first floor bedroom to make it a master allowing for more space for us to then have all 3 kids on the 2nd floor. We have explored other building options but as far as the budget goes, this is the most reasonable. Allowing this would make our perfect home a dream come true and one we will love in forever.*

4. John Flatley Company (petitioner) and John J Flatley (owner) – Variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign 1 foot from the front property line whereas a setback of 20 feet is required. The parcel is located at 685 Daniel Webster Highway in the I-1 (Industrial) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 6E, Lot 3-4. Case # ZBA 2023-27.

Chad Branon, Fieldstone Land Consultants & Kevin Walker, John Flatley Company presented the petition to the Board. Mr. Branon began by providing an overview of the parcel in question and reiterating that the variance is being requested to allow the placement of a ground sign 1.5 feet from the Right of Way (ROW) whereas 20 feet is required. He went on to explain that the site is the home of a flex building that is nearing completion that will be rented by several tenants, so a sign is an important aspect of the current use. Mr. Branon explained that they originally intended to place the sign at the shared entrance near the St. Gobain property but have since decided that having it close to the main entrance would make more sense. He shared a copy of the master site plan to show the ROW in front of the property to demonstrate that placing the sign within the setback would put it far away from the roadway. He explained it further by giving the example that the Webster Green sign approximately 21 feet from the ROW on the west side of the road but it is 29 feet from the travel way. The sign they are proposing on the opposite side of the road, will be 1.5 feet away from the ROW but 43 feet from the travel way. To anyone traveling the road, the sign will not look like it obtained relief at all, and might even appear to sit further away than others along that stretch of road.

Mrs. Christensen commented that if the sign is placed within the setback, it would actually be too far back from the road and not able to be read by cars driving by. Chair Conescu asked why the ROW line is so different in the area, and wondered if it is because the State intends to widen the road at some point. He then opined if that happened, the sign would be 1 foot away from the road.

Mr. Branon then read through the responses to the Ordinance criteria (outlined below).

Chair Conescu expressed his concerns about the ROW being adjusted in that area and feels that there has to be a reason it was done. Mrs. Christensen argued that if the state did it to be able to widen the road, it would not have been isolated to this one small section of road. Mr. Branon added that they have gone through extensive permitting with the NHDOT and the subject of widening the road has never been discussed. He feels that the reason for expansionist odd shape is for utility and drainage infrastructure that is located there and shared a copy of the existing conditions plan to show the location of the utilities and catch basins. Mr. Walker explained that

as part of the drainage plan for the site the applicant had to intercept where the drainage was getting discharged from the roadway and account for it with their drainage plan. The same drainage is still there but instead of collecting on their site, they collect it in a drain manhole and control it from that point. He continued to say that in his discussions with NHDOT he was told the widened area was created for utilities.

Brian Dano stated he is generally in favor of the sign but has concerns about illumination given the proximity to the residential uses along DW Highway. Mr. Walker replied that they are ok with putting the sign on a dusk to dawn timer so that it goes on at dawn and shuts off when it gets dark so it is not on overnight. Mr. Branon added that the sign itself complies with the regulations, it is just the placement of it that does not. Mr. Dwyer asked if having the ground sign minimizes the signs that can be on the building and Mr. Price explained that it does and briefly explained the sign regulations for wall signs and how the size calculation is impacted with the presence of ground signage.

Public Comment

Gloria Kearns (50 Shelburne Road) asked how the residents are supposed to get out of Webster Green with all of the traffic. Chair Conescu redirected the conversation because traffic is not part of the sign placement proposal that is in front of the Board. She then asked why the placement of the sign can't be where the St. Gobain entrance is and several Board members explained that the petitioner has the right to place the sign in front of the entrance, they are just looking to place it closer to the ROW than what is allowed.

Gary Ford (22 Kimberly Drive) asked if the sign illumination will promise to only have it lit from dusk until dawn will be in writing anywhere. Chair Conescu responded that the illumination is not part of the discussion at hand so the only place the discussion will be captured is in the meeting minutes. Mr. Dwyer added that it does not need to be in writing.

Andrea Ireland (15 Kimberly Drive) asked how big the sign would be and was advised it is 96 square feet. She expressed concerns with the illumination and Mr. Dwyer pointed out that the ambient light from the buildings will be brighter than the sign. Ms. Ireland continued to with concerns about traffic and the placement of the entrance across the street from the Webster Green condominiums. Mr. Dwyer advised Ms. Ireland that the concerns she is raising now have nothing to do with the sign placement and if they move the sign 30 feet down the road, a variance would not be needed at all because the ROW is narrower in that location. He also stated that if the sign gets pushed back too far and people do not know where to turn, it could cause more traffic concerns and people having to do U-turns, possibly in the Webster Green parking lot.

Ashley Tenhave (75 Shelburne Road) voiced various concerns including that the residents of Webster Green were told during the site plan process that the entrance across from them was going to be a secondary entrance only, so she feels that the sign should be placed closer to the shared entrance for St. Gobain. She stated that the bus stop for Webster Green is right across from the entrance to the Flatley site and she is worried that drivers will be distracted by the sign which will cause accidents that could impact their children's' safety. She encouraged the Board to deny the variance because a sign that large does not need to be that close to their homes.

Cassie Mello (61 Shelburne Road) asked what types of businesses will be in the site and Mr. Price clarified that it is Industrial/flex use as authorized by the Conditional Use Permit (CUP) and site plan approval. She thinks that the signs on the building should be sufficient and such a large sign

is not needed. She also echoed the other concerns about traffic in that area how adding big tractor trailers will just make it worse.

Katie Poirier (11 Kimberly Drive) started off by commenting she feels that the traffic study that was done for this site was done during COVID-19 so it is not valid. She continued by arguing that a huge sign in front of their complex will be confusing to the tractor trailers that are supposed to use the shared St. Gobain entrance and they will start using the wrong entrance. She stated that they cannot get out of their complex now and fears that adding a sign will make it worse. She also expressed concerns about the values of their condominiums depreciating.

Mark Caton (Pioneer Way) and Joel Folliard (11 Kimberly Drive) both sent e-mails to the Community Development staff regarding this proposal.* Chair Conescu read both letters during the meeting.

**Copies of the emails can be found in the Zoning Board Project file which is stored at the Merrimack Town Hall in the Community Development Department.*

Mr. Branon took a moment to clarify that the sign is not going to be any closer to the road than other signs on the DW Highway and will set back 43 feet from the edge of pavement. He added that they believe the request is reasonable and meets the spirit and intent of the ordinance. He spoke about the revegetation plan for the site and used the zoning exhibit plan to point out the landscaping details. As for the traffic study, there was an extensive study done that was reviewed by Town staff and the Town's peer review consultants.

Chair Conescu asked about the St. Gobain shared entrance and Mr. Branon shared a layout plan that shows the location of that entrance. He also clarified that traffic is not being funneled to one particular entrance and everyone (including tractor trailer trucks) is free to use whichever one they choose. Chair Conescu asked if a sign is being placed at the St. Gobain entrance and Mr. Branon replied that they do not intend to do that. Chair Conescu expressed concerns that without a sign people are not going to know to use that entrance and Mr. Branon disagreed because a truck driver will know his/her route. Mrs. Christensen recalled the conversation that the Planning Board had regarding access and the two access points was a requirement of the Fire Department. She also agreed that the large trucks will most likely utilize the St. Gobain entrance because there is a traffic light there. Chair Conescu continued to express concerns with approving the variance because of the proximity to the Webster Green entrance and asked what types of businesses will be going into the site. Mr. Walker provided some examples of the uses allowed by the CUP and explained that they have two potential tenants interested, with one being a tile business but he could not recall what the other one is. He also gave examples of tenants in the Flatly flex site that was constructed in Nashua.

The Board voted 3-2-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the variance under Section 17.10.3 (b) of the Zoning Ordinance to permit placement of a ground sign 1 foot from the front property line whereas a setback of 20 feet is required, conditioned upon obtaining a sign permit for the proposed ground sign, on a motion made by Brian Dano and seconded by Lynn Christensen. Rich Conescu and Patrick Dwyer voted in opposition.

Findings of Fact:

1. ***Granting the variance would not be contrary to the public interest because:*** Placement of the sign in the new proposed location will allow approaching vehicles to more easily identify the site and the businesses within the site. Easier identification of addresses will also have the added benefit of increased safety for vehicles and pedestrians along Daniel Webster. Due to the right-of-way line, the proposed sign will be located at a similar distance away from the pavement as other signs along Daniel Webster and despite being 1 foot away from the right of way, the sign will not create a visual impact greater than the zoning ordinance originally intended. The design of the sign will not create any health or safety problems and will provide easily identifiable signage for the tenants and community. For these reasons granting this variance would not be contrary to public interest.
2. ***The spirit of the ordinance is observed because:*** We believe the purpose of the ordinance is to minimize the visual obstruction of signs located too close to roadways and to maintain the visual aesthetic of the Town and safe sight distance of roadways. Due to the wider than typical right-of-way width at the proposed entrance and sign location, the 1 foot setback will still meet the spirit of the ordinance. The sign will be located 36 feet from the edge of Daniel Webster which would be standard for a typical lot. The entrance will be landscaped for visual appeal and meets all the site distance requirements. Since this proposal will provide the above and will result in no negative impacts to the public we believe that granting the variances would observe the spirit of the ordinance.
3. ***Granting the variance would do substantial justice because:*** Granting this variance would allow for the best location of the sign in the most reasonably visible location. The proposed sign will meet the design standards for signs including square footage, sign height, and letter height. The Daniel Webster right-of-way is restrictive and unnecessarily requires any sign to be further back from the traveled way if strict conformance with the zoning ordinance is required. Allowing the sign to be located within 20' of the right-of-way would not impact visual appearance of the neighborhood or have negative impact on safety, and the spirit of the ordinance would be met. Granting this variance would do substantial justice because it would allow for the productive use of the property, as described above. In other words, a denial of this variance request would be an injustice to my client as there would be no apparent gain to the general public by denying this application.
4. ***Granting the variance would not diminish the values of surrounding properties because:*** The existing site is located in the Industrial District and is bordered by a mix of industrial and commercial properties, along with a residential development to the northwest. The commercial and industrial properties have similar signs to advertise their businesses and therefore the proposed sign for this project will match the visual appearance of the neighborhood and will not diminish the value of surrounding properties. Additionally, the construction of a sign in this location will aid the businesses in the newly constructed flex buildings in order to help them grow and thrive. The addition of successful businesses in the area will bring more customers to the site. As a result we would expect this project to have positive impacts on 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 subject parcel 6E-3-4 is 45.44 acres, or

1,979,298 square feet. It is located in the 1-1 industrial district. Section 17.10.3(b) of the Merrimack Zoning ordinance requires ground signs in the industrial and commercial district to be set back 20 feet from the edge of any public right-of-way. The subject parcel is unique due to a taking that adjusted the right-of-way line into the lot. The taking created a jog that made the ROW line approximately 24 feet further into the site. This adjustment also pushes the allowable location for a sign further into the site and away from the travel way where passerby will have more difficulty seeing and reading the sign. Due to the taking, the right-of-way line is now located where a sign would typically be allowed. Based on the above, we do not believe that a fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

b. *The proposed use is a reasonable one because:* *We believe that the proposed use is a reasonable one for all of the reasons previously stated. The following is an outline of why we believe the proposed use is reasonable:*

- Granting this variance would allow for the installation of a sign in a more visible location.*
- This project would have no measurable negative impacts on the surroundings or their property values.*
- The sign location would not be contrary to the public interest.*
- This project will not alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public.*
- This proposal would in our opinion observe the spirit and intent of the ordinance.*
- The sign will help new businesses in the recently constructed buildings grow and flourish.*
- Since this proposal will provide the above and will result in no negative impacts to the public we believe that the proposed location is reasonable. A hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." See Rancourt v. City of Manchester, 149 N.H. 51, 54 (2003). A confluence of factors makes this unique lot a prime location for a sign, a use common on the Everett Turnpike and similar New Hampshire highways, and therefore reasonable.*

5. Discussion/possible action regarding other items of concern

Mrs. Christensen reminded the Board members that the NH Municipal Association (NHMA) holds informative training sessions for anyone interested in attending one, and encouraged Board members to take some.

6. Approval of Minutes – July 26, 2023

The Board voted 5-0-0 to approve the minutes of July 26, 2023 as submitted, on a motion made by Patrick Dwyer and seconded by Lynn Christensen.

7. Adjourn

The Board voted 5-0-0 to adjourn at 8:36 p.m., on a motion made by Patrick Dwyer and seconded by Brian Dano.