



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES

**WEDNESDAY, MARCH 27, 2019**

Board members present: Patrick Dwyer, Richard Conescu, Lynn Christensen, Kathleen Stroud, and Alternates Leonard Worster (left 8:25 p.m.) and Drew Duffy (left 8:00 p.m.)

Board member absent: Alternate Rod Buckley

Staff present: Planning and Zoning Administrator Robert Price and Recording Secretary Zina Jordan

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

Patrick Dwyer called the meeting to order at 7:00 p.m. and designated Leonard Worster to sit for the vacant full-time position.

### **2. Roll Call**

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

**3. Wired Barn, LLC. (petitioner/owner)** – Equitable Waiver of Dimensional Requirements under Section 2.02.13(e)(4)(a) of the Zoning Ordinance to permit an existing barn to remain 29.58 feet from the front property line whereas 30 feet is required. The parcel is located at 3 Wire Road in the C-2 (General Commercial), Flood Hazard Conservation and Aquifer Conservation Districts. Tax Map 5D-3, Lot 109. Case # 2019-04.

Richard Conescu recused himself from discussing or voting on this item. Patrick Dwyer designated Drew Duffy to sit for Richard Conescu.

Paul Chisholm, Project Manager, Keach-Nordstrom Associates, Inc., said that, when the barn was constructed in 1985, it was slightly over the front and side property lines.

Paul Chisholm read the Equitable Waiver criteria into the record.

On October 18, 2018, that applicant came before the Zoning Board of Adjustment (ZBA) to operate a dog day care facility. The work required to pursue that proposal was too costly. Now the petitioner wants to convert the barn into a two-bedroom residential unit. The setback encroachments were discovered when a survey was done as part of the site plan. A residential use is allowed in the Town Center Overlay District.

Robert Price explained that an equitable waiver is a statutory option created by the legislature to get relief when there is an unintentional dimensional violation that is discovered much later.

Paul Chisholm said the 1985 plan shows that the builder intended to site the barn correctly.

Patrick Dwyer noted that the encroachments are both only a matter of inches.

There was no public comment.

**The Board voted 5-0-0 to grant the Equitable Waiver, on a motion made by Lynn Christensen and seconded by Drew Duffy.**

### **Findings of Fact**

1. *Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the Town:* A copy of a record plan dating back to 1985 (attached) states the garage as “under construction”, thus establishing its existence for more than 10 years. Planning staff has confirmed that no enforcement action has been taken on the property to date;
  2. *Explain how the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property:* Generally speaking, improving and adding value to a property does not cause the value of surrounding properties to diminish. The proposed use fits in with the existing neighborhood, which has a mixture of adjacent commercial, multi-family and residential uses. The character of the barn will be maintained, which the applicant believes fits the character and charm of this established neighborhood;
  3. *Explain how the cost of correction far outweighs any public benefit to be gained:* The building encroachment into the front yard setback is less than 7”. The applicant would bear a substantial cost to alter the structure to make it conforming. No noticeable difference in appearance or benefit to the public would be realized by such a minor change in layout.
- 4. Wired Barn, LLC. (petitioner/owner)** - Equitable Waiver of Dimensional Requirements under Section 2.02.13(e)(4)(b) of the Zoning Ordinance to permit an existing barn to remain 14.42 feet from the side property line whereas 15 feet is required. The parcel is located at 3 Wire Road in the C-2 (General Commercial), Flood Hazard Conservation and Aquifer Conservation Districts. Tax Map 5D-3, Lot 109. Case # 2019-05.

Richard Conescu recused himself from discussing or voting on this item. Patrick Dwyer designated Drew Duffy to sit for Richard Conescu.

There was no public comment.

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

**Findings of Fact**

1. Same as #1 above for Agenda Item 3;
2. Same as #2 above for Agenda Item 3;
3. *Explain how the cost of correction far outweighs any public benefit to be gained:*  
The building encroachment into the front yard setback is less than 5". The applicant would bear a substantial cost to alter the structure to make it conforming. No noticeable difference in appearance or benefit to the public would be realized by such a minor change in layout.

- 5. Jeffery & Nadja Glauber (petitioner/owner)** – Variance under Section 2.02.1.A of the Zoning Ordinance to permit personal services and professional offices in addition to the already permitted (through a previously granted variance) dentist office and residential uses. The parcel is located at 33 Bedford Road in the R (Residential) and Aquifer Conservation Districts, and Wellhead Protection Area. Tax Map 6D, Lot 239. Case # 2019-06.

Richard Conescu returned to the Board; Drew Duffy returned to alternate status.

Dr. Jeffrey Glauber, 33 Bedford Road, stated that, in 1974 a variance was granted permitting a dental office and residential uses on the property. He is retired and wants to lease the unused part to a similar professional or small business if it is not possible to lease to a dentist. That is why he is seeking a variance to allow personal services and professional offices as well as a dental office. Only the Glaubers (and not the tenant) would live in the residence.

Dr. Glauber read the variance criteria into the record.

There was no public comment.

Dr. Glauber explained that the 1974 variance was limited to the dental office. The bank discovered that the variance was illegal; it goes with the property and not with the owner, based on a NH Supreme Court decision. In 1986 the variance was re-written to go with the property. Robert Price added that the original variance was granted improperly to the owner of the property, but variances run with the property, not the owner. The variance was later clarified to be with the land, but limited to a dentist office use. He added that the petitioner is seeking to amend that variance to permit personal service and professional office uses in addition to the dentist office, which are similar to what a typical Home Occupation would allow.

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

**Findings of Fact**

1. Granting the variance would not be contrary to the public interest because the dental office has been in use from 9/1974 to 6/2017;

2. The spirit of the Ordinance is observed because the space will be utilized as it has been for close to 43+ years, as determined by the previous variance;
  3. Granting this variance would do substantial justice because the Glaubers are unable to carry the entire financial burden long term unless they can get help with the additional expenses of the unused part of the structure. For close to 43 years, this property was classified as a mixed-use property that produced income from the dental office. Since it was closed, the mixed-use aspect was removed, but the carrying costs have not been modified (i.e., real estate taxes, insurance, energy costs, maintenance etc., are the same.);
  4. The values of the surrounding properties would not be diminished because there will be no change in how this space will be used by any future tenant, per previous variance requirements, other than a similar type of business, (i.e., real estate, accountant, lawyer, etc.). There will be no change in the structure;
  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 this property has been in existence since 9/1974, with the dental office functioning out of it. It has been assessed as a mixed-use property by the Tax Assessment Office. When the office was closed, the town removed the mixed-use aspect; however the financial burden on this property has not changed. To deny the variance would remove the applicant's ability to receive any income to carry all the costs associated with the structure;
    - 2) The proposed use is a reasonable one because the structure and property will remain exactly the same as it has been from the beginning. There would be no outward change in appearance.
- 6. Apple Development Limited Partnership (petitioner/owner)** – Variance under Section 17.10.3 of the Zoning Ordinance to permit a previously-approved electronic reader board sign to have an area of 672 square feet whereas 253 square feet is permitted (by previously-approved variance). The parcel is located at 360 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Planned Residential Overlay and Elderly Housing Overlay Districts. Tax Map 4D-3, Lot 001. Case # 2019-07.

Robert Barsamian, OVP Management, said that the subject of this petition is the proposed sign at the rear of the Merrimack 360 Plaza property adjacent to the F.E. Everett Turnpike. Exposure on the street is critical. Studies and safety views over 3-4 months and speaking to the State determined that the approved sign is inadequate. Despite a lot of traffic on D.W. Highway, the traffic counts are not high. The petitioner must drive traffic to attract retail tenants. Merrimack 360 Plaza is still not full. It does

not have highway access. The sign is necessary so people can see it and so tenants would be excited enough to help pay for its long-term success. Robert Barsamian showed photos of trees with current and proposed size signs illustrating how and when they would appear to northbound and southbound traffic on the Turnpike.

Patrick Dwyer asked about light noise affecting the condominiums across and adjacent to the Plaza. Robert Barsamian replied that the package is the same as when the petitioner previously appeared before the ZBA. He does not know whether an electronic reader board sign would be utilized or not. Patrick Dwyer said that would determine whether he would approve the variance. Robert Barsamian said that, either way, regulations preclude light shining on someone else's property. The area is covered with trees. The sight lines are the tree lines. The petitioner wants to cut as few as possible. The petitioner wants the sign to be seen from the Everett Turnpike, not from the condominiums. There would be no difference in height to what was originally approved. When it is known how many tenants would want to use the sign, the decision about a digital sign would be made. Patrick Dwyer claimed that people could see the sign despite the trees and regulations.

Robert Barsamian said that cost is another factor. A digital sign is unlikely, but he does not want to count it out. There are four 150'-high wireless communications towers next to the Plaza. He pointed out that the Merrimack Premium Outlets (MPO) has a 1,600 s.f. sign, which is visible from the Everett Turnpike, but this would be 672 square feet. The applicant can cut only so many trees.

Robert Barsamian showed photos to demonstrate that visibility of the sign for southbound traffic is more challenging. Traffic must get close to the sign before getting a decent view. The sign would be angled to face the Everett Turnpike.

Robert Price clarified that the sign was originally approved as an electronic reader board; the applicant still maintains that option and right. Flashing and scrolling messages are not allowed by Ordinance; the sign's message must be static for 20 minutes. Robert Barsamian said the sign would change every 20 minutes if there are enough tenants to participate. If not, it would be longer. He showed a video of how long it would take a driver on the Turnpike to see the sign. He does not have a video taken from D.W. Highway. Due to the nature of the sign's design, only the unlit side would appear on D.W. Highway.

There would be no change in illumination or height. Only the size would change, from 10' x 25' to 14' x 48'. Robert Barsamian repeated that the Plaza must generate more traffic to attract and keep tenants. If it loses traffic, it would lose tenants.

Richard Conescu noted that the proposed size is similar to billboard dimensions. Robert Barsamian agreed that it is a billboard's standard size.

Attorney Peter Imse, Sulloway & Hollis, PLLC, read the variance criteria into the record.

As to #1, public interest: "The applicant will forfeit off-premises advertising to secure the grant of this variance", Robert Barsamian explained that the 2017 variance request for

off- and on-premises advertising was denied because the applicant is not allowed to do both.

As to #2, spirit of the Ordinance: Richard Conescu noted that billboards are prohibited and this would not be similar to MPO. Robert Price stated that, if the petitioner limits the sign to on-site advertising, it would not qualify as a billboard. Since there is no definition of a billboard in the Ordinance, he must rely on similar Ordinance provisions. Billboards tend to focus on off-premise advertising. He determined that this is a permitted sign. Robert Barsamian clarified that the sign would not be a billboard, although the size would be the same as a typical billboard's size. Additionally, it should be noted that the MPO sign was permitted through the conditional use permit process with the Planning Board, and did not require any relief from the Zoning Board.

As to #5, Patrick Dwyer saw no unnecessary hardship. Attorney Imse said a sign on the Everett Turnpike is necessary to get traffic to Merrimack 360 Plaza because the Plaza is not visible from the Everett Turnpike. That is the hardship.

Drew Duffy left the meeting at 8:00 p.m.

### **Public comment**

Chairman Dwyer read into the record a letter from Eva Ferrara, 89 East Ridge Road. She is concerned with increased traffic and the size of the sign on D.W. Highway, but she seems to misunderstand that the sign would not be on D.W. Highway, but adjacent to the Everett Turnpike.

Virginia Heald, 3 Pondview Drive, said the problem is that there is no anchor store to advertise the Plaza. The proposed sign is "horrible". She is concerned that light noise would affect wildlife. An increase in sign size increases light noise. The sign would take away from Merrimack's small-town feel and is out of character. MPO's sign is softly illuminated and not "in-your-face". It looks Colonial, adds to the character of the area and is not adjacent to a residential area. Virginia Heald asked how many lumens the sign would emit at various distances and whether it would shine into the night sky. She claimed it would affect homes and would still be seen on D.W. Highway.

Patrick Dwyer asked how possible future widening of the Everett Turnpike would affect the sign's location. Robert Barsamian said it would not because of the setback.

Attorney Imse said a State sign permit is necessary, which would not be allowed if location were an issue. The applicant will comply with all regulations.

Richard Conescu did not want to approve what might be illegal, namely a billboard, for which he wants a definition. Robert Price said it was not determined that the sign falls under the billboard category; this should be treated as any other variance.

Lynn Christensen said it would be different if the sign were on D.W. Highway; a reasonable size is needed for high Everett Turnpike speeds. That is the hardship. She commended the petitioner for angling the sign to protect the Town, houses and residences. MPO does have neighboring residences, namely Whittier Place. The MPO sign impacts them more than this would impact Horseshoe Pond and East Ridge. It would be set back from and directed to the Everett Turnpike.

**The Board voted 3-2-0 to grant the Variance, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Patrick Dwyer and Richard Conescu voted in opposition.**

### **Findings of Fact**

1. Granting the variance would not be contrary to the public interest because the sign would be located behind the commercial development and away from DW. Highway. The proposed size is consistent with the common industry standard size for outdoor advertising. The applicant will forfeit off-premises advertising to secure the grant of this variance. The Board previously determined that this sign was not contrary to the public interest. It is not cluttered, visually overwhelming or out of character with the area. It is unique in that it is directed toward Turnpike traffic, while most applications are intended to regulate street-level signs. The only other notable sign of this kind is in the vicinity of Merrimack Premium Outlets. It is visible from the Everett Turnpike, but is not cluttered, visually overwhelming or out of character with the area. The proposed sign would aid motorists by presenting a clear and readable message. Most of the surrounding area is commercial. The few exceptions are residences that are mostly screened from the surrounding developments. The increase in signage area reflects the need for effective advertising for this large commercial development consistent with the overall commercial nature of the area;
2. The spirit of the Ordinance is observed because on this unique site adequate and functional signage requires a 14' x 48' sign along the Turnpike, where traffic is much faster. A 253 square foot sign is unable to contain large enough print to effectively communicate messages to passing Turnpike motorists traveling at 65-70 miles per hour. A 253 square foot sign is not a common industry standard for which outdoor advertising is designed and marketed. The increase in size poses no risk of clutter, confusion or the capacity to overwhelm, similar to the MPO sign;
3. Granting this variance would do substantial justice because the sign would be proportional to the size of the commercial development. Merrimack would be served by the use and development of a property that was partially vacant for years. That use and further development depend on the visibility of the tenants, which requires adequate and proportional signage. A 14' x 48' sign is the most common market standard for this type of sign. Tenants prefer to apply their marketing materials on standard platforms that allow them to predict pricing and to use pre-existing advertisement designs. Cost-effective advertising furthers the success of business, not just for tenants, but by providing goods and services, jobs, tax base, and activity to the community. There are no drawbacks or negative impacts because of the increased size;
4. The values of the surrounding properties would not be diminished because variances have already been granted for this two-sided 100'-tall, 253 square foot electronic sign. Increasing the signage area will not increase the light cast off from the sign or brightness of the sign. It would simply allow motorists to see the

sign from farther away by permitting larger lettering. The sign location is removed from the local roads and behind the development, so the increase will affect only motorists on the Everett Turnpike. The sign will improve the appearance of the area by drawing attention away from the abutting obtrusive cell phone tower. The values of the surrounding properties are directly tied to the success or failure of this development, which is dependent on the success and visibility of its tenants. The increased signage area will help further the success of the commercial development by increasing its tenants' visibility and indirectly supporting surrounding property 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 of the unique location and character of this parcel. The development is larger than the surrounding commercial developments and there are no similar signs in the surrounding area. This sole, large sign will not clutter, confuse or overwhelm motorists. The increased size is essential to allow motorists on Everett Turnpike to locate this development. As the sign will be adjacent to and abutting the Everett Turnpike and not the Daniel Webster Highway, it is not the target of the public purpose of the Ordinance;
  - 2) The proposed use is a reasonable one because of the size, layout and configuration of the property in relation to the vantage point of a driver on Everett Turnpike. The increased signage area is necessary for an effective sign near the Everett Turnpike. The commercial development is not visible to the motorists on the Turnpike. It is reasonable, given the scale and distance from nearby Turnpike exits, that the applicant should have an effective sign to attract motorists traveling at Turnpike speeds;
- 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 Board has already considered and determined an unnecessary hardship is present when it granted a variance for a 253 square foot sign. The same justifications are applicable to this application. The property is unique in that it abuts both Route 3 and the Everett Turnpike, but it is not located in the well-traveled and more recently developed area of Town that makes it conducive to development and easily accessed from the Everett Turnpike. Effective signage has to be readable at a glance by drivers traveling at Everett Turnpike speeds. The success of this development is hindered without the visibility that would be afforded by the increase in signage area. As commercial development continues to thrive at



locations close to Everett Turnpike exits, it becomes crucial for this development to be able to attract customers effectively.

#### **8. Approval of Minutes – February 27, 2019**

This agenda item was discussed before agenda item #7.

**The minutes of February 27, 2019, were approved as submitted, by a vote of 4-0-1. Richard Conescu abstained.**

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

This agenda item was discussed after agenda item #8.

Leonard Worster recused himself from discussing and voting on this item and left the meeting at 8:25 p.m.

Pam and Carl Belmonte, 81 Woodward Road, request a re-hearing of Case #2018-03, in which the Board granted variances to Stephen Chase and Robin Cousineau, 85 Woodward Road, to permit a two-lot subdivision with one lot having 90' of frontage whereas 250' are required and having 61,610 square feet of contiguous non-wetland area whereas 100,000 square feet are required.

The Belmontes claim that the Zoning Board erred in its findings of fact for each of the five variance criteria.

Chairman Dwyer read aloud the letter from the Belmontes' Attorney Robert Shepard, Smith-Weiss Shepard, PC, a copy of which is on file with the Community Development Department.

The Board stated that the applicant must provide additional information that was not provided at the time of the original hearing on February 27, 2019, and that, since there were only four voting members left, three of them would have to vote in favor of granting a re-hearing. Kathleen Stroud saw no new information. She took extensive notes at the February 27, 2019, meeting; the attorney's letter repeats the same information; it just words it differently. There is no new information the petitioners can present; they can only re-argue the case. Chairman Dwyer agreed. He voted against it at the last meeting. It would be a waste of time to hear the same arguments. Because he did not attend the February 27, 2019, meeting nor watch it, Richard Conescu was uncomfortable voting. Lynn Christensen had no problem with a re-hearing if new evidence were presented.

**A motion made by Patrick Dwyer and seconded by Lynn Christensen to grant the rehearing failed for lack of three affirmative votes, 2-1-1. Kathleen Stroud voted in opposition; Richard Conescu abstained.**

**The Board voted 4-0-0 to continue this item to April 24, 2019, at 7:00 p.m., in the Matthew Thornton Room, on a motion made by Richard Conescu and seconded by Lynn Christensen.**

#### **9. Adjourn**

**The meeting was adjourned at 8:47 p.m., by a vote of 4-0-0, on a motion made by Kathleen Stroud and seconded by Lynn Christensen.**