



# 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, FEBRUARY 28, 2018

Members present: Patrick Dwyer, Fran L'Heureux, Richard Conescu, and Alternates Leonard Worster (left 8:00 p.m.), Kathleen Stroud, and Rod Buckley.

Members absent: Tony Pellegrino and Lynn Christensen.

Staff present: Planning and Zoning Administrator Robert Price, Assistant Planner Kellie Shamel, and Recording Secretary Zina Jordan.

#### 1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m. and designated Leonard Worster and Kathleen Stroud to sit for Lynn Christensen and Tony Pellegrino, respectively.

#### 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.

3. **Justin Sleeper (petitioner/owner)** – Variances under Section 3.02 of the Zoning Ordinance to permit a three-family residence on a lot with approximately 16,901 s.f. of area whereas 120,000 s.f. is required; front setbacks of approximately 30 feet and 36 feet respectively whereas 50 feet is required; side setbacks of approximately 15 feet and 20 feet respectively whereas 50 feet is required; and a lot depth of approximately 120 feet whereas 200 feet is required. The parcel is located at 14 Hoyt Street in the R-4 (Residential) and Aquifer Conservation Districts. Tax Map 4D-4, Lot 025. Case #2018-01. **This item has been withdrawn by the petitioner.**

#### Withdrawn

5. **APMK Ventures, LLC. (petitioner/owner)** - Special Exception under Section 2.02.2 (C) of the Zoning Ordinance to permit a single family dwelling in a C-1 District. The parcel is located at 4 Harris Avenue in the C-1 (Limited Commercial) and Aquifer Conservation Districts and Wellhead Protection area. Tax Map 6D-1, Lot 030. Case #2018-03.

This agenda item was discussed before agenda item #4.

Peter McClintick, Manager, APMK Ventures, LLC, said that most C-1 lots in this area have single-family homes. The petitioner wants to construct a single-family home on a

vacant C-1 lot, which requires a Special Exception. Peter McClintick read the ordinance criteria into the record.

There was no public comment.

**The Board voted 5-0-0 to grant the Special Exception, on a motion made by Richard Conescu and seconded by Kathleen Stroud.**

## **FINDINGS OF FACT**

1. The specific site is an appropriate location for the proposed use in terms of overall community development because it would be in character with the area. There are single-family homes abutting the property and in close proximity that are also in the C-1 (Limited Commercial) District;
  2. The proposed use, as developed, will not adversely affect the neighborhood because there are other single-family homes in the neighborhood. Minimal site work is needed to develop the site. The topography of the lot would not substantially change. The home would be connected to town water and sewer. The proposed use would enhance the neighborhood;
  3. There will be no nuisance or serious hazard to vehicles or pedestrians because the occupant would probably have 2-3 vehicles, which would cause little traffic or impact;
  4. Adequate and appropriate facilities will be provided for the proper operation of the proposed uses because it would be serviced by town water and sewer and would have on-site parking for at least four cars.
- 4. Arne, LLC. (petitioner/owner)** - Variance under Section 3.02 of the Zoning Ordinance to permit a two-lot subdivision with one lot having 159.22 feet of frontage whereas 250 feet is required. The parcel is located at 63 Wilson Hill Road in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 4B, Lot 130. Case #2018-02.

This agenda item was discussed after agenda item #5.

Attorney Brett Allard, Bernstein Shur, Sawyer & Nelson, explained that the Zoning Board of Adjustment (ZBA) granted an identical variance in 1989; however the petitioner never completed the subdivision process with the Planning Board and the variance expired. There is only one house on the subject lot. There would not be a new driveway; the existing driveway would be used and shared. Attorney Allard read the statutory criteria into the record.

As to #3, substantial justice, Richard Conescu said much has changed since 1989 and the ZBA should not consider a direct comparison. Attorney Allard countered that the topography, property conditions and the plan are the same. Fran L'Heureux asked whether the lot would be subdivided again, should the variance be granted. Attorney

Roy Tilsley, Bernstein Shur, Sawyer & Nelson, stated that the petitioner would follow the original plan and would not subdivide farther.

As to #5, unnecessary hardship, Chairman Dwyer said the only hardship from a denial would be that the petitioner would not be able to build an additional house.

The Board asked the petitioner to reply to #5.B because he had not satisfied the hardship criterion: If the criteria in paragraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot reasonably be used in strict conformance with the Ordinance and a variance is therefore necessary to enable a reasonable use of the property. Richard Conescu asked whether two driveways could be created to service two lots. Attorney Allard said there is not enough frontage, the topography does not allow it and both lots would be below the required 250' frontage requirement. The proposed plan provides adequate frontage to at least one of the lots. Attorney Tilsley added that the lot can support a two-lot subdivision with a shared driveway. Strict observance of the Ordinance would be a hardship. The 1989 variance was for another owner. The current owner states that he would not subdivide further.

#### **Public comment**

John Harris, 69 Wilson Hill Road, spoke in opposition. It would be a back lot development. He wondered how a large property with residual land in back of the home would be addressed. The petitioner did not meet the statutory criteria: The variance is not in the public interest because of the impact on the integrity of the current zoning. It does not meet the spirit of the Ordinance because the plan is not sufficient to over-ride it. Denial would create substantial justice because it would be a significant gain to the public. There would be no loss or injury to the petitioner, who can still keep his home. There is no hardship because other homes are subject to the same zoning restrictions. The property is not unique; it is similar to other lots in the area. The petitioner has a reasonable use of his property.

Rhonda Tapply, 65 Wilson Hill Road, spoke in opposition. The plan would be unsafe, unsustainable over time, would create animosity between neighbors, and possibly end in litigation. The Tapply family was not allowed to subdivide when they purchased their lot in 1986, which was then of a similar shape and acreage as the subject lot. As such, they opted to sell a portion of their lot to their neighbor. These are the only two homes on the hill. The Arne lot is no more unique than the Tapply lot. This is not a simple variance. This would be the only shared driveway on Wilson Hill Road at the highest point of the hill. Rhonda Tapply described the difficulty of maneuvering up and down her own driveway in bad weather. Water freezes like a pond at the bottom in winter. The driveway on the subject lot is in disrepair; it is narrow and pitches and there is a blind spot that creates a hazard in both directions. Rhonda Tapply described how complex and expensive it would be to plow a shared driveway and the hazardous impact on the homeowners who would share it. She asked whether the conditions of a driveway easement are enforceable, how to access the homes in an emergency, whether there is enough turning room at the top for emergency vehicles, and who would

pay to maintain and repair the driveway. What would happen if one neighbor refuses to pay for a required repair? The petitioner wants one house to be responsible for all driveway repairs. How could the burden be placed on one homeowner? Neither of the previous two owners of the subject lot repaired the driveway. The point of requiring a 250' frontage is to keep the wooded area, which is not a hardship. Granting the variance would create the precedent that anyone on Wilson Hill Road could tear down their home and build another in the back. Chairman Dwyer and Richard Conescu explained that the variance would not set a precedent because each case is unique. They explained that the previous variance is null and that this would be a new variance. A shared driveway is a Planning Board issue.

Doris Foss, 55 Wilson Hill Road, spoke in opposition. The difference between the required 250' and the requested 159' frontage is 90'. The brook on the Foss property drains under the road and eventually into the Souhegan River. Doris Foss asked whether a septic system would create a runoff problem in the River and whether there would be blasting. She is concerned about wells. She can see the existing home and would be able to see the new home. Doris Foss asked why there are pink and blue flags on her property and who gave permission to place them there.

Bob Hayes, 62 Wilson Hill Road, spoke in opposition. A new home would create more of an issue for the wells, which went dry this past summer. The brook becomes a wetland at #60 Wilson Hill Road and does not drain into the Souhegan River. Zoning laws should protect the neighbors.

Attorney Tilsley said the driveway plan was stamped by a surveyor. Whether the driveway could support two homes is a Planning Board issue. The driveway has to be redone, and the petitioner has committed to doing that. There is plenty of room and good sight lines to the road. The surveyor's flags should be on the property line; they can be moved if they are not. The contact information for the surveyor who prepared the plan was provided to Doris Foss so she could follow up directly. Replacing the driveway where there is ledge is a unique situation that creates a hardship. The lot can support two lots. The only issue is whether the variance criteria would be met.

Fran L'Heureux asked whether the houses would interfere with the brook Doris Foss spoke of. Attorney Allard noted that there is no brook delineated on the plan. Attorney Tilsley added that drainage is a Planning Board issue.

Chairman Dwyer opined that the proposed well and leach field would be a problem for the house setback and likely lead to future variance requests. In his opinion, the petitioner does not meet the hardship, substantial justice or public interest criteria. The 250' requirement is not a hardship.

**A motion to grant the Variance failed, by a vote of 1-4-0, on a motion made by Patrick Dwyer and seconded by Kathleen Stroud. Patrick Dwyer, Fran L'Heureux, Richard Conescu and Leonard Worster voted in opposition.**

**The Board voted 4-1-0 to deny the Variance, because the petitioner failed to demonstrate a hardship inherent to the property, as the property is able to continue as a single lot with an existing home that is in compliance with the**

**requirements of the ordinance, on a motion made by Richard Conescu and seconded by Fran L'Heureux. Kathleen Stroud voted in opposition.**

**Leonard Worster recused himself from discussing and voting on agenda item #6 and left the meeting at 8:00 p.m.**

**Patrick Dwyer designated Rod Buckley to sit for Lynn Christensen.**

**Patrick Dwyer called a five-minute recess.**

**6. David Paul and Toni Paul (petitioners/owners)** — Re-Hearing of an Appeal of Administrative Decision (previous Case #2017-34) as per the requirements of RSA 674:41, regarding the issuance of a residential building permit for a lot without frontage on a Class V or better roadway, pursuant to the statutory appeal process. The parcel is located at 312B Baboosic Lake Road in the R(Residential) District. Tax Map 6A-2, Lot 156-09. Case #2018-04.

Chairman Dwyer noted that, on January 31, 2018, the ZBA granted the Request for a Re-Hearing of an Appeal of Administrative Decision due to receiving new information on easements.

Attorney Joseph Mitchell, 15 Parkhurst Road, said the basis of the appeal was that the statute allows building on a private road. He reviewed the history of the parcel. Of the five units on the lake that were serviced by Guter Lane, three have been removed and one has been replaced. Three are still serviced by Guter Lane. A building permit was granted in 1987 for a 36'x48' garage/barn. The Paul's also installed a septic system. In 1994-1995 an apartment was added to the second floor, which the Town later noted in its Assessing records. A friend was going to move into it. In 1996 the taxes were increased because there was living space in the garage. The petitioner is seeking a change of use from the 1987 plan in order to hook up the electric and septic systems and replace the deck on the east with a new deck on the west. The parcel used to have access on Jebb Road, but the petitioners gave up their access in order to help their neighbors the Langers construct a building that would obstruct the road. In 2016 a septic design was approved to service the Gray and Paul homes. The 1995 apartment was not cleared with the Town; in 1996 the Town saw the dwelling unit on the second floor.

Fran L'Heureux summarized that in 1987 the second floor was opened and in 1995 a floor was installed and that the Paul's want to keep it as an apartment. Rod Buckley asked whether the Town officially approved the dwelling and whether there are any documents to support it. Attorney Mitchell replied in the negative.

Attorney Mitchell stated that there would be no change in the 1.48 acre footprint and that nothing would be erected. Only the use would change. The 1,050' Guter Lane access to the house and barn is 75' from the Gray property. The petitioner wants to shorten it to 800' and stay 350' away from the Gray property. RSA 674.1 states that "no permit shall be issued for the erection of a building"; however one can have access by a private road, as other properties in Merrimack do. Section d. states that Town Council, following review and comment from the Planning Board can authorize a Building Permit.

The Town would not assume responsibility/liability for the private road or for emergency services not being able to reach the lot, which would be recorded at the Registry of Deeds. A shorter easement would remediate the hardship. The proposal would not affect the Master Plan or cause hardship for future owners or the municipality. Attorney Mitchell claimed that a precedent was set at 81 Woodward Road, where the Town claimed to own the abandoned railroad bed. In 2011, the owners were granted an easement over it to access their land-locked parcel. The Town gave them a non-exclusive easement to cross a Town-owned private road to build a house.

Robert Price said that case was also an appeal of an administrative decision. No precedent was set. Just as in this case, the RSA says that the petitioner must comply with the process outlined in the Statute in order to obtain a building permit.

Richard Conescu said that an easement could be used if it met certain requirements, which may not be the case in this instance. Attorney Mitchell said that, as a condition of approval, the petitioner would conform to the easement any way the Town wants. There would be cross-easements for the two lots plus the Gray easement. The old traveled way to reach the subject lot would be given up. An easement was given to the Grays for a boat ramp/access to Baboosic Lake. Everything is in escrow until the ZBA makes a decision.

David S. Paul, 4 Baxter Lane, the petitioners' son, wants to remodel. Since 1997 the plan has been for a garage with an apartment above, which the ZBA denied in January because there is no legal road frontage. There was access until his parents gave up their right-of-way access to the Langer's. They promised to return it, but they did not because they did not think the Paul's needed it. Now they do. David Paul reviewed the history of the camp, cottage, home and garage. The Town gave a permit to build a garage on the property in 1987. David S. Paul built an apartment in 1995. His friend who installed the septic system did not get a permit. It predated the Shoreland Protection Act. David S. Paul overlooked getting a permit for the apartment. The neighbors were all aware of it. In 2017 the Langer's said it would be a great idea for his parents to retire in it. They have paid property taxes for the living space since 1997. The only reason they are appearing before the ZBA is because of the Building Permit requirement. Two decades ago unbuildable lots were created, but there was no intention to affect the garage. The Town allowed replacing the cottage and septic system. The landscape, structure and footprint of the existing garage would not change. The abutting neighbors approve, as do most of the neighbors. No one ever expressed a concern. The right-of-way would allow reconfiguring the driveway to afford more privacy. The Paul's intent is to keep the building in the family for generations.

Attorney Mitchell said that private covenants follow the property. Although they say that the lots cannot be used for residential purposes, the Paul's have lived there for more than 20 years and have gone to Superior Court in order to continue doing that. Attorney Mitchell disagrees that they must go to Town Council and the Planning Board before they go to the ZBA. They want a building permit first.

Richard Conescu asked whether the only issue is separate septic and electric systems. If so, he suggested that the Paul's hook up to the systems at the other house so that

they would not have to appear before the ZBA. David S. Paul acceded that he could do a subpanel if the ZBA denied the appeal.

Rod Buckley asked whether the apartment would have a new address. David S. Paul said they would be 312A and 312B if he does not install a subpanel.

Fran L'Heureux reminded the meeting that a building permit is the issue.

### **Public comment**

Chairman Dwyer read a February 14, 2018, supporting letter from Sheila & Carey Demers, 19 Jebb Road, into the record. The cited the Pauls' involvement with the lake's well-being. Dave has assisted the Baboosic Lake Association with many drainage projects to ensure maintaining its health and Toni has served on the Baboosic Lake Board of Directors for many years to maintain a safe and thriving lake.

Chairman Dwyer read a February 28, 2018, opposing letter from Daniel Johnson & Linda Sobel, 314 Baboosic Lake Road, into the record. Drought conditions of the last several years necessitated a significant drawdown on their well. Adding a dwelling unit that would tax the same aquifer would exacerbate their situation. The Paul driveway/access road is a gravel road in close proximity to their house. The road gives access to three houses. The proposed dwelling would increase traffic, noise and dust.

Joseph Schliefer, 25 Jebb Road, who spoke in support, said there would be no problem with diminution of values because house values increase yearly.

Ron Englehardt, 32 Shore Drive, who spoke in support, said that several homes were razed and rebuilt. The Pauls made a high quality building and also built several homes in the neighborhood.

Jane Wenzel, 37 Scenic Vista Way, spoke in support. She is on the Baboosic Lake Association Board; Toni Paul is a former member. She agrees with the Demers about the Paul family's support of the Baboosic Lake Association and about the project. The Paul's are involved in the community. The existing dwelling produces no noise, traffic or dust. The Town should help the Paul's to maintain their family dwelling, which is in everyone's best interest.

Attorney Laura Dodge, McLane Middleton, represents the Grays. Guter Lane is a driveway and not a private road, but RSA 674 says a right-of-way is sufficient access. The Paul's have a deeded right-of-way, but it does not extend to the lot where the barn is. That is why there is an easement. Guter Lane never serviced five houses; it services only the Paul and Gray homes – others may have used it over the years, but it has historically and legally only served two lots. The Grays will not reclassify the driveway as a private road, but they would be willing to sign an access agreement for the subject parcel. In other words, they would allow access without creating an official road. Kenneth Gray, 310 Baboosic Lake Road, confirmed that he does not want an official road, but that he would agree to an access easement.

Chairman Dwyer asked if a possible future owner would also have access. Attorney Dodge said it would be a permanent easement that would run with the land.

Jebb Curelop, 23 Jebb Road, spoke in opposition. He is the grandson of Willard Jebb, who wanted to protect the lake from development. In 1978 the Planning Board approved Willard's subdivision plan to cut a 5.8 acre piece of property for 10 lake front abutters. Because he never wanted the land in the back to be developed or to impair the lake, he made the following restrictions and covenants in every deed that is binding on all owners and their successors: No lot would have a permanent residence or be subdivided and no roadway would be replaced or rebuilt. That created a huge buffer zone in the back. No approvals to build a dwelling were given to the Paul's. David N. Paul is a builder and should know better. Willard Jebb's plan is what the Paul's showed the Planning Board in 1987, so they know it exists and the restrictions it contains.

Chairman Dwyer asked if the notes on the subdivision plan (recorded at the Hillsborough County Registry of Deeds as Plan #12233) are enforceable. Robert Price said that staff has the same question, who recommend a condition of approval that the subdivision plan and its conditions be reviewed by Town Counsel.

Chairman Dwyer opined that Jebb Curelop is asking property owners to give up property rights. Richard Conescu added that no one can sign away a right.

Attorney Morgan Hollis, Gottesman & Hollis, spoke in opposition. He represents Ellen Curelop, 23 Jebb Road, who is Willard Jebb's daughter. Attorney Hollis wanted to correct the issues and facts. If the petition is denied, the Paul's would have no legal right to use the garage as a residence. Contrary to what Richard Conescu stated earlier, that means that something would have to change. Everyone must have the proper permit for a home and utilities. No one has the right to do that without a permit. The Paul's do not have a right to use the property as a residence just because they lived there for 20 years. A "handshake" is illegal and inappropriate. No one should live there now because there is no approved septic system. The Town has a March 4, 1995, record of complaint from Mrs. Guter about the Pauls' use of heavy equipment to install a new tank and an apartment in the garage in the middle of the night. The Town never inspected the apartment. The complaint was put on hold until the Guter's returned from Florida. The septic approval is for the Gray property and not for the Paul property. The system installed by the Paul's was illegal and failed. Someday other people will live there in two houses. Note #8 on HCRD Plan #12233 is that no owners shall convey new lots separated from the existing lot. Each lot is always one lot. The lot, building, and residence are now separated without permits or approvals. The Paul's want the ZBA to make it right, but it is not right. Contrary to what Attorney Mitchell stated, two previous court cases clearly state that one must go to Town Council first and then to the Planning Board to see if the driveway can allow safe access (*Merriam Farm, Inc. v Town of Surry*, dated July 18, 2012, Case #2011-311; and *Vachon v. Town of New Durham ZBA*, decided May 3, 1989, 131 N.H. 623). It should not go to the ZBA first. The conditions of the covenants were approved by the Town's Planning Board, so the Town has the right to enforce them. Tax assessors do not decide what is legal. Just because the apartment is taxed does not make it legal. RSA 674 dates from 1983 not from 1995.



This is a complex legal issue. Attorney Hollis cited the NH Municipal Association guidelines (which he read), two prior court cases and a book by a leading municipal attorney that all show how to handle such a matter. They all say that it is Town Council that decides whether a private way qualifies as a required road. For Attorney Mitchell to go to the ZBA first is premature.

RSA 674:41 says that the petitioner must prove financial difficulty or unnecessary hardship and that the circumstances do not require building structures to be related to existing or proposed streets. That applies to garages and barns. A home cannot have a private way as access because emergency vehicles may not be able to access it. That is why there is a frontage requirement and why a building must be related to a public way. The Fire Department must comment first. In the first court case cited by Attorney Hollis, the Merriam Farm case, it was determined that the petitioner must meet the same hardship requirements as with a variance. In the second court case, the Vachon case, it was determined that it is up to a town to decide whether a road/driveway is safe. If there is no access to a town road, there is no access for emergency services. If the Board grants the building permit, the Paul's will build a residential use on a private way that the Town cannot control.

Chairman Dwyer asked how this is different from a condominium that maintains its private road. Attorney Hollis explained that a condo road must be built to Town standards that the Planning Board has put into place and that documents must be approved by Town Counsel to ensure the access will be kept open.

Attorney Hollis claimed that the Paul's have not met the hardship criterion and their situation is not unique. A residence over a garage is not a reasonable or legal use and the ZBA should not make it legal.

Robert Price explained that the decision to deny a building permit was made because the lot has no access to a Class V or better roadway, as outlined in RSA 674:41 and there was no information about an easement. The Paul's wanted a frontage variance first, but Legal Counsel advised that the RSA requires them to appeal the administrative decision.

Lynn Langer, 2 Langer Way, spoke in opposition and to correct David S. Paul's testimony. The Paul's had an agreement with her father to split the land in half, but that never happened. Jebb Road is a paper road that is unusable. The Paul's chose to remove the camp and to install a boat ramp there; that means they knew they would never use Jebb Road. The back of the property is not connected to the waterfront because the Paul's separated it from the main property. It would become a lot that could be sold someday, but it was not intended as a back property.

Chairman Dwyer and Vice Chair Fran L'Heureux wanted the ZBA to get advice from the Town's Legal Counsel before deciding legal issues. They felt it would be unfair for the ZBA to decide without getting a legal opinion first. Robert Price reminded the Board that they are required to set a date certain when continuing a case as opposed to leaving a continuance open-ended.

**The Board voted 5-0-0 to continue this item to April 25, 2018, at 7:00 p.m., in the Matthew Thornton Meeting Room, on a motion made by Patrick Dwyer and seconded by Fran L’Heureux.**

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

**None.**

**8. Approval of Minutes – January 31, 2018**

**The minutes of January 31, 2018, were approved, with changes, by a vote of 3-0-2, on a motion made by Richard Conescu and seconded by Fran L’Heureux. Fran L’Heureux and Rod Buckley abstained.**

**9. Adjourn**

**The meeting was adjourned at 10:03 p.m., by a vote of 5-0-0, on a motion made by Kathleen Stroud and seconded by Rod Buckley.**