



# 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, DECEMBER 17, 2014

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

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. and designated Leonard Worster to sit for the vacant member position.

**The election of a Vice Chair resulted in a tie vote with both nominees receiving two votes. Patrick Dwyer deferred to Tony Pellegrino who accepted the position.**

#### 2. Roll Call

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

**3. Lynn M. Waller (petitioner) – Variance under Section 3.02 of the Zoning Ordinance to permit a single family residential lot without the required 250 feet of Frontage. The parcel is located at 9 Lester Road in the R-1 (Residential) District. Tax Map 4B, Lot 014. Case # 2014-48. *This agenda item is continued from the November 19, 2014, meeting.***

Attorney Greg Michael, Bernstein Shur, said the lot is unique: it is large and rectangular in an area with a mix of lot sizes. The only issue is frontage. The petitioner seeks a Variance to allow subdividing the lot into two parcels. Lot "A" would have 151' of frontage whereas 250' is required; Lot B would be compliant. The sight distance is good. Attorney Michael questioned whether frontage is really relevant and what legitimate public purpose it serves. The current frontage harms no one. While stating his case, Attorney Michael cited several previous court cases, including Hannigan vs. Concord, (1999).

Attorney Michael Klass, Bernstein Shur, 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 applicant obtain subdivision approval from the Planning Board for the proposed two-lot subdivision, on a motion made by Patrick Dwyer and seconded by Leonard Worster.**

## Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the six-acre lot can easily support a second residential dwelling if the subdivision is approved. The only impediment is Class V frontage. There is no threat to public safety, health or welfare. There will be no change to the surrounding neighborhood. The purpose of the frontage requirement is safe access and prevention of lot overcrowding. The lot has good sight distance and meets all other requirements;
  2. The spirit of the ordinance is observed because the requested location for the single-family residential dwelling is in a residential zone. 151' of frontage is more than sufficient to create a driveway approximately 25' wide to access the single-family dwelling. If the lot were located on Town sewer and water, the frontage would be conforming and no variance would be required. The lot is not overcrowded and its size and shape are like those of the surrounding lots;
  3. Granting this variance would do substantial justice because the inability to subdivide a six-acre lot because of the minor frontage deficiency represents a significant loss to the applicant with no appreciable gain to the general public. The oversized lot has safe access. The use is permitted in this district;
  4. The values of the surrounding properties would not be diminished because the residential use will produce little traffic, noise, odor, or any other detrimental impacts to the surrounding area. The lot meets all but the frontage requirement and will not alter the character of the neighborhood;
  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 purpose of the Ordinance is to control uses that are not suited for a particular zoning district. This lot is large enough to support the area requirements for residential dwellings; the only issue is frontage deficiency. Unlike the applicant's parcel, most lots in this area are approximately 1.5-2.5 acres in size;
    - 2) The proposed use is a reasonable one because it allows a use that is permitted, namely single-family residential.
4. **Kevin Duggan of Metro Sign & Awning for Go Wireless, LLC. (petitioner) and KRG Merrimack, LLC. (owner)** – Variance under Section 17.10(4)(g) of the Zoning Ordinance to permit a wall sign to be 47 s.f. whereas 29 s.f. is required. The parcel is located at Unit H at 7 Continental Boulevard in the I-1 (Industrial), C- 2 (General Commercial) and Aquifer Conservation Districts. Tax Map 3D, Lot 003-01. Case # 2014-50. ***This agenda item is continued from the November 19, 2014, meeting.***

**As the applicant did not appear, the Board voted 5-0-0 to continue this item to January 28, 2015, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Tony Pellegrino and seconded by Richard Conescu.**

- 5. Robert T. Bevill (petitioner)** – Request for Rehearing regarding Case # 2014-40, in which the Board voted to deny an Appeal of an Administrative Decision seeking to overturn the Community Development Department Staff decision to classify a fire arms service, maintenance, transfers and assembly business as being eligible for a Home Occupation, which allowed the Planning Board's approval of such a business located at 11 Blair Road in the R (Residential) and Aquifer Conservation Districts. Tax Map 6C, Lot 170. Case # 2014-53.

Fran L'Heureux noted that the applicant for the Home Occupation has withdrawn his petition to open a gunsmith shop. Jillian Harris cautioned that he may return in the future. Patrick Dwyer questioned why the Board should hear the Request in that case. Jillian Harris explained that the Zoning Board of Adjustment (ZBA) must decide about classifying a firearms business as a Home Occupation and whether to hold a Rehearing of Case #2014-40 for that decision.

Richard Conescu said that Robert Bevill's statement is not accurate. In it, he claims that his civil rights were violated, that there is a case for municipal estoppel and that Town oversight protocols had been circumvented. Richard Conescu also stated that the ZBA cannot discuss what the applicant might do in the future, but must operate on a case-by-case basis.

**The Board voted 4-1-0 to deny the request for a Rehearing, on a motion made by Richard Conescu and seconded by Tony Pellegrino. Patrick Dwyer voted in the negative.**

- 6. 480 D.W. Highway-Choueiri Realty, Madi E. Choueiri Trustee (petitioner/owner)** – Special Exception under Section 2.02.2(C) of the Zoning Ordinance to permit a restaurant in the C-1 District. The parcel is located at 480 D.W. Highway in the C-1 (Limited Commercial) and Aquifer Conservation Districts. Tax Map 5D-3, Lot 046. Case # 2014-54.

Madi Choueiri, 480 D.W. Highway, who wants to open a 40-seat Lebanese French restaurant, said the site once housed a restaurant. It will take 6-7 months to renovate the entire building. The restaurant will be on the lower level with a canopy over the handicap access and stairs.

Madi Choueiri read the statutory criteria into the record.

There was no public comment.

**The Board voted 5-0-0 to grant the Special Exception, with the condition that there be Planning Board approval or Administrative Approval (whichever is deemed appropriate) for the change of use, on a motion made by Patrick Dwyer and seconded by Richard Conescu.**

## **FINDINGS OF FACT**

1. The specific site is an appropriate location for the proposed use in terms of overall community development because it is an excellent location for a restaurant. There are no other Lebanese French-style restaurants in the area. It will offer the community diverse food choices and will make Merrimack more of a destination for people who live outside the community;

2. The proposed use, as developed, will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area because this location was formerly a restaurant. There is plenty of parking in the existing lot. There is no plan to change the footprint of the building. The restaurant will offer the neighborhood a walkable dining option;
3. There will be no nuisance or serious hazard to vehicles or pedestrian because the parking lot is located behind the building, which has an entrance on Church Street beside the cemetery. The lot is safe for vehicles and customers. There is no need for street parking;
4. Adequate and appropriate facilities will be provided for the proper operation of the proposed uses because, having owned a restaurant in Paris, France, the applicant plans to have top-notch kitchen equipment and an extremely pleasant dining atmosphere. All Town requirements will be met.

- 7. Frederick and Kristyne Hayden & Donzi Realty, LLC. (petitioners/owners) –** Variance under Section 3.02 of the Zoning Ordinance to permit the construction of a 5,000 s.f. garage/barn within 13.3 ft. of the side property line whereas 20 ft. is required. The parcel is located at 7 Priscilla Lane in the C-1 (Limited Commercial) and Aquifer Conservation Districts. Tax Map 6D-2, Lot 004. Case # 2014-55.

This item was discussed after item #8.

Frederick Hayden, 5 and 7 Priscilla Lane, 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 of approval of Case #2014-56, seeking a Variance for a garage/barn not incidental and subordinate to the principal dwelling residence, on a motion made by Richard Conescu and seconded by Tony Pellegrino.**

#### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because the side setback is against the Highway property. No structures will likely be built on the State land and no one will be moving to that property. The structure will act as a noise barrier from traffic. The land on that side is not suitable for quiet enjoyment. The new structure will be no closer than the existing one, just 30' longer. It will be on the same line as the building to be razed in order to stay away from the leach field between the two properties;
2. The spirit of the ordinance is observed because it will not affect any neighbor's privacy or view. A garage is not living space; no one will move into it;
3. Granting this variance would do substantial justice because it would allow the use of more of the yard for quiet enjoyment from the highway noise. The applicant would not have to drive on the leach field as much if it is moved closer to the line/highway;
4. The values of the surrounding properties would not be diminished because the new structure will be tastefully built and add value to the neighborhood and

because three of the five homes on the street already have similar sized garages/barns;

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 other properties do not rest against a highway with increasing traffic flow;
  - 2) The proposed use is a reasonable one because the structure is the personal use, storage and hobbies, and will fall in line with the rest of the neighborhood.

- 8. Frederick and Kristyne Hayden & Donzi Realty, LLC. (petitioners/owners) –** Variance under Section 1.03(A)(3) of the Zoning Ordinance to permit the construction of a 5,000 s.f. garage/barn not incidental and subordinate to the principal dwelling residence. The parcel is located at 7 Priscilla Lane in the C-1 (Limited Commercial) and Aquifer Conservation Districts. Tax Map 6D-2, Lot 004. Case # 2014-56.

This item was discussed before item #7.

Frederick Hayden, who lives at 5 Priscilla Lane and has just purchased #7 Priscilla Lane, 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 of approval of Case #2014-55, seeking a Variance to permit the construction of a 5,000 s.f. garage/barn within 13.3' of the side property line whereas 20' is required, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.**

#### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because three of the five houses on the street have garages that are 2,500 or 3,000 square feet or more. The highway is the major abutter;
2. The spirit of the ordinance is observed because the building will be used to house the applicant's antique tractors and vehicles and other personal items not for commercial use. No one will live in the building;
3. Granting this variance would do substantial justice because the applicant owns the house next door and would be able to use more of the property for enjoyable purposes. There is a pool in his backyard; the yard next door is a junkyard. The trees will be removed and the yard enlarged. The applicant will apply to the State for a permit to build a berm. The new building will cut down noise from D.W. Highway;
4. The values of the surrounding properties would not be diminished because they will be increased due to the quality of the construction and the cleanup of the property that has been occupied by hoarders for the last 20 years. The garage will be removed;

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 other homes in the area have large garages. This will block out the noise and visibility from the Highway and add to the applicant's and the neighbors' quiet enjoyment of the property.
  - 2) The proposed use is a reasonable one because it is a garage/barn for indoor storage. The property will still have plenty of outdoor space.

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

Noting that the issue has arisen in other communities, Patrick Dwyer asked whether the Board wanted to add gunsmith into the Home Occupation section of the Zoning Ordinance. Jillian Harris said there are few applications for this use. Richard Conescu said if it is not a real business but is being done for family and friends, the owner could do so without ZBA approval. The Planning Board imposed conditions in this case. Tony Pellegrino said staff would alert the ZBA if more cases are predicted. Richard Conescu questioned whether the ZBA could really define every possible Home Occupation.

Fran L'Heureux asked staff for a report on how many Home Occupations there are in Merrimack, what types, when they were approved, and whether there are any problems associated with gunsmith shops in Town. Richard Conescu suggested a joint discussion with the Planning Board.

#### **10. Approval of Minutes – November 19, 2014**

**The minutes of November 19, 2014, were approved as submitted, by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.**

#### **11. Adjourn**

**The meeting adjourned at 8:10 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Richard Conescu.**