



Town of Merrimack, New Hampshire

Community Development Department
6 Baboosic Lake Road
Town Hall - Lower level - East Wing

603 424-3531
Fax 603 424-1408
www.merrimacknh.gov

Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES WEDNESDAY, MARCH 31, 2021 7:00 P.M.

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

Board members absent: Alternate Drew Duffy.

Staff present: Planning and Zoning Administrator, Robert Price.

Due to the COVID-19 pandemic, and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, the Zoning Board of Adjustment is authorized to meet electronically.

As stated on the agenda, the meeting was aired live on Merrimack TV. Telephone access was available for members of the public wishing to speak during the Public Hearing or provide public comment. Also identified on the agenda was the opportunity for general public comment to be submitted leading up to the start of the meeting via email to commdev@merrimacknh.gov.

Members of the Board and Town Staff were participating via Zoom. In accordance with RSA 91-A:2 III, each member of the Board was asked to state, for the record, where they were, and who, if anyone, was with them.

1. Call to Order

Richard Conescu called the meeting to order at 7:04 p.m. and Rod Buckley read the preamble.

2. Roll Call

- **Richard Conescu:** Stated he was participating alone in the room he was in.
- **Ben Niles:** Stated he was participating alone in the room he was in.
- **Lynn Christensen:** Stated she was participating alone in the room she was in.
- **Patrick Dwyer:** Stated he was participating alone in the room he was in.
- **Rod Buckley:** Stated he was participating alone in the room he was in.

- ### 3. Colby Perham (petitioner/owner) – Variances under Section 3.05 of the Zoning Ordinance to permit a detached garage 8.6 feet from the side property line whereas 15 feet is required and 20 feet from the rear property line whereas 40 feet is required. The parcel is located at 8.5 Seaverns Bridge Road in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 2A, Lot 020-02. Case # ZBA 2021-03.

Colby Perham, (petitioner and owner) presented the project to the Board. He explained that due to the size of his lot and the location of his swimming pool, the proposed location is the only spot the garage can go.

Public Comment was received via email from: Milada & Francis Grossi, 15 Seaverns Bridge Road. A copy of this email is on file with the Community Development Department.

The Board voted 5-0-0, on a roll call vote, to grant the variances, on a motion made by Patrick Dwyer and seconded by Lynn Christensen.

Case 2021-03 Findings of Fact:

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

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

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

The lot size is .977 acres which is smaller than the 2.3 acres normally required. This makes it difficult to build without encroaching the setback on at least 2 sides.

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

It would provide much needed garage and storage with the areas present use.

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

The proposed building will maintain the character of the neighborhood where 2 of the 3 abutting properties have structures within 5 feet or 8 ½ feet of Seaverns Bridge property lines. The proposed structure will comply with the use of the property and neighborhood.

5. *Unnecessary Hardship*

a. *Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:*

The property having less than an acre and 152 feet of frontage, it becomes unavoidable to add a detached structure without encroaching the setbacks on multiple sides.

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

It is similar to all other properties in the neighborhood with less than one acre of property.

4. Ron Dupont (petitioner) and Streif, LLC (owner) – Variance under Section 3.02, Note 6 of the Zoning Ordinance to permit a building canopy 18 feet from the Daniel Webster right-of-way whereas 22 feet was previously approved by variance. The parcel is located at 406 Daniel

Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # ZBA 2021-04.

Matt Peterson, (Keach-Nordstrom Associates, Inc.) presented the project on behalf of the petitioner. Mr. Peterson began by explaining that this project already received a variance to allow the building to be constructed closer to the DW Highway Right of Way but they forgot to take the building's canopy into account so they are looking to revise the original variance. Mr. Peterson then read through the responses to the statutory criteria (outlined below).

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the Variance on a motion made by Ben Niles and seconded by Lynn Christensen with the following condition:

1. The petitioner shall obtain final site plan approval from the Planning Board for the proposed mixed use building.

Case 2021-04 Findings of Fact:

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

The applicant is seeking relief from the required front setbacks on D.W. Highway. The D.W. Highway requirement is for a 50' front setback. A variance was granted to the applicant previously on October 28th 2020, reducing the 50' front setback to 22'. This variance request is reducing the 22' to 18' for an extended overhang along the building. This overhang will allow for safe travel into the building during inclement weather, while creating an appealing facade. This 4' reduction does not diminish what was stated in the previous variance request. The building will still be in line, if not farther back than nearby structures along the west side of Daniel Webster. The Town of Merrimack would still have the ability to widen Daniel Webster Highway in the future with the previously given 20' of right-of-way. As such, this 4-foot reduction is not contrary to public interest because not only does it allow for the town's major roadway to grow, bring new business to the town, but also help to create an attractive building with this proposed overhang.

2. The spirit of the ordinance is observed because:

Based on the previous statements that the setback reduction from the previously approved 22' to approximately 18' would be in line or further back than existing business along D.W. Highway. The spirit of the ordinance is to ensure buildings are not crowding the roadway and create a cohesive neighborhood. With this 18-foot setback the proposed building will still be 38 feet away from the current roadway. Most if not all buildings in this area along Daniel Webster Highway are currently sitting this far back or closer to the roadway. Therefore, the applicant feels that granting this variance would stay within the spirit of the Ordinance.

3. Granting the variance would do substantial justice:

As stated above this is one of the only lots on the west side of D.W. Highway that has deeded an extra 20' to the D.W. Highway ROW. This reduced lot size impedes possible development of the parcel. Substantial justice would be done for the applicant by granting a reduction in setback to allow for an appealing building to be built.

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

The proposed construction of a 3,000sf office type building with residential units above should only help to increase the values of surrounding properties in the C-2 district as typically commercial property is more valuable in a commercial district. This specific 4-foot reduction from the previously approved setback is to provide a more attractive building by adding this awning, which would in-tum also help 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:*

The relationship that exists between this property and the ordinance is that the ordinance is looking to the future of D.W. Highway expansion and making sure uses are located an appropriate distance from D.W. Highway. Based on the lot shape and location of the proposed building, the building would still be 38 feet from the current roadway, and allows for the best use for this uniquely shaped parcel.

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

The use is allowed, which would make it a reasonable one in the applicant's opinion, however the applicant is seeking relief from front setback along D.W. Highway for a reasonable use of the property, and to allow an attractive facade, as discussed with the town, to be built.

5. Merrimack Parcel A, LLC (petitioner) and Merrimack Park Place Condominium (owner) – Variance under Section 2.02.4(D) of the Zoning Ordinance to permit a mixed-use development Conditional Use Permit (CUP) to be sought from the Planning Board at a higher residential density than was originally approved by variance (in 2015) on a lot in the I-2 (Industrial) District. The parcel is located at 10 Premium Outlets Boulevard in the I-2 (Industrial), Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 3C, Lot 191-02. Case # ZBA 2021-05.

Chairman Conescu began by addressing a comment that was received from a resident regarding the legal notice. In an email addressed to the Zoning Board, Michael Mills (7 Arbor Street) cited the following concerns with the legal notification. The resident alleged that the legal notice failed to:

1. Properly state the location for the proposed change.
2. Did not properly identify the owners of the property.
3. Did not state the higher residential density requested.

4. Did not identify how the requested change in density would be implemented.

Chairman Conescu stated that the location and property owners were identified and that items 3 and 4 are Planning Board concerns and do not need to be addressed by the ZBA. He concluded that the legal notice did meet the criteria of RSA 676:7.

Dave Fenstermacher, (VHB, Inc.) and Tom (Jay) Leonard, (Welts, White & Fontaine, PC) were both present to discuss the project on behalf of the petitioner. Mr. Leonard provided an overview of the project by explaining that in November 2015 the project received a variance to allow a mixed use development in the I-2 Industrial zone. At the time of that meeting, they presented a conceptual plan to the Zoning Board and then went in front of the Planning Board to obtain CUP approval. Once the approvals were in place, the owners began marketing the site which lead to changes to the original proposal. Mr. Leonard then shared the original concept plan and reviewed the breakdown of the uses, which consisted of the following:

- 160,000 square feet of office space.
- A 100,000 square foot hotel.
- 145,000 square feet of residential.
- A parking garage with 1152 parking spaces.

Once they understood more about the market, they made changes to the conceptual plan and went to the Planning Board in February 2019 and were granted approval for the CUP. In September 2019 they went back to the Planning Board to amend the plan that was approved in February to the following:

- 110 room hotel
- 224 residential apartments
- 250 seat restaurant

The project is before the Zoning Board again because the petitioner is looking to add an additional 208 apartments to the development. Mr. Leonard added that construction has already begun on the 224 apartments that were previously approved and the additional units will be a compliment to the existing approval. He clarified that the petitioner feels that the development meets the definition of a mixed use development but they wanted to circle back with the ZBA for final approval.

Chairman Conescu asked staff to clarify why an additional variance is needed if one was already granted. Robert Price explained that staff felt that adding the additional apartments severely changed the density to the point that they thought it should be reviewed by the Board again. Chairman Conescu stated that the original approval did not include a specific density requirement and Robert Price confirmed that it did not, but the overall layout has changed so significantly that they felt the Board should re-review it. Patrick Dwyer expressed that he feels the mixed use of the parcel is no longer being met and Mr. Leonard disagreed because they are still moving forward with the hotel and restaurant. He also added that it is a mixed use to the larger Merrimack Premium Outlets (MPO) parcel and that they will still need Planning Board approval to actually amend the CUP. Chairman Conescu asked for clarification as to why this is not a Planning Board decision and Robert Price explained that while the Ordinance for a Mixed Use Conditional Use Permit does not specifically address density, the plans have changed so drastically since the Zoning Board of Adjustment granted the variance originally that staff wanted to ensure the Zoning Board still felt the new plans met the spirit of their original decision. Patrick Dwyer asked why the change is being made and Mr. Leonard responded that market for office

space right now is basically non-existent and they were too limited with what could be included for retail units because they cannot compete with the Premium Outlets. He concluded by showing a rendering of what the apartments will look like and stating that they have found that there is a need for upscale apartments and the original plan was simply not economically viable.

Rod Buckley asked if the original parking plan is still in place. Mr. Leonard responded that the original plan called for a parking garage that has been removed since it is no longer needed and parking is available for the apartment units underneath each building. Dave Fenstermacher added that the current parking plan has approximately 970 spaces and was adjusted to meet the requirements of the current proposed uses.

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

Dave Fenstermacher shared the plan again to show the distance between the edge of the proposed apartment building and the residential development that exists today. He also added that the road that goes behind the building will be gated and will be used for emergency access only and the existing trees will be kept and stockade fencing will be added to help with privacy concerns. Chairman Conescu asked why the change to the access road was made and Mr. Fenstermacher explained that it came up in discussion during the Planning Board meeting and they wanted to keep the traffic off of Continental Blvd. while also noting vehicular turn movements would be difficult in that location.

Patrick Dwyer voiced concerns about the project stating that he does not feel that it is really a mixed use development anymore; it is apartment buildings with a hotel and restaurant. He also questioned the reason that was given regarding eliminating the retail because they cannot compete with MPO, stating that information would have been known when this was first proposed so why is it just a problem now. Mr. Leonard responded by explaining that they knew all along that there would be retail restrictions but they thought they would still be able to find tenants but after five years of marketing the site, they learned that they were wrong and there just wasn't a need for it. He went on to explain that there is a demand for housing right now and this particular parcel is situated right off the highway so it makes it an ideal location.

Robert Price clarified that the lot in question is in fact a stand-alone parcel and is not part of the premium outlets development, and that the MPO project cannot be considered part of the mixed use development.

Ben Niles spoke in favor of the project stating that the last few years have shown that there is a need for additional housing so we should let the developer develop based on the need and not ask them to build something that will incur losses.

Public Comment was received via email from: Vincent Cosco, General Manager, Merrimack Premium Outlets. A copy of this email is on file with the Community Development Department.

Public Comment was also received from Michael Mills, (7 Arbor Street). Mr. Mills expressed concerns with the way the legal notice was written, stating that there was not enough detail and information was missing and incorrect. The parcel has been split into four units, three of which are owned by Merrimack Parcel A, LLC and one is owned by Slate Merrimack Acquisition LLC, and this was not depicted accurately in the notice. He also referenced that the deletion of the retail space was not mentioned anywhere in the notice nor was the request to add 208 additional apartments. Chairman Conescu interjected to explain that the applicant is applying for a mixed use permit so what is being built is irrelevant at this time and just part of the presentation.

Robert Price explained that the Board has already decided that the abutter notice met the criteria of RSA 676:7 and recommended that Mr. Mills file an appeal if he wishes to pursue the matter further.

Mr. Mills indicated that he does not wish to appeal it but wants the Zoning Board to ensure that published notices are clear enough so that people reading them can decipher if it is a meeting they need to attend. Mr. Mills also expressed concerns that during the presentation Mr. Leonard testified that the proposed apartments are luxury apartments but the application that was submitted refers to them as Market Rate apartments and is confused by the discrepancy. Chairman Conescu clarified that luxury apartments are what is being proposed and Mr. Mills stated that he does not believe there is a need for more luxury apartments in Merrimack, Work Force and Market Rate apartments are what is needed. Chairman Conescu clarified that the type of apartments does not matter to the mixed use approval and reiterated that the approval has already been granted to allow for a mixed use on this parcel. He continued by encouraging Mr. Mills to bring his questions about the apartments to the Planning Board.

Mr. Mills then asked if any studies have been done on what impact this development will have on the existing houses in the neighborhood. Chairman Conescu explained that it's a subjective topic and one realtor could say the surrounding property values will go up and another could say they will go down. Mr. Mills disagreed and stated that a licensed real estate appraiser would give an accurate assessment of property values both with and without the development. He concluded by stating that the town should take into consideration the surrounding neighbors and the fact that they do not want to have to look out their windows at high rise apartment buildings.

Mr. Leonard addressed some of Mr. Mills's concerns by explaining that the parcel was converted to a condominium form of ownership for development and financial reasons only and that Mr. Monahan is a principal owner of the lots that will contain the hotel and restaurant and is also the head of the association. Mr. Leonard reiterated that the applicant is just substituting the retail and office space component for a residential use for a development that is currently underway. Robert Price also clarified that the only reason this project is before the Board again is because of the increased residential density.

The Board voted 4-1-0, on a roll call vote, to grant the variance, with conditions, on a motion made by Rod Buckley and seconded by Lynn Christensen. Patrick Dwyer voted in opposition. The following conditions apply:

1. The petitioner shall obtain approval for an amended Conditional Use Permit from the Planning Board to allow the addition of the second apartment building (up to 208 additional multi-family residential units); and
2. The petitioner shall obtain site plan approval from the Planning Board for the second apartment building following approval of the Mixed Use Conditional Use Permit.

Case 2021-05 Findings of Fact:

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

The Property has been granted a variance to permit a mixed use development with a different mix of components to include commercial office space, retail space, hotel and residential. The proposed mixed use development increases the residential component of

the Project. It would not be contrary to the public interest because the additional market rate rental apartments will provide an important component in the housing stock for the Town of Merrimack. It will also support the commercial and industrial businesses in the immediate area. The Merrimack Master Plan supports the idea of diverse housing and recognizes that diverse housing is essential to a viable community. This proposal accomplishes the goal of diverse housing. To be contrary to the public interest, a variance must "unduly and in a market degree, conflict with the ordinance such that it violates the ordinance's basic zoning objections". *Malachy Glen Associates, Inc. v. Chichester, NH 155 102 (2007)*. This proposal will not alter the essential character of the locality because all uses are presently permitted. The request is to increase the residential component which will be located adjacent to residential uses. The proposal will not threaten public health, safety or welfare because there is sufficient and appropriate supporting infrastructure including roads, water and sewer.

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

The requirements that a variance be consistent with the spirit of the ordinance coexists and is related to the requirement that granting a variance not be contrary to the public interests. *Chester Rod and Gun Club, Inc. v. Town of Chester 152 NH 577 (2005)*. This particular lot is an out parcel between retail, residential and commercial/industrial businesses. The proposal (an increase in the residential component of the mixed use development) will not adversely impact health, safety or welfare of the community. It is not contrary to any purpose of zoning rather it accomplishes a stated purpose of diverse housing and mixed complementary uses at exits associated with the interstate highway system. The mixed use project is the highest and best use of the Property and will be subject to Planning Board review and approval of a conditional use permit as well as a site plan. The Property is a portion of the original development of Merrimack Premium Outlets. The proposed use is complimentary to the Merrimack Premium Outlets and there is no reason to limit the residential component of the mixed use development.

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

Substantial justice inquiry requires that the ZBA examine whether "any loss to the individual [by strictly enforcing the ordinance] is outweighed by a gain to the general public". *Malachy Glen Associates, Inc. v. Chichester, NH 155 102 (2007)*. Here the proposed use of additional residential component within the mixed use development is consistent with the abutting residential neighborhood but also consistent with the retail uses in the Merrimack Premium Outlets to the east and consistent with the commercial/industrial uses to the south and west. The proposed use is also appropriate given the surrounding infrastructure – roads, sewer and water. There is no reason to limit the residential component of the mixed use project. The loss to the property owner would be substantial. Strict enforcement [reducing the residential component] would not result in a gain to the general public. As applied to this Property, there is no reason for strict enforcement of the ordinance limiting the residential component.

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

For the following reasons, the values of surrounding properties will not be diminished: The existing mixed use development under construction is a substantial restaurant, 4 story hotel and 4 story apartment complex. Immediately to the north is a single family

residential development. The present proposal is to permit another apartment complex to mirror and complement the existing apartment complex. It will be adjacent to the existing residential development off site. However, the distance and separation are substantial. There will be no impact to the values of the adjacent residential properties and the transition from business and commercial uses to residential is appropriate. The value of adjacent commercial and industrial properties will not be adversely impacted.

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 general public purpose of the mixed use provision within the Merrimack Zoning Ordinance is to allow mixed use development on undeveloped parcels where there is adequate transportation and utility infrastructure. The mixed use provision allows for diversity of both commercial and residential developments. This Property meets the criteria and, although it is not on Daniel Webster Highway, is in an area of significant employment and commercial activity in the Town of Merrimack. The Property has direct access to a state roadway and it is immediately at an exit for an interstate highway. The ZBA determined in 2015 that prohibiting residential uses on this Property was not reasonably related to the general public purposes of the Zoning Ordinance. At that time, there was no fair and substantial relationship sufficient to justify prohibition. The same is true today. There is no public purpose which will be accomplished by limiting the residential component of this mixed use project.

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

The proposed use is a reasonable one in that the "mixed use development" is permitted by the original variance. The only question before the ZBA in this application is the extent of the residential component within the mixed use. In the context of surrounding uses on the site and in the context of surrounding uses off site, the proposed use is a reasonable transition both on site and off site. The proposed use supports an important need for housing diversity. The ZBA found that there was a hardship in 2015 and that the hardship warranted a variance for mixed uses including residential uses. The same facts and circumstances exist now and are now perhaps stronger than ever. Demand for office space is down substantially. The market for retail space has been changed dramatically over the last year. Merrimack Premium Outlets has substantial space and is approved for additional space. There are conditions and restrictions that apply to the subject parcel in order to protect the investment of Merrimack Premium Outlets. In view of all the circumstances, the proposed use – an additional apartment building within a mixed use project – is appropriate and reasonable.

6. Discussion/possible action regarding other items of concern

7. Approval of Minutes – January 27, 2021

The Board voted 3-0-2, on a roll call vote, to approve the minutes of January 27, 2021, as presented, on a motion made by Patrick Dwyer and seconded by Ben Niles. Lynn Christensen and Rod Buckley abstained.

8. Adjourn

The Board voted 5-0-0 to adjourn at 8:57 p.m. on a motion made by Rod Buckley and seconded by Lynn Christensen.