



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, JANUARY 26, 2022

Board members present: Patrick Dwyer (Vice Chair), Lynn Christensen, Ben Niles, Rod Buckley and Chuck Mower (alternate).

Board members absent: Richard Conescu (Chairman)

Staff present: Casey Wolfe, Assistant Planner

1. Call to Order

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

2. Roll Call

Patrick Dwyer led the pledge of allegiance, swore in those that intended to testify and appointed Charles Mower to sit for Rich Conescu. Rod Buckley read the preamble.

- 3. Robert A. Curry & Karen J. Curry (petitioners/owners)** – Variances under Section 3.02 of the Zoning Ordinance to permit the conversion of an existing single-family dwelling to a two-family dwelling in the R-1 (Residential) District whereas two-family dwellings are not permitted, and to permit a two-family dwelling, post conversion, to remain approximately 30 feet from the front property line whereas 50 feet is required (this setback variance is only necessary if the variance to permit the 2-family dwelling is granted). The parcel is located at 4 County Road (formerly 2 County Road) in the R-1 (Residential, by map) & Aquifer Conservation Districts. Tax Map 3A, Lot 65. Case # ZBA 2021-39. **This item is continued from the November 17, 2021 and December 29, 2021 ZBA meetings.**

The Petitioner was represented by Robert Curry (petitioner/owner) and Brett Allard (Bernstein, Shur, Sawyer & Nelson, P.A.). Mr. Allard provided a brief description of the parcel in question and stated that the petitioner is requesting two variances associated with converting an existing single family home into a two family dwelling. Both variances are from section 3.02 of the Zoning Ordinance and the first one is a request to allow a two family home in the R-1 District whereas it is not permitted by right. The second is to allow the existing structure to remain 30 feet from the front property line whereas 50 feet is required. He went on to explain that the house is currently in legal non-conforming status, however when and if the variance is granted to allow the two family conversion, the legal non-conforming status is terminated. Mr. Allard also explained that the conversion will be only internal and no external changes to the dwelling are being proposed. He went on to say that the second unit is much like an Accessory Dwelling Unit (ADU) but due to the size (approximately 1900 square feet), it does not meet the criteria. Mr. Curry explained that construction of the second living space had been commenced by the previous owner when they purchased the house so they would like to complete it and live in the new unit while renting out the existing furnished side.

Rod Buckley asked Ms. Wolfe for clarification on if there is a difference between who can rent an ADU versus an apartment and she explained that there is no difference except when you have an ADU the owner must occupy one of the two units.

Mr. Allard then read through the responses to the statutory criteria (outlined below).

There was no Public Comment.

The Board voted 5-0-0 to grant the variance to allow the two-family dwelling on a motion made by Charles Mower and seconded by Lynn Christensen.

The Board voted 5-0-0 to grant the variance for the setback on a motion made by Lynn Christensen and seconded by Rod Buckley.

Case # 2021-39 Findings of Fact

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

For a variance to be contrary to the public interest, the proposal has to conflict with the ordinance so much that it violates the ordinance's basic zoning objectives. The relevant tests are (1) whether the proposal will alter the essential character of the neighborhood; and (2) whether it threatens the public health, safety or welfare. See *Farrar v. Keene*, 158 N.H.684 (2009). Granting these variances will not alter the essential character of the neighborhood. The proposed conversion is strictly limited to interior reconfiguration of the existing dwelling. The existing deck is already "grandfathered" in its current footprint and the applicant is not proposing any changes to it. Thus, from an external perspective, the character of the neighborhood will remain unchanged by this proposal. Nor will granting the variances threaten public health, safety, or welfare. The existing well and septic are sufficient to support any increased usage associated with one additional bedroom and 1 bathroom. And there is sufficient parking in the driveway to accommodate one or two additional vehicles.

Further, it is not uncommon for single-family homes to be converted to two-family or multi-family homes. Such alterations help to increase access to housing alternatives, particularly in a time when the demand for affordable housing (which is limited in our State) continues to increase. Creating new opportunities for this type of housing is a benefit to the public interest in light of the current housing crises. There will be no adverse impacts or injury to any public rights if the variances are granted. Accordingly, granting the variances would not be contrary to the public interest.

2. The spirit of the ordinance is observed because:

It is in the public's interest to uphold the spirit of the ordinance; therefore, Courts have held that these two criteria are related. If you satisfy one test you almost certainly satisfy the other. See *Farrar v. Keene*, 158 N.H. 684 (2009). In addition to the above stated reasons, which are incorporated herein by reference, granting the variances will not result in additional or undue congestion or overcrowding in the area. Indeed, while the existing dwelling is large enough to support a second unit, the second unit will not be large enough to support anything more than a small family (only 1 bedroom and 1 bathroom proposed). As to the deck within the front yard setback, the spirit of the ordinance is to recognize that grandfathered structures should be allowed to continue if unaltered. The applicant is not proposing any changes to the deck, and the variance in this regard is more in the nature of a recognition that the deck on the old, grandfathered portion of the structure can remain in place notwithstanding the interior reconfiguration of the dwelling. Therefore, the spirit of the ordinance is observed.

3. Granting the variance would do substantial justice because:

The Supreme Court has held that measuring substantial justice requires balancing public and private rights. "Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." *Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 515 (2011). There is no injury to the public if the variances are granted. There is no gain to the public if the variances are denied. There is only loss to the Applicant if the variances are denied. Therefore, when balancing public and private rights, the loss to the Applicant if the variances are denied outweighs any loss or injury to the public if the variance are granted. Additionally, the proposed dwelling and related improvements are "appropriate for the area". See *U-Haul Co. of New Hampshire & Vermont v. City of Concord*, 122 N.H. 910,913 (1982). Therefore, granting the variances would do substantial justice.

4. Granting the variance would not diminish the values of surrounding properties because:

If the variances are granted, this property will remain consistent with the residential character of other lots in the surrounding area such that there will be no adverse effect on surrounding property values. As discussed above, while the existing dwelling is sizeable enough to support a second living unit, the second unit will be small enough that it will not likely be occupied by anything more than a small family. Therefore, the second unit will not lead to an increase in noise, traffic, or visual blight for the surrounding properties. There is sufficient parking area on the lot to support an additional unit and there will not be any congestion or overcrowding if the variances are granted. This new lot also has fully compliant frontage on County Road. No additional hazards or safety issues will arise due to the strictly interior conversion of the home.

Since this proposal is only for interior construction, the Applicant is not proposing to build new structures or to expand the footprint of existing structures within the setbacks closer to abutting properties than is otherwise allowed under the Zoning Ordinance such that the value of surrounding properties could potentially be compromised. Allowing the deck to remain within a small portion of the front yard setback will not affect the values of surrounding properties. Therefore, surrounding property values will not be diminished if the variances are granted.

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:

Unnecessary hardship will be found when the subject property has special conditions or circumstances that distinguish it from other properties in the area and (1) there is no substantial relationship between the purpose of the ordinance and the specific application of the ordinance as applied to the property; and (2) the proposed use is reasonable. See RSA 674:33.

The Applicant's property is distinguishable from other properties in the area. It is one of the few properties in the area that is not impacted by wetlands, the Souhegan River, or other brooks and streams. This lot consists entirely of dry, contiguous upland. Additionally, this property maintains a large dwelling structure - half of which consists of finished living space first constructed in or around 1748, and the other half of which consists of a newer addition of unfinished living space. There is also a barn attached to the rear portion of the dwelling structure. Other lots in the area do not share all of these unique features.

Owing to these special conditions, there is no fair and substantial relationship between the purpose of the Zoning Ordinance's prohibition against two-family dwellings in the R-1 Zone and the 50-foot front yard setback and their application here. Because of its large size, the current residence can reasonably and readily support a second living unit without nuisance to abutting properties. See *Farrar*, 158 N.H. at 689 (holding that size of residence was relevant to determining whether property was unique in its environment where variance sought to convert a large, historical single use residence to a mixed use of two residences and office space). To the extent the purpose of the Zoning Ordinance's restriction on two-family dwellings in this Zone is to prevent congestion and overcrowding, those issues are not present here in light of the size and configuration of the existing dwelling, the long driveway that provides enough parking for a second unit, and the existing well and septic that can support one extra bedroom and bathroom. Moreover, since this proposal is limited to interior reconfiguration and maintaining the existing deck, there will be no external change or effect to the property or the neighborhood. The Applicant is not proposing any new setback encroachments, and the proposal is compliant with all other requirements of the Zoning Ordinance. Accordingly, the purposes that the Zoning Ordinance seeks to protect are not in any way threatened if these variances are granted.

b. The proposed use is a reasonable one because:

For all of the foregoing reasons, which are incorporated herein by reference, the proposed use is reasonable. This property and the existing structure are uniquely appropriate for conversion to a two-family use. Granting these variances will enable a reasonable use of the property.

4. Dick Anagnost (petitioner) and GTONH, LLC (owner) - Variance under section 15.04.C of the Zoning Ordinance to permit a residential density of 420 units in a Planned Unit Development whereas a maximum of 400 is allowed (378 units currently exist). The parcel is located at 6 Twin Bridge Road in the R-4 (Residential) Elderly Housing, Aquifer Conservation, Planned Residential Development Overlay, and the Town Center Overlay Districts. Tax Map 5D-3 Lot 114. Case # ZBA 2022-01.

Dick Anagnost (petitioner) and Jason Lopez (Keach-Nordstrom Associates, Inc.) were present to discuss the project with the Board. Mr. Lopez began by sharing an overview of the property in question and explaining that the subject lot is part of the Planned Unit Development (PUD) for the Commons of Merrimack. The petitioner is proposing to construct two buildings, each with 24 residential units (for a total of 48) however, in order to do so, a variance is needed as the PUD currently has 372 existing units and zoning allows for up to 400, so this project is over the maximum density by 20 units. Mr. Lopez went on to explain that this project is unique in the sense that all of the units will be Workforce Housing (he provided the statutory definition of Workforce Housing in RSA 674:58) and typically you only see a certain percentage of units delineated as such.

Chairman Dwyer asked where the 372 existing units are located and Mr. Lopez demonstrated the location on the plan provided and gave the unit break down for each of the developments included in the PUD. Lynn Christensen stated that there is a great need for affordable housing in this area which triggered a conversation about the term affordable housing and how it makes people think it is low income housing which is not the same. Mr. Anagnost stated that individuals/families making up to \$70,000 a year can qualify for these units and he added that a similar property he built in Bedford has Teachers, Police officers and Firefighters as some of the tenants. Mrs. Christensen asked if the Board approves the project, how can they be reassured that he will not switch to market rate units and Mr. Anagnost replied that it is a condition of his financing. He explained that the extra units will allow him to keep the rates low. Mr. Lopez then read through the responses to the statutory criteria (outlined below).

Chairman Dwyer asked if this development was part of the original plans for the Commons and Mr. Lopez shared an old plan to show that the original plans called for more retail units to eventually be built in the space in question. He added that at some point in time the parcel was subdivided from the rest of the land and is now its own map and lot.

Public Comment

Melissa Blasek (9 Twin Bridge Road) spoke in opposition to the project stating that Twin Bridge Road is narrow and there is already not a lot of room to maneuver because of the overflow parking that is always in the street from the dance and martial arts studios in the Sal's plaza. She stated that she has a young child and is concerned about this creating a traffic hazard and added that the residents that live on that road already have difficulty getting in and out during peak times.

Chuck McNulty (11 Twin Bridge Road) expressed concerns that the road was not designed to see this type of traffic and stated that when London Court was built, the road (Front Street) was built to handle the volume of cars but Twin Bridge Road was not. He briefly touched on concerns regarding existing drainage problems, indicating that one of his neighbor's yard gets flooded now. Mr. McNulty also mentioned the cars from the dance and martial arts studios that line the road and how difficult it is turning onto DW Highway now, especially during winter months when snow lines the street.

Steven Cook (7 Twin Bridge Road) spoke in opposition of the project citing similar reasons as his neighbors, traffic issues leading to safety concerns. Mr. Cook asked why his abutter letter states 378 and the petitioner stated 372. Ms. Wolfe stated she was not sure why the numbers differ and added that she will look into it (Mr. Lopez provided a response to this question below).

Mrs. Christensen stated that there should not be cars parking on Twin Bridge Road and that can be and should be dealt with. She also added that the parking is a function of the Planning Board and will be discussed if the variance is granted.

Tina Wilson (13 Twin Bridge Road) stated similar concerns with traffic and concerns for safety as her son's bus stop is on Twin Bridge Road. She also expressed fears that all of the snow will be pushed towards her house and will cause flooding issues when it melts.

Mr. Anagnost replied to some of the concerns by explaining that they intend to encourage the tenants to enter and exit through the shopping center entrance because it has a traffic signal. He spoke about the abundance of parking available in the shopping center lots as a means of not worrying about where snow storage can go or where cars can park during snow removal. He also added that if retail units had been built out as originally planned, the traffic would be far worse than what the proposed residential units will generate.

Mr. Lopez addressed the confusion in the number of exiting units by explaining that when he started the research with staff they originally thought there are 378 but then realized there are 372. Mr. Buckley asked about green space on the lot and Mr. Lopez explained that it is a Planning Board function and has not been looked at yet. Mr. Buckley then asked about parking on the site, which is also a Planning Board function, however Mr. Lopez did demonstrate where the proposed parking spaces are going to be and added that they intend to file a parking easement for the Commons plaza to allow the residents to use those spaces as needed.

Tina Wilson (13 Twin Bridge Road) asked when the original 372 units were approved and Chairman Dwyer responded that there were a series of approvals done back in the 1980s.

Steven Cook (7 Twin Bridge Road) suggested that they make the driveway into the units one way to cut down on traffic exiting through Twin Bridge Road. He stated that when the plaza was first built, it was one way traffic but somehow the sign was removed through the years. Chairman Dwyer explained that his suggestion would be something that the Planning Board would need to consider.

Mr. Mower asked about the impact on the schools and expressed concerns about adding more students to the system since the Superintendent of schools has already stated that they are expecting 41 additional students next year District-wide. He feels as if this is something that the petitioner should supply to the Board if they want additional density granted. Chairman Dwyer and Mrs. Christensen both offered their opinions on the subject, stating that given what they have seen from other projects (such as Gilbert Crossing) they feel that the school impact would be minimal. Mr. Mower explained that there is a cost to the town for each student enrolled in the school system and feels that the Board should consider the budget when making decisions that impact the town.

Mr. Buckley and Mr. Niles both spoke in favor of the project because they feel that there are a lot of high priced housing options in town and not enough options that are affordable to young adults just starting out or individuals living on their own. Mrs. Christensen agreed and added that she is thrilled to have a developer that is willing to construct something that the community needs and not be concerned with just making money.

The Board voted 4-1-0 to grant the variance, with conditions, on a motion made by Lynn Christensen and seconded by Rod Buckley. Charles Mower voted in opposition.

Case # 2022-01 Findings of Fact

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

Under the PUD ordinance there are no restrictions on the types of units permitted, like market rate, low income, workforce housing, elderly, single family homes, town homes or multi-family buildings. This project seeks to develop the subject property with two 24-unit buildings for a total of 48 units. Each unit will be a two-bedroom workforce housing unit. The Owner has made the decision to develop all 48 units as workforce housing, not just a portion of the units found in most similar projects. The result of this voluntary decision provides for a benefit to the public interest by helping meet the need for affordable housing and allow more options for people to live and work in Town.

Further the request only seeks to exceed the permitted density by 20 units (or 5%). As an example, by right the owner could construct two buildings each containing fourteen (14) 1,850± square foot two-bedroom market rate luxury units. The proposed option is to construct two buildings each containing twenty-four (24) 1,100± square foot two-bedroom workforce housing units. Therefore, if the two options both construct two buildings with similar massing and exterior appearance it could be suggested that the workforce housing option provides a greater benefit and is not contrary to the public interest.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance states "To promote the health, safety, convenience and general welfare of the Town of Merrimack and to make it an attractive place in which to live ... " The request to exceed the 400-unit density threshold by 20 units is in alignment with the spirit of the ordinance by providing quality affordable housing for the local workforce, like teachers, police and fire staff, young professionals, restaurant and retail staff. The convenience to work and live in the same

community and having affordable housing both help provide the ability to have a better life balance. It also can allow for the residents to have greater community involvement that can benefit the general welfare of the Town.

3. Granting the variance would do substantial justice because:

The subject property and all abutting properties are located in the Residential District. The properties directly abutting to the west, north and east are commercial uses consisting of restaurants, retail, service businesses and office space. The properties directly abutting to the south are single family homes. The proposed use of multifamily residential could be considered a transitional use between the commercial and single-family homes. There are other existing multifamily unit buildings within the same PUD. Therefore, the proposed use is consistent with the areas present uses and provides for affordable housing in the area, so granting of the variance would do substantial justice.

4. Granting the variance would not diminish the values of surrounding properties because:

As mentioned in item 1 above, as an example, by right, the owner could construct two buildings each containing fourteen (14) 1,850± square foot two-bedroom market rate luxury units. The proposed option is to construct two buildings each containing twenty-four (24) 1,100± square foot two-bedroom workforce housing units. Therefore, if the two options both construct two buildings with similar massing and exterior appearance it could be suggested that the granting of the variance for an additional 20 units will not create a discernible difference. Further, similar existing multifamily unit buildings exist in the area. For these reasons we suggest that the granting of the variance will not diminish the values of surrounding properties.

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 provisions of the Zoning Ordinance permit the approval of additional residential units within the "The Commons" at Merrimack PUD by right. The subject property is within the PUD and is vacant and available for additional development. This makes the subject lot unique in comparison to abutting properties and prime for the development for the proposed use.

b. The proposed use is a reasonable one because:

The proposed use will add 48 workforce housing units to an underserved sector of the housing market.

5. Discussion/possible action regarding other items of concern

None

6. Approval of Minutes – December 29, 2021

The Board voted 5-0-0 to approve the minutes of December 29, 2021, as submitted, on a motion made by Lynn Christensen and seconded by Charles Mower.

7. Adjourn

The Board voted 5-0-0 to adjourn at 8:30 p.m. on a motion made by Rod Buckley and seconded by Lynn Christensen.