



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, JULY 27, 2022

Board members present; Chair Richard Conescu; Patrick Dwyer; Ben Niles; Rod Buckley, Lynn Christensen and Alternate Charles Mower.

Board members absent: None

Staff present: Robert Price Planning and Zoning Administrator

1. Call to Order

Chair Richard Conescu called the meeting to order at 7:00 p.m.

2. Roll Call

Richard Conescu led the pledge of allegiance and swore in members of the public who would be testifying. Rod Buckley read the preamble.

3. Black Diamond Development, LLC (petitioner) and MM Reality Trust (owner) – Variance under Section 2.02.3.B of the Zoning Ordinance to permit an industrial warehouse use in the C-2 (General Commercial) District. The parcel is located at 734 DW Highway in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 7E, Lot 31. ZBA Case # 2022-17. This item is continued from the May 25, 2022 and June 29, 2022 ZBA meetings.

Steve Keach (Keach Nordstrom Associates, Inc.) presented the petition on behalf of the petitioner. Mr. Keach began by explaining that the applicant is seeking a variance to permit the construction of an industrial warehouse in the general commercial zone. He provided an overview of the parcel in question and described the uses that abut the property before sharing the plans for the proposed warehouse building. The building is planned to be 102,600 square feet and will contain 16 truck bays. The parking area will include approximately 129 parking spaces and will be accessed from DW Highway. Mr. Keach went on to explain that a tenant has not been secured at this time but the demand for this type of warehouse space is high right now so they do not foresee a problem. He pointed out the proximity to the highway at this location as an attractive marketing advantage to prospective tenants. Chairman Conescu asked what the frequency of trucks coming and going from the site would be. Mr. Keach explained that without having a tenant secured it is hard to say exactly but explained the type of tenant they are looking for (i.e. sortation or fulfillment operations) would result in less traffic than a typical warehouse use. Patrick Dwyer commented that he lives in that area of town and the traffic is already bad without the warehouse so adding to it is only going to make it worse. Mr. Keach tried to give examples of traffic volumes from other towns that have similar warehouses but Mr. Dwyer declared he did not want to debate the topic because comparing DW Highway (a two lane roadway) to a four-lane roadway does not make sense.

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

Mr. Dwyer raised concerns about the increase of noise in the area and Mr. Keach assured the Board that when and if the project goes before the Planning Board avenues for noise mitigation can be addressed. He took the opportunity to remind the Board that if the variance is approved, they still need to obtain approval from the Planning Board before any permits can be pulled. He also argued that the location is a perfect spot for this type of business because of its proximity to the highway, the trucks will have to travel less than a mile to get to the turnpike.

Rod Buckley asked staff if the variance is approved if the Planning Board can restrict the type of warehouse allowed in order to prevent trucks coming and going at all hours of the night. Mr. Price advised that the Board cannot dictate the type of warehouse allowed but does have control over hours of operation so they could restrict it that way. Chairman Conescu expressed concerns that truck drivers could potentially be sleeping at the site overnight and asked staff if there is a way to prevent that from happening. Mr. Price indicated that there would ultimately be no way to ensure this would not happen. Chuck Mower asked how many of the residential developments in the area of the subject parcel have signalized entrances. Mr. Keach responded that both Maple Ridge and Society Hill have a shared traffic light and Crosswoods Path does not.

Chuck Mower questioned why the Board members keep asking about traffic because he thought traffic was not something the ZBA was permitted to consider. Mr. Dwyer stated that it can be considered by the ZBA as of a couple of years ago. Mr. Mower then continued to express frustration with some other inconsistencies within the ZBA review process and Vice Chair Buckley asked that the discussion be tabled until later in the meeting.

Chairman Conescu stated that his concerns with the project are that he does not believe the spirit of the ordinance and hardship criteria are met. He feels the spirit of the ordinance is not met because the use is strictly industrial and not a mix of commercial and industrial. As for the hardship, he explained that this is not a case that the owner needs to construct a warehouse for his business because there is not a tenant yet. This is just an owner wanting to make the most profit from his land, which can be appreciated but is not a hardship. He also reiterated the concerns about the traffic impact and truck drivers sleeping in their trucks overnight on the property.

Mr. Keach argued that this use is a vital function of modern commerce. He also explained that these warehouses help cut down on traffic because one vehicle makes deliveries to lots of people instead all of those people travelling to purchase their own goods.

Lynn Christensen stated that she feels that the hardship criteria is met and that this parcel is very close to the (I-1) Industrial zone so it fits. Additionally, the current use is a danger to the environment and is happy that it is being re-developed into something else. Mrs. Christensen also stated that she believes that the impact to traffic will not be bad because of the proximity to the highway.

No Public Comment

Ben Niles asked if there is a way to approve the variance with the condition that the Planning Board consider noise and traffic. Lynn Christensen (who is also a Planning Board Member) ensured Mr. Niles that the Planning Board does consider noise and traffic when reviewing plans. Mr. Niles expressed concerns that the trucks will be idling for long periods of time which could be disruptive to the residential neighbors at Maple Ridge. Mr. Dwyer reiterated his concerns with traffic and noise and added that the ambient light will be an issue with the neighboring residential development as reasons for opposing the project. He stated that he does not believe the applicant

demonstrated the hardship criteria and feels that the project may also have a negative impact on the property values of the residential units in the surrounding area.

The Board determined that the petitioner's responses to the statutory criteria (outlined below) were sufficient, proved that each criterion was met, and adopted the responses as the Board's findings of fact.

The Board voted 3-2-0 to grant the variance with conditions, on a motion made by Lynn Christensen and seconded by Ben Niles. Richard Conescu and Patrick Dwyer voted in opposition. The following condition applies:

1. The petitioner shall obtain site plan approval from the Planning Board for the industrial warehouse development.

Findings of Fact:

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

Granting a use variance will not be contrary to the public interest. More specifically, the requested variance will not unduly conflict with the basic purposes of the relevant zoning provisions as it will neither alter the essential character of the area nor threaten public health, safety, or welfare and in fact will actually be a benefit to the public health, safety, and welfare by removing the junk yard use from the area.

The existing neighborhood consist of a commercial gas station, service facilities, a restaurant, mixed residential use, and industrial type uses. This property has operated for many years as a Junk Yard known as Majestic Motors. The applicant believes the construction of an industrial/warehouse building in lieu of the current facility would be in the public's interest because of potential health, safety, and the welfare concerns for the public as it relates to the existing Junk Yard and future potential contaminations.

2. The spirit of the ordinance is observed because:

As seen on the enclosed zoning map of this area, there are multiple zones along DW Highway in this area and with the new highway interchange the applicant believer that an industrial/warehouse building on this lot would be consistent with the overall development of this area per the spirit of the ordinance.

3. Granting the variance would do substantial justice because:

By allowing the applicant to redevelop the site to a use that fits into the surrounding area and utilizes the main roadway system through town via access to the state roadway system via the new interchange would result in substantial justice being done.

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

Again, currently the site is a Junk Yard, the applicant does not see any way that removal of that entity and replacing it with a new warehouse building would diminish the value of surrounding properties in this section of Town that has industrial, commercial, and mixed use residential units around the area.

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:

There is no substantial relationship between the general purposes of the ordinance and the specific violation being applied to the property. First off as the board knows there are two ways to determine unnecessary hardship, existence of special conditions or circumstances that distinguish the subject property from others. This application has outlined the special conditions hardship case. As I think most members would agree, a viable commercial site needs access from the main roads to have the best chances to be successful and the layout of this parcel doesn't allow much density or visibility to a proposed commercial entity on this site and as such the applicant has proposed an industrial/warehouse building located on the back portion of the parcel because visibility isn't as imported to this type of use. A denial of this variance would not have any substantial relationship between the general purposes of the ordinance and the specific violation being applied to this property as it would not allow the existing facility to be removed from the town.

b. The proposed use is a reasonable one:

The proposed use of an industrial/warehouse building located only a few parcels south of the industrial zone is believed to be a reasonable one by the applicant.

- 4. Peter McClintick (petitioner/owner)** – Variance under Section 2.02.13 (E) (4) (a) of the Zoning Ordinance to permit the construction of a single family dwelling 20 feet from the front property line whereas 30 feet is required. The parcel is located at 12 Hadley Road in the R-4 (Residential, by soils), Aquifer Conservation, Elderly Housing and Town Center Overlay Districts. Tax Map 5D-4, Lot 37. ZBA Case # 2022-25.

Attorney Greg Michael presented the petition on behalf of the petitioner. He began by providing a brief history of Hadley Road and shared a rendering of the current street layout with the proposed dwelling shown on the lot in question. He explained that the lot is in the town center overlay which only requires 20,000 square feet and the subject parcel has approximately 23,000 square feet. Mr. Michael went on to explain that aside from the size of the lot and frontage requirements, the rear and side setbacks are able to be met, however due to the topography on the site, the applicant is seeking a variance for the front setback.

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

No Public Comment.

The Board determined that the petitioner's responses to the statutory criteria (outlined below) were sufficient, proved that each criterion was met, and adopted the responses as the Board's findings of fact.

The Board voted 5-0-0 to grant the variance on a motion made by Patrick Dwyer and seconded by Lynn Christensen.

Findings of Fact:

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

Granting the variance would not be contrary to the public interest because it will provide additional housing in the area and the proposed use is consistent with the surrounding properties.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance is observed because the proposed development is a permitted use within the district and the nature of the development (single-family residential) is identical to many of the surrounding properties.

3. Granting the variance would do substantial justice because:

There is no harm to the general public by allowing a dwelling to be constructed within the front building setback. Given the nature of the site and the steep sloping topography, there will be less overall disturbance on the parcel as a result of granting the variance.

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

The values of surrounding properties will not be diminished because the Applicant is proposing a use that is consistent with the surrounding properties. Additionally, many of the existing dwellings are already constructed within the front setback.

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:

Due to the nature of the site topography, the area on the parcel that can be reasonably developed is quite small, given the overall size. Due to this special condition, there is no fair and substantial relationship between the general purpose of the Zoning Ordinance's front setback requirement and its application to the subject property. Applying the required front setback to this property provides no benefit to the general public, it results in significantly more material and construction cost to grade out the building/yard area and it observes the intent of the ordinance.

b. The proposed use is a reasonable one because:

The proposed use is a reasonable one because the use is permitted in the district and closely matches the existing uses of surrounding properties.

5. Discussion/possible action regarding other items of concern

Chairman Conescu asked Mr. Mower to elaborate on the discussion from earlier regarding the Zoning Board not following protocols. He also clarified that the discussion should be between the petitioner and the Board and not go through the Chair. Mr. Mower stated that the Board should ask questions and then accept the petitioner's response and not badger them. He feels as if the petitioner is sometimes badgered when a Board member does not like the response that was given. He also questioned why he was told in the past that traffic is a Planning Board function but now is being told that the ZBA can discuss it. Mr. Mower also mentioned that the Board should distance themselves from the petitioners and remember that they are acting on behalf of the Town of Merrimack. Chairman Conescu responded that he feels it's important to build a rapport with the petitioners because not all of them have experience presenting to Boards so opening a conversation and finding out what they are doing will help put them at ease. The Board continued to discuss the appropriateness of discussions with the petitioners and Chairman Conescu

reiterated that it is never appropriate to discuss the protocol of the Board during a project discussion.

6. Approval of Minutes – June 29, 2022

The Board voted 4-0-1 to approve the minutes of June 29, 2022, as submitted, on a motion made by Patrick Dwyer and seconded by Rod Buckley. Lynn Christensen abstained.

7. Adjourn

The Board voted 5-0-0 to adjourn at 8:38 p.m. on a motion made by Rod Buckley and seconded by Patrick Dwyer.