



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

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## MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES WEDNESDAY, JANUARY 27, 2021 7:00 P.M.

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

Board members absent: Rod Buckley

Staff present: Planning and Zoning Administrator, Robert Price.

Due to the COVID-19 pandemic, and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, the Zoning Board of Adjustment is authorized to meet electronically.

As stated on the agenda, the meeting was aired live on Merrimack TV. Telephone access was available for members of the public wishing to speak during the Public Hearing or provide public comment. Also identified on the agenda was the opportunity for general public comment to be submitted leading up to the start of the meeting via email to [commdev@merrimacknh.gov](mailto:commdev@merrimacknh.gov).

Members of the Board and Town Staff were participating via Zoom. In accordance with RSA 91-A:2 III, each member of the Board was asked to state, for the record, where they were, and who, if anyone, was with them.

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### 1. Call to Order

Richard Conescu called the meeting to order at 7:04 p.m. and appointed Drew Duffy to sit for Rod Buckley.

### 2. Roll Call

- **Richard Conescu:** Stated he was participating alone in the room he was in.
- **Ben Niles:** Stated he was participating alone in the room he was in.
- **Lynn Christensen:** Stated she was participating alone in the room she was in.
- **Drew Duffy:** Stated she was participating alone in the room she was in.
- **Patrick Dwyer:** Stated he was participating alone in the room he was in.

Patrick Dwyer read the preamble.

- ### 3. Brian Allen (petitioner) and Kali Construction, LLC (owner) – Special Exception under Section 2.02.13 (E) (6) of the Zoning Ordinance to permit a single family dwelling 11.5 feet from the side property line whereas 15 feet is required. The parcel is located at 7 Loop Road in the C-1 (Limited Commercial), Aquifer Conservation, Town Center Overlay and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 067. Case # ZBA 2021-01.

Brian Allen (petitioner) presented the project to the Board. Mr. Allen began his presentation by sharing the plot plan and explaining that the house that was previously there was encroaching on the side setback by 11 feet. When it was demolished and the new house was built, they intended to push the foundation back to meet the requirements but there was an error made and the foundation was poured 3.5 feet closer than intended, leading to the need for a Special Exception. Mr. Allen then read through the responses to the ordinance criteria.

Public Comment was received from: Paul English, 5 Loop Road. Mr. English asked for clarification on if the new house is closer to his property line. The Board confirmed that the encroachment is on the opposite side, so it is closer to 9 Loop Road. Mr. English then stated that he thinks the house looks good and will probably be contacting the new owner about putting bushes between their properties.

**The Board voted 5-0-0, on a roll call vote, to grant the special exception, on a motion made by Lynn Christensen and seconded by Patrick Dwyer.**

***Case 2021-01 Findings of Fact:***

- a. The proposed additions, alterations or improvements would serve to promote the reuse, restoration, rehabilitation or otherwise enhance an historic building or structure or any other potentially historic building or structure identified in the Historic Resources Inventory component of the Town Center Plan because:***

*The existing house was not livable and the landscaping was overgrown.*

- b. The proposed additions, alterations or improvements are for a use currently permitted within the Town Center Overlay District because:***

*Single Family homes are allowed.*

- c. The proposed additions, alterations or improvements would not result in significantly increased hazards to vehicles or pedestrians or impair or impede emergency vehicle access or the provision of emergency services or the planned improvements to the transportation Corridor because:***

*Replacing an existing house.*

- d. The proposed additions, alterations or improvements would not result in unreasonable impacts to abutting properties by way of increased noise, odor, visual blight or other nuisance because:***

*Replacing an existing single family home.*

- e. The proposed additions, alterations or improvements would serve to enhance the overall goals of the Town Center Plan because:***

*New home will bring families to downtown.*

- f. Adequate provisions for parking and other necessary support facilities are provided for the proposed additions, alterations or improvements because:***

*Existing driveway will be used.*

- 4. Wonderland Farm, LLC (petitioner) and Linda Raymond (owner)** – Variance under Section 2.02.1 of the Zoning Ordinance to permit Commercial uses (sales of Christmas trees & accessory uses) in the R-1 (Residential) District. The parcels are located at 105 and 107 Turkey Hill Road in the R-1 (Residential, by soils), and Aquifer Conservation Districts. Tax Map 4C, Lots 229 and 229-01. Case # ZBA 2021-02.

Brett Allard, (Bernstein-Shur), petitioner’s legal counsel and Derek Gagnon, (petitioner) presented the project to the Board. Mr. Allard shared the concept plan and demonstrated the layout of the proposed Christmas Tree Farm. He noted that a portion of land on 107 Turkey Hill Road (4C/229) is also going to be utilized by way of an easement from the current owner (Linda Raymond) and showed the location of the proposed driveway. He went on to explain that the variance is not being requested for the sale of Christmas trees, because that is allowed by right under RSA 674:32-a. Rather, the variance is for the operation of a “snack shack” and for Christmas trees to be brought in from other locations and sold during the first few years of operation while they wait for the Christmas trees planted on site to grow. It takes approximately 7-10 years to grow the trees and they are planted in batches. The Christmas trees that will be brought in will help the family off-set the startup costs of the business. The trees (between 500-800) will be brought in on a flatbed truck in one delivery in November. The truck will be on site for a few hours and will then leave. Mr. Allard continued by pointing out that this is a seasonal business that will only be operational from after Thanksgiving until approximately Christmas Eve. The other months of the year, the property will be dormant with just the trees growing.

Mr. Allard mentioned that the petitioner went to the Planning Board at the beginning of January to present the concept for feedback and received positive feedback and support from that Board. He also referenced specific feedback from Councilor Boyd and a letter of support that was received from an abutter in reference to the conceptual plan. Chairman Conescu commented that the letter was shared with the Zoning Board but could not be read into the record because it was addressed to the Planning Board. Mr. Allard then read through the responses to the statutory variance criteria.

Chairman Conescu inquired about the broadness of granting Commercial use on the properties and questioned whether or not a convenience store could be established there at some point if commercial sales are allowed. Mr. Allard reiterated that the petitioner is only seeking the variance to allow for the sale of Christmas trees that are transported in from another site and the sale of food items at the “snack shack.” Robert Price interjected and explained that the petitioner is requesting a specific use but if the Board was to grant the variance for “commercial use” without any conditions, that would open the door for legal interpretation to allow something else. Staff recommends applying very specific conditions of the commercial use, should the Board vote to grant the variances.

Lynn Christensen asked Mr. Allard to speak specifically about the “snack shack” as the materials the Board received do not mention it. Mr. Allard demonstrated where the “snack shack” is being proposed on the lot and indicated that it is going to be a 20x20 building that will sell food and beverages (items such as cookies, and hot chocolate) and possibly small Christmas crafts/goods. It will also most likely be used as the place the customers go to purchase their trees. Ms. Christensen stated that she understands the intent but wants to ensure the type of sales can be limited. Chairman Conescu stated that he feels that they should follow the recommendation of staff and specifically call out the conditions in any motion to grant variances. Mr. Price clarified

that they can not specify an exact list of goods for sale, but can call out a broad type of goods (i.e. items that are considered accessory to a Christmas tree farm). Lynn Christensen asked if the hours and days of operation could be limited. Mr. Price responded that is not a function of the Zoning Board but could be specified by the Planning Board. Mr. Allard added that the “snack shack” will be mobile so that it can be removed from the site during the off-season.

Patrick Dwyer asked Mr. Allard to explain his assessment that the surrounding homes will not see diminished values. Mr. Allard explained that the Christmas tree farm itself is allowed without ZBA approval as part of the Agricultural Exemption under State of NH law, so it is important to keep in mind that they are only asking for a variance for the sale of trees brought in from off site and a small “snack shack.” It is their belief that a delivery of trees once a year and the sale of snack items will not have a negative impact on the neighborhood.

Lori Liberty (11 Acacia Street) voiced concerns about opening up commercial use on the properties that could then lead to other types of commercial uses down the road. Chairman Conescu commented that the Board has the same concerns and they will specify in any motion to grant the variances that commercial uses are limited to the sales to trees and items sold in the “snack shack.” She also expressed concerns about having people wandering through her backyard cutting down her own trees and using town water to irrigate the trees when Merrimack has a water shortage as it is. Lynn Christensen stated that the issues raised are applicable to the Planning Board and recommended that she voice her concerns to the Planning Board when and if applicable.

Debra Uttero, (5 Acacia Street) asked how the surrounding air, water and soils will be protected from any chemicals used to fertilize the trees. Chairman Conescu advised Mrs. Uttero that her question would need to be addressed to the Planning Board. She then asked if a residential house or any other structures can be built on the property now or in the future. Patrick Dwyer responded by explaining that the Zoning Board is just hearing testimony to decide whether or not a commercial component can be included with the Christmas Tree farm, they are not approving the farm itself because that is already allowed. Mrs. Uttero’s last question was regarding a wooded buffer around the property protecting the view for the neighbors and Patrick Dwyer indicated that this is also a Planning Board question.

Patrick Dwyer expressed his support for the Christmas tree farm and indicated that he is glad to see something agricultural be put there instead of more homes. He does feel that, should the Board vote to grant the variances, they need to specify the type of commercial use allowed to prevent problems down the road. Chairman Conescu agreed.

Lynn Christensen asked Robert Price if the Zoning Board can approve the off-site sale of trees without the “snack shack” and whether a temporary “snack shack” can still be brought in without the variance. Robert Price explained that since this parcel is zoned residentially, in order for commercial sales to be allowed (both the “snack shack” and off-site trees) the variance would need to be granted. Lynn Christensen then asked if they can limit a period of time that trees could be trucked into the property for sale. Mr. Price explained that a variance runs with the land so they cannot limit the variance itself, but if she is referring to the hours of operation, that function belongs to the Planning Board. He also explained that if they are looking to limit the type of products for sale allowed, they need to make it a condition of the approval. Patrick Dwyer asked for clarification regarding the variance sitting with the land to ensure they are not opening up the parcel to commercial use if the property is ever sold. Robert Price explained that it all depends on how the motion is made. If they limit the commercial use to items related to the sale of Christmas trees during the Christmas season, then that is all that will be allowed.

Lynn Christensen echoed Patrick Dwyer's earlier comment about supporting the proposal but wanted to prohibit other/unrelated commercial use.

**The Board voted 5-0-0, on a roll call vote, to grant the variance, with conditions, on a motion made by Lynn Christensen and seconded by Patrick Dwyer. The following conditions apply:**

1. Commercial sales of imported Christmas trees shall be limited to November 1 – December 25 annually and may occur on Map 4C, Lot 229 & Map 4C, Lot 229-1.
2. Sales of items from the “snack shack” proposed to be located on Map 4C, Lot 229 as shown on the Conceptual Site Plan dated October 15, 2020 and provided to the ZBA shall be limited to related applicable seasonal items only.
3. The petitioner shall obtain site plan approval from the Planning Board for the proposed Christmas tree farm.

***Case 2021-02 Findings of Fact:***

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

*To be contrary to the public interest, the variance must unduly conflict with the ordinance such that it violates basic zoning objectives. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 107–08 (2007). To determine whether the variance unduly conflicts with the ordinance such that it violates basic zoning objectives, the board must analyze whether granting the variance would alter the essential character of the neighborhood. See Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011). Granting the variance to allow imported Christmas trees to be sold on the property will not alter the essential character of the neighborhood. The only additional “impact” of this use compared to selling trees grown on the property as a matter of right is occasional deliveries of trees to the site. The traffic associated with these deliveries will be negligible relative to existing traffic on Turkey Hill Road. These occasional deliveries will only occur intermittently for approximately one month during the year, consistent with the seasonal nature of the business. There will be no impact on abutters. Therefore, granting the variance would not be contrary to the public interest. Moreover, 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 reasons set forth above, the spirit of the ordinance is observed because selling trees grown on the property is permitted by right and there is no impact to the neighborhood by allowing imported trees to be sold on site until enough mature trees are grown on the property to sustain the business. Therefore, 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 gain to the public if the variance is denied. There is only loss to the Applicant if the variance is denied. As such, when balancing public*

*and private rights, the loss to the Applicant if the variance is denied outweighs any loss or injury to the public if the variance is granted. Therefore, granting the variances would do substantia justice.*

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

*The proposal is fully compliant with all dimensional requirements of the Zoning Ordinance, including all setback requirements. The Applicant does not require any setback variances in order to build or otherwise use the setback buffer abutting neighboring properties. In fact, the plan calls for a wooded buffer to remain around the perimeter of the tree farm in order to provide an additional buffer between that area and abutting properties. The Applicant can sell trees grown on-site as a matter of right and there will be no effect on the values of surrounding properties by granting a variance permitting the sale of imported trees during the first few years of the business until enough mature trees are grown on-site to sustain its operations. This is a very passive use and a productive use of this unique property that fits well within the neighborhood. As such, surrounding property values will not be diminished if the variance is granted.*

**5. Unnecessary hardship.**

*The Applicant's property is distinguishable from other properties in the area. First, it is much larger than all other properties in the area. The property is approximately 8.66 acres. The overwhelming majority of abutting properties (of which there are 20) range from approximately .5 acres to approximately 2 acres. Second, the property is uniquely "horseshoe" shaped in that most of its area consists of "back land" situated away from its frontage along Turkey Hill Road. Other lots in the area do not share these unique features.*

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

Chairman Conescu welcomed Ben Niles to the Board as a Full Time Member noting Ben was recently appointed as a full member by the Town Council to fill the vacancy left by the resignation of Kathleen Stroud.

*Lynn Christensen left the meeting at 8:15 p.m.*

**6. Approval of Minutes – December 30, 2020**

**The Board voted 4-0-0, on a roll call vote, to approve the minutes of December 30, 2020 on a motion made by Patrick Dwyer and seconded by Drew Duffy.**

**7. Adjourn**

**The Board voted 4-0-0 to adjourn at 8:17 p.m. on a motion made by Drew Duffy and seconded by Ben Niles.**