



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, JUNE 30, 2021

Board members present: Richard Conescu, Patrick Dwyer, Ben Niles, Rod Buckley and Alternate Drew Duffy.

Board members absent: Lynn Christensen

Staff present: Planning and Zoning Administrator, Robert Price.

1. Call to Order

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. Patrick Dwyer read the preamble.

Richard Conescu designated Drew Duffy to sit for Lynn Christensen.

- 3. Saint-Gobain Performance Plastics Corporation (petitioner/owner)** – Appeal of an Administrative Decision (under RSA 674:34) that attached additional requirements to the issuance of a building permit. The parcel is located at 701 Daniel Webster Highway in the I-1 (Industrial), Aquifer Conservation Districts, and Wellhead Protection Area. Tax Map 6E, Lot 003-02. Case # ZBA 2021-08. **This item is continued from the May 20, 2021 meeting.**

Withdrawn by petitioner.

- 4. 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.

Due to an abutter notice defect, this item was not heard by the Board.

- 5. Nickolay & Tanya Gaponov (petitioner/owner)** – Appeal of Administrative Decision determining that the current use of the property is a “contractor yard” per the Town Zoning Ordinance. 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 2021-17.

Robert Price clarified that intent of the appeal by explaining that the petitioner is not disputing their business classification as a contractor yard, they are disputing the decision not to allow it as a Level I home occupation.

Tanya Gaponov, (petitioner/owner) was present to discuss the appeal of administrative decision. Ms. Gaponov began by explaining that her husband (Nikolay) runs a small concrete company from their home and they did not realize it was not allowed until they received a violation letter from the town. After receiving the violation notice and speaking to town staff, they rented a space to keep the commercial components of the business (i.e. materials, trucks, etc.) and now feel that they should be allowed to operate the business as a home occupation. Ms. Gaponov argued that with the removal of the trucks and the material, they feel that they now meet the criteria outlined in the Zoning Ordinance for a level one home occupation (no more than 500 sq ft of space used, no customers visiting the site, no signs, etc.) but were advised by staff that it is still considered a contractor yard and is not a permitted as a home occupation.

Chairman Conescu stated that according to the staff memo, Robert Price had suggested that they apply for a variance to allow the business as a home occupation and was curious why they did not take that route. Ms. Gaponov explained that she did not feel a variance was necessary because they meet the criteria for a level one home occupation, so that is why they are appealing the decision. Ms. Gaponov read through the home occupation language in the zoning ordinance and pointed out that contractor yards are not specifically mentioned as being permitted or excluded so it is left up to interpretation. Chairman Conescu explained the difference between granting an appeal from administrative decision versus a variance and the fact that when an appeal from administrative decision is granted it means the rules change for everyone and not just the property in question.

Mr. Price explained that the town's ordinance is a permissive ordinance which means that all permitted uses need to be specified within the ordinance and anything not allowed does not. He further clarified that although the Home Occupation section of the Ordinance contains specific exclusions and even though a contractor yard is not specifically listed as an exclusion, it is staff's opinion that a contractor yard is not allowed as a home occupation. He added that the last version of the ordinance (which was changed in January 2021) did allow for contractor uses as home occupations but that was taken out due to the amount of complaints received regarding those uses.

Rod Buckley asked for clarification on if the business can operate at full capacity if the appeal is granted and Mr. Price explained that if the appeal is granted the petitioner can apply for a home occupation approval through the Community Development department but they would need to comply with the requirements outlined in the zoning ordinance for a level one home occupation. The problem is that in speaking with Ms. Gaponov, they still want to store materials on site in the garage, which is not within the limits of a level one home occupation because it means they will have trucks loading and unloading materials, extending the contractor yard use even if in a reduced capacity.

Ms. Gaponov explained that they did not want to apply for the variance because the process seems complicated and they did not want to hire a lawyer to help them fill out the application. She added that since the violation letter was received, they have scaled down what is stored on their property, she believes they meet the definition of a level one home occupancy so a variance should not be needed. There was continued discussion about the difference between granting an appeal of administrative decision versus granting a variance and Chairman Conescu opened up the floor for public comments.

Public Comment

Kathleen Versprille (111 Bedford Road) spoke against granting the appeal and citing her reason that contractor yards are allowed in the Industrial zone and Bedford Road is a residential neighborhood. She also discussed the definition of a home occupation and expressed that she does not see how a contractor fits within that definition. Patrick Dwyer clarified that the

petitioner is not disputing that they are a contractor yard, they are appealing the decision that a contractor yard cannot be a level one home occupation. Ms. Versprille asked for clarification on if a contractor yard is currently allowed as a home occupation and Mr. Price confirmed that it is not. She then asked how the ordinance can get changed and Mr. Price explained that if a variance is applied for and granted then the change is only for the lot in question. Changing the ordinance so that contractor yards are allowed as a home occupation would be done through a recommendation from the Planning Board and approval by Town Council.

Michelle Craig (107 Bedford Road) spoke in favor of granting the appeal because the business in question has been in existence for many years so she does not understand why it is now a problem.

Ms. Gaponov addressed the comments reading through the definition of a home occupation (which can be found in the Zoning ordinance and Building Code manual dated January 14, 2021) and expressed again that she feels that they meet the definition now that they have removed the trucks and consolidated the materials to the garage.

The Board members expressed their individual opinions on the appeal versus the variance and whether or not they agree with the change to disallow contractor yards as home occupations. Several board members expressed concerns that approving the appeal would open the door for everyone operate contractor yards from their home.

The Board voted 3-2-0 to deny the Appeal of Administrative Decision (and uphold the Community Development Staff's determination) on a motion made by Rod Buckley and seconded by Drew Duffy. Patrick Dwyer and Rich Conescu voted in opposition.

- 6. Erick's Custom Exhaust (petitioner) and D-Kern II, LLC (owner)** – Special Exception under Section 2.02.3(C) (1) of the Zoning Ordinance to permit an automobile service and repair station in the C-2 (General Commercial) District. The parcel is located at 386 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, and Elderly Zoning Districts. Tax Map 4D-3, Lot 028. Case # ZBA 2021-18.

David Kuerner, (property owner) & Erick Ortiz, (business owner) were present to discuss the special exception request with the board. Mr. Kuerner began by explaining that he purchased the land and business in 1998 and in November 2020 he leased the property to Mr. Ortiz who has been conducting the business as a repair business. Mr. Ortiz applied for a repair plate with the state and was denied because the town indicated that automotive repairs are not approved on this site. Mr. Kuerner stated that they have always done car wash, oil changes and minor repairs and did not realize repairs were not approved.

Mr. Kuerner then read through the responses to the ordinance criteria (outlined below).

The Board asked Mr. Ortiz to comment on the complaints of reckless driving (specifically burnouts) that are occurring at the property.

Mr. Ortiz explained that they have had issues with individuals doing burnouts in the parking lot after hours but he does not tolerate it when the business is open and will put a stop to it immediately. He added that the burnouts are not being done by his staff and that they do have cameras on the property to try to discourage that type of behavior.

Public Comment

Public Comment was received via email from: Gakis Vasilios, (388 Daniel Webster Highway), Andrew Davenport (390 Daniel Webster Highway) & an anonymous resident. Copies of these emails are on file with the Community Development Department.

Mr. Kuerner responded to the allegations of fraudulent inspections by advising the board that Mr. Ortiz does have a license to conduct state inspections and that the state is very diligent in ensuring that businesses are operating within the stipulations of the law. He also added that losing your inspection license would be very detrimental to a business so no one would risk it. As for the allegations that cars are being sold at the property, Mr. Ortiz commented that he sold a couple personal vehicles but does not sell cars as part of the business. He stressed that he cares about his customer's safety and would not ever do anything illegal that could put them in harm's way. He added that their custom exhausts are loud but they are legal, he will not add an illegal exhaust system to any vehicle. Mr. Ortiz also commented that he is very respectful of the neighboring businesses and will always ask for permission before using their parking lots for anything.

Rod Buckley asked about the parking situation and the allegations that they park cars in the grass and on the neighboring property. Mr. Ortiz insisted that he does not park cars on other people's property and if they have to use the median to park cars, it's only on a temporary basis. Mr. Price interjected to advise the Board that automotive repairs was never a permitted use for this property so a parking calculation was never done and that if the Special Exception is granted the applicant will need to complete a Site Plan review process with the Planning Board and the site plan will cover parking.

The Board voted 5-0-0 to grant the special exception, with the condition that the petitioner shall obtain full site plan approval from the Planning Board for the proposed automobile service and repair use, on a motion made by Patrick Dwyer and seconded by Rod Buckley.

Case #2021-18 Findings of Fact

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

The petitioner offers many services to the community such as oil change, repair and car wash.

b. The use as developed will not adversely affect the neighborhood:

The premises have been an oil change, repair and car wash for over 20 years, we are not changing anything.

c. There will be no nuisance or serious hazard to vehicles or pedestrians:

The building sits far enough back from the street to not cause a hazard. The petitioner has a large lot with access completely around the building and adequate parking.

d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use or uses:

The petitioner has adequate bays, 6 in total to offer all of the services they offer and a clean and comfortable waiting area for their customers. The petitioner has also updated some of their equipment.

- 7. Richard Morin (petitioner/owner) – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a detached garage 15 feet from the front property line whereas 30 feet**

is required. The parcel is located at 125 Amherst Road in the R-1 (Residential, by map) and Aquifer Conservation Districts. Tax Map 4B, Lot 083. Case # ZBA 2021-19.

Chris Condon (126 Amherst Road) & Richard Morin (owner) were present to discuss the variance request with the board. Mr. Condon began by describing the unique layout of Mr. Morin's lot and explaining that approximately 60 feet from the edge of pavement there is a 40 foot drop off which minimizes the usable depth of his lot. The resulting narrowness of the lot has forced the need for the variance because they are unable to build the size garage they want within the setbacks without a variance.

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

Ben Niles asked if there is already a garage on the property and Mr. Morin responded that there is an existing small garage that is used for storage. Mr. Morin shared a picture of the proposed garage with the board members and Mr. Condon reiterated that the entire lot is only 60 feet wide before it drops off in the back so with a 30 foot setback and a 25 foot garage that only leaves five feet of area before the drop off, which is why the variance is being requested.

There was no public comment.

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

Case #2021-19 Findings of Fact

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

This garage will not alter the character of the neighborhood, threaten public safety, health or welfare of the community.

2. The spirit of the ordinance is observed because:

The proposed garage will uphold the spirit of the ordinance.

3. Granting the variance would do substantial justice because:

The benefit of the proposed garage would provide much needed storage with the area's present use.

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

This proposed garage will comply with the use of the property. Current properties on the street are not visible from the street. The garage should not adversely affect the current surrounding property values.

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:***

This property at 125 Amherst Road has an unusual lot.

b. The proposed use is a reasonable one because:

The special condition of the property mentioned causes the proposed garage to be reasonable. The proposed garage will not alter the character of the surrounding homes.

The Board took up items 8 and 9 together.

- 8. Robert Jones (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 18,644 square feet of lot area whereas 40,000 square feet is required and 120 feet of frontage whereas 150 feet is required. The parcel is located at 47 Lamson Drive in the R-4 (Residential) District. Tax Map 2B, Lot 175. Case # ZBA 2021-20.
- 9. Robert Jones (petitioner) and Lloyd Maclean (owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 27,628 square feet of lot area whereas 40,000 square feet is required. The parcel is located at 19 Winchester Drive in the R-4 (Residential) District. Tax Map 2B, Lot 176. Case # ZBA 2021-21.

Robert Jones (47 Lamson Drive/petitioner) spoke on behalf of both agenda items eight and nine. He began by explaining that the side lot of his property (Lamson Drive) abuts the backyard of Mr. Maclean's property on Winchester Drive. He continued by explaining that there is a stone wall that separates the properties that each owner thought was the lot line but a recent survey has shown that the property line extends beyond the wall. The lot line adjustment is being requested to officially make the stone wall the actual property line divider since it has always served as a natural separation of land. Mr. Jones then read through the responses to the statutory criteria (outlined below).

Public Comment

Lloyd Maclean (19 Winchester Drive) stated that he has always known the stone wall to be the property line so he has used it as such throughout the years and even had his irrigation system installed based upon the wall as a property marker. Chairman Conescu asked if part of his irrigation system is on Mr. Jones's property now and he responded that it is, which is why they want to correct the lot line issue now.

The Board voted 5-0-0 to grant the variances in Case #2021-20, with the following conditions, on a motion made by Patrick Dwyer and seconded by Rod Buckley:

- 1. The requested variance in ZBA Case 2021-21 shall be obtained, and;**
- 2. The petitioner shall obtain final approval from the Planning Board for the proposed lot line adjustment.**

The Board voted 5-0-0 to grant the variance in Case #2021-21, conditioned upon the petitioner obtaining final approval from the Planning Board for the proposed lot line adjustment, on a motion made by Patrick Dwyer and seconded by Drew Duffy.

Case #2021-20 and 2021-21 Findings of Fact

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

Both properties in question, lot 28-175 & 28-176 are both currently legal non-conforming lots. As these lots have been non-confirming since the 1975/76 time frame it's not likely that any lot line adjustment would change the nature of the neighborhood or have any negative

impact on the public interest After adjustment lot 28-175 would drop in Sq. ft. and maintain its current frontage, lot 28-176 would increase in Sq. ft. and maintain its frontage.

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

The spirit of the ordinance is observed as this adjustment does not offer the possibility of future development, does not impact the character of the neighborhood, or have a negative impact on the public health, safety or welfare.

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

Each property owner agrees on the need to establish a firm, recognizable boundary between the properties. To continue with our current boundary located in the middle of an unrecognizable grassy area creates opportunity for future boundary disputes and complicated real estate transactions. Granting the variance would protect each property owner's interests and prevent disagreements in the future.

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

This adjustment impacts two specific abutting properties, does not alter any external property lines and offers no greater ability for development. The adjusted boundary exits on the side of lot 28-175 and the rear of lot 28-17 6. The rock wall suggested to be used has served as the natural boundary for a number of years, moving to this location offers no impact to any surrounding 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:*

The properties in question were sub-divided and built upon well before the current zoning ordinances were in effect. As existing non-conforming lots, updates in Merrimack's zoning ordinance necessitate that any changes to the lots require approval from the Zoning and Planning Board. Adjusting the boundary between lot 28-175 & lot 28-176 does not provide the opportunity for the lots to be used in any manner for which they are not currently being used, strictly residential homes. No negative impact to the surrounding properties or the town of Merrimack will be realized.

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

Post adjustment the property will be used in the exact same fashion as it has since built in 1975/76, residential units offering no change in use given the variance.

10. Michael Petrovick (petitioner) and James Turbyne (owner) – Variance under Section 3.02.A of the Zoning Ordinance to permit a Two Family Residence in the R-1 (Residential) District whereas only Single Family Residences are permitted. The parcel is located at 35 Tinker Road in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 2C, Lot 014. Case # 2021-22.

Michael Petrovick introduced the project by explaining that the home owner (James Turbyne) had recently purchased the property with the intentions of adding an ADU for his mother to

reside in. After submitting the application for the ADU, they were advised by staff that due to the configuration of the additional unit, it did not meet the criteria of an attached ADU and recommended that they seek approval for a two family instead. Mr. Petrovick continued to explain that due to the layout of the house and the ledge that exists on the property, the proposed location is the only possible spot the addition could be placed and they could not create an internal connection to the main house which would be a requirement for an attached ADU. They are now seeking a variance to permit a second dwelling that is 1,100 square feet and includes a 230 square foot single car garage.

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

There was no public comment.

The Board voted 5-0-0 to grant the variance on a motion made by Drew Duffy seconded by Rod Buckley.

Case #2021-22 Findings of Fact

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

The proposed multifamily dwelling is not contrary to public interest as the dwelling is setback beyond view from the surrounding properties and is not contrary to the spirit of the zone.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance is observed because the proposed addition maintains the required setbacks and is designed to architecturally blend with the existing dwelling. The proposed project seeks to maintain the character of the dwelling and the neighborhood.

3. Granting the variance would do substantial justice because:

Due to the existing configuration of the dwelling, it is not possible to construct an ADU which meets the requirements of the owner.

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

The proposed project seeks to maintain the character of the existing dwelling and neighborhood while allowing the owner to provide housing for his relative. The residence is visually screened from the road and 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:

The configuration of the existing dwelling and site do not allow for the addition of an ADU which meets the requirements of the ordinance or the residential code. Application of the ordinance would require substantial additional work to the existing dwelling.

b. The proposed use is a reasonable one because:

The project intends to provide alternative housing options at this property while maintaining aesthetics and quality. The purpose of the proposed dwelling is to provide for the owner's family member to live independently.

11. Discussion/possible action regarding other items of concern

- General discussion about the re-appointment process.

12. Approval of Minutes – May 26, 2021

The minutes of May 26, 2021 were approved as submitted, by a vote of 4-0-1, on a motion made by Rod Buckley and seconded by Ben Niles. Drew Duffy abstained.

13. Adjourn

The meeting was adjourned at 9:08 p.m. by a vote of 5-0-0, on a motion made by Drew Duffy and seconded by Rod Buckley.