



# Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES

WEDNESDAY, JUNE 26, 2019

Board members present: Richard Conescu, Lynn Christensen, Kathleen Stroud, Rod Buckley, and Alternates Leonard Worster (left 7:35 p.m.) and Drew Duffy

Board member absent: Patrick Dwyer

Staff present: Assistant Planner Kellie Shamel and Recording Secretary Zina Jordan

### 1. Call to Order

Lynn Christensen called the meeting to order at 7:00 p.m. and designated Drew Duffy to sit for Patrick Dwyer.

### 2. Roll Call

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

- 7. Curtis M. Wheeler, Jr. (petitioner/owner)** – Variances under Section 2.02.1.C.2.c of the Zoning Ordinance to permit a detached Accessory Dwelling Unit (ADU) with 1,078 sq. ft. whereas a maximum of 1,000 sq. ft. is permitted, and under Section 2.02.C.2.d, to permit a detached ADU on a lot comprised of less than 125% of the minimum lot area required by Section 3.02.A, Table 1. The parcel is located as 5 Lakeside Drive in the R-2 (Residential) District. Tax Map 6A-1, Lot 153. Case #2019-16.

This agenda item was discussed after agenda item #2.

Attorney Thomas Quinn, Thomas F. Quinn Law Office, received new information regarding the ADU and would like additional time to review.

**At the petitioner's request, the Board voted 5-0-0 to continue this item to July 31, 2019, at 7:00 p.m., in the Matthew Thornton Room, on a motion made by Kathleen Stroud and seconded by Rod Buckley.**

- 8. Curtis M. Wheeler, Jr. (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit an existing deck to remain within the side setback (exact distance from property line to be verified by a certified plot plan) whereas 15 feet is required. The parcel is located as 5 Lakeside Drive in the R- 2 (Residential) District. Tax Map 6A-1, Lot 153. Case #2019-16.

This agenda item was discussed before agenda item #4.

Attorney Thomas Quinn received the certified plot plan today and would like additional time to review and determine whether a Variance is necessary.

**At the petitioner's request, the Board voted 5-0-0 to continue this item to July 31, 2019, at 7:00 p.m., in the Matthew Thornton Room, on a motion made by Rod Buckley and seconded by Richard Conescu.**

**4. Chestnut Hill Properties, LLC (petitioner/owner)** – Variance under Section 3.08.8 of the Zoning Ordinance to amend a previously approved cluster subdivision (permitted by previous variance to be allowed in the R-1 District) to be serviced by individual septic systems whereas municipal sewer is required. The parcels are located at Bannon Circle and Ritterbush Court (approved, not constructed roads) in the R-1 (Residential, by map) District. Tax Map 5B, Lots 002, 005, 007, 008, 009-01 through 009-71. Case #2019-13. **This item is continued from the April 24, and May 29, 2019 meetings.**

The Chair informed the audience that the petition has been withdrawn by the petitioner..

**3. James Gadbois (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a detached garage 26 feet from the front property line whereas 50 feet is required. The parcel is located at 85 Patten Road in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6C, Lot 394. Case #2019-12. **This item is continued from the April 24, 2019 meeting.**

This agenda item was discussed after agenda item #4.

James Gadbois, 85 Patten Road, stated he lives in a house constructed in the 1800's which had a detached garage located on a concrete slab at the front of the property. He said the garage has been removed and he would like to rebuild a new garage in the same location on the existing concrete pad. When he was before the ZBA in April 2019, the Board requested that he provide a certified plot plan that accurately depicts the property lines and proper setback for the proposed garage. Meridian Land Services provided a plot plan two weeks ago. James Gadbois read the statutory criteria into the record.

There was no public comment.

**The Board voted 5-0-0 to grant the Variance, on a motion made by Kathleen Stroud and seconded by Drew Duffy.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because there is no harm in reconstructing a garage in the same location it occupied for the last 50 years. Cars and all tools and items used daily can be kept orderly and covered, making the lot look clean;
2. The spirit of the Ordinance is observed because people will be excited to see a huge improvement to the lot when all items – woods, ladders, bricks, etc. – are enclosed in a garage and the front is organized;

3. Granting this variance would do substantial justice because there is no harm to the public in building this structure. There is plenty of work space to construct the garage, which would be for personal use - storing cars, lawn items and tools;
4. The values of the surrounding properties would not be diminished because the garage would have a positive look from the road. All objects would be condensed on the lot, making the neighborhood look better;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) 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 because the septic system was installed where pressure lines go behind the garage. The proposed garage cannot be moved back more without adding 4' to make a 24' width from the original 20';
  - 2) The proposed use is a reasonable one because there was a garage on a slab that was taken down because of age. There is a slab there now. The petitioner would use the existing area, going no closer but making the garage larger, going from 22' x 20' to 24' x 38';
- B. If the criteria in paragraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot reasonably be used in strict conformance with the Ordinance and a variance is therefore necessary to enable a reasonable use of the property. The septic system was designed to stay closer to the front of the property because the hill that was created for leaching had to be in a specific area. The further back, the higher the water table.

**5. Jason Stover (petitioner/owner) – Variance under Section 3.05 of the Zoning Ordinance to permit a detached garage 10 feet from the side property line whereas 15 feet is required. The parcel is located at 59 Belmont Drive in the R-4 (Residential) District. Tax Map 7D, Lot 355. Case #2019-14.**

Jason Stover, 59 Belmont Drive, proposes to build a 24' x 24' detached garage, but needs another 5'. Lenny Worster questioned the accuracy of the side setback distance. Jason Stover stated a pine tree marks the 40' side setback. Jason Stover read the statutory criteria into the record.

**Public comment**

James Zissulis, 61 Belmont Drive, said pipes and a row of trees on the edge act as 40' side setback markers. The variance would work very well for both Jason Stover and himself.

**The Board voted 5-0-0 to grant the Variance, on a motion made by Drew Duffy and seconded by Kathleen Stroud.**

## Findings of Fact

1. Granting the variance would not be contrary to the public interest because it would in no way affect the abutters;
2. The spirit of the Ordinance is observed because in order to build a 24' x 24' garage, 5' more is needed on the 15' side setback;
3. Granting this variance would do substantial justice because it would increase the value of the property and surrounding homes and allow for parking two cars in the garage;
4. The values of the surrounding properties would not be diminished; the garage would only increase them;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) 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 because it would not allow for a 24' x 24' garage without the proposed setback variance and the petitioner would have to build a smaller garage;
  - 2) The proposed use is a reasonable one because it would not impose on abutters and would increase the value of surrounding homes.

**6. Granite State Professional Martial Arts (petitioner) and 501 DWH, LLC (owner)**  
– Variance under Section 17.09 of the Zoning Ordinance to permit commercial wall signage in a residential district. The parcel is located at 501 Daniel Webster Highway in the R-4 (Residential), Aquifer Conservation, Town Center Overlay, Elderly Overlay and Planned Residential Development Overlay Districts. Tax Map 5D-3, Lot 113. Case #2019-15.

The property is zoned residential and therefore only allows residential signage which is limited to six square feet. The existing commercial building received variance approval, but staff could not locate any evidence that corresponding signage variance relief was ever granted to this property. The petitioner is locating a martial arts studio to the lower level of the building and needs wall signage to help identify the location of the business.

Joan Shelton, Granite State Professional Martial Arts, has been in business in Merrimack for 12 years at 370 D.W. Highway, but the property has been sold and she is moving to 501 D.W. Highway. Although it is zoned residential, there are several commercial uses around it. There was a martial arts school at that location before, but it has been vacant for two years. Joan Shelton would like to put the sign at the north end of the plaza.. All the businesses in the building have a sign. Joan Shelton read the statutory criteria into the record.

There was no public comment.

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

**Findings of Fact**

1. Granting the variance would not be contrary to the public interest because 501 D.W. Highway already has several businesses in it, including Sal's Pizza and a dance studio. Granite State is a school of self-defense that offers the benefit of physical exercise and health to the community. The building is currently being used commercially;
2. The spirit of the Ordinance is observed because the variance would allow putting a sign on the north side of the building to the left of the Sal's Pizza sign. This is for the public interest and does not harm the public in any way. The sign would be seen from D.W. Highway as people travel south as well as from the building's parking lot;
3. Granting this variance would do substantial justice because the gain to the general public of offering martial arts for children and adults is huge. The school also offers yoga and special classes to the public, such as self-defense for first responders, which is also offered free to the public. Although having a viewable sign helps the business, it also lets the public know these classes are available;
4. The values of the surrounding properties would not be diminished because 501 DW. Highway previously had a martial arts school in this space. A Chinese restaurant and a tractor supply are in the strip mall behind the building. The school would add to all the local businesses by bringing more people to the area. There is only one small business across the street. The school would not negatively impact it. There is easy access into and out of the space, so traffic would not be negatively impacted;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) 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 because the petitioner seeks to put up a sign on a building that is zoned residential, although it has several commercial businesses in it already. Denial of the variance would cause a hardship to the public because it would make it hard for them to find the business without a sign. This is an established school moving from another location;
  - 2) The proposed use is a reasonable one because the public in Merrimack and the surrounding area is already benefiting from the school. It is moving to 501 D.W. Highway, where there was previously a martial art school. Erecting a sign would make it easy for the public to find the school and enhance their lives.

- 9. Stephen Chase & Robin Cousineau (petitioner/owner)** – Variances under Section 3.02 (A) of the Zoning Ordinance to permit a two - lot subdivision with one lot having 86,505 sq. ft. of contiguous non-wetland area and the second lot having 65,046 sq. ft. of contiguous non- wetland area whereas 100,000 sq. ft. is required. The parcel is located at 85 Woodward Road in the R-1 (Residential, by map) and Aquifer Conservation Districts. Tax Map 7A, Lot 007. Case #2019-17.

Leonard Worster left the meeting at 7:35 p.m.

Attorney Greg Michael, Bernstein Shur, Sawyer & Nelson, said the variance is related to soil types. The larger of the two lots, Lot 7 is 5.5 acres and lot 7-1 is 2.3 acres. In 1979 the original lot had no soil restrictions, but the Ordinance has since changed. At the February 27, 2019, meeting, the ZBA granted a frontage variance and a variance for contiguous non-wetland area.. The final subdivision plan survey discovered that there was a tie-in. The line was not totally disconnected. Because the petitioners did not want to mislead the ZBA and the Planning Board, they recalculated. The frontage line was moved because of the boundary and connectivity and conforms. Contiguous soils are now the only issue. The plan has been modified slightly to show the updated information. The original soils on smaller Lot 7-1 were shown to be 61,160 s.f of contiguous non-wetland area.. After ZBA approval, it was enlarged to 65,046 s.f. Lot 7 went from 175,000 sf. to 86,505 s.f of contiguous non-wetland area. The petitioner has gone before The Merrimack Conservation Commission (MCC) and the commission had no issues with the variance.

Paul Chisholm, Project Manager, Keach-Nordstrom Associates, Inc., described what he investigated and calculated to get accurate information. There is a septic system on the east side of the house. Test pits determined that soils on Lot 7-1 could support a 19-bedroom home and that there are no drainage problems.

Attorney Brett Allard, Bernstein Shur, Sawyer & Nelson, read the statutory criteria into the record.

#### **Public comment**

Attorney Robert Shepard, Smith-Weiss Shepard, represented Carl Belmonte, 81 Woodward Road, who filed an appeal to the now-withdrawn petitions. All lots increased their contiguous non-wetland square footage. The “funky” irregular lot configuration was designed to meet frontage and upland requirements. As to the statutory criteria, the variance is contrary to the public interest. There is no guarantee the petitioners would not subdivide further. Groundwater in the Aquifer Conservation District must be protected. Baboosic Brook goes through the lot. The spirit of the Ordinance is not observed by creating two non-conforming lots. Substantial justice would not be done. There would be no gain to the public by not protecting the aquifer; denying the variance would protect it. The Belmonte driveway is 30’ from the proposed petitioners’ driveway. Attorney Shepard said there should not be two driveways 30’ apart. That would diminish the Belmonte’s property value. The petitioner told the MCC there is a tight building envelope. The house would be in direct sight of the Belmonte’s home.

Carl Belmonte, 81 Woodward Road, chose this rural neighborhood for privacy and seclusion. The petitioner ignored the potential impact to his property and to wildlife. It

would be a uniquely small house in a neighborhood of large homes. The septic system is in the floodplain and Baboosic Brook setback.

Elizabeth Leclair Furbush, Keller Williams, said that, in her opinion, privacy is part of a home's value. According to an article and studies, privacy, peace and quiet are #3 on the list of what is important to home buyers.

Attorney Shepard said that denying a variance would not create an unnecessary hardship. This is not a unique parcel. The Board must protect such properties from being developed. It is not a reasonable use to squeeze in a house so close to the neighbors. The proposed buffer on the plan has no way of being enforced and therefore the house would still be visible to the Belmonte's.

Attorney Michael claimed that Attorney Shepard was stating facts that are not there. Soils are the only issue being discussed with the property. Hurting privacy is a "red herring". The proposal meets every lot and yard requirement. The lot is now larger than others in the zone. Home value is not an issue. There would be no harm, injury, health or public safety issues. Attorney Michael cited a Litchfield case and read the Ordinance about protecting natural resources and water supply. The lot is big enough. Soils do not create a privacy problem. Attorney Michael brought an expert to the meeting; Attorney Shepard is not an expert. Baboosic Brook running through the property and the soil distribution make the property unique. The ZBA was correct when it said the statutory criteria were met. The homeowner before Carl Belmonte was granted a variance in 2011 to build on a lot with no frontage. Without that ZBA action, Carl Belmonte would not be living in that house.

April Dugay, Realtor, Berkshire Hathaway, said that privacy "is in the eye of the beholder". The proposed house would not affect property values nor negatively affect surrounding homes at all. New construction in a neighborhood helps to increase property values.

Paul Chisolm listed Attorney Shepard's inaccuracies: Carl Belmonte is not a direct abutter. The properties are separated by a railroad bed and by over 100'. The proposal conforms completely to Aquifer Conservation District requirements. The driveways would not be 30' apart; there would be 30' from the driveway to the edge of the property line. The Belmonte driveway would be approximately 150' away. All wildlife requirements have been met. There would be no development or fill in the flood plain; the petitioner conforms to all regulations. No trees can be cut on Town land, so there is automatically a 50' buffer.

**The Board voted 4-0-1 to grant the Variances, with the condition that the petitioner shall obtain Planning Board approval for he proposed subdivision, on a motion made by Rod Buckley and seconded by Kathleen Stroud. Drew Duffy abstained.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because given the substantial size of Lot 7A-7, there is sufficient area for drainage and sanitary facilities. The petitioners have lived on that lot for many years and have not

experienced any material drainage or sanitary issues. The petitioners are not proposing to develop Lot 7A-7 further or otherwise change its use, so there is no reason to believe that granting the variance would create any of these issues or be contrary to the public interest. Granting the variance would not threaten the public health, safety or welfare and would have no adverse impact or injury to any public rights.

Lot 7A-7-1 as proposed can adequately accommodate the proposed dwelling, septic, well, and driveway and complies with all setback and other requirements;

2. The spirit of the Ordinance is observed because the new plan no longer requires a frontage variance on Lot 7A-7-1. Both lots otherwise comply with all setback requirements. The proposed uses on both lots are permitted by right on the property;
3. Granting this variance would do substantial justice because there is no injury to the public if the variances are granted. There is no gain to the public if they are denied. The loss to the petitioner when balancing public and private rights outweighs any loss or injury to the public. The petitioners are not proposing any physical changes or additional improvements to Lot 7A-7. Any alleged future impact to the public would be the same whether the variance is granted or denied. There is no potential for future impact to the public if the variance is granted to Lot 7A-7; there is only loss to the petitioner if it is denied.
4. The values of the surrounding properties would not be diminished because the existing property is densely wooded. The petitioners propose a tree clearing limit around the proposed dwelling. The remaining trees would serve as a natural screen and buffer between Lot 7A-7-1 and abutting properties. The proposed dwelling on that lot is set back more than 350' from Woodward Road, practically eliminating any impact on the property across the road (which has driveway access off Parkhurst Road, not Woodward Road). If the variances are granted, the petitioner will be required to seek subdivision approval from the Planning Board, which will further ensure that any improvements to the proposed lot would not diminish surrounding property values.

April Dugay, a realtor with Berkshire Hathaway Home Services, studied the subject area and determined that surrounding property values would not decrease if the variances are granted and a new home is constructed on Lot 7A-7-1;

5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 1) 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 because the existing property is distinguishable from other properties in the area; most notably, it is bisected by Baboosic Brook. The amount of wetlands on the existing property and its location and path also distinguish it from others in the area and is a hardship. The Zoning Ordinance requires a



100,000 square foot minimum contiguous non-wetland area for proper drainage and sanitary facilities. The petitioners have lived on Lot 7A-7 for many years without experiencing any material drainage or sanitary issues. The petitioners do not propose to further develop or change any improvements to Lot 7A-7.

Because the wetland area on Lot 7A-7-1 is limited to a small portion on the northerly boundary, there is sufficient buildable area on the southerly portion of Lot 7-7-1 to facilitate the proposed dwelling, septic, well, and drainage;

- 2) The proposed use is a reasonable one because single-family residential is permitted by right on both lots in the R-1 District. Uses by right are *per se* reasonable.

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

The Board said farewell to and congratulated Kellie Shamel in her new position as Milford Town Planner.

The Board agreed to move its annual meeting from August to April to coincide with the Planning Board's annual meeting.

#### **11. Approval of Minutes — May 29, 2019**

**The minutes of May 29, 2019, were approved as submitted, by a vote of 4-0-1, on a motion made by Kathleen Stroud and seconded by Drew Duffy. Richard Conescu abstained.**

#### **12. Adjourn**

**The meeting was adjourned at 8:20 p.m., by a vote of 5-0-0, on a motion made by Rod Buckley and seconded by Drew Duffy.**