



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## **MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MEETING MINUTES WEDNESDAY, MAY 26, 2021**

**Board members present:** Richard Conescu, Patrick Dwyer, Lynn Christensen (arrived at 7:07 pm), Ben Niles and Rod Buckley

**Board members absent:** Alternate Drew Duffy

**Staff present:** Assistant Planner Casey Wolfe

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

Richard Conescu called the meeting to order at 7:01 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. Chairman Conescu advised the petitioners that a fifth Board member will be joining the meeting late but any cases heard while there are only four voting members present will still require at least three affirmative votes to pass.

### **3. Mark & Rebecca Livingston (petitioner) and Rebecca Zannoni (owner) – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of an attached garage 17 feet from the front property line whereas 30 feet is required. The parcel is located at 31 Gail Road in the R-4 (Residential) District. Tax Map 2B, Lot 089. Case # ZBA 2021-09.**

Mark & Rebecca Livingston (petitioners/owners) were present to discuss the project with the Board. Rebecca Livingston advised the Board that they are requesting a variance to permit the construction of an attached garage 17 feet from the front property line whereas 30 feet is required. Ms. Livingston then read through the responses to the statutory criteria (outlined below).

*Lynn Christensen joined the meeting at 7:07 p.m.*

There was a brief discussion about placing the garage where the existing deck is located, but the home owners explained that it would be too costly to tear down the deck and replace it.

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.**

### ***Case 2021-09 Findings of Fact:***

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

The variance is not contrary to the public interest because the proposed garage does not conflict with the explicit or implicit purpose of the ordinance. It does not alter the essential character of the neighborhood, threaten public health safety or welfare or otherwise injure public rights.

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

The spirit of the ordinance is observed because the proposed garage will uphold the spirit of the ordinance and allows ample space for the town to access utilities.

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

Substantial justice is done because the benefit of the proposed garage does not outweigh the harm to the general public.

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

The values of the surrounding properties are not diminished. The proposed garage will raise the property value of the house, please see attached appraisal. The proposed garage will have a positive effect on the neighboring houses 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 property at 31 Gail Road is burdened by the zoning restrictions of a 30' set back from the road. The purpose of the zoning restriction in question is to allow the town or utility supplier to access the underground wires. The proposed plan for the garage allows ample space for the town or utility supplier to still access the underground wires (please see plans). To set the proposed garage back will cause unnecessary financial burden because a recently built deck (permit from town) will need to be cut into altering the deck, patio & pool in the back yard. Because of the special conditions of the property, the restrictions, as applied to the property, does not serve that purpose in a "fair and substantial" way.

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

The special conditions of the property, 31 Gail Road, mentioned above cause the proposed garage to be reasonable. The proposed garage does not alter the essential character of the neighborhood.

- 4. Andre Roy (petitioner/owner) –** Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a detached garage 11 feet from the side property line whereas 15 feet is required. The parcel is located at 16 Belmont Drive in the R-1 (Residential, by soils), Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 6D, Lot 257. Case # ZBA 2021-10.

Andre Roy (petitioner/owner) was present to review the project with the Board. He read through the responses to the statutory criteria (outlined below) and also shared a letter that he said to have received from a neighbor in response to the project. The Community Development Department does not have a copy of this letter and can therefore not validate who the letter is from or what was written.

Patrick Dwyer asked what was located behind the house on the drawing that was submitted and Mr. Roy explained that the area in question is where his leach field is located which is why he has no other place to construct the garage.

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 Rod Buckley.**

***Findings of Fact (Case #2021-10)***

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

Adding a garage will enhance the property and also make it more appealing.

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

Will still maintain front and rear setbacks according to code.

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

It will allow better use of the property and the property will match all other houses with garages.

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

Garage would add property values of the neighborhood and allow better use of the property.

***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:***

Cannot use side property because of setback requirements without a variance. Cannot place the garage anywhere else on the property because of septic and house placement.

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

It will allow for use of the property that will enhance the owner's ability to maximize use of the property.

- 5. Leonard Amadeo (petitioner) and Amadeo Revocable Trust (owner) –** Variance under Section 2.02.7.A.6 of the Zoning Ordinance to permit the construction of a detached garage 10 feet from the edge of a wetland whereas 40 feet is required. The parcel is located at 14 Acacia Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 4C, Lot 074. Case # ZBA 2021-11.

Robert M. Shepard (Smith-Weiss Shepard & Sony, P.C.) and Leonard Amadeo (petitioner) were present to discuss the project with the Board. Mr. Shepard began by providing the size of the lot and explaining that prior to seeking the requested variance Mr. Amadeo first had to relocate an existing drainage easement in the hopes of constructing a 12x24 square foot one stall garage on his property. Mr. Shepard went on to explain the garage will be used for the storage of personal property and parking of one vehicle. He added that the variance is needed because this is the only

location on that lot that the garage can be placed due to the wetlands and read through the responses to the statutory criteria. Mr. Amadeo provided some additional details about the drainage easement that is located at the property and was relocated with permission from the Town Council.

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 Ben Niles.**

***Findings of Fact (Case #2021-11)***

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

The Applicant and his wife have lived at 14 Acacia Street since 1984. The variance would allow the Applicant to add a 12' x 24', one (1) stall garage, which shall provide a secure place for the storage of personal property and the parking of a vehicle. The requested use by the Applicant is a permitted use in a residential zone.

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

The proposed construction of a 12' x 24' one (1) stall garage will replace a portable garage that has been in the same location for approximately ten (10) years. The construction of this garage is a permitted use in the residential zone. The location of the proposed 12' x 24' one (1) stall garage is ideal and will not result in the over-crowding of the lot.

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

The granting of the variance will do substantial justice because it will allow the Applicant to better use his property and to efficiently and safely store personal property and a vehicle. The Applicant went through a lengthy process with the Town of Merrimack to relocate the existing drainage easement to a location that would allow the Applicant to construct this one (1) stall garage. The wetland in question is actually a drainage easement as shown in the plan prepared by Meridian Land Services, Inc. and attached as Exhibit A. This is not an actual wetland, but it is a drainage easement and there is a culvert as the drainage easement meets Acacia Street.

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

The proposed one (1) stall garage will be consistent with the architecture of the Applicant's home and of surrounding properties. The addition of the proposed one (1) stall garage will enhance the value of the Applicant's property and it will not diminish the values of surrounding properties. The proposed one (1) stall garage will have the same shingles and siding as the house and the same garage door as the existing garage doors.

***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 lot owned by the Applicant is nearly two (2) acres in size. There is a wet area in the southern section of the lot.

There was a drainage easement that ran very close to the Applicant's home. The Applicant was able to move this drainage easement, with the consent of the Town of Merrimack, to a location further away from the Applicant's home. The drainage easement is not a wetland area, but it is a drainage easement without a drainage pipe located therein, except for where the drainage easement meets Acacia Street. The proposed structure, as shown on Exhibit B, will be ten (10) feet away from the drainage easement and it should be forty (40) feet away, according to the Zoning Ordinance. Without the presence of the drainage easement, the proposed construction of the one (1) stall garage would be permitted, without the need for a variance. The location of the drainage easement is the special condition of the property that distinguishes from other properties in the area. The specific application of the forty (40) foot setback from the wetlands area is not applicable in this case, since there is no actual wetland area in the drainage easement and the construction of the one (1) stall garage will have no impact on the wetland area to the south of the drainage easement.

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

The proposed use, which is the construction of a 12' x 24', one (1) stall garage is a reasonable use that is consistent with residential uses. The new, aesthetically pleasing garage, will replace a temporary garage that has been in that same location for approximately ten (10) years. The new structure will allow the Applicant to store personal property, such as outdoor furniture and tools and it will allow the Applicant to park one (1) vehicle in the structure. Furthermore, it will provide a workshop for the Applicant, in his retirement years.

*The Board took up items 9 and 10 prior to Items 6, 7 & 8. Additionally, the Board combined items 9 and 10 into one public hearing.*

- 9. Garret & Jillian Soucy (petitioner/owner)** - Appeal of Administrative Decision that determined pre-existing nonconforming lots of record are required to conform to current zoning requirements upon modification of the lot following a lot line adjustment even though such adjustments would result in no change to the lot area, depth, or frontage. The parcel is located at 12 Dodier Court in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7C, Lot 047-01. Case # ZBA 2021-15.

Alexander Buchanan represented the petitioners and requested that the Board hear two appeals of administrative decision first. He argued that the lot line adjustment that the home owners are seeking will not result in any changes to the lot area, depth, or frontage so there is no basis for a variance to begin with. After a brief discussion, Chairman Conescu agreed to hear the appeals first.

Lynn Christensen asked for clarification on how the town's legal counsel views the subject and Casey Wolfe confirmed that the town's legal counsel agrees with the staff's interpretation that a non-conforming lot cannot be altered without variances. Mr. Buchanan indicated that the lots will not be changing if the lot line adjustment is approved so he feels that the variances are not needed. Patrick Dwyer asked why the lot line adjustment is being requested and Mr. Buchanan responded that it is needed to correct an encroachment issue. The neighbors are going to swap land so that the encroachment issue is corrected without impacting the fence or the lot size. He also added that he feels that the town is adding unnecessary work for their residents by requiring variances on something that is not changing. Rod Buckley asked for clarification on how this is recorded so that when the house is sold the new lines are known to the home owners. Casey Wolfe advised that if the appeal or variances are granted, the home owners still need to get approval from the Planning Board to change the lot lines. If the lot line adjustment is approved, it gets recorded at the Registry of Deeds. She also reminded the Board that when an appeal of administrative decision is granted it sets a precedent for future similar cases regarding how the ordinance is interpreted. Chairman Conescu asked what precedent it sets and Casey explained

that it would need to be confirmed with the town's legal counsel but she believes it would mean that changes to non-conforming lots that are not are not resulting in any actual changes will not require variances. The discussion continued and Mr. Buchanan restated his point that the lot line adjustment is not changing anything about the property that the town is trying to protect with the ordinance (lot size, frontage, etc.) so he believes setting a new precedent would still protect the interests of the town. The Board members discussed how the change could impact future cases and Casey advised everyone that they also have the option of continuing the hearing to request feedback from the town's legal counsel.

There was no public comment.

**The Board voted 5-0-0 to deny the Appeals of Administrative Decision (and uphold the Community Development Staff's determination) on a motion made by Lynn Christensen and seconded by Rod Buckley.**

- 10. Ronald & Zelia Rosenfeld (petitioner) and Roseneiro Trust of 2014 (owner)** - Appeal of Administrative Decision that determined pre-existing nonconforming lots of record are required to conform to current zoning requirements upon modification of the lot following a lot line adjustment even though such adjustments would result in no change to the lot area, depth, or frontage. The parcel is located at 14 Dodier Court in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7C, Lot 047-02. Case # ZBA 2021-16.

**Agenda items 9 and 10 were combined into one public hearing, see comments under agenda item 9.**

*The Board combined items 6, 7 and 8 into one public hearing.*

- 6. Garrett & Jillian Soucy (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 87,268 square feet of lot area whereas 100,000 square feet is required. The parcel is located at 12 Dodier Court in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7C, Lot 047-01. Case # ZBA 2021-12.

Alexander Buchanan represented the petitioners and read the responses to the statutory criteria (outlined below).

There was no public comment.

**The Board voted 5-0-0 to grant the variance in Case #2021-12, with conditions, on a motion made by Patrick Dwyer and seconded by Rod Buckley.**

- 7. Garrett & Jillian Soucy (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 241.33 feet of frontage whereas 250 feet is required. The parcel is located at 12 Dodier Court in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7C, Lot 047-01. Case # ZBA 2021-13.

Alexander Buchanan represented the petitioners and read the responses to the statutory criteria (outlined below).

There was no public comment.

**The Board voted 5-0-0 to grant the variance in Case #2021-13, with conditions, on a motion made by Patrick Dwyer and seconded by Rod Buckley.**

8. **Ronald & Zelia Rosenfeld (petitioner) and Roseneiro Trust of 2014 (owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit a lot (following a lot line adjustment) with 200 feet of frontage whereas 250 feet is required. The parcel is located at 14 Dodier Court in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 7C, Lot 047-02. Case # ZBA 2021-14

Alexander Buchanan represented the petitioners and read the responses to the statutory criteria (outlined below).

There was no public comment.

**The Board voted 5-0-0 to grant the variance in Case #2021-14, with conditions, on a motion made by Patrick Dwyer and seconded by Lynn Christensen.**

***Findings of Fact (Case #2021-12-14)***

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

The requirement that the variance not be contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance and the two have for years been treated together by the State Supreme Court. Because the provisions of a zoning ordinance represent a declaration of public interest, any variance would be contrary thereto to some degree. Consequently, the Supreme Court has instructed that to determine whether a requested variance is not contrary to the public interest and is consistent with the spirit of the ordinance, the ZBA must determine whether granting the variance would "unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives" The State Supreme Court has recognized two tests for determining whether granting a variance would violate an ordinance's basic zoning objectives. One is to determine whether the variance would "alter the essential character of the neighborhood." The other is to determine whether granting the variance would "threaten the public health, safety or welfare".

In this case, granting the variance would not unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's "basic zoning objectives" because granting the variance would neither "alter the essential character of the neighborhood" nor "threaten the public health, safety or welfare" and granting the variance would observe the spirit of the ordinance. Since each of the non-conformities at issue have been in place for over 35 years, it has been shown that neither has, nor likely would, change the neighborhood in any way, or threaten any other public concern as defined by the Supreme Court. This application clearly meets the requirements of this combined test considering the benign effect of granting the variance.

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

See #1.

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

Granting the variance would do substantial justice. "Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice", *Malachy Glen Assoc. v. Town of Chichester*, 155 NH 102, 109 (2007).

Denial of the requested relief would cause the applicants to suffer a loss from as little as the diminution in value of each of the lots by the existence of the encroachment, to as much as the full value of the properties should the continued non conformities prevent the continued use of each parcel as a single family home.

While the amount of said loss due to the continued existence of the encroachment is difficult to measure, it does exist. On the other hand, denial of the variances will result in no appreciable gain to the general public. Granting the variance will not increase the density of development in the district, negatively impact the character of the neighborhood, increase undue health or safety issues or otherwise negatively impact the general public. Accordingly, there is no gain to the general public from denial of the variance.

Since there is loss to the applicants and no gain to the public the application passes this test.

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

Granting the variance will not diminish the value of surrounding properties. In order for the granting of the variance to diminish the value of the surrounding properties, there must be some physical change to the properties brought about by the non-conforming aspects of the subject lots. Since they have existed in their current conformation for over 35 years without complaint, it is extremely doubtful that the approval of the variance would suddenly create a reason that surrounding properties are worth less.

Further, granting the variance request will not create any observable change to either lot that would place a neighboring property at risk to a reduction in value because of a condition affecting such properties as a nuisance or physical injury to the property. The physical tangible and observable attributes of the properties will be the same before and after the variance are granted.

Again, because nothing changes on the properties by the granting of the variance there can be no effect on surrounding properties. To have an effect on something there must be a cause. There is no cause here, because there is no change to the physical lots, so the application meets this requirement.

***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:***

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship to each Applicant.

- A. Special conditions of the lots distinguish them from other properties in the area. The special conditions of these lots are that they have varying degrees of non-conformity created by the Town changing the Zoning Ordinance requirements necessitating these requests to otherwise legally use their properties. Owing to these special conditions of the lots that distinguish them from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - I. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of the provision to the subject lots. As the ordinance itself declares, the purpose of the Residential Land Use District is as follows:
    - A. Purpose: The regulations of the residential land use, soils limitation districts are intended to guide the uses of those areas or tracts of land for residential purposes relative to their capabilities and limitations and to discourage such uses which would:



1. Contribute to pollution of aquifers, surface and ground water, and their recharge through the introduction of sewage or other contaminants.
2. Cause the misuse of sensitive lands within the community.
3. Give cause for unnecessary or excessive expenses to the Town to provide and/or maintain essential services and utilities which arise from inharmonious use of such lands.

The subject lots are being used for allowed residential purposes and no change in their use is contemplated by the variance. Thus, the use of the lots after the variance will be in compliance with the general purpose of the residential use. Given the longstanding existence of the lots, it is extremely doubtful that the granting of the variances would suddenly result in the Jots contributing "to pollution of aquifers, surface and ground water", prevent "their recharge", cause "misuse of sensitive lands" or create "unnecessary or excessive expenses to the Town ....".

- i. The proposed use is a reasonable one. The proposed use is a permitted use in the District and cannot be any more reasonable as a permitted use.

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

- B. An unnecessary hardship exists because the aforesaid special conditions of the property prevent the property from being reasonably used in strict conformity with the ordinance. These lots are incapable of being modified to increase frontage or acreage. Since neither lot has sufficient frontage, neither lot can give up frontage to the other and still have both be compliant. Further, there is insufficient space on Lot 7C-47-2 to accommodate an increase of 16,000 +/-square feet to bring Lot 7C-47-1 into compliance. Accordingly, the variances are required to enable the owners the reasonable use of their lots. Applying the facts and circumstances of this lot line application to this bifurcated requirement results in the conclusion that all three determinations should be made in applicant's favor.

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

### **a) Request for Re-Hearing regarding case # ZBA 2021-05, Merrimack Parcel A, LLC.**

Chairman Conescu advised the Board that no new material was submitted but the appellant's argument is that all of owners of the parcel were not properly identified in the notice. The Board discussed the details of the original hearing to refresh everyone on what the project was requesting. Lynn Christensen stated that she feels there is no cause for a re-hearing because the location of the project and the owners were cited in the original notice.

**The Board voted 5-0-0 to deny the request for Re-Hearing on motion made by Patrick Dwyer and seconded by Rod Buckley.**

Chairman Conescu asked if they could get feedback from the town's legal counsel about the ramifications of approving an appeal whenever they receive an appeal of administrative approval. Patrick Dwyer added that he thinks it would be helpful to have the background from legal counsel anytime they are consulted on a case. Casey advised the board she will speak with Community Development Director Tim Thompson about the Board's request.

## **12. Approval of Minutes – April 28, 2021**

**The minutes of April 28, 2021 were approved as submitted, by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Rod Buckley.**

### **13. Adjourn**

**The meeting was adjourned at 8:26 p.m. by a vote of 5-0-0, on a motion made by Ben Niles and seconded by Rod Buckley.**