



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, JUNE 29, 2016

Members present: Fran L'Heureux, Patrick Dwyer, Richard Conescu, and Alternates Leonard Worster and Tom Mahon.

Members absent: Tony Pellegrino and Lynn Christensen.

Staff present: Community Development Director Tim Thompson and Recording Secretary Zina Jordan.

1. Call to Order

Fran L'Heureux called the meeting to order at 7:00 p.m. and designated Leonard Worster and Tom Mahon to sit for Tony Pellegrino and Lynn Christensen, respectively.

Fran L'Heureux welcomed Tom Mahon as new member of the Board, noting his many years as a Town Council member and service on many Town committees.

2. Roll Call

Tom Mahon led the pledge of allegiance. Richard Conescu read the preamble. Fran L'Heureux swore in members of the public who would be testifying.

- 3. Richard Elliot (petitioner) and Michael and Rae Ann Dopson (owner) - Variance** under Section 2.02.1(B)(2)(f) of the Zoning Ordinance to permit a second driveway for a proposed Accessory Dwelling Unit (ADU). The parcel is located at 4 Sunnysdale Drive in the R (Residential) and Aquifer Conservation Districts. Tax Map 5D-3, Lot 099. Case # 2016-26.

Tim Thompson said the petitioner asked for a continuation of the related Special Exception Petition at the May 28, 2016, meeting. A second driveway is not allowed; however since one family member has a recognized disability, the petitioner is seeking a variance for reasonable accommodation without proving the hardship criterion (per RSA 674:33(v)). Since the decision on the Variance will impact the Special Exception, it was placed before that item on the agenda.

Richard Elliott, 3 Amalia Drive, Nashua, read the statutory criteria into the record.

Both families live in Merrimack. Michael Dopson spends a lot of time going to the other house to meet the physical needs of his sister and his mother. The second driveway would have no impact on the neighborhood's character because there are no other homes on that side of the street. Two abutters wrote letters of support.

Tom Mahon asked about excavation, which Richard Elliott said would take 2½-3 hours, because the land is reasonably graded.

Tom Mahon suggested reversing through the kitchen and going left rather than right and downstairs to the driveway. Richard Elliott explained that, although it is possible, there are 2-3 vehicles that work different hours, so one would always be blocking the emergency vehicle or van. It goes out only 2-3 times monthly. There is not enough parking space. Two family members are homebound.

Public comment

Tim Thompson read into the record a May 20, 2016, letter from Sandra Mote, 2 Sunnydale Drive, supporting the variance.

The Board agreed that the hardship criterion need not be met due to the physical disability of the resident.

The Board voted 5-0-0 to grant the Variance, with the following condition, on a motion made by Richard Conescu and seconded by Patrick Dwyer.

That approval be conditioned on the granting of the Special Exception for the ADU that is the next item (Case #2016-22) on the agenda.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because it would provide a family-oriented environment to care for an electric chair-bound 60-year sister with cerebral palsy and her 87-year old mother. The additional driveway would give wheelchair van access for doctor appointments;
 2. The spirit of the Ordinance is observed because the very limited use on this dead end street would not change;
 3. Granting this variance would do substantial justice because it would allow a brother and his family to care for a sister and mother at home. The home is built on a hill with no practical way to build ramps to get to the lower elevation where the current driveway exists;
 4. The values of the surrounding properties would not be diminished; an ADU would increase them. The additional driveway would abut the power line easement and would not change the look or character of the neighborhood;
 5. Not required per the provisions of RSA 674:33(v)
- 4. Richard Elliot (petitioner) and Michael and Rae Ann Dopson (owner) - Special Exception under Section 2.02.1(B)(2) of the Zoning Ordinance to permit an Accessory Dwelling Unit (ADU). The parcel is located at 4 Sunnydale Drive in the R (Residential) and Aquifer Conservation Districts. Tax Map 5D-3, Lot 099. Case # 2016-22. This agenda item is continued from the May 25, 2016 meeting.**

Richard Elliott, 3 Amalia Drive, Nashua, read the Ordinance criteria into the record.

Tim Thompson explained that the proposed condition disallowing a second driveway can be eliminated, since the Board just approved it with the previous petition for variance. Since State law no longer allows towns and cities to require that an ADU be

only for a family member, there is no longer a need to register a restrictive covenant with the Registry of Deeds regarding family occupancy of the ADU. However he recommends executing and recording a restrictive covenant with the Registry of Deeds to ensure that the ADU will not be converted to a condominium or other form of legal ownership.

There was no public comment.

The Board voted 5-0-0 to grant the Special Exception, with the following conditions, on a motion made by Richard Conescu and seconded by Tom Mahon.

1. The primary dwelling unit, ADU, and lot shall not be converted to a condominium or any other form of legal ownership distinct from the ownership of the single-family dwelling. In order to assure compliance with this requirement, the property owner shall execute a restrictive covenant running in favor of the Town, which shall be recorded in the Hillsborough County Registry of Deeds and a copy provided to the Community Development Department and the Assessor prior to the issuance of a Certificate of Occupancy;
2. The petitioner/owner shall obtain any necessary right-of-way permits from the Public Works Department for the proposed driveway construction.

Findings of Fact

1. The site is an appropriate location for the proposed use in terms of overall community development because it would provide a family-oriented environment and solve the problem of caring for an elderly parent as her needs increase in the future and to continue to care for a disabled sister;
2. The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighborhood because the developed space would all be external on the side of the existing home and would meet setback requirements. The additional driveway would meet sight requirements;
3. There will be no nuisance or serious hazard to vehicles or pedestrians because the home is currently occupied by the same four adults who would continue to live there. The additional space would allow the family to care for their loved ones at their home instead of constantly driving across town to their current home;
4. An adequate parking area is provided for motor vehicles on the premises because there would be an additional driveway with parking for a single handicap van that would seldom move;
5. The ADU is contained within or will be an addition to an existing or proposed single-family detached dwelling. The ADU would be an addition to the existing home and attached to it by a hall. It would have its own egress through an exterior door;
6. The ADU contains one bedroom;
7. The ADU does not exceed 1,000 square feet in area or fifty per cent (50%) of the area of heated living space within the principal dwelling unit in area, whichever is smaller. The ADU would be approximately 832 square feet or 42% of the existing

home's heated space after the 50 square foot hall connecting the ADU to the existing home is added;

8. The ADU is connected internally to the principal dwelling unit by a common hallway;
 9. The ADU occupancy will be restricted to family members only, with the term "family" as defined as individuals related by blood, marriage or adoption to the fee simple owner-occupant(s) of the principal dwelling unit. The occupants would be the owner's mother and sister;
 10. The ADU is designed to remain functionally dependent on the principal unit and will not have provisions for separate utilities, garages, driveways, yards and other similar amenities. All utilities and services would be supplied by the principal living unit with only a single meter servicing the home. However an additional driveway would be connected to allow van access for wheelchair convenience.
6. **Kim Mattucci for Kid's Creative Cove Learning Center, LLC. (petitioner) and Windsup Properties I, LLC. (owner)** - Variance under Section 2.02.03 of the Zoning Ordinance to permit a childcare center in the C-2 District. The parcel is located at 22 Greely Street in the C-2 (General) Commercial and Aquifer Conservation Districts. Tax Map 4D-4, Lot 060. Case # 2016-24.

Leonard Worster recused himself from discussing and voting on this item.

Kim Mattucci, 10 Twin Bridge Road, opted to continue with only four Board members and read the statutory criteria into the record.

As to #1, public interest, she said the facility would be licensed for 40 children aged six weeks to six years. The facility is a split level, each with its own egress. As to #3, substantial justice, there is no need for a sign on the main street, just a wall sign on the building. The facility on Twin Bridge Road has no sign. Business comes by word of mouth. As to #4, values of surrounding properties, operating hours would be Monday-Friday from 7:00 a.m. to 6:00 p.m., with no hours on federal holidays.

Richard Conescu said it makes no sense that the Ordinance allows a hotel but not a child care facility in the C-2 District. Tim Thompson was surprised that it is not a permitted use, saying that it should be addressed in the future.

The Board voted 4-0-0 to grant the Variance, with the condition that the petitioner obtain Planning Board or Administrative Approval for the commercial childcare use of the subject parcel as deemed applicable, on a motion made by Patrick Dwyer and seconded by Richard Conescu.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because it would not alter the essential character of the area nor threaten the public health, safety or welfare. The proposed childcare use is consistent with the general commercial nature of the immediate neighborhood. Farther away are significant retail and manufacturing businesses. A childcare center is a commercial operation that would not unduly and in a marked degree conflict with the Ordinance's basic

zoning objective of serving regional and/or local service needs. The building is already in place on the property and would not require material modification. The proposed use would not cause adverse impacts on other uses in the area. The childcare would be in its own standalone building and has already been reviewed by the NH Department of Health & Human Services, Childcare Licensing Unit, as an acceptable location for a childcare facility;

2. The spirit of the Ordinance is observed because the childcare center would provide a valuable support service to residents working in the area. The plan provides for ample and safe off-street parking off Greeley Street, minimizing potential traffic congestion on Daniel Webster Highway. The Zoning Board of Adjustment has previously approved a variance for another childcare in the C-2 zone, including a 2012 approval for 706 Milford Road;
3. Granting this variance would do substantial justice because denying the proposed use would cause no appreciable gain to the general public, since childcare is consistent with other uses in the C-2 District and provides significant support to other businesses on Daniel Webster Highway and Continental Boulevard. The existing structure is not well suited to restaurant use or retail sales as it lacks visibility from Daniel Webster Highway. The applicants would put the property to a more productive use that would serve an important community need. Access to the property is available only from Greeley Street, after turning off Daniel Webster Highway at a signalized intersection. If the existing structure were located 50' closer to Greeley Street, a variance would not be required;
4. The values of the surrounding properties would not be diminished because there would be no material increase in traffic, noise or other interference with the use and enjoyment of the surrounding commercial properties. A childcare facility would serve the needs of residents working in the area and employees who commute to area businesses. It would operate on weekdays during normal business hours and would not generate noise or other impacts to properties off-hours or on weekends. The proposed use is likely to increase rather than decrease values;
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 property is unique because of its location between Daniel Webster Highway and the Merrimack River. Access is only from a single signalized intersection. The location is ideal for a safe and a quiet entry point for parents dropping off and picking up their children. The location restricts more intensive commercial uses that require greater visibility, such as restaurants, that can already be found on Daniel Webster Highway. A commercial childcare center would provide an important supporting service to other permitted uses in the C-2 District and serve regional and/or local service needs;

- 2) The proposed use is a reasonable one because it would put the property to a productive use that serves an important supporting role for surrounding commercial uses. The property has been unoccupied for 4-6 months. The childcare facility would be close to major roadways that help residents/parents commute to and from work and area businesses;

6. Lawrence & Lorna Fortin (petitioners/owners) - Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a residential porch within 10 feet of the side property line whereas 15 feet is required and within 15 feet of the front property line whereas 30 feet is required. The parcel is located at 4 Caron Street in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 015. Case # 2016-25.

Leonard Worster returned to the Board.

Tim Thompson explained that the pre-existing non-conforming home was built in 1956 and predates the I-1 Industrial zoning of the parcel. Different setbacks are required in an industrial zone than in a residential zone. Since the existing building violates setback requirements, any change would require a variance.

Lawrence Fortin, 4 Caron Street, read the statutory criteria into the record.

There was no public comment.

Patrick Dwyer said this is a unique situation.

The Board voted 5-0-0 to grant the Variance, on a motion made by Patrick Dwyer and seconded by Tom Mahon.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed location is the last house on a dead end, with a concrete retaining wall. There is only one other dwelling on Caron Street. The abutting neighbor's house faces away from the property and is significantly higher up the hill. The structure would not negatively impact any traffic or neighbors' view;
2. The spirit of the Ordinance is observed because, due to the concrete retaining wall, the property frontage has limited usage and access. The house was built before current setbacks were in place; therefore it sits too close to the front and side property lines;
3. Granting this variance would do substantial justice because, with an elderly parent in residence, the current concrete steps are a hazard. The proposed porch would give safe entry into the house along with positive use of the front yard;
4. The values of the surrounding properties would not be diminished because, although the zone is industrial, the use is a home. The porch would add to the tastefully landscaped yard and would only add value;

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 original dwelling was built before the current zoning requirement; therefore the front and side setbacks are in violation and variances are needed. This is the only property with a concrete retaining wall, rendering access from the road to the yard infeasible. The current entry is in violation of setback requirements and needs to be made more conducive to the inhabitants;
 - 2) The proposed use is a reasonable one because a safer and protected entry into the dwelling would be an aesthetically pleasing addition to the property.
6. **Gregory E. Michael of Bernstein, Shur, Sawyer & Nelson, P.A. (petitioner) and Patricia J. Schippani, LLC.** - Variance under Section 2.02.4(B) of the Zoning Ordinance to permit a personal service use (existing holistic therapy center) in the I-1 (Industrial) District. The parcel is located at 4 John Tyler in the I-1 (Industrial) District. Tax Map 2D, Lot 041-10-5. Case # 2016-27.

Tim Thompson explained that SOMA Holistic Therapy has operated at this location for nine years, but their existence only recently came to light. A review of Town records found that SOMA did not seek the necessary approvals to locate at this site and were required by staff to obtain them. Compliance is being sought after the fact.

Attorney Michael Klass, Bernstein Shur, said this is a personal service use in a single unit of a five unit condominium that was converted five years ago. Patricia Schippani was unaware of the zoning requirement and made no attempt to avoid it. After another tenant asked about the permitting status, the Town sent her a letter informing her that the business is not compliant. Tim Thompson added that, when the Town is made aware of a long-standing violation, it sends a letter asking for a correction. Research uncovered no permits. The Town typically will not know if someone is in violation unless someone reports a concern. Like many New Hampshire communities, Merrimack has no (annual) licensing requirement that would uncover such a violation. Attorney Klass said no one said anything for nine years. The two other owners support the application. Tim Thompson said the other tenants' uses are permitted and require no relief, but this use is not allowed in the I-1 Industrial District.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, with the condition that the petitioner obtain Planning Board or Administrative Approval for the personal service establishment use of the subject property, as deemed applicable, on a motion made by Tom Mahon and seconded by Richard Conescu.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed use would not threaten the town's health, safety, convenience, or general welfare in any way. The relatively benign and low intensity use of the property as a therapy center does not generate significant traffic, noise or any other impacts detrimental to the surrounding area. The variance would simply allow for the continued use of the property in the same fashion that has existed for the last nine years in a manner that is safe, reasonable and promotes convenience by providing various therapy services to the Town. The fact that the Therapy Center is compatible with the zoning district and the surrounding neighborhood is evidenced by the fact that it has existed harmoniously in this location for the last nine years and is consistent with other uses within the condominium;
2. The spirit of the Ordinance is observed because the use and nature of the Therapy Center is low intensive and relatively benign and would not result in any negative impacts on the surrounding condominium uses or the neighborhood as a whole. The property's use would not change from what it has been over the last nine years. The Therapy Center is already consistent with and an established part of the fabric of this locality;
3. Granting this variance would do substantial justice because denying the variance would not results in an appreciable gain to the public, given that it does not propose any new uses of the property. Instead the variance would simply formalize a use of the property that has continued for approximately nine years. It is difficult to envision how shuttering the Therapy Center would provide residents of the Town with any gain whatsoever. On the other hand, denying the application would result in a substantial loss to the applicant by preventing the reasonable use of the Therapy Center in the way that it has been used for the last nine years;
4. The values of the surrounding properties would not be diminished because the requested relief would not diminish the character of the neighborhood, which includes various commercial businesses that are compatible with the Therapy Center. This request simply seeks to allow the property to be used by the Therapy Center as it has done for the last nine years. Granting the variance would produce no different or significant traffic, noise, odors, or other detrimental impacts to the surrounding area. The values of the surrounding properties would not be diminished,
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 property is unique in that it has housed the Therapy Center for the last nine years. The property has been customized with insulation that effectively isolates the Therapy Center from its neighbors and vice versa. During these nine years, the business has become part of the fabric of the neighborhood;
- 2) The proposed use is a reasonable one because it is low intensity in nature and does not result in any negative impacts to the surrounding area. The proposed use would not diminish the character of the neighborhood. The reasonable use of the Therapy Center is confirmed by the fact that it has existed in the property for the last nine years.

8. Discussion/possible action regarding other items of concern

The ZBA agreed to schedule a joint meeting with the Planning Board and the Merrimack Conservation Commission (MCC) at a date/time to be determined. Patrick Dwyer suggested the topic of the effect of PFOA on groundwater and soil. Tim Thompson explained that it is a state rather than a local regulatory concern.

Tim Thompson announced that he and Planning and Zoning Administrator Jillian Harris would present two amendments to the zoning ordinances - on ADUs and on signs - at the July 19, 2016, Planning Board meeting.

9. Approval of Minutes - May 25, 2016

The minutes of May 25, 2016, were approved as submitted, by a vote of 3-0-2, on a motion made by Richard Conescu and seconded by Leonard Worster. Patrick Dwyer and Tom Mahon abstained.

10. Adjourn

The meeting adjourned at 8:20 p.m., by a vote of 5-0-0, on a motion made by Richard Conescu and seconded by Tom Mahon.