



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## **MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, JULY 28, 2021**

**Board members present:** Patrick Dwyer, Ben Niles, Rod Buckley and Lynn Christensen.

**Board members absent:** Richard Conescu

**Staff present:** Casey Wolfe, Assistant Planner

### **1. Call to Order**

Patrick Dwyer called the meeting to order at 7:02 p.m. He made a general announcement to all of the petitioners that there are only four board members present so in order for a motion to pass, it will need at least a 3 votes. He explained that all petitioners have the option to ask for a continuance until the next meeting to allow for a full Board to be present.

### **2. Roll Call**

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

- 3. Bilden Properties, LLC (petitioner/owner)** – Appeal of Administrative Decision determining that the current use of the property is a “junk yard” per the Town Zoning Ordinance and NH RSA 236:112. The parcel is located at 719 Daniel Webster Highway in the C-2 (General Commercial), R-4 (Residential) and Planned Residential Districts. Tax Map 7E, Lot 052. Case # ZBA 2021-07.

**At the petitioner’s request, the Board voted 4-0-0 to continue the public hearing to August 25, 2021, on a motion made by Lynn Christensen and seconded by Rod Buckley.**

*Patrick Dwyer recused himself from Item #4, Lynn Christensen assumed the Chair.*

- 4. Nickolay & Tanya Gaponov (petitioners/owners)** – Variance under Section 2.02.1.A.2.c of the Zoning Ordinance to permit a Contractor/Storage Yard as a Level I home occupation. The parcel is located at 109 Bedford Road in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6C, Lot 194. Case # ZBA 2021-23.

Tanya Gaponov, (petitioner/owner) spoke on behalf of the request. She read through the responses to the statutory criteria and paused after each question to answer questions from the Board.

Ben Niles asked for an overview of the business and Mrs. Gaponov explained that her husband operates a small concrete business from their home and he installs patios and walkways for customers so no work is actually done at their property, it is all done at the customer’s homes. She added that they have no employees and only store one work vehicle on site. She explained that they had purchased a Boom truck and had that stored on site but their neighbor complained

which triggered the violation from the town and they have since removed that truck from the premises.

Ms. Christensen asked if the business has materials stored on site and Mrs. Gaponov explained that yes, there are materials stored in their shed and she reconfirmed that they have one commercial vehicle. Ms. Christensen also asked the petitioner to confirm that she is seeking the variance to allow a contractor's yard as a level one home occupation. Mrs. Gaponov confirmed that although she does not agree with the classification of the business as a contractor's yard, they are seeking the variance for that reason.

Ms. Christensen asked Mrs. Gaponov to explain the hardship and she replied that if her husband cannot work then they cannot feed their family. Ms. Christensen asked if it is an option to store the materials at another location and Mrs. Gaponov explained that they are storing some items at an off-site location but it is costing them a lot of money and is a financial hardship.

### Public Comment

Kathleen Versprille, (111 Bedford Road) stated that she felt that several Zoning Board members did not act impartially at the June 30, 2021 meeting when this issue was first discussed. She said that she felt that several Board members encouraged further action by the petitioner and implied that they would support a variance if one was sought. Additionally, Ms. Versprille stated that she researched variance requests heard by the Board for the past 2 years and found that none of them have been denied. She reminded the Board that contractor yards were eliminated from the most recent Zoning ordinance as an acceptable home occupation and that granting this variance would be detrimental to the public interest because the house is located in a residential neighborhood. She further added that she feels that the property values of the surrounding homes may be impacted negatively by granting this variance. She then read sections 2.02.1.A.2.e.1 and 2.02.1.A.2.e.6 of the Zoning Ordinance, pertaining to specific home occupation requirements, to conclude her comments.

Tanya & Nickolay Gaponov responded to Ms. Versprille's comments by advising the Board that the ordinance states that the storage of any goods cannot be external to the house or accessory buildings but they are storing the materials inside of their shed. They also reconfirmed that they have one commercial vehicle and have removed all of the heavy equipment associated with the business from their property. Any equipment that is on their property now is for their personal use and is not staying on site after it is not needed. Nickolay Gaponov added that he feels that the Zoning Ordinance should be revised to add contractors back in as an approved level one home occupation and added that many residents probably do not even know it is not allowed. He clarified that most of the materials needed for his business are delivered right to the job site and he just needs approval to keep some small materials in his shed.

Ms. Christensen clarified that the violation was originally given because the business had grown beyond what would be acceptable for a home occupation even if it was an allowed use. Since they have scaled down the operation and moved the heavier equipment off premises, they are now at a point that a variance is even conceivable. She reminded the petitioner that if the variance is granted, she will still need to seek Planning Board approval.

**The Board voted 3-0-0 to grant the variance, with conditions, on a motion made by Rod Buckley and seconded by Ben Niles.**

### ***Case #2021-23 Findings of Fact:***

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

Our home occupation does not alter the character of the neighborhood (we live on a busy road that is not part of a subdivision), does not threaten public health, safety or welfare. There is no odor, fumes, smoke, dust, vibrations, noise or light produced by the home occupation.

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

We are seeking to have a home occupation permit in compliance with the rules outlined in Section 2.02.01 of the ordinance and our home occupation fits the definition of home occupation as outlined in the ordinance.

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

Merrimack ordinance allows for home occupations as defined: non-residential use carried on within a residence or its accessory buildings which use is clearly incidental and secondary to the principal use of the property as a residence and does not change the character therefore. Our home occupation meets that description and it also follows all the rules as outlined in the Level 1 Home Occupation Section 2.02.01. We are a middle class family trying to raise our 3 young kids. Tanya is a stay at home mom, and I am the sole provider for our family financially. Granting this variance would clearly do substantial justice as all people should be able to provide for their families as they see fit as long as it is not physically harmful to others, and my business is clearly not physically harmful to others.

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

**We are seeking to have a home occupation permit and plan to follow the level 1 home occupation rules as outlined in Section 2.02.01 of the ordinance. Items pertaining to the home occupation will be kept in the existing permitted accessory structure (shed).**

**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 property has a permitted accessory structure (shed) that will house items related to the home occupation. The shed is also located toward the back of the property. We are also in the process of installing a privacy fence between us and our neighbor at 111 Bedford Road.

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

We are seeking to have a home occupation permit in compliance with the rules outlined in Section 2.02.01 and with our home occupation fitting the definition of home occupation as outlined in the Merrimack ordinance. That is very reasonable.

*Patrick Dwyer resumed as chair.*

- 5. Lanson & Diane Simmons (petitioners/owners)** - Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a detached garage 10 feet from the side property line whereas 15 feet is required. The parcel is located at 25 Souhegan Drive in the R-4 (Residential), Elderly Housing Overlay and Aquifer Conservation Districts. Tax Map 5C, Lot 528. Case # ZBA 2021-24.

Lanson Simmons began by explaining that he is seeking a variance from his side setbacks in order to construct a 24x24 detached garage. He then read through the responses to the statutory criteria and paused after each question to answer questions from the board.

Mr. Dwyer asked for clarification on where the garage will be placed. Mr. Simmons used an aerial image of his property to explain that the garage will be just north of the existing three season porch. Rod Buckely asked if there are any other structures that cannot be seen in the aerial and Mr. Simmons explained that there is a shed on their property that cannot be seen because it is covered by the canopy of the trees.

#### Public Comment

Margo Parlin (23 Currier Road) stated that she did not know about the project prior to receiving the letter and would have liked more time to understand where the garage is going. Chairman Dwyer clarified the placement of the garage and assured Ms. Parlin that she is not giving up any property with this variance, they are just looking to construct the garage 5 feet closer to her property line than what is currently allowed.

Mr. Simmons responded to the public comments by explaining that they could move the garage closer to Currier drive without the need for a variance but they did not want to place it there because they felt it would obstruct the home owner's view of the road.

**The Board voted 4-0-0 to grant the variance on a motion made by Lynn Christensen and seconded by Ben Niles.**

#### ***Case #2021-24 Findings of Fact:***

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

As the garage will be aesthetically pleasing and lend itself to the overall regular and uniform look of the development.

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

The non-conformity of the lot allows the garage to be positioned only in an area of the lot between the residence and the side setback.

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

Other homes in the neighborhood have standard 2 car garages and have sought variances for the same.

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

Rather, increase the value since the other homes in the neighborhood and this will be an added amenity comparatively.

##### **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 property is a double frontage lot with 2 front, 2 side and no rear setbacks. As well, the drive is positioned on the second front on Carrie Drive, which is not the actual address of the residence. This makes the residence driveway allowing a standard 24x24 garage and not any larger than this.

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

The 2 car garage will provide protection to the vehicles during inclement weather and also provide storage for snow-blowers, lawnmowers and such. A 24x24 garage therefore is a reasonable use for the residence.

- 6. Janheim Associates, LLC (petitioner/owner)** - Variance under Section 3.02, Note 6 of the Zoning Ordinance to permit a 7.5 foot high retaining wall 15 feet from the Daniel Webster Highway right-of-way whereas 50 feet is required. The parcel is located at 281 Daniel Webster Highway in the C-1 (General Commercial), I-1 (Industrial) Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 3D-2, Lot 033. Case # ZBA 2021-25.

Thomas J. Leonard (Welts, White & Fontaine, PC, Esq.) was present to discuss the variance request on behalf of the petitioner. He began by explaining that relief is needed from the front setback because of the height of the retaining wall. They were advised that since the wall is going to be higher than three feet, it is considered a structure and therefore must comply with the setbacks. Mr. Leonard advised the board that 3 feet of the wall has already been constructed because that is what is allowed without the need for a variance and if the board grants the requested variance, the remaining 4.5 feet will be added, making the wall 7.5 feet high, which is not higher than street level. He assured the board that the wall has been engineered and then read through the responses to the statutory criteria and paused after each question to answer questions from the board.

There was no public comment.

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

***Case #2021-25 Findings of Fact:***

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

The proposal will have no adverse impact on health, safety or welfare of the community. There is no significant impact on the zoning scheme or the purposes of zoning. In fact, the changes will make the site safer, function better, and it will be more attractive.

The public has an interest in preserving open spaces, while at the same time allowing for expansion of existing roadways. Since a retaining wall is not a traditional structure it can be removed if there is ever the need for that space for highway expansion. Additionally, the public will benefit from the removal of invasive plant species as there is now a limited risk of the plant spreading to additional properties.

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

The character of the industrial area will only be enhanced and there is no threat to public health, safety or welfare. Front yard setbacks are in place to allow for an aesthetically pleasing front yard, allow for access around buildings, and to keep open a possibility for the expansion of the public roads. This variance will allow for improved landscaping in the front area of the property.

Additionally, because this is not a typical structure, and the expansion of the highway remains an option as a retaining wall can be easily removed.

The purpose of the variance is to permit a wall high enough to allow the applicant to eliminate the rip rap slope which enables the invasive species. By eliminating the slope, the buffer area will look better and be more consistent of the overall landscaping. The spirit of the ordinance will be observed as there would still be open spaces and areas for expansion of existing right of way.

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

In New Hampshire, “any loss to the individual that is not outweighed by a gain to the general public in an injustice”. Here, the property will be upgraded by the addition of the retaining wall as the retaining wall will increase the maneuverability of trucks on the lot. Additionally, many of the topographical concerns of the land will be solved. If the variance is granted there will be no harm to the public as the public will benefit from a landscaped front of the property. Denial of the variance will create harm to the owner which is not outweighed by any benefit to the public.

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

Granting the variance will not cause any real change as to what an Industrial Building lot. Adjacent properties will not be adversely affected as they will only see potential upgrades to the exterior of the building and will not see any practical change from what been in use for years.

### **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 property is burdened by a unique topography which interferes with reasonable use of the truck area. The current slope with no structure does not provide the best opportunity for truck maneuverability. Having a slope between the highway and the paved portion of the driveway provides an area along the frontage which cannot easily be landscaped and maintained without the use of a retaining wall. If the slope were shallower, this variance would not be necessary as a 3-foot wall is permitted. However, the topography requires a retaining wall greater than permitted.

The general public purpose of the ordinance is to maintain open spaces, provide access, and to improve aesthetics. In this particular property, because of the required slopes and rip rap, a higher wall will likely advance those general public purposes more than the lower wall. There is no relationship between the strict application of the rule and accomplishing the purpose of the ordinance.

Similarly, the purpose of the definition of “structure” is to ensure engineering responsibility. In this case, the Town of Merrimack wishes to assure a properly constructed wall. Its indirect impact (i.e. compliance with the setback) is unique and does not require strict application of the zoning ordinance in order to accomplish the public purposes.

#### **b. The proposed use is a reasonable one because:**

Replacing a rip rap slope with a landscaped retaining wall is reasonable in maintaining the character of an industrial and commercial building. Replacing a rip rap slope, filled with an

invasive plant species, with a landscaped retaining wall is a reasonable transition in line with the hardship of the land.

7. **MJ 20 Beacon St, LLC (petitioner/owner)** - Variance under Section 2.02.7 (A) (6) of the Zoning Ordinance to permit an addition 19.9 feet from the edge of a wetland whereas 40 feet is required. The parcel is located at 20 Beacon Drive in the R-1 (Residential, by soils), Floodplain and Aquifer Conservation Districts. Tax Map 5C, Lot 617. Case # ZBA 2021-26.

Jason Bolduc (CSS, Meridian Land Services, Inc.) presented the variance request on behalf of the petitioner. Mr. Bolduc provided an overview of the parcel including the existing drainage that is in place. He went on to explain that there is not currently any natural vegetation in the area of the proposed addition and that the addition was designed so that any runoff will be diverted away from the existing easement. Before reading through the responses to the statutory criteria, Mr. Bolduc also advised the board that there was a minor typographical error in the notification. The addition is attached to the existing house and not detached as stated in the notice.

Lynn Christensen asked the Casey Wolfe if this project also has to go to the Planning Board for approval and she responded that it does not. Ben Niles asked if the living area above the garage will be part of the main house and not an accessory dwelling unit (ADU) and Mr. Bolduc confirmed that it is not an ADU. He also stated that the project went before the Conservation Commission on July 12<sup>th</sup> and they had no concerns with the petitioner's request.

Lynn Christensen asked for clarification on where the new leach field is being proposed. Ronny Ghannem (the petitioner/property owner) used the plan that was shared to demonstrate the locations of the existing and proposed leach fields. She also asked if the propane tank is buried and Mr. Ghannem confirmed that it is not, it is above ground. Mr. Ghannem also commented that the wetlands in question are not natural wetlands and were made when the drainage easement was put in place. Mrs. Christensen explained that since it is classified as wetlands the Board needs to treat it as such.

There was no public comment.

**The Board voted 4-0-0 to grant the variance on a motion made by Rod Buckley and seconded by Lynn Christensen.**

***Case #2021-26 Findings of Fact:***

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

Research into the lot, yielded a plan at the registry of deeds dated May 12, 1975, titled "Drainage Easement Plan, in Merrimack. N.H. Prepared for, Town of Merrimack". The function of this easement is to collect stormwater from Beacon Drive. The proposed addition is to be located in an area that is currently maintained landscape and not undisturbed natural woodland or a buffer area. Grades around the addition are proposed such that stormwater runoff from the addition will be diverted away from the wetland. Therefore, there is no anticipated impacts to the wetland or the public interests of which the wetland provides.

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

This proposal does not deprive the Residence of Merrimack's health, safety, convenience and general welfare. The wetland functions as a detention area for stormwater runoff. Stormwater enters a catch basin on Beacon Drive, then flows through a culvert which daylight into the wetland. Stormwater from Beacon Drive includes salt, sediments and other pollutants associated with road traffic. No other significant inputs of surface water enter the wetland area and there is

not defined outlet. The proposed addition will not impact the existing functionality of the wetland area.

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

The ordinance was created after the lot was created and developed, hereby limiting the owners use of the property. With the wetland area entirely located on the subject property and at a relatively low point in the neighborhood. No benefit to the general public will be provided, by not allowing relief from this ordinance. Granting the variance would do substantial justice because, this proposal will have no adverse effects to the general public.

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

Granting the variance would not diminish the values of surrounding properties, because it will not affect the function of the subject easement/wetland. Relief from the ordinance will not increase flooding potential of this property or that of adjacent 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:**

We feel that the wetland area which may, or may not be resultant of up gradient development and limits the otherwise buildable area of the parcel a special condition of the subject property.

a) To prevent the development of structures and other land uses on or adjacent to wetlands that would contribute to pollution of surface and ground water. This proposal will not contribute to the pollution of the wetland that receives constant inputs of stormwater from Beacon Drive.

b) To prevent the destruction and degradation of natural wetlands that provide flood protection. The wetland receives a majority of its inputs from Beacon Drive. The grading around the proposed addition will divert water away from the wetland and will not add additional inputs to the wetland.

c) To prevent unnecessary or excessive expenses to the Town to provide and maintain essential service and utilities which arise because of inharmonious use of wetlands and adjacent upland areas. The addition is being proposed in an area that is currently maintained landscape and does not serve as a natural buffer. This proposal will not create unnecessary or excessive expenses to the town

d) To encourage those uses that can be appropriately and safely located in and around wetland areas. This wetland's primary function is to receive inputs of stormwater from Beacon Drive. It does not have any public recreational use.

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

The proposed use is a reasonable one, because there is no anticipated harm to the public, natural resources or adjacent property values. The citizens of Merrimack will not be affected negatively by this proposal, because to the best of our knowledge this proposal meets all



other Town and State regulations. Proposed grading around the addition will divert stormwater away from the wetland area, thus not affecting the easements intended function. The subject wetland has no defined outlet and the only major input is stormwater from Beacon Drive. Therefore, the wetland area has low functions and values. This proposal will have no contributions to pollution or degradation of the wetland area or cause any unnecessary expenses to the town.

8. **Andrew Sullivan (petitioner) and 598 DW Highway, LLC (owner)** - Special Exception under Section 2.02.2(C) of the Zoning Ordinance to permit a multi-family residential use in the C-1 (Limited Commercial) District. The parcel is located at 598 Daniel Webster Highway in the C-1 (Limited Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 6D-1, Lot 028. Case # ZBA 2021-27.

Andrew Sullivan (Sullivan Law, Esq.) and Nick Key (developer) were present to discuss the project with the Board. Mr. Sullivan referenced a conceptual site plan that was shared with the board to walk through the proposal which consists of four 2 family buildings with parking in the center. He explained that their first request is a Special Exception to allow residential use in the C-1 district and if that is approved, the second request will be several variances for dimensional and setback relief. Mr. Sullivan provided an overview of the surrounding lots and then reviewed the ordinance criteria for the Special Exception. In the midst of doing so, he also referenced a Broker response letter that was submitted with the application that speaks to the current housing shortage (a copy of the Broker response letter is in the project file in the Community Development Department at Merrimack Town Hall).

Patrick Dwyer asked if the trees in the back of the property are being eliminated and Mr. Key responded that they will not be removed. Ben Niles commented that he does not feel that there is adequate parking because there are only 2 visitors spots. Lynn Christensen advised that parking is a function of the Planning Board and Chairman Dwyer took the opportunity to remind everyone that the decision before them is just the Special Exception to determine if a residential use can be allowed in the C-1 district.

#### Public Comment

Chuck Mower (4 Depot Street) indicated that he cannot segment his feedback to just the Special Exception because he knows that granting the special exception opens the door to the variance requests for a project he is opposed to. He does not feel that the proposal fits within the characteristics of the existing village (Reeds Ferry) and does not want to see it approved.

David Bradish (5 Wheeler Street) stated that he has concerns with the use of the property and feels that it will have a significant impact on the neighborhood. He feels that the use should be consistent with the current zone the parcel is in, which is limited commercial and this proposal does not appear to be "limited" residential.

Justin Dunlea, (7 Wheeler Street) owns the property right behind the parcel and expressed concerns about construction noise and the trees that now serve as a barrier between the two lots being removed. He added that he knows that petitioner said they will not be removed but he believes that will have to be in order to achieve what they are trying to do. He also feels that what they are proposing to do is too large for the lot size and added that Mr. Sullivan even made a remark that the "area is not there."

Jessica Dunlea (7 Wheeler Street) stated that she would like to see the use remain as limited commercial which is what is intended. When she purchased her house she did so knowing that the lot would be developed for commercial use and has concerns with her privacy being violated if there are several residential units on the lot that will peer into her back yard.

Ginny Zhong (594 Daniel Webster Highway) owns the property next door and is concerned that the trees that separate the two properties and add privacy will be removed. She is also concerned with the construction and how it might impact her own house because her foundation is old.

Mr. Dwyer reminded the audience that the petition that is being discussed is for the use of the lot as residential and a lot of the comments are geared towards the variance request which is next on the agenda if the Special Exception passes. Lynn Christensen added that she is hearing a lot of comments about construction and advised the attendees that construction will occur regardless of the use that is approved.

Mr. Sullivan responded by reminding the Board that 10 years ago the neighborhood was residential and has evolved into commercial through the years as residential units backed out. He then commented that a lot of the issues being raised (such as trees and construction) are addressed at the Planning Board level and that they are simply looking for a special exception to allow residential in the C-1 District. He added that it is an allowable use by special exception and not a variance which means the town considers it a reasonable use. Mr. Sullivan also pointed out that there is already residential use along DW Highway and the majority of it is in fact multi-family.

Chuck Mower (4 Depot Street) spoke again in opposition of the project and is concerned about the integrity of the neighborhood as he feels that a large condo does not fit in with the neighborhood.

Lynn Christensen stated that she would much rather see a residential use on that lot than a commercial one as she feels it is more consistent with the neighborhood. She also added that the previous use of the lot was a residence. Chairman Dwyer questioned the way the notice was written and whether or not they would be granting approval for multiple units if they grant the special exception. Casey Wolfe confirmed that the special exception is only for the use and the density is decided with the variance request.

**The Board voted 3-1-0 to grant the Special Exception, on a motion made by Lynn Christensen and seconded by Rod Buckley. Ben Niles voted in opposition.**

***Case #2021-27 Findings of Fact:***

**[1] The specific site is an appropriate location for such a use or uses in terms of overall community development:**

Any analysis of this criterion must recognize two important facts: ONE: the entire country is experience a housing shortage and most town are allowing once commercial and industrial buildings to be repurposed by converting them into residential uses; and TWO: the Pandemic has created a cosmic and permanent shift in how people work, allowing more and more remote work to take place --- and experts agree this phenomenon will not abate, but will continue to add to the increased demand for housing.

The proposed use of Lot 28 is a direct response to these two facts.

Lot 28 borders a residential district in the back. There are still many residential properties fronting DW Hwy in both directions and on both sides of the road. SEE, Annotated Tax Map at exhibit F. It a crystal ball could be examined; it would undoubtedly show there will be more residential buildings on DW Hwy in the not too distance future to fill an urgent need for more housing in Merrimack. The convenience of living right on DW Hwy will be an added bonus.

A 4-building site with 2 units each (up and down, not townhouse style) with central parking spaces in front of each building is a good use of the Lot 28. In juxtaposition, when considering retail or office parking requirements, the lot is really too small for either retail or office use.

Further, a residential use abutting a residential neighborhood "fits" nicely in the area and will not cause disruptive noise to the residents in the rear, but will, rather, act as a buffer from the noise of DW Highway for the houses in the rear. A residential use surrounded by commercial uses does not detract from the commercial uses and is consistent with the overall "mixed use" nature of the uses running up and down DW Hwy in Merrimack.

For these reasons, the site location is an appropriate use in terms of overall community development.

**[2] The use as developed will not adversely affect the neighborhood:**

The proposed use in this mixed use neighborhood, will not adversely affect the neighborhood. It will not generate the same noise level as would an office or retail use, is consistent with the abutting residential use in the rear and will have no impact on Charlie's Diner or the office to the south.

**[3] There will be no nuisance or serious hazard to vehicles or pedestrian:**

The four building/8 residential unit site will not create a nuisance for the reasons stated in [1] and [2] above. A public sidewalk running along the front of the site provides a safe walking area for pedestrians. Because (a) the current two curb cuts will be consolidated into one curb cut in the center of the lot, (b) the traffic generated will be less than if the use were commercial and probably no more than if the use were an office, (c) the cars exiting the site will face out and will have plenty of sight line distance, there will be no physical characteristic of the lot creating hazards to vehicles or pedestrians. [Now site has two curb cuts. When developed, there will only be one coming out of the center of the lot. ]

**[4] Adequate and appropriate facilities will be provided for the proper operation of the proposed use or uses:**

The proposed 8 residential units in four buildings, served by the requisite number of parking spaces, municipal water and municipal sewer, will be a use with adequate and appropriate facilities for the proper operation of the use.

9. **Andrew Sullivan (petitioner) and 598 DW Highway, LLC (owner)** - Variances under Section 3.05 of the Zoning Ordinance to permit construction of 8 multi-family units with a minimum lot area of 26,136 s.f. whereas 320,000 is required, a minimum lot depth of 125 feet whereas 200 feet is required, a front setback of 25 feet, whereas 50 feet is required and a rear setback of 22.5 feet whereas 40 feet is required. The parcel is located at 598 Daniel Webster Highway in the C-1 (Limited Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 6D-1, Lot 028. Case # ZBA 2021-28.

Andrew Sullivan (Sullivan Law, Esq.) and Nick Key (developer) were present to discuss the project with the Board. Mr. Sullivan began by pointing out that the size of this lot (0.6 acres) does not allow for even one residential unit so now that a special exception has been granted for residential use, a variance will be needed regardless of how many units are proposed. At the request of the abutters in attendance, he restated the proposal that was shared during the Special Exception discussion and provided additional details on the units (eight 3 bedroom units in 4 buildings) and the number of parking spaces being proposed. He then read through the responses to the statutory criteria pausing after each for questions from the board. He emphasized that the

lot is vacant right now and unless something is approved that is economically feasible, it is going to remain a vacant lot which is not beneficial to the town or the owner.

Ben Niles asked what was on the lot prior to it being empty and Lynn Christensen responded that it was a single family home that was converted to a lawyer's office.

#### Public Comment

David Bradish (5 Wheeler Street) stated that he has concerns with the use of the property and feels that it will have a significant impact on the neighborhood. He feels that the use should be consistent with the current zone the parcel is in, which is limited commercial and this proposal does not appear to be "limited" residential.

Jessica Dunlea (7 Wheeler Street) stated that that she has concerns with increased traffic and the impact the development will have on her privacy. Her house is directly behind the subject property so if the setbacks are reduced, the buildings will be practically on top of her house and the new residents will be able to see into her house.

Chuck Mower (4 Depot Street) spoke in opposition of the project stating that he is against the development because it does not fit into the character of the community and what is being proposed belongs on a lot 12 times the size of this one. He added that the number of variances needed should be an indication that the lot is too small for what is being proposed. Mr. Mower expressed that he does not have any concerns with a limited commercial use or even a residential use but has grave concerns about this proposal because it violates everything that the residents have worked hard to build.

Mr. Sullivan asked if he could modify the request to change the number of units and Mr. Dwyer explained that it could not be done, it would need to be a new petition and Casey Wolfe confirmed that is accurate. Mr. Sullivan challenged that a variance could be granted with conditions and Mr. Dwyer stated that it would be in his client's best interest to submit a new plan because it removes any ambiguity.

*The Board took a five minute recess.*

After returning from the recess, Mr. Sullivan advised the board that the petitioner is going to withdraw this petition.

**Withdrawn by petitioner.**

#### **10. Discussion/possible action regarding other items of concern**

#### **11. Approval of Minutes - June 30, 2021**

**The minutes of June 30, 2021 were approved as submitted, by a vote of 4-0-0, on a motion made by Rod Buckley and seconded by Ben Niles.**

#### **12. Adjourn**

**The meeting was adjourned at 9:53 p.m. by a vote of 4-0-0, on a motion made by Lynn Christensen and seconded by Rod Buckley.**