



# Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

WEDNESDAY, DECEMBER 18, 2019

**Board members present:** Board members present: Richard Conescu, Kathleen Stroud, Patrick Dwyer, Lynn Christensen, and Alternates Drew Duffy & Ben Niles

**Board members absent:** Rod Buckley and Alternate Leonard Worster

**Staff present:** Planning & Zoning Administrator Robert Price

#### 1. Call to Order

Richard Conescu called the meeting to order at 7:00 p.m. and designated Alternate Drew Duffy to sit for Rod Buckley.

#### 2. Roll Call

3. **Streif, LLC (petitioner/owner)** – Variance under Section 3.02, Note 6 of the Zoning Ordinance to permit the construction of a 3,000 sq. ft. building 20 feet from Daniel Webster Highway whereas 50 feet is required. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-39. **This item is continued from the November 20, 2019 meeting.**

**At the petitioner's request, the Board voted 4-1-0 to continue this item to January 29, 2019, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Kathleen Stroud and seconded by Lynn Christensen. Patrick Dwyer voted in opposition.**

4. **Streif, LLC (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit the construction of a retaining wall 10.88 feet from the front property line whereas 30 feet is required. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-40. This item is continued from the November 20, 2019 meeting.

**At the petitioner's request, the Board voted 4-1-0 to continue this item to January 29, 2019, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Patrick Dwyer voted in opposition.**

5. **Streif, LLC (petitioner/owner)** – Special Exception under Section 2.02.3 (C) (1) of the Zoning Ordinance to allow for a residential use in the C-2 (General Commercial) District. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation

and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-41. **This item is continued from the November 20, 2019 meeting.**

**At the petitioner's request, the Board voted 4-1-0 to continue this item to January 29, 2019, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Patrick Dwyer voted in opposition.**

6. **Adam Gilmer (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a two-lot subdivision with one lot having 66,816 sq. ft. of contiguous non-wetland area whereas 100,000 sq. ft. is required. The parcel is located at 7 Fuller Mill Road in the R-1 (Residential, by map) District. Tax Map 4B, Lot 167-01. Case # 2019-42. **This item is continued from the November 20, 2019 meeting.**
7. **Adam Gilmer (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a two-lot subdivision with one lot having 78,790 sq. ft. of total area whereas 100,000 sq. ft. is required; 59,258 sq. ft. of contiguous non-wetland area whereas 100,000 sq. ft. is required; and 185 feet of lot depth whereas 300 feet is required. The parcel is located at 7 Fuller Mill Road in the R-1 (Residential, by map) District. Tax Map 4B, Lot 167. Case # 2019-43, 2019-44, and 2019-45.

*Agenda items 6 and 7 (Case # 2019-42 and 2019-43-45) were heard together but voted on separately.*

Attorneys Greg Michael & Brett Allard, Bernstein, Shur, Sawyer & Nelson, P.A. represented the petitioner. Attorney Michael began by explaining that they have submitted several variance requests for the lot in question as well as an appeal from administrative decision, which will only be necessary if the variances are not granted. Attorney Michael also went on to explain that the wetlands that run across the existing lot make it impossible to use the portion of the land that is dry without subdividing the land. He also added that the Zoning Ordinance restrictions that are in place are to allow for proper drainage and septic areas which will not be an issue for the single family dwelling that is being proposed.

Attorney Allard reviewed the dimensions of each lot (which are outlined in the Findings of Fact below) and then read the Findings of Fact aloud to the Board.

No public comments were received.

**The Board voted 5-0-0 to grant the Variance in Case #2019-42, on a motion made by Lynn Christensen and seconded by Patrick Dwyer, with the following conditions:**

1. The petitioner shall obtain variances for the lot size (showing 78,790 s.f. whereas 100,000 s.f. is required; depth (showing less than 200 feet whereas 300 feet is required) and contiguous upland (showing 59,258 s.f. whereas 100,000 s.f. is required; and
2. The petitioner shall obtain subdivision approval from the Planning Board for the proposed subdivision.

#### **Findings of Fact (Case #2019-42)**

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

*The proposed use on the new proposed lots (4B-167-1) (the “Proposed Lot”) is single family residential, which is permitted in the R-1 Zone.*

*The general public purpose of minimum contiguous non-wetland area requirements are so that lots will have proper areas for drainage and sufficient areas for sanitary facilities. The proposed lot has a total area of 146,062 square feet (3.35 acres) 66,816 square feet (1.53 acres) of that total area is contiguous upland. Given the substantial size of the proposed lot, there is sufficient area for both drainage and a subsurface waste water disposal system.*

*Therefore, because the proposed lot can adequately accommodate the proposed dwelling and features incidental thereto, granting the variance will not threaten the public health, safety or welfare. There will be no adverse impact or injury to any public rights if the variance is granted. Granting the variance will not alter the essential character of the neighborhood.*

**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, the proposed lot otherwise complies with all requirements of the zoning ordinance and does not require any further relief from the same. As such, granting the variance does not violate basic zoning objectives and the spirit of the ordinance is observed.*

**3. Granting the variance would do substantial justice:**

*There is no injury to the public if the variance is granted. There is no significant gain to the public if the variance is denied. Therefore, the loss to the applicant when balancing public and private rights outweighs any loss or injury to the general public. There is no gain to the public if the variance is denied.*

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

*The proposed lot is densely wooded. Moreover, if the variance is granted, the applicant will be required to seek subdivision approval from the Planning Board, which will ensure that any improvements to the proposed lot will not diminish surrounding property values. The proposed use is residential, which is consistent with abutting residential uses in this neighborhood. As such, the values of surrounding properties will not be diminished.*

**5. Unnecessary Hardship**

**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.**

**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 the other properties in the area. Most notably, it can be subdivided with sufficient upland area to adequately accommodate a single-family dwelling, but the wetland soils on the easterly portion of the proposed lot make this variance necessary. Other*

*properties in the area either cannot adequately accommodate an additional single-family dwelling by way of subdivision, or are not impacted by wetland soils in this manner.*

*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 100,000 square foot minimum contiguous non-wetland area requirement and its application to the proposed lot. As stated, the general public purpose of such requirements is so that lots will have proper areas for drainage and sufficient areas for sanitary facilities. Because the wetland area on the proposed lot is contiguous and essentially limited to the easterly portion of the lot, there is sufficient contiguous buildable area on the westerly portion of the proposed lot to facilitate drainage and a subsurface waste water disposal system. Accordingly, even though the proposed subdivision requires this variance, the purpose that the Zoning Ordinance aims to protect will be preserved if it is granted.*

**2. The proposed use is a reasonable one because:**

*The proposed use 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).*

**The Board voted 5-0-0 to grant the variances in Cases #2019-43, 2019-44, and 2019-45, on a motion made by Lynn Christensen and seconded by Drew Duffy, with the following condition:**

1. The petitioner shall obtain subdivision approval from the Planning Board for the proposed subdivision.

**Findings of Fact (Cases #2019-43, 2019-44, 2019-45)**

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

*The existing use on proposed lot 4B/167 is single-family residential, which is a permitted use in the R-1 zone. There is an existing single-family home, well and leech field on the lot. The Applicant does not propose any further development or changes to the proposed lot 4B/167 by way of this application. Proposed lot 4B/167 has more than 250 feet of frontage and will consist of approximately 1.81 acres with 59,258 +/- square feet of contiguous upland area.*

*The general public purpose of minimum lot size contiguous upland and lot depth requirements are so that lots will have sufficient buildable area, proper areas for drainage and sufficient areas for sanitary facilities.*

*There is already sufficient area for the existing house and related infrastructure, as evidenced by the fact that the Applicant lives on the property and have not experienced any material drainage or sanitary issues. The Applicant is not proposing to further develop proposed lot 4B/167 or otherwise change its use, so there is no reason to believe that granting the variances will create any of these issues or be contrary to the public interest. No additional variances are necessary and proposed lot 4B/167 complies with all setback and other requirements. Granting the variance will not threaten the public health, safety, or welfare. There will be no adverse impact or injury to any public rights if the variance is 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, the proposed use is permitted by right on the proposed lot 4B/167, so granting the variances will not violate basic zoning objectives. Nothing on the ground of proposed lot 4B/167 will change as a result of the variances. The lot is consistent with the residential character of the neighborhood and will remain as such. Therefore, granting the variances will not alter the essential character of the neighborhood and the spirit of the ordinance is observed.*

**3. Granting the variance would do substantial justice:**

*There is no injury to the public if the variance is granted. There is no significant gain to the public if the variance is denied. Therefore, the loss to the applicant when balancing public and private rights outweighs any loss or injury to the general public.*

*Additionally, the Applicants are not proposing any physical changes or additional improvements to proposed lot 4B/167 if the variances are granted. Thus, as to proposed lot 4B/167, any alleged future impact to the public will be the same whether the variances are granted or denied. Since there is no potential for future impact to the public if the variances are granted, there is only loss to the Applicant if the variance is denied. As such, granting the variances would do substantial justice.*

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

*The existing property is densely wooded. Since granting the variances will not trigger any changes to proposed lot 4B/167 and the lot will continue to be used consistent with the residential character of the neighborhood, there will be no effect on surrounding property values.*

**5. Unnecessary Hardship**

**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.**

**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 existing property is distinguishable from other properties in the area. Most notably, it has wetlands on the southerly portion of the lot which run across the proposed lot line and into proposed lot 4B/167-01. However, most of the upland on proposed lot 4B/167 is contiguous. As such, the amount of wetlands is not so severe that the existing property cannot accommodate the proposed subdivision. However, the unique location and path of the wetlands on the property results in a hardship under the Zoning Ordinance.*

*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*

*100,000 square foot minimum lot size and the contiguous upland requirement and its 300 foot lot depth requirement, and their application to the proposed lot 4B/167.*

*As stated, the general public purpose of such requirements is so that lots have sufficient buildable area, proper area for drainage and sufficient areas for sanitary facilities. However, the Applicant lives on proposed lot 4B/167 and has not experienced any material drainage or sanitary issues. Because the Applicant is not proposing to further develop or make any improvements to proposed lot 4B/167 if the variances are granted, there is no fair and substantial relationship between the general public purpose of these requirements and their application here. The purpose that the Zoning Ordinance seeks to protect is not in any way threatened if the variances are granted. Since no material drainage or sanitary issues have existed in the past, and the Applicant is not proposing any topographical changes or changes to any improvements on proposed lot 4B/167 by way of this application, there is no reason to believe that granting the variance would cause the issues that the Zoning Ordinance seeks to prevent.*

*Additionally, the wetland area in the property spans across both proposed lots and naturally severs the property into two buildable areas. The easterly buildable area is on the proposed lot 4B/167 and already has an existing dwelling and related infrastructure with frontage on Fuller Mill road. The westerly buildable area is on proposed lot 4B/167-01 which has frontage on Farmer road. As such, the existing wetlands naturally subdivide the property in essentially the same manner proposed by the Applicant, making this proposal particularly appropriate for the property. Accordingly, even though the proposed subdivision requires these variances, the purpose that the Zoning Ordinance aims to protect will be preserved if they are granted.*

**2. The proposed use is a reasonable one because:**

*The proposed use 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).*

- 8. Adam Gilmer (petitioner/owner)** – Appeal of Administrative Decision that the property’s soil characteristics are irrelevant when determining minimum lot size, minimum contiguous non-wetland area, and minimum lot depth requirements for a lot in the R-1 (Residential, by map) District. The parcel is located at 7 Fuller Mill Road in the R-1 (Residential, by map) District. Tax Map 4B, Lot 167. Case # 2019-46.

**This item was withdrawn by the petitioner.**

- 9. PMG Northeast, LLC (petitioner) and Blue Hills Fuels, LLC (owner)** – Special Exception under Section 2.02.3 (C) (1) of the Zoning Ordinance to permit a gasoline station in the C-2 (General Commercial) District. 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 # 2019-47.

Planning & Zoning Administrator Robert Price summarized the project by explaining why a Special Exception is needed if the use is not changing. When the gas station was originally constructed it was a permitted use in that Zone, however, the Zoning Ordinance has since changed to allow it only as a Special Exception. Additionally section 9.02 (D) of the Ordinance

indicates that if any building or structured is moved in any way (i.e. in this case torn down) then the current provisions will apply which make the Special Exception necessary.

Courtney Herz, Sheehan, Phinney, Bass & Green, P.A. represented the petitioner and read aloud the Special Exception criteria responses, pausing only to clarify that the existing gas station is being torn down and rebuilt.

No public comments were received.

**The Board voted 5-0-0 to grant the Special Exception,, on a motion made by Kathleen Stroud and seconded by Drew Duffy, with the following condition:**

1. The petitioner shall obtain site plan approval from the Planning Board for the proposed gasoline station.

**Findings of fact - Ordinance Criteria, 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 Applicant's proposal to utilize the property for a gasoline station is appropriate. Notably, the Ordinance explicitly allows such a use in the District, which is specifically designed to accommodate retail businesses in support of the "demand created by Merrimack's strategic location and continuing growth." Ordinance, §2.02.3(A). In fact, a gasoline station has long been operates at this property, which is located at the corner of two major roads in town. The property's location is ideal for servicing the traffic accessing the many businesses located in the district.*

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

*Not only will the proposed use not adversely affect the neighborhood, the proposed gasoline station will not represent any change in use, as it is currently operating a gasoline station (and has done so for many years). Moreover, the neighborhood is solely commercial, without any residential uses nearby, making it an ideal location for a gasoline station.*

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

*As is evident from the sketch site plan submitted herewith, the Applicant, working with the engineering firm of Master Consulting, P.A., is working to carefully design a new gasoline station at the property. The design diligently accounts for safe and efficient traffic flow, and adequate sidewalks are contemplated. Again, because the proposed use is not a change in use at the property, the Board need not be concerned about a new unanticipated hazard.*

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

*Finally, as is also evident by the sketch site plan submitted herewith, the Applicant is proposing a carefully planned and well-conceived facility. The Applicant, which owns, operates and/or supplies more than 1,650 petroleum sites and accounts in the eastern United States, has*

*extensive experience in the gasoline industry, making them well-equipped to design and operate an adequate and appropriate facility at the property.*

*The Applicant has also been working in consultation with Planning staff and presented its initial, conceptual plans for the property to the Planning Board at the June 18, 2019 meeting. The Planning Board was generally receptive to the proposed plans and the Applicant has incorporated the Planning Board's comments into its revised sketch site plan.*

**10. John Stewart (petitioner) and ANMI Merrimack Realty, LLC (owner)** – Variance under Section 2.02.1 of the Zoning Ordinance to permit professional offices, personal services, and indoor recreational facilities in the R-1 (Residential, by soils) District. The parcel is located at 25 Craftsman Lane in the R-1 (Residential, by soils), Aquifer Conservation Districts and Wellhead Protections Area. Tax Map 2A, Lot 005. Case # 2019-48.

**11. John Stewart (petitioner) and Gloria Heath (owner)** – Variance under Section 2.02.1 of the Zoning Ordinance to permit professional offices, personal services, and indoor recreational facilities (on a portion of the property to be transferred by a subsequent lot line adjustment) in the R-1 (Residential, by soils) District. The parcel is located at 21 Craftsman Lane in the R-1 (Residential, by soils), Aquifer Conservation Districts and Wellhead Protections Area. Tax Map 2A, Lot 006. Case # 2019-49.

*Agenda items 10 and 11 (Case # 2019-48 and 2019-49) were heard together but voted on separately.*

Thomas Burns, TFMoran, Inc. represented the petitioner and summarized the project by explaining that variances are being requested to allow for a commercial business in a residential district. He further explained that if approved, the petitioner will be using the property to open a Martial Arts Studio/After School program. The second variance also includes a lot line adjustment for 21 Craftsman lane to allow for ample parking for the business and to construct a fenced in play area for the after school program. Before reading the Findings of Fact into the record, Mr. Burns also added that the property in question has been used commercially for decades.

Chairman Conescu asked for clarification on why the variance is needed if the use is not changing and Robert Price explained that the previous commercial businesses operated and changed periodically without the proper approvals from the Zoning or Planning Boards.

No public comments were received.

**The Board voted 5-0-0 to grant the variance for Case #2019-48, on a motion made by Patrick Dwyer and seconded by Drew Duffy, with the following conditions:**

1. The petitioner shall also obtain the variance in Case #2019-49; and
2. The petitioner shall obtain approval from the Planning Board for the proposed lot line adjustment, and a site plan for the proposed martial arts studio, accessory after-school program and professional office space.



**The Board voted 5-0-0 to grant the variance for Case #2019-49, on a motion made by Patrick Dwyer and seconded by Kathleen Stroud, with the following condition:**

1. The petitioner shall obtain approval from the Planning Board for the proposed lot line adjustment, and a site plan for the proposed martial arts studio, accessory after-school program and professional office space.

**Findings of Fact (both Cases 2019-48 and 2019-49)**

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

*The proposal is consistent with the public interest given the size, nature and history of the existing structure and site and their ability to readily support the proposed use(s) without significant alteration. The use would not alter the essential character of the property or surrounding neighborhood, nor would it affect the safety, health and welfare of the public.*

**2. The spirit of the ordinance is observed:**

*The proposal creates a number of complimentary uses on what has historically been a commercial property. The size and nature of the existing structure makes the uses reasonable and appropriate for the site. Additionally, the uses are consistent with the history of the site and the neighborhood, maintaining and protecting the value of surrounding properties and will improve the overall aesthetic of the site.*

**3. Granting the variance would do substantial justice:**

*There would be no harm to the general public or surrounding properties given the historical nature of the site and existing building and their ability to support the proposed uses. Additionally, substantial justice to the Applicant would be provided by allowing for a reasonable reuse of an existing commercial property which otherwise would be prohibited by strict adherence to the Zoning Ordinance.*

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

*The proposed commercial use(s) would be a continuation of the general use of the site and building and can be easily accommodated within the existing structure. Additionally, the uses would be considered less impactful on the lot than prior uses, and would therefore help to maintain the character of the surrounding neighborhood.*

**5. Unnecessary Hardship**

**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.**

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:**

*Strict adherence to the Zoning Ordinance would create an unnecessary restriction on what has historically been operated as a commercial property and would require redevelopment of the site and building.*

**2. The proposed use is a reasonable one because:**

*It allows for the continued commercial use of the site within the building that is appropriately sized and constructed to accommodate the users while maintaining the essential character of the neighborhood*

**12. Donald Belisle (petitioner) and Bilden Properties, LLC (owner) –** Special Exceptions under Sections 2.02.3.C.1.d and 2.02.3.C.1.f of the Zoning Ordinance to permit automobile sales, storage, service, and repair in the C-2 (General Commercial) District. The parcel is located at 719 Daniel Webster Highway in the C-2 (General Commercial), R-4 (Residential) Districts, and Planned Residential Development Overlay. Tax Map 7E, Lot 052. Case # 2019-50.

**Lynn Christensen recused herself from this agenda item. Richard Conescu designated Ben Niles to sit in her place.**

Ben Osgood (Engineer) summarized the project by explaining that they are seeking a Special Exception to allow for an automobile sales and service business in the C-2 Commercial District. Mr. Osgood read through the Special Exception criteria responses (documented below).

Patrick Dwyer challenged Mr. Osgood's statement that there will be no excessive noise if the exception is granted because repairing cars can cause a lot of noise. Mr. Osgood explained that the repairs would be conducted within the existing building and would be minimal because the petitioner would just be repairing cars he intends to sell. He has no intention of operating a repair business for the general public.

No public comments were received.

**The Board voted 5-0-0 to grant the Special Exceptions, on a motion made by Patrick Dwyer and seconded by Ben Niles, with the following condition:**

1. The petitioner shall obtain site plan approval from the Planning Board for the proposed automotive sales, storage, service and repair facility.

**Findings of fact - Ordinance Criteria, 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 site is an existing commercially developed site with paved parking areas, a sales office, and auto prep building already in place. The surrounding properties in the immediate area include other automobile based uses such as convenience stores, a car wash, automobile sales and service businesses, and gas stations.*

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

*The properties on either side are also zoned C-2 and there is a substantial wooded buffer between the proposed use and the residential units located to the rear. Automobile sales do not produce any obnoxious odors, excessive noise, or other detrimental effects on abutting properties.*

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

*Adequate access with proper site distance is provided. The site has ample existing paved parking areas and driveways to support the business. The roadway does not have sidewalks and is not the type of roadway where pedestrian use would be extensive.*

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

*The property has sufficient existing parking, office facilities and a shop area for vehicle prep and sales.*

**Lynn Christensen rejoined the Board, and Ben Niles returned to Alternate status.**

- 13. Chestnut Hill Properties, LLC (petitioner/owner) –** Variance under Section 3.08.2 of the Zoning Ordinance to permit an approved, but not yet constructed, Cluster Residential Development to have a density of 77 lots whereas 71 lots are permitted per the variance granted January 30, 2014. The parcels are located at Bannon Circle and Ritterbush Court (approved, not constructed roads) in the R-1 (Residential, by map) District. Tax Map 5B, Lots 002, 005, 007, 008, 009-01 through 009-71. Case #2019-51.

Attorneys Greg Michael & Brett Allard, Bernstein, Shur, Sawyer & Nelson, P.A. and Kevin Anderson, Meridian Land Services, Inc. represented the petitioner for this project. Attorney Michael summarized the project by explaining that the petitioner is requesting a variance to allow six additional lots to a cluster development that was previously approved (by another variance) as 71. If approved, the lot size would go from 71 lots to 77. Attorney Michael went on to explain the long history of this project and recounted the various instances and outcomes of each time the project was presented to either the Zoning or Planning Board. In lieu of reading through sixteen pages of notes, Attorney Michael summarized the current request by showing on the subdivision plan how the new lots would easily fit into the 193 acre parcel. He also indicated that the proposal would have no impact on drainage or the roadways but those issues would surely be covered when the project is presented to the Planning Board. Attorney Michael also detailed the issues with the sewer that the proposed cluster would be connecting to (which is the same system that the Middle school is on) and indicated that the petitioner has agreed to cover the cost of fixing not only that problem but will also be making improvements to Old Blood Road, which will serve as emergency access for the school. Attorney Michael also pointed out that the petitioner could easily grid out the land and go to the Planning Board with a request for subdivide the land for residential homes with private septic and not bother fixing the existing sewer problem but that is not in the best interest of everyone involved. The current model leaves a large majority of the land as open space which abuts existing conservation land owned by the town. Attorney Michael also made reference to how the proposed project fits into key elements of the town's Master Plan (i.e. using cluster developments to allow for housing while preserving rural character, incentivize projects with open space developments and offer alternative housing options for current and future generations).

The Findings of Fact were read and the following questions were asked by the Board:

Patrick Dwyer asked if the variance is denied will the petitioner revert back to subdividing the lots with private sewer. Attorney Michael answered that the petitioner would be within his rights to do so and they would have a perfect case for hardship because of the cluster denial.

Lynn Christensen asked for clarification on if the six additional lots are to compensate for the change in the quote for the sewer repair. Attorney Michael confirmed that the six additional lots would be to off-set the new cost. He also clarified that the original estimate was to repair the sewer and since that time, they learned that it needs to be replaced, which is why the estimate is now approximately \$600,000 more.

Rich Conescu asked if the lot sizes would be reduced as a result of the additional lots and was told that yes, some of them may be adjusted. Attorney Michael also cited several lot sizes of other cluster developments in town, which showed that the proposed lots are larger than the average of other clusters in town.

Lynn Christensen also asked for a demonstration on how the new lots would fit into the area showed in the map that was presented. Attorney Michael demonstrated this on the map.

Chairman Conescu opened the floor for public comments.

Tom Feller (27 Merrymeeting Drive) raised concerns about buffers and drainage and encouraged the Town to move swiftly on this because the number of houses keeps increasing each time the sewer estimate goes up.

Michael Peach (31 Old Blood Road) expressed concerns about upgrades to Old Blood Road and the possibility of adding sidewalks to keep children walking to and from school safe. He also has concerns about the increase of cars in the neighborhood with 77 additional houses and what it will do to the roads in the neighborhood

Attorney Michael returned to address the concerns raised by the abutters. He clarified the statement about the drainage not changing by explaining that it will be set up so that there is no more water or anything going off of the land based off of the requirements of the Planning Board. Attorney Michael also indicated that the petitioner is contributing \$375,000 to make improvements to Old Blood Road and that traffic studies have already been done and will most likely get discussed again when the project gets heard by the Planning Board.

**The Board voted 4-1-0 to grant the variance, on a motion made by Drew Duffy and seconded by Lynn Christensen with the following condition (Patrick Dwyer voted in opposition) :**

1. The petitioner shall obtain approval from the Planning Board for the amended subdivision.

## **Findings of Fact**

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

*As the courts have stated, to be contrary to the public interest the variance must unduly and in a marked degree conflict with the Ordinance such that it violates the Ordinance's basic zoning objectives. The primary objective for the Residential Zone is to provide for residential uses. The cluster residential development provides for reduced infrastructure with substantial acreage set aside for open space. The amended subdivision will remain compliant with the four purposes of Section 3.08.1, which promote the public interest. No public or private rights will be adversely affected by allowing the requested relief. In fact, the public will benefit directly due to sewer repairs. The amended subdivision would neither negatively impact the essential character of the neighborhood nor threaten the public's health, safety or general welfare.*

**2. The spirit of the ordinance is observed:**

*By modifying a conventional subdivision to the amended 77 lot cluster subdivision, the spirit of the Ordinance is observed, and several Master Plan recommendations are fulfilled. The amended subdivision not only ensures the protection of the public and environment through appropriate road, lot, drainage, and waste/sewer designs, but realizes the full benefits of a cluster design with open space as per Section 3.08.1.*

**3. Granting the variance would do substantial justice:**

*Substantial justice is done when the loss to the Applicant in denying the variance would exceed any gain to the general public by strictly enforcing the Ordinance's requirements. Granting the requested variance will allow the property to be developed in a way that strikes the best balance of community needs, conservation of the natural environment, and Applicant's construction of the approved development. Denial of the variance will not result in appreciable gain to the general public, but would cause substantial loss to the Applicant by preventing the best use of the property, as the sewer repair is a central condition of the current approvals. Granting the variance will actually result in substantial gain to the general public due to the sewer repairs and through open space & secondary school access.*

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

*A conventional subdivision as allowed by right, would impact the entirety of the property. Alternatively, the amended subdivision would concentrate the impact to an internal area and the open space will protect a significant buffer around the perimeter of the property. The addition of six lots within the previously approved subdivision would not be perceptible to the surrounding properties, so there would be no adverse impact to affect property values. As a result of the reduced impact, it is clear that there will be no diminution of values of the surrounding properties, the majority of which are town owned.*

**5. Unnecessary Hardship**

***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.***

***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:***

*Although the property is located within the overall R-1 Residential District, the property's special conditions allow it to otherwise meet the Section 3.08 cluster requirements with the extension of public sewer service. The granting of this variance would permit the required sewer repairs to be completed. Thereby allowing the previously approved subdivision to move forward. No fair and substantial relationship exists between the general public purpose of the Ordinance's use restrictions and the specific application of those restrictions to the property because a cluster subdivision allows the most efficient and practical development of the property. In this case, strict application of the Ordinance would result in a conventional subdivision with a far greater impact and disturbance on the property and surrounding area, which is contrary to the spirit of the Ordinance.*

**2. The proposed use is a reasonable one because:**

*Residential subdivision is a permitted use in the R-1 District, and the proposed Cluster Subdivision is a reasonable use of this 193 acre parcel which abuts the town's conservation land. The development can support the additional six lots without substantial design modifications related to road, drainage or utility design. The amended subdivision would not injure any public or private rights.*

**14. Discussion/possible action regarding other items of concern**

*None.*

**15. Approval of Minutes - November 20, 2019**

**The minutes of November 20, 2019 were approved as submitted, by a vote of 4-0-1, on a motion made by Lynn Christensen and seconded by Patrick Dwyer. Drew Duffy abstained.**

**16. Adjourn**

**The meeting was adjourned at 8:52 p.m. by a vote of 5-0-0, on a motion made by Drew Duffy and seconded by Kathleen Stroud.**