



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, FEBRUARY 26, 2014

Members present: Fran L'Heureux, Patrick Dwyer, Phil Straight, Kevin Shea and Alternates Nathan Barry and Richard Conescu.

Members absent: Tony Pellegrino and Alternate Leonard Worster.

Staff present: Planning and Zoning Administrator Nancy Larson and Recording Secretary Zina Jordan.

1. Call to Order

Fran L'Heureux called the meeting to order at 7:00 p.m. and designated Nathan Barry to sit for Tony Pellegrino.

2. Roll Call

Kevin Shea led the Pledge of Allegiance and Phil Straight read the preamble and swore in members of the public who would be testifying.

Nancy Larson announced that March 5, 2014, would be her last day in Merrimack. She has accepted the position of City Planner for the City of Concord. Fran L'Heureux wished her good luck, stating that Concord is getting a "gem". She and the Board thanked Nancy Larson for helping the ZBA in every way. Attorney Greg Michael, Bernstein Shur; Bill Wilkes, KJB Ventures; Steve Keach, Keach-Nordstrom Associates, Inc.; Robert Baskerville, Bedford Design Consultants; and Cathy Champagne, Jutras Signs, Inc., added their accolades and congratulations.

3. G. Nasr Realty LLC. (petitioner/owner) – Equitable Waiver of Dimensional Requirements under Section 3.02 of the Zoning Ordinance to allow an encroachment within the side yard to remain approximately 19.52 feet from the side property line of D.W. Highway whereas 20 feet is required. The parcel is located at 715 D.W. Highway within the C-2 (General Commercial) and the Planned Residential Overlay Districts. Tax Map 7E, Lot 054-1. Case #2014-04.

Steve Keach, Keach-Nordstrom Associates, Inc., said Jack Nasr purchased the EZ Stop Gas Station in 2011. When Steve Keach designed an amended site plan for a donut shop drive-thru that was approved by the Planning Board on February 18, 2014, he discovered that the utility room on the southwest corner of the existing building is approximately 0.48' over the 20' side yard setback requirement or 19.52' from the boundary, whereas 20' is required. No one knows how this happened. The building has been occupied since 1996, when the Town did not require certified foundation or plot plans for commercial buildings.

Steve Keach read the points of law into the record.

There was no public comment.

The Board voted 5-0-0 to grant the Equitable Waiver, on a motion made by Patrick Dwyer and seconded by Kevin Shea.

Findings of Fact

1. *Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the town:* The subject building was constructed in 1996 and received a certificate of occupancy the same year. In 2013 a survey of the premises revealed the building to be situated 19.52' from the southerly side lot line where 20' is required. It was the owner rather than the town who discovered the encroachment.
2. *Explain how the physical or dimensional violation does not constitute a public or private nuisance nor diminish the value of other property in the area nor interfere with nor adversely affect any present or permissible future uses of any such property:* Since the extent of the encroachment on the side yard is minimal (0.48'), and only at a single building corner, it is, and since the time of 1996 construction has been, unnoticeable. Land situated immediately to the south is occupied only by high-tension power lines.
3. *Explain how the cost of correction far outweighs any public benefit to be gained:* The utility room appendage and slab rest on a concrete foundation, which would necessitate significant demolition and replacement at significant cost to correct a 0.48' encroachment that has existed unnoticed since 1996. In this case, correction would not benefit the public in any way, so any cost of correction would outweigh the same.
4. **Jutras Signs, Inc. and Naticook Automotive, LLC.** – Variance under Section 17.10(3)(B) of the Zoning Ordinance to allow a new sign to be installed in place of an existing sign approximately 3 feet from the right-of-way whereas 20 feet is required. The parcel is located at 717 Milford Road within the C-2 (General Commercial) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 2B, Lot 031. Case # 2014-05.

Robert Baskerville, Bedford Design Consultants, said the property is unusual. It has odd shaped property lines and was on the old Route 101A that was still owned by NH Department of Transportation (DOT). The owner could acquire only one of DOT's unbuildable sliver pieces in 2000. The property line is not in a normal relation to the road, so although the sign is 5' from the property line, it is 50', 63' and 87' from pavement at various points. Moving the sign 15' would put it in the parking lot, over the underground leaching field and utilities areas.

Cathy Champagne, Jutras Signs, Inc., read the points of law into the record.

#2 Spirit of the Ordinance: Phil Straight asked whether a one-post sign was considered. Cathy Champagne explained that the Volkswagon dealership program determines the sign, which has two posts. Richard Conescu noted that some signs in the vicinity are close to the road. This one will be behind them. The request is logical. Cathy Champagne added that parking lot drainage is another factor. Kevin Shea said the sign is Volkswagen's branding.

There was no public comment.

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 replacing the sign does not represent a substantial change and will not alter the essential character of the locality and will not in any way threaten the public health, safety or welfare. The public interest is served when a venue displays clear and distinct wayfinding devices in order to direct traffic in

a safe and efficient manner. The proposed sign plan is an integral and necessary element to the venue in order for the public to identify, locate and arrive at the destination. The venue itself is not readily or easily visible to traffic driving past the site. This sign plan maintains the landmark that directs visitors. The new sign will comply with setback regulations. It will be on the same location but with the Volkswagen look;

2. The spirit of the ordinance is observed because the “one size fits all” rule for sign sizes is not equitable to buildings with setbacks that significantly exceed the norm or where the frontage is not visible to the traveling public. The State of NH right-of-way easement is significantly greater than the norm. The Town’s Ordinance does not discriminate between a property with a 10’ easement and this property with a 40’+ right-of-way easement. The spirit of the Ordinance will be observed because this sign plan does not change the existing condition; it merely maintains it for the traffic driving past this venue. The sign does not and will not adversely affect the essential character of the locality. It will not be obvious that the sign is so close to the property line;
3. Granting this variance would do substantial justice because this is a distinct and unique site that requires specific considerations to sustain viability. The unique feature in this case is the upward slope of the land combined with the 40’+ easement that pushes the sign back to the edge of the parking lot. The existing sign helps the traveling public fairly and accurately locate and identify the use at this venue. Requiring the sign to be set back 20’ from the property line will cause a significant loss to the business and provides no gain to the public;
4. The values of the surrounding properties would not be diminished because they and the Town will readily locate this venue. The values of the surrounding properties may become more desirable if the variance is granted;
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 due to the 40’+ right-of-way easement and the upward slope of the land, a sign placed 20’ from the property line would not be visible from the road, which makes this situation unlike other parcels in the area. The parcel is large and the building is set back from the road enough that building signs alone will not be an adequate option;
 - 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 its uniqueness. Property values and the overall aesthetics of the area will not be adversely affected;
 - 2) The proposed use is a reasonable one because the sign will continue to inform the public and promote the public safety without impacting residents.
5. **KJB Ventures, LLC** – Variance under Section 3.02 of the Zoning Ordinance to allow the subdivision of one lot into two lots for permitted retail and personal service uses, where one lot will contain 98’ of lot depth whereas 125’ is required and allow for construction of a structure with a rear setback of 24’ whereas 40’ is required. Additionally, to permit a lot with frontage on a private street whereas 125’ of frontage on a Class V or better road is required. The parcel is located at 4 Dobson Way in the C-2 (General Commercial) and Aquifer Conservation District. Tax Map 3D, Lot 003-3. Case # 2014-06.

Attorney Greg Michael, Bernstein Shur, said the lot is in part of the Shaw’s Plaza area where retail and medical uses are permitted and where two buildings could be erected on one lot. Satisfying potential users is difficult and complicated. It is proposed to split the lot in two as the most practical and effective means for financing purposes. Camp Sargent Road frontage would be used for Lot 3-1, where the size and frontage conform. However the rear setback issue has

24' rather than the required 40'. Because of cross-easements, the setback is on paper only, making it a technical violation. Lot 3-2 frontage is on Dobson Way, which is not a Town-accepted road. It is part of the driveway access to the development. 125' of frontage on a Class V Town road are needed. Depth is measured from frontage. There are 98' whereas 125' are required. The discrepancy is not noticeable.

RSA 672:14 defines a subdivision. The owner cannot mortgage part of a parcel or draw a line to divide or lease a building without triggering a subdivision if there is a foreclosure on one part. By subdividing the lot, he is trying to avoid erecting two buildings on a single parcel. Attorney Michael cited similar subdivisions of land that the ZBA granted in the past. Allowing two buildings would enhance the area to be developed and allow the land to be utilized consistent with the area.

Attorney Chris Aslin, Bernstein Shur, read the points of law into the record.

#2 Spirit of the Ordinance: Richard Conescu asked for a definition of "adequate" access, which Attorney Michael said means there are no deficiencies.

#3 Substantial justice: Patrick Dwyer said this is opinion rather than fact. Attorney Michael stated that substantial justice is what is fair for the owner vs. benefit to the public; it is not about what someone else might think. If the variance is denied, the owner may lose good tenants and good commercial industry and have difficulty obtaining financing. The petitioner does not want big empty buildings or to build on speculation. There are too many vacant buildings in Merrimack. The owner cannot lease a building unless the property is subdivided. Denial would significantly impact the owner without benefit to the Town. The proposal expands the pool of prospective tenants who cannot afford to build. Allowing flexibility would attract better tenants. It has been done in the past.

Richard Conescu asked for an explanation of the financing issue. Attorney Michael said that, to build one building, the owner must mortgage or lease the land. A long-term lease must be on separate land. If there were one building, there would be an encumbrance if one party wants to lease and the other wants to build.

Richard Conescu asked how this differs from past ZBA actions. Citing CVS at Connell Plaza, which was subdivided and leased, Attorney Michael said this concept is no different. The land must be subdivided to make the project work.

#4 Values of surrounding properties: Patrick Dwyer opined that determining values is subjective. Attorney Michael said the project is completely unrelated to the mobile home park and there would be no violation of any setbacks there. Patrick Dwyer said the plan would increase traffic and take away more open space. Kevin Shea stated that the point of law refers to diminished value between the subdivided lot vs. the non-subdivided lot rather than the diminished value of the empty lot vs. the building.

#5. Hardship: Patrick Dwyer saw none.

There was no public comment.

The Board voted 4-1-0 to grant the variance to allow the subdivision of one lot into two lots for permitted retail and personal service uses, where one lot will contain 98' of lot depth whereas 125' is required, with the condition that the applicant shall obtain subdivision and site plan approval from the Planning Board for the proposed development, on a motion made by Kevin Shea and seconded by Nathan Barry. Patrick Dwyer voted in the negative.

The Board voted 4-1-0 to grant the variance to allow the subdivision of one lot into two lots for permitted retail and personal service uses and allow for construction of a structure with a rear setback of 24' whereas 40' is required, with the condition that the applicant

shall obtain subdivision and site plan approval from the Planning Board for the proposed development, on a motion made by Kevin Shea and seconded by Nathan Barry. Patrick Dwyer voted in the negative.

The Board voted 5-0-0 to grant the variance to allow the subdivision of one lot into two lots for permitted retail and personal service uses and to permit a lot with frontage on a private street whereas 125' of frontage on a Class V or better road is required, with the condition that the applicant shall obtain subdivision and site plan approval from the Planning Board for the proposed development, on a motion made by Kevin Shea and seconded by Nathan Barry.

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. The proposed subdivision lots will be put to reasonable commercial uses and share access and parking *via* easements to utilize the existing area safely and consistently with the surrounding neighborhood. Because Dobson Way is a well-established and well-maintained private street that meets the technical standards of a Class V road, the basic zoning objectives of the frontage requirements will be satisfied;
2. The spirit of the ordinance is observed because the proposed lots will be larger than the minimum lot area for the C-2 District and will be separated by a shared access lane used by patrons of both proposed lots for access. Dobson Way is a well-established and well-maintained private drive that provides more than adequate and safe access to the proposed lots. There will be no adverse impact on health, safety or welfare. The use is consistent with the surrounding neighborhood;
3. Granting this variance would do substantial justice because denial would result in no appreciable gain to the general public because it would reduce the productive commercial use of the currently vacant property and cause a substantial loss to the applicant by preventing a reasonable and productive use of the property for two separate and independent tenants. It is difficult to obtain financing for two buildings on a single lot. The depth requirement would cut off a significant piece of the property. The actual distance is closer to 125' rather than 98';
4. The values of the surrounding properties would not be diminished because the essential character of the neighborhood would not be altered. The variance would allow attractive, permitted commercial uses of the property that are consistent with the surrounding commercial uses. It will more likely increase surrounding property values by putting a currently vacant lot to productive use.
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:
 - i) 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 the property is distinct from surrounding properties as it is a corner lot positioned at the end of a commercially developed area with access from a well-traveled private way and frontage on an adjacent public street in the C-2 District. The proposed subdivided lots would be designed to complement each other for access and parking in a unified development. Requiring additional separation between the lots would serve no reasonable public purpose and would constitute a hardship to the applicant. The center lot line is only a paper line. Requiring 40' between the two parcels is unreasonable. There is no rational basis to the depth requirement.

As to the frontage requirements, proposed lot 3-1 would be accessed from Dobson Way, like other neighboring commercial uses. Dobson Way is more than adequate for safe and reliable public access. Where the proposed lot has more than the required 125' of frontage on Dobson Way, it would be unreasonable and counterproductive to prevent use of the proposed lot for lack of frontage on a Class V or better highway. Strict application of the frontage requirement would cause undue hardship to the applicant by prohibiting a reasonable use that is more consistent with the purpose of the C-2 District than the existing vacant lot;

- ii) The proposed use is a reasonable one because a commercial use is permitted by right in the C-2 District and is therefore reasonable.

6. Discussion/possible action regarding other items of concern

None.

7. Approval of Minutes – January 29, 2014

The minutes of January 29, 2014, were approved as submitted, by a vote of 3-0-2, on a motion made by Patrick Dwyer and seconded by Kevin Shea. Fran L'Heureux and Nathan Barry abstained.

8. Adjourn

The meeting adjourned at 8:20 p.m., by a vote of 5-0-0, on a motion made by Patrick Dwyer and seconded by Kevin Shea.