



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, JANUARY 29, 2014

Members present: Patrick Dwyer, Phil Straight, Tony Pellegrino, Kevin Shea, and Alternates Leonard Worster and Richard Conescu.

Members absent: Fran L'Heureux and Alternate Nathan Barry.

Staff present: Assistant Planner Donna Pohli and Recording Secretary Zina Jordan.

1. Call to Order

Patrick Dwyer called the meeting to order at 7:00 p.m. and designated Richard Conescu to sit for Fran L'Heureux.

2. Roll Call

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

- 3. Able Ebenezer Brewing Co. (petitioner) and Columbia Circle, LLC. (owner) –** Special Exception under Section 2.02.4(E)(1) of the Zoning Ordinance to permit an accessory use of on-site retail sales of company products located at 31 Columbia Circle in the I-1 (Industrial) & in the Aquifer Conservation Districts. Tax Map 4D-3, Lot 007. Case # 2014-01.

Steve Keach, Keach Nordstrom-Associates, Inc., said the property has been empty for 1½ years. A brewery is a permitted use in the Industrial District. On January 7, 2014, the Planning Board granted final conditional approval for a change of use from an industrial wholesale/distribution facility to a craft brewery. Retail sales would be an accessory use.

Carl Soderberg, Able Ebenezer Brewing Company, will open a nano-brewery that makes craft beers. Beer production and distribution are the facility's primary use.

Katherine Basso, Project Engineer, Keach Nordstrom-Associates, Inc., said the .68-acre site has 596 square feet of office space and 4,715 square feet of warehouse space and is surrounded by other commercial and industrial development. The only exterior modification will be re-striping the parking lot. A tasting room is an accessory use.

Steve Keach read the points of law into the record.

In answer to Board questions, Carl Soderberg said operating hours would be noon-8:00 or 9:00 p.m., Thursday-Saturday to start and to allow the market to dictate in the future.

Peak hours would be during the evening rush hour when people are on their way home. Sales would be from the sample/tasting room. Retail and production areas would be separate according to federal law. There would be more hours for brewery operations and delivery than for public hours. Anheuser-Busch has no take-home products, which is why it runs tours all day. Able Ebenezer will sell product. The bulk of its customers will come after work. Carl Soderberg is working with the Wastewater Division so that waste/chemical disposal would be the same as at Anheuser-Busch. Only two chemicals are used and they are non-caustic. Most grain is converted to beer; waste grain is given to a farm in exchange for wheat.

There was no public comment.

Phil Straight said this is a proper use in the I-1 (Industrial) District.

The Board voted 5-0-0 to grant the Special Exception, on a motion made by Kevin Shea and seconded by Tony Pellegrino.

1. The specific site is an appropriate location for the proposed use in terms of overall community development because the principal use involves light manufacturing. The Columbia Circle neighborhood contains a variety of industrial trade, wholesale and service businesses that are compatible with the planned light manufacturing facility in terms of use and intensity. Several, including the previous owner, have operated showrooms and/or engaged in retail sales to the public;
 2. The proposed use, as developed, will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area because Columbic Circle business park has traditionally housed a wide variety of industrial trade, wholesale/distribution, light manufacturing and service businesses of a modest scale. The Abel Ebenezer Brewing Company will be fully contained within a building. It intends to maintain a clean and professional outward appearance. The name on the sign will be the only change in appearance. The Brewery will be an asset to the Columbia Circle business park neighborhood;
 3. There will be no nuisance or serious hazard to vehicles or pedestrian because since the operation is anticipated to generate very low volumes of vehicular traffic and essentially no pedestrian traffic. Initially the brewery intends to operate only a single van-sized vehicle (for product deliveries) from the premises. The overall volume of site-generated traffic will be slight and the truck traffic even lighter. There will be 3-6 employees. The use and intensity is less than that of the former owner;
 4. An adequate parking area is provided for the motor vehicles on the premises. A total of 10 striped/paved parking spaces will be provided on site. There is sufficient existing paved area on the premises to park up to an additional 15-16 passenger-sized vehicles comfortably. The need for additional parking is unlikely given the brewery's small size, but overflow space is available.
- 4. Old Blood Properties, LLC. (petitioner/owner) – Variance under Section 3.08(2) of the Zoning Ordinance to allow a cluster subdivision in the R-1 (Residential) District where cluster developments are not permitted and additionally requested that six cluster lots in excess of the number that would be allowed based on the conventional**

subdivision requirements in the R-1 (Residential) District. The parcels are located at a 196-acre tract off Old Blood Road. Tax Map 5B, Lots 2, 3, 3-1, 5, 6, 7, 8, 9 & 023. Case # 2014-02.

Attorney Greg Michael, Bernstein Shur, reminded the Zoning Board of Adjustment (ZBA) that, on August 28, 2009, it granted a variance for a cluster subdivision and on August 25, 2011, it granted a variance for six additional cluster lots. There have been no changes and the applicant wants to renew both expired variances. The lots between the proposed road and Merrymeeting Drive were moved away. Drainage will not increase, change, or impact abutting properties. On August 28, 2009, the applicant demonstrated that he could get more than 100+ lots in a cluster zone, but proposed a cluster with the same number of lots as he could get in a grid plan (66). This plan has 127 acres of open space and 16 unused acres. It abuts Town conservation land, thus creating more open space. The Planning Board is favorably disposed to a cluster subdivision in this area. On August 25, 2011, the sewer line on Madeline Bennett Road was discussed. It has significant problems; neither the Town nor the State ever approved it. The applicant offered to fix the sewer line at a cost of \$400,000-\$650,000 in exchange for the six extra lots. The cost was determined by a Town study.

Attorney Michael read the points of law into the record.

Phil Straight noted that, in 2009, the Merrimack Conservation Commission (MCC) agreed that a cluster would have less environmental impact than a grid.

Public comment

Patrick Dwyer read an e-mail from Attorney John Weaver, McLane, Graf, Raulerson & Middleton Professional Association, representing Thomas Feller, 27 Merrymeeting Drive. Remediation and mitigation measures have been necessary because a significant amount of stormwater has run off into the Feller backyard. Owners of other residences abutting the Old Blood property have experienced the same problem. The proposed cluster development threatens to undo the mitigation efforts. The new road and residences are likely to increase the peak discharge, volume, timing, velocity, and base flow of the runoff of water, fertilizers, oils, road salt and agents from the Old Blood property to the abutting properties on Merrymeeting Drive. Thomas Feller proposed the following condition of ZBA approval: "That the Planning Board shall attach the necessary conditions to ensure that there will be no increase of the peak discharge, volume, timing, velocity, or base flow of the runoff of water, fertilizers, oils, road salt, and other agents from the subject property to the properties identified as Town of Merrimack Tax Map 5B, Lots: 96-9; 96-10; 96-11; 96-12; 96-13; 96-14; and 96-15."

Attorney Weaver also appeared in person before the ZBA. Patrick Dwyer stated that this is an issue that should be brought before the Planning Board. Phil Straight said staff would give the e-mail to the Planning Board. The ZBA issue is approval of a cluster subdivision. Attorney Weaver noted that there is precedent: the ZBA has placed conditions of approval in the past. Richard Conescu stated that the alternative if a cluster subdivision were denied would be a grid subdivision that would do more harm to the abutting properties. Attorney Weaver agreed that the issue would be raised when the Planning Board reviews the site plan, but wanted the ZBA to highlight the issue with them. Phil Straight repeated that it is not the ZBA's purview/legal authority to ask the

Planning Board to make a condition. Attorney Weaver said the Planning Board could say that a change in the plans requires a new ZBA review because the use leads to runoff. He wanted the ZBA to say that it expects this use to have no runoff.

Barbara Chase, 23 Merrymeeting Drive, echoed Attorney Weaver. She argued that the values of surrounding properties would be diminished (Criterion #1) because of traffic, the proximity to homes and a road or easement abutting some properties. She asked whether there are data to prove that property values would not be diminished. She also objected that it is not a hardship to build a less efficient development (Criterion #5). The proposal will have a terrible affect on the neighborhood. Peer review is no guarantee (e.g., water issues on Madeline Bennett Drive when the Middle School was built). There will be 70 homes behind hers and a road behind her yard. Barbara Chase cannot trust that everything will be okay.

Patrick Dwyer said the ZBA has no data and that the applicant would correct the sewer issue and will not add to the problem. The Town will assess property values. Barbara Chase asked how the ZBA could grant a variance if it does not know if there is a change in property values. Phil Straight explained that general accepted practice is that new construction tends to increase values. Barbara Chase responded that a road on the property line decreases the value of her home. Patrick Dwyer said that new technology and best practices have possibly improved since the Chase home was built 30 years ago. More houses in Merrimack may lower taxes. This is a renewal of a variance that was approved twice before. The Master Plan is open to clusters. Kevin Shea said a road would probably diminish property values whether it is in a grid or a cluster development. The ZBA can do nothing about where a road goes. The cluster is the only issue. Barbara Chase said homes on top of the hill are bad for her home. She wants a baseline if there is a problem later.

Margaret Pickett, 29 Merrymeeting Drive, opposes connecting the development to Madeline Bennett Road, which already has a lot of traffic. The intersection will be worse. Children's safety is a major concern. There is no need for a second way out of Madeline Bennett Road. The sewer line from the Middle School is fully operational. Connecting it to a new development will create new issues. If the development cannot be connected to the sewer, the applicant will have to build a grid and install a septic system, which means he can build fewer homes. The developer wants a sewer in order to build more homes.

Kevin Shea said the issue is whether granting the variance would protect homes on Madeline Bennett Drive or make matters worse. Richard Conescu said property values and runoff are debatable, but they are outside the ZBA's jurisdiction.

The Board voted 4-1-0 to grant both variances, with the following conditions, on a motion made by Phil Straight and seconded by Richard Conescu. Patrick Dwyer voted in the negative.

1. That the email read into record from Attorney Weaver on behalf of Mr. Feller dated January 28, 2014, be given to the Planning Board upon their discussion of the subject project;
2. That the maximum number of lots does not exceed by six lots that number that would be allowed based upon the R-1 District conventional subdivision requirements (Determined by the Planning Board on February 7, 2012 to be 66

lots based on a yield plan of lots with a minimum of 100,000 sq. ft. lot size/250 ft. of frontage);

3. The applicant shall be required to connect to (and correct current design deficiencies of) the sewer line at the Middle School, as deemed appropriate by the Planning Board.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because no public or private rights will be affected by allowing a cluster subdivision with six additional lots. A cluster subdivision allows for preservation of greater open space, which is consistent with the Master Plan. A cluster subdivision with six additional lots would neither negatively impact the essential character of the Old Blood Road development and surrounding neighborhood nor threaten the public health, safety or welfare. The Board previously found that both requested variances were not contrary to the public interest;
2. The spirit of the ordinance is observed because the cluster subdivision with six additional cluster lots creates a more appealing neighborhood than the conventional residential development. Because it abuts Town conservation land, the development will preserve over 100 acres and will blend better with the essential character of the neighborhood. The Board previously found that both requested variances were not contrary to the public interest;
3. Granting this variance would do substantial justice because they will allow the property to be developed in a way that strikes the best balance of community needs, conservation of the natural environment, and accessibility, access and safety for the homeowners and improvements to municipal infrastructure. Covenants protect green space and abutting lands. Denying the variance will result in no appreciable gain to the general public, while causing a substantial loss to the applicant by preventing the best use of his property. The Board previously found that both requested variances were not contrary to the public interest;
4. The values of the surrounding properties would not be diminished because the subdivision of 196 acres will have no measurable impact to the surrounding area. There will be lesser impacts to neighboring properties due to the preservation of substantial open space. The six additional lots will have no appreciable effect on neighboring areas and will not diminish property values. The cluster development will have the same number of units as in a grid plan;
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. The property is unique because it is located in that portion of the R-1 District that does not allow cluster development. It also abuts Town conservation land. A cluster subdivision allows the most efficient and practical development of the property. If the property were located in a permitted cluster zone, a greater

number of cluster lots would be allowed than the requested six additional lots. Strict application of the Ordinance would result in a conventional subdivision with a greater disturbance and impact on the property and the surrounding area. The Board previously found that both requested variances were not contrary to the public interest;

- 2) The proposed use is a reasonable one because residential uses are permitted in the R-1 District. The proposed cluster development would not injure any public or private rights.

5. The Stephanie Tomasian Revocable Trust, Lynda & Warren Tomasian, Trustees (petitioners/owners) – Variance under Section 3.02 of the Zoning Ordinance to allow a proposed lot with 75,800 s.f. of contiguous non-wetland uplands where 100,000 s.f. is required. The parcel is located at 5 Tomasian Drive in the R-1 (Residential) & Aquifer Conservation Districts. Tax Map 4B, Lot 012-02. Case #2014-03.

Attorney Greg Michael, Bernstein Shur, explained that, on September 25, 2013, the ZBA granted a variance to permit a lot with 76,325 square feet of contiguous non-wetland area whereas 100,000 square feet are required and with approximately 235' of lot depth whereas 300' are required. The Planning Board granted conditional approval, but subsequently an error in where the stake was set on one boundary was found, reducing the lot by 525 square feet. Because the original variance specifically called for 76,325 square feet of contiguous upland area, the applicant must obtain a new variance for the project to proceed to final approval with the Planning Board.

There was no public comment.

Attorney Michael said that nothing is different except for a small reduction in square footage. There are no wetlands. The lot is comprised entirely of uplands. Size and depth are the only issue. Everything fits on the lot.

Attorney Michael read the points of law into the record.

The Board voted 5-0-0 to grant the variance, on a motion made by Kevin Shea and seconded by Phil Straight.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed lot is comprised entirely of uplands with no wet areas and has moderately well draining soils and more than adequate area and depth to support a single-family septic system. There will be no adverse impact on the health, safety or welfare of the public;
2. The spirit of the Ordinance is observed because the proposed lot has adequate uplands to support a single-family septic system. There would be no change to the character of the neighborhood and there will be no adverse impact on the health, safety or welfare of the public;
3. Granting this variance would do substantial justice because denial would cause a substantial loss to the applicants by preventing a reasonable subdivision of their property with no appreciable gain to the public;

4. The values of the surrounding properties would not be diminished because the essential character of the neighborhood would not be substantially altered;
5. A. Owing to the 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 special condition of the proposed lot. Although it contains moderately well draining soils, they are designated as “severe” soils under the Ordinance, which applies the most stringent lot area and depth requirements. If the soils were appropriately considered moderate, the proposed lot would nearly satisfy the lot area requirement (80,000 square feet for moderate soils) and would exceed the lot depth requirement (200’ for moderate soils);
 - 2) The proposed use is a reasonable one because it is a permitted use and the lot has sufficient contiguous non-wetland areas to support a single-family septic system.

6. Discussion/possible action regarding other items of concern

None.

7. Approval of Minutes – December 18, 2013

The minutes of December 18, 2013, were approved, by a vote of 4-0-1, on a motion made by Tony Pellegrino and seconded by Phil Straight. Kevin Shea abstained.

8. Adjourn

The meeting adjourned at 8:25 p.m., by a vote of 5-0-0, on a motion made by Kevin Shea and seconded by Tony Pellegrino.