



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, MAY 25, 2022

Board members present; Chair Richard Conescu; Patrick Dwyer; Ben Niles; Lynn Christensen and Alternate Charles Mower.

Board members absent: Rod Buckley

Staff present: Robert Price, Planning & Zoning Administrator

1. Call to Order

Chair Richard Conescu called the meeting to order at 7:03 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. Rich Conescu seated Chuck Mower for Rod Buckley.

The Board took up Item 3 after Item 10.

- 4. Richard Kalika (petitioner)** - Appeal from an Administrative Decision regarding the Planning Board decision made on April 5, 2022 pertaining to the KTK Realty Trust, LLC site plan. The parcel is located at 20 Star Drive in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D, Lot 12.

Lynn Christensen recused herself from Item 4.

Petitioner Richard Kalika presented the petition.

Richard Conescu informed the petitioner that the Board only has four members present for this item. The Board asked the petitioner whether he wished to proceed with less than a full Board, or continue their hearing to the June 29, 2022 meeting. The petitioner opted to continue the hearing. Objection was raised by the subject property owner's Legal Counsel.

The Board voted 3-1-0 to deny the petitioner's request to continue this item to June 29, 2022 at 7:00 p.m. in the Matthew Thornton Room, on a motion made by Patrick Dwyer and seconded by Charles Mower. Richard Conescu voted in opposition.

Chairman Conescu advised the petitioner that the Zoning Board met with the Town's Legal Counsel and was advised that the appeal does not fall within the ZBA's jurisdiction under RSA 676:5. The RSA states that the ZBA can hear appeals regarding Planning Board decisions when that decision is based upon the terms of the zoning ordinance. Since that was not the case for the matter at hand, the ZBA has no jurisdiction. Chairman Conescu informed the petitioner that he cannot speak for the rest of the Board but given the advice of the Town's Legal Counsel, he would

personally not be voting in favor of granting the appeal. Mr. Kalika asked what his options are and Chairman Conescu advised him that he can proceed forward with his appeal and the Board would vote on it, or withdraw it.

The petitioner withdrew the Appeal of the Planning Board's decision.

Lynn Christensen rejoined the Board for the remainder of the meeting.

The Board took up Items 6 & 7 together before Item 5.

6. **Black Diamond Development, LLC. (petitioner) and 744 DW LLC (owner)** – Variances under Section 2.02.3.B of the Zoning Ordinance to permit an industrial warehouse use in the C-2 (General Commercial) District and Section 3.02 to allow for a rear setback of 5 feet whereas 40 feet is required. The parcel is located at 744 DW Highway in the C-2 (General Commercial) District. Tax Map 7E, Lot 35. Case # ZBA 2022-16.
7. **Black Diamond Development, LLC (petitioner) and MM Reality Trust (owner)** – Variance under Section 2.02.3.B of the Zoning Ordinance to permit an industrial warehouse use in the C-2 (General Commercial) District. The parcel is located at 734 DW Highway in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 7E, Lot 31. ZBA Case # 2022-17.

At the petitioner's request, the Board voted 5-0-0 to continue Items 6 & 7 to June 29, 2022 at 7:00 p.m. in the Matthew Thornton Room, on a motion made by Lynn Christensen and seconded by Patrick Dwyer.

5. **Deborah Atamanchuck (petitioner/owner)** – Variance under Section 2.02.3 of the Zoning Ordinance to permit mixed use (residential and bakery) in the C-2 (General Commercial) District. The parcel is located at 4 Mound Court in the C-2 (General Commercial), Aquifer Conservation, and Elderly Housing Overlay Districts. Tax Map 4D-4, Lot 2. Case # ZBA 2022-15.

Matthew Peterson, Keach-Nordstrom Associates, Inc. presented the petition to the Board. He began by providing the size and location of the property and explaining that it was purchased in 2013 by the current owner (Deborah Atamanchuck) who has been using the property as both residential and commercial since that time. The applicant learned from staff that a variance was never granted to allow the mixed use at the site so they are seeking the variance now to correct the issue.

Mr. Peterson 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, with conditions, on a motion made by Patrick Dwyer and seconded by Ben Niles. The following condition applies:

1. **The petitioner shall obtain Site Plan Approval from the Planning Board for the proposed garage & building addition.**

Board determined that the applicant's responses to the statutory criteria were sufficient, proved that each criterion was met, and adopted the responses as the Board's findings of fact:

1. ***It must not be contrary to the public interest because:***

Granting a dual use variance will not be contrary to the public interest. More specifically, the requested variance will not unduly conflict with the basic purposes of the relevant zoning provisions as it will neither alter the essential character of the area nor threaten public health, safety, or welfare. The existing neighborhood will remain largely unaffected by the granting of a dual use variance on the subject property. This property has operated for many years if not decades as a residence and a dual use property without proper permits. As such the current owners have been told that they are in violation of operating a dual use property without proper permits, as such we are here tonight to try and clean that up. As such with the length of time this property has operated as a dual use property the applicant believes this variance would not be contrary to the public interest.

2. The spirit of the ordinance is observed because:

As this board has seen over the last few years having a dual use property with the owner living on site has been consistent with the spirit of the ordinance along DW Highway. Also, the applicant believes the spirit of the ordinance is to ensure like neighborhoods and compatible uses near each other and in this case where they have operated in concert with each other for years we feel this variance is consistent with the spirit of the ordinance.

3. Granting the variance would do substantial justice because:

Substantial justice would be done by allowing the applicant to remain on site with their business and add onto the existing structure.

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

The surrounding properties are all commercial and by allowing a dual use on this property, which has existed for years and not effected values in the area we would add that the granting of this variance would not diminish the values of surrounding properties.

5. It must be shown that denial would result in 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:

First off as the board knows there are two ways to determine unnecessary hardship, existence of special conditions or circumstances that distinguish the subject property from others. This application has outlined the special conditions hardship case. As stated throughout this presentation the owners currently live on site and the denial of this variance would require them to find other housing at a time when housing is very hard to find at reasonable prices and a denial would not have any substantial relationship between the general purposes of the ordinance and the specific dual use violation being applied to this property.

b. The proposed use is a reasonable one:

The proposed use of a dual use property along D. W. Highway has been granted in the town and this one would be a reasonable use at this location due to tile existing structure on site and II ow it has been used for years if not decades.

- 8. Lanna Martin (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit the installation of an in-ground pool 6 feet from the side property line whereas 12 feet is required. The parcel is located at 21 Cassie Lane in the R-4 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 4C, Lot 47-5. Case # ZBA 2022-18.

Petitioner/owner Lanna Martin presented the petition to the Board. She explained that she is seeking a variance to allow a pool six feet from the property line whereas 12 feet is required. She read through the responses to the statutory criteria (outlined below).

Lynn Christensen asked if there are any shrubs between property lines and Ms. Martin explained that there is a white privacy fence on the side of the yard that will have the pool.

Mrs. Christensen asked if she has spoken to her neighbors about the variance and Ms. Martin indicated that she has and they have no concerns.

Patrick Dwyer asked about the pool house that is shown on the plans because it looks to be only 5 feet from the property line. Mr. Price clarified that the petitioner lives in a cluster development where the setbacks are only five feet for structures but pools have their own setback of 12 feet.

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 Lynn Christensen.

Board determined that the applicant's responses to the statutory criteria were sufficient, proved that each criterion was met, and adopted the responses as the Board's findings of fact:

1. It must not be contrary to the public interest because:

The pool will be located on our property and fully enclosed with a fence. Three of the four sides of the fence is currently planned to be white privacy fencing therefore, the pool's placement will not be contrary to the public interest.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance is to provide reasonable yard setbacks to abutting properties. We will meet the spirit of the ordinance because we will still have sufficient space between the water's edge and the property line. We will try to minimize the variance while also ensuring we do not disrupt the current hardscape.

3. Granting the variance would do substantial justice because:

We have an existing hardscape that we do not want to disturb. Granting this variance request will allow us to install the pool on our property without causing damage to the current patio.

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

The pool and associated backyard landscaping will not diminish the value of our property, if anything, it may increase the value of our property and in turn, increase the value of surrounding properties.

5. It must be shown that denial would result in unnecessary hardship:

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property:

The neighborhood is a clustered development which limits the amount of room that we have to work with as it relates to an in-ground pool installation. Additionally, we have an extensive hardscape already in the backyard that prevents us from easily installing the pool in a way that doesn't require a variance so that we don't disrupt the existing patio.

- 9. Mark Giorgini (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a deck 8 feet from the side property line whereas 15 feet is required. The parcel is located at 99 Front Street in the R-4 (Residential, by soils), Aquifer Conservation & Elderly Housing Overlay Districts, and Wellhead Protection Area. Tax Map 6E-1, Lot 6. ZBA Case# 2022-19.

Petitioner/owner Mark Giorgini presented the petition to the Board. He explained that he is seeking a variance to allow construction of a deck 8 feet from the side property line whereas 15 feet is required. He further explained that he is replacing an existing deck that was in place when he purchased the property in doing so, learned that building permits were acquired however the variance was not. Mr. Giorgini 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 Lynn Christensen and seconded by Ben Niles.

Board determined that the applicant's responses to the statutory criteria were sufficient, proved that each criterion was met, and adopted the responses as the Board's findings of fact:

1. It must not be contrary to the public interest because:

The new deck will almost exactly replace an old falling apart deck.

2. The spirit of the ordinance is observed because:

The footprint is the same as what was there previously.

3. Granting the variance would do substantial justice because:

It will remove an eyesore and make the property look better and be more functional.

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

A new deck looks better than an old falling apart one. The abutter didn't have a problem with the old deck.

5. It must be shown that denial would result in unnecessary hardship:

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how the property cannot be reasonably used in strict

conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property:

A variance was already approved for the garage and the deck follows the line of that. The grade of land at this location makes it mostly useless other than for a deck. The inside of the house is set up for the deck in the proposed location (i.e. sliding doors).

10. Michael & Shana Starr (petitioners) and 598 DW Highway LLC (owner) – Variances under Section 3.02 of the Zoning Ordinance to permit a multi-family residential density of one unit per 4,372 square feet whereas 40,000 square feet per unit is required (6 units whereas 0 are permitted), a multi-family residence on a lot with a depth of 125 feet whereas 200 feet is required, a front setback of 30 feet whereas 50 feet is required along DW Highway, and a Northerly and Southerly side setback of 40 feet each whereas 50 feet is required. The parcel is located at 598 DW Highway in the C-1 (Limited Commercial), Aquifer Conservation, Elderly Housing Overlay Districts and the Wellhead Protection Area. ZBA Case #2022-20.

Matthew Routhier, (TF Moran, Inc.) & Mike Starr (petitioner) presented the petition to the Board. Mr. Routhier began by recapping the variances being requested and began reviewing the responses to the statutory criteria (outlined below).

1. It must not be contrary to the public interest because:

The area/neighborhood consists of a mix of non-residential and residential uses. There are restaurants, single family homes, two-family homes, three-family homes, a gas station, convenience store with residential above and an assisted living facility within close proximity. Granting the variance would not be contrary to the public interest because the use is reasonable one which would complement the adjacent uses and benefit the neighborhood businesses.

2. The spirit of the ordinance is observed because:

The spirit and intent of the ordinance is to attract development where water and sewer are available, specifically multi-family residential. This particular lot was granted a special exception for a residential use under the zoning ordinance in 2021. The size and scale of the development as proposed, will maintain substantial separation from adjacent uses and maintain the main street appeal.

After reviewing the first two criteria, Mr. Mower interjected to state that has a lot of concerns with the size of the building being proposed on a half-acre lot. At this time, Mr. Price stated that staff feels that Mr. Mower should recuse himself from this discussion because prior to joining the Board, he spoke in opposition to a similar proposal for this parcel (for eight units instead of six). Mr. Mower declined to recuse himself as he feels that his public service record in town proves that he can be fair. He then went on to explain that this request is materially different from the last one however it is still too large for the lot in question. He went on to add that there are not any others parcels within Reeds Ferry similar to what is being proposed and it does not fit into the neighborhood.

Chairman Conescu asked why they are proposing six units and Mr. Starr responded that six units are needed to absorb the cost of the land, taxes and construction of the building. He stated that he could talk to the architect to see if he can bring the height down and added that he is trying to bring a nice building to the neighborhood.

Mr. Mower stated that he feels that the Zoning Board should not be in the business of approving a bunch of variances in order to shoe-horn an inappropriate project into a small lot because someone made a bad business deal.

3. Granting the variance would do substantial justice because:

Granting the variance will allow the development of lot which otherwise has been vacant. The use is consistent with the neighborhood and its combination of residential and non-residential uses. The proposed residential use is a reasonable one that will maintain the character of the neighborhood and maintain adequate separation to adjacent uses.

Chairman Conescu questioned that the proposal fits with the character of the neighborhood and asked if there are other housing developments with high density in that area. Mr. Routhier stated there are two and three family residential units nearby and the density would be similar in nature to what is being proposed. Mr. Mower disagreed with that statement and contended that there are no properties in Reeds Ferry that are similar in nature to what is being proposed.

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

Granting the variance will not diminish the values of the surrounding properties because the lot currently remains vacant. The proposed use will not generate the noise, traffic or other nuisances that might be associated with some commercial uses. The proposed development will maintain the character of the neighborhood and will complement the mix of architectural styles of the neighborhood, while maintaining adequate separation between abutting uses.

5. It must be shown that denial would result in 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:

No fair and substantial relationship exists between the purpose of the ordinance provisions and the specific application to the subject property because the provision of this section of the ordinance is to maintain residential and non-residential uses at a comparable scale, where the public may not necessarily be able to differentiate between a commercial use and a residential use. The lots size along with the availability of public water, sewer and gas lends itself to the development of multi-family residential at a smaller scale, similar to the buildings in the neighborhood. The lots location to services such as dining, convenience stores, gas stations and smaller retail/pharmacy uses compliment the use and its proposed construction on the lot.

b. The proposed use is a reasonable one:

The proposed use is a reasonable one as the ordinance specifically calls out that the Limited Commercial zone contains a mix of residential and non-residential uses. The lot is also serviced by public water and sewer which is a requirement for a multi-family development. Since this lot was granted a special exception for a residential use, the Zoning Board previously felt that a residential use would not have a negative impact on the abutting uses. The size and scale of the proposed multi-family development is not out of character with the existing uses in the area. The proposed development will maintain almost fifty percent of the lot as open space/yard area while maintaining substantial separation between the abutting uses and the property lines.

Jessica Dunlea (7 Wheeler Street) spoke in opposition of the project and expressed concerns about the added traffic and the loss privacy once the landscaping is cut back to make room for the building. Ms. Dunlea also states that she feels that the variances being requested are not minor and it feels like they are trying to jam a big building on a small piece of land and is worried that it could diminish her home's value.

Vice Chairman Dwyer asked if she would have concerns with a single family home being built on the lot and she replied not at all. She would like to see a single family home or small business built there but what is being proposed is too large for the lot.

Justin Dunlea (7 Wheeler Street) voiced similar concerns about the loss of privacy and added that loss of trees will also mean that they will lose all of the shade they have in their yard now. He also stated he is concerned with the increase in noise to the neighborhood, the decrease in property values and added traffic.

Phillippe Roy (6 Chapel Lane) asked if the variance is approved if he can build an eight story building because he has more land and expressed general frustration with the large buildings being built throughout town.

Mercedes Fleming Roy (6 Chapel Lane) spoke about her concerns that the size of the building being proposed does not fit in with the character of the neighborhood. She also spoke about the added traffic and the numerous accidents that already occur at the nearby intersection of Harris Avenue, Depot Street & Daniel Webster Highway.

David Bradish (5 Wheeler Street) expressed similar concerns about decreased property values and loss of privacy/shade but he also stated that he does not believe this request is reasonable because you should not need multiple variances to make a project work and if you do, then it is not reasonable. Mr. Bradish also conveyed his concerns regarding the trash dumpster that would be abutting his property and the pests that it could bring as well as the possibility of having 6 more families with dogs in the neighborhood and the added challenges of that.

Mr. Starr responded to the public comments by indicating that the building will not allow pets, decks are not being proposed and he plans on installing windows with built in blinds to protect the neighbor's privacy. He also stated that he has no plans on removing trees that do not interfere with the construction of the building and will be installing privacy fence around the property. He addressed the traffic concerns by sharing his belief that due to the amenities in the area, the residents will be walking more than driving. Mr. Routhier added that the traffic impact for a residential use is less than what it would be if a commercial building was constructed. He also stated that the proposed building height is within the zoning regulations and the trees that are being mentioned are taller than the building that is being proposed (36 feet) so they will offer some privacy.

Mr. Niles asked how tall the fence is going to be and Mr. Starr replied that he will put up a fence as tall as he can to help with privacy.

Mrs. Christensen stated that she does not feel that the spirit of the ordinance is being met because if the variance is granted there would not be adequate separation between properties. She also stated that the proposed building does not fit with the character of the neighborhood. Chairman Conescu agreed with Mrs. Christensen and added that he feels that the proposal would diminish the surrounding property values. Mr. Niles added that he feels that the cost of construction is not a justification for the density being proposed.

The Board voted 4-0-1 to deny all variances, on a motion made by Lynn Christensen and seconded by Ben Niles, because the petitioner failed to meet the legal threshold for any of the five criteria for a variance. Charles Mower abstained.

3. Annual Meeting – Election of Officers & Review of Rules of Procedure

The Board voted 5-0-0 to amend the Rules of Procedure as presented, on a motion made by Lynn Christensen and seconded by Patrick Dwyer.

The Board voted 5-0-0 to table the Election of Officers to the June 29, 2022 meeting to allow for a full Board to be present and participate in the discussion, on a motion made by Patrick Dwyer and seconded by Lynn Christensen.

11. Discussion/possible action regarding other items of concern.

12. Approval of Minutes – April 27, 2022.

The Board voted 4-0-1 to approve the minutes of April 27, 2022, as submitted, on a motion made by Lynn Christensen and seconded by Ben Niles. Richard Conescu abstained.

13. Adjourn

The Board voted 5-0-0 to adjourn at 8:35 p.m. on a motion made by Lynn Christensen and seconded by Patrick Dwyer.