



Town of Merrimack, New Hampshire

Community Development Department

6 Baboosic Lake Road

Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

603 424-3531

Fax 603 424-1408

www.merrimacknh.gov

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES

WEDNESDAY, MARCH 26, 2014

Members present: Fran L'Heureux, Patrick Dwyer, Phil Straight (arrived 7:15 p.m.), Tony Pellegrino (arrived 7:15 p.m. and left 9:38 p.m.), Kevin Shea, and Alternates Leonard Worster, Nathan Barry and Richard Conescu.

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

1. Call to Order.

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

2. Roll Call.

Patrick Dwyer led the pledge of allegiance, Kevin Shea read the preamble and Fran L'Heureux swore in members of the public who would be testifying.

- 3. Sanford Surveying and Engineering, Inc. (petitioner) and Sean & Christine Frazier (owners)** – Equitable Waiver of Dimensional Requirements under Section 3.02 of the Zoning Ordinance to allow an encroachment of a shed within the side setback to remain approximately 9.6 feet from the side property line whereas 30 feet is required. The parcel is located at 88 Lawrence Road within the R-1 (Residential) District. Tax Map 7B, Lot 016. Case # 2014-07.

Raymond Shea, Sanford Surveying and Engineering, Inc., said the property is bounded by the Town border with Bedford to the north, the Town transfer station to the south, and residential lots to the west. It has 125' of frontage, a driveway, a single-family home with a garage underneath, and a shed behind the house. The owner wants to add an addition at the south end of the house for an ADU. The property is oddly-shaped and narrow in front.

Raymond Shea read the points of law into the record.

There was no public comment.

Patrick Dwyer and Nathan Barry said there has been no public nuisance since the shed was constructed in 2005.

The Board voted 5-0-0 to grant an Equitable Waiver, on a motion made by Patrick Dwyer and seconded by Nathan Barry.

Phil Straight and Tony Pellegrino arrived at 7:15 p.m., and requested that their designees continue voting for the rest of the meeting.

Findings of Fact

1. Explain how the nonconformity was discovered after the structure was substantially completed or after a lot or other division of land in violation had been transferred to a *bona fide* purchaser: The violation was discovered in December 2013 during a survey of the property. The shed was constructed in 2005.

Explain how the violation was not an outcome of ignorance of the law, failure to inquire, obfuscation, misrepresentation or bad faith, but was instead caused either by a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in Ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority: The owner received the proper permits, but did not realize the lot line was not where he thought it was.

2. Explain how the physical or dimensional violation does not constitute a public or private nuisance or diminish the value of other property in the area or interfere with or adversely affect any present or permissible future uses of any such property: The shed is set back from the street and is adjacent to the transfer station, which will not adversely affect either distant residential abutters or the Town transfer station. It is out of view from the road.
3. Explain how the cost of correction far outweighs any public benefit to be gained: The shed is a 16'x20' stick-built building on a concrete slab. Moving it out of the setback would not benefit the general public and would not be cost effective.
4. **Sandford Surveying and Engineering, Inc. (petitioner) and Sean & Christine Frazier (owners)** – Variance under Section 3.02 of the Zoning Ordinance to allow an Accessory Dwelling Unit (ADU) 20.5 feet from the side property line whereas 30 feet is required. The parcel is located at 88 Lawrence Road within the R-1 (Residential) District. Tax Map 7B, Lot 016. Case # 2014-08.

Raymond Shea, Sandford Surveying and Engineering, Inc., read the points of law into the record.

There was no public comment.

The Board voted 5-0-0 to grant a Variance, with the condition that the petitioner obtain Zoning Board approval for the Special Exception Case #2014-09, 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 a 10' intrusion into the building setback will have no adverse affect on the general public;
2. The spirit of the ordinance is observed because there is still a significant setback (20.5') to the property line. The affected abutter is the Town transfer station, which should be adequately protected with a 20' setback;
3. Granting this variance would do substantial justice because it would allow the owner the ability to construct an ADU, which is allowed by Special Exception;
4. The values of the surrounding properties would not be diminished because the abutting residences should not notice the 10' reduction in the setback, which will have no affect on the Town transfer station;
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.
 - 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

the affected abutter is the Town transfer station, which should not require a significant setback.

2) The proposed use is a reasonable one because the purpose of the addition is an ADU.

5. Sandford Surveying and Engineering, Inc. (petitioner) and Sean & Christine Frazier (owners) – Special Exception under Section 2.02.1(B)(2) of the Zoning Ordinance to allow an Accessory Dwelling Unit (ADU) in the R-1 (Residential) District. The parcel is located at 88 Lawrence Road. Tax Map 7B, Lot 016. Case # 2014-09.

Raymond Shea, Sandford Surveying and Engineering, Inc., read the points of law into the record.

Patrick Dwyer questioned #5, containment within the existing dwelling, and #7, not to exceed 50% of heated living space of principal dwelling unit. He noted that the applicant would remove a wall and create a separate entry to the deck, but an ADU entry must be shared. Raymond Shea said it would be a second egress in the rear. A new two-car garage will be built under the addition. The ADU will be on the second floor. The garage is not included in the total square footage. The dining room and new addition are deducted because they are not part of the ADU, making it 37% of heated living space.

Nathan Barry said it would be hard to abuse the purpose of the Ordinance by utilizing that space with a door on the second floor.

There was no public comment.

The Board voted 5-0-0 to grant a Special Exception, with the following conditions, on a motion made by Nathan Barry and seconded by Patrick Dwyer.

1. Petitioner to obtain Zoning Board approval for the variance (Case #2014-08) regarding the location of the side setback;
2. Execution of Declaration of Covenants for the Accessory Dwelling Unit (form will be provided by staff);
3. Payment of Hillsborough County Registry of Deeds recording fee for recording of the Declaration of Covenants for the Accessory Dwelling Unit.

Phil Straight, noting that the Fire Department wants an emergency exit, asked staff to find its recommendation that a door is allowed in an ADU for emergency and safety purposes, especially because an ADU is typically for an older relative. Donna Pohli explained that an egress is needed and that the internal connections of ADUs are what should be considered when determining the ADU's purpose.

Item 9, Tomasian Drive, was taken up before Item 6, SMC Management Corporation.

9. Tomasian Drive, LLC. (Petitioner) and The Stephanie Tomasian Revocable Trust of 2001 (owner) – Variance under Section 3.08.2 of the Zoning Ordinance to allow a cluster development in the R-1 (Residential) District and a Variance under Section 3.08.8 to allow the subdivision to be served by individual septic systems. The parcel is located at 10 Tomasian Drive. Tax Map 4B, Lot 009-1. Case #2014-13.

Ken Clinton, President, Meridian Land Services, Inc., said the property is bounded by Town-owned conservation land to the west and south, Amherst Road to the south, Tomasian Drive to the east, and the Souhegan River to the north. In other words, the 49.5-acre parcel is exclusively abutted by either Town land or Tomasian land. A conventional subdivision would have 19 lots around public roads and would require no variances. However it would not protect the River and would cause great impact. A cluster layout would also have 19 lots in the center with open space

around them, a buffer along Town property and separation from the River. It would afford more environmental protection and less infrastructure. Each lot would have a septic system and a 4,000 square foot reserve box. On March 17, 2014, the Merrimack Conservation Commission (MCC) endorsed the proposal, stating that the clusters “enable an efficient and environmentally conscious use of the property which benefits both the surrounding open space and the public. While the proposed cluster has a lightly larger wetland impact (17,500 vs. 12,000 square feet), the overall benefit of protecting the Souhegan River watershed makes the cluster more desirable.”

Ken Clinton read the points of law into the record.

Kevin Shea asked whether all septic systems and leach fields would be between the homes and the street. Ken Clinton said they would; many homes will have a pool in the backyard.

Fran L’Heureux asked the distance from the bank of the River to the houses, which Ken Clinton said is 550’ at the closest point. The 100-year flood limit was determined to be 220’ elevation, whereas the closest house would be at 242’ elevation.

Public comment

Pete Gagnon, 130 Bedford Road, cited 2,000 on-site disposal system failures in the past in this type of severe soil. They were shut down and the Town had to install sewers. It would set a precedent to put septic systems in a part of town with severe soils. They should be separated more and built above the water table. Leach fields fill up with rain and cause problems in the River. He is concerned about setting a precedent and the possibility of future failures.

Fran L’Heureux reminded Pete Gagnon of the MCC’s endorsement. Kevin Shea said the leach fields would purposely be placed away from the area that Pete Gagnon highlighted. Ken Clinton said numerous Meridian Land Service professionals are wetland and soil scientists and septic designers. All test pit results are accurate and appropriate for this cluster. The MCC saw the same plan set. The soils are moderate or slight for general permeability. The Town says most soils are severe for septic absorption. There are over 125,000’ of slight soils. In accordance with NH Department of Environmental Services (DES) regulations, there is no leach field directly in parent soil and soils will be supplemented. Ken Clinton read out the requirements. The lot sizes are larger than required and more than adequate for individual residential septic systems. The soils are greater than anything required. A wetland scientist made a site-specific soil map.

Pete Gagnon claimed that there is a conflict with the Zoning Ordinance because the Town rates the soils as severe rather than moderate. Phil Straight asked staff to clarify what the MCC addressed. It was probably disturbance to the River rather than soil type. The old soil maps are notoriously inaccurate. Ken Clinton said he made the identical presentation to the MCC and went into detail concerning the quality of soils. The MCC fully understood those aspects and their endorsement reflects that. Phil Straight added that the MCC does not second-guess perc tests. He said that septic failures Pete Gagnon cited were caused by soils mapping inaccuracies. Tony Pellegrino asked if test pits were dug on every property and how deep they were dug. Ken Clinton replied that test pits were dug with an excavator on all 19 lots to a depth of 6’-8’ and found no ledge or hardpan.

The Board voted 5-0-0 to grant a variance to allow a cluster development, with the following conditions, on a motion made by Kevin Shea and seconded by Leonard Worster.

1. That the petitioner obtain subdivision approval from the Planning Board;
2. That the Merrimack Conservation Commission verify that it is comfortable with septic systems on the soils designated on the plan.

The Board voted 5-0-0 to grant a variance to allow the subdivision to be served by individual septic systems, with the following conditions, on a motion made by Kevin Shea and seconded by Leonard Worster.

1. That the petitioner obtain subdivision approval from the Planning Board;
2. That the Merrimack Conservation Commission verify that it is comfortable with septic systems on the soils designated on the plan.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the primary objective of the Residential Zone is to provide for residential uses and to accommodate septic systems safely. The lots are suitable for individual septic systems and related residential improvements. The proposed cluster subdivision concept complies with the four purposes of Section 3.08.1. No public or private rights will be adversely affected by a cluster as opposed to a conventional subdivision. A cluster would not negatively impact the essential character of the Tomasian Drive neighborhood nor threaten the public's health, safety or general welfare;
2. The spirit of the ordinance is observed because the project fulfills several Master Plan recommendations, such as promoting more clusters. It would ensure the protection of the public and environment through appropriate lot and septic designs and realize the benefits of open space. There will be a substantial buffer. The value and function of the proposed open space are substantially increased when considered as an extension of the Town's adjacent Ireland conservation parcel with further protection along the Souhegan River;
3. Granting this variance would do substantial justice because the loss to the applicant in denying the variance would exceed any gain to the general public by strictly enforcing the Ordinance's requirements. Granting the variance will allow the property to be developed in the way that strikes the best balance of community needs, conservation of the natural environment, compliance with septic design requirements, and the applicant's pursuit of the proposed cluster. The cluster is consistent with the overall R-1 goal of providing residential housing with suitable septic systems. Granting the variance will result in substantial gain to the general public through open space and River protection;
4. The values of the surrounding properties would not be diminished because a conventional subdivision would impact the entire property, with lot development dispersed along both the road and River frontages, whereas a cluster would concentrate the impact to an internal area and the open space will protect a significant buffer around the perimeter of the property. The septic systems will be designed according to Town and State requirements. As a result of the reduced impact, there will be no diminution of values of surrounding properties, the nearest of which are owned by the Tomasian family;
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 because the ability of the proposed lots to support individual residential septic systems negates the need of the public sewer requirement. A cluster subdivision allows the most efficient and practical development of the property. Strict application of the Ordinance would result in a conventional subdivision with a far greater impact and disturbance on the property and surrounding area.
 - 2) The proposed use is a reasonable one because the 49-acre parcel abuts the Town's Ireland conservation land. The lots can support individual residential septic systems and related residential improvements. The cluster would not injure any public or private rights.

6. SMC Management Corporation (petitioner) and New Stream RE Funding 17, LLC. (owner) – Special Exception under Section 2.02.3(C)(1)(b) of the Zoning Ordinance to allow a multi-family residential use in the C-2 (General Commercial) and Aquifer Conservation Districts. The parcel is located at 4 Executive Park Drive. Tax Map 4D, Lot 076. Case # 2014-10.

Attorney Roy Tilsley, Bernstein Shur, said the applicant proposes to erect a five-building multi-family apartment complex with a clubhouse at the former Merrimack Hotel site.

Steven Keach, Keach-Nordstrom Associates, Inc., presented the history of the parcel, which consists of 16.87 acres with woodland that is bifurcated by Naticook Brook and is on the boundary of residential and commercial districts. The building is damaged because it has been unused for seven years and is now a liability. It would have to be gutted and stripped before being used because it is deteriorating and no longer meets code. This highly visible property was assessed at over \$9 million in 2012, but at only \$2.74 million now. That represents a loss of \$150,000 in tax revenue. The applicant proposes to raze the building and everything on the property, including paving, except the utilities. The five buildings will be three stories each with 16 units per floor/48 per building. There will be parking for 35 vehicles plus handicapped spaces included under each building. There will be 16 two-bedroom units, 24 one-bedroom units and eight studio units per building for a total of 80 two-bedroom units, 120 one-bedroom units, and 40 studio units. There will also be parking spaces outside and amenities. There will be a management office in the community building, full-time on-site staff, a meeting room, and a fitness center. The site will be laid out campus style. There will be no parking against buildings. There will be room between the sidewalk and building with entries on the ends, a boulevard approach and landscaping. No lights will shine onto other buildings. The clubhouse will be central to the site and the main entrance. Underground parking allows for more green space. There will be no additional impacts to the Brook to the west. More setbacks than are required will be provided. A berm system will be built. The buildings will face each other. There will be double traffic lanes and walkways through the property to what surrounds it. The modern units will be rentals in perpetuity. The project will conform to State and local modern storm water management techniques. The quality of runoff to the Brook and River will be superior to what was there previously.

Attorney Tilsley read the points of law into the record.

Fran L'Heureux questioned #1, appropriate location. She predicted there would be twice as many people at night as were in the hotel. Attorney Tilsley agreed, but said that what people do in the buildings is somewhat similar. Fran L'Heureux said a hotel and an apartment complex are completely different. This would be 100% occupancy with cars coming and going.

Fran L'Heureux questioned #2, adverse affect on the neighborhood. She asked whether the Police and Fire Departments had been consulted. Attorney Tilsley said Fougere Development met with them and they had no objections. Steven Keach said the developer would donate money to help reinstate a ninth fireman. Fran L'Heureux asked if these would be working-class apartments. Attorney Tilsley said they are for people who want to rent and not people who need to rent. It will be a nice complex for those who are not ready to buy. John Halvorsen, SMC Management Corporation, said they would be first-class units to meet the demand of young professionals and managers. Kevin Shea asked whether windows and balconies would overlook residential neighbors to the west. Steven Keach said there is a tremendous grade differential and the parcel is heavily wooded. Windows on the back of the building will not be seen. The buildings will be at the same height as the hotel was. John Halvorsen said he has not decided about balconies. The trend is away from a full-size balcony toward a French balcony, which is just a slider that opens onto an area on which someone cannot stand. That is what Fire Departments prefer.

Nathan Barry questioned #3, nuisance or serious hazard to vehicles or pedestrians. He asked about traffic coming off D.W. Highway onto the property. There are three lights where 500 more people would drive and walk across. Fran L'Heureux cited the backup during commuting hours. Nathan Barry never saw anyone using a crosswalk. Steven Keach said he would do a traffic analysis for the Planning Board, although one was done in 2006 for a proposed hotel with a restaurant and spas. There will be heavy traffic during commuting hours. At the morning and evening peak hours, there will be 0.7 vehicles trips per dwelling unit per hour or 200 vehicles. Everyone will end up at a signalized intersection. Some cars will go south/turn right directly onto F.E. Everett Turnpike; the rest will go to the light. The backup is elsewhere. The applicant will build sidewalks. Tony Pellegrino asked about 4:00 p.m. traffic/bottlenecks because of traffic from Budweiser, BAE, Nashua Route 3, Continental Boulevard, and Route 101. Steven Keach said the volume through the intersection has not changed since the 2006 study. NRPC and NH Department of Transportation (DOT) data say traffic use for residents is not very different from hotel traffic. The traffic study done for the Merrimack Premium Outlets says the numbers are not dramatically different for a multi-family residence than for the previously proposed hotel. Patrick Dwyer said this is not an office park; residential use will create less traffic than a commercial use. It is a Planning Board issue. Tony Pellegrino added that it is zoned commercial and can handle commercial traffic. Nathan Barry opined that traffic lights would have to be set on new cycles for people crossing. Steven Keach said pedestrians do not change signal timing; they walk when cars are stopped.

Public comment

Finlay Rothhaus, 14 Kittredge Lane, sits on the Town Council. He said there is a limited amount of commercial property in Merrimack. Loss of commercial space is a loss of revenue that could have offset residential taxes. The Master Plan said this property/corridor should be commercial. Community Development Director Tim Thompson told him that the optimum number of rentals in Merrimack should be 15%. Steven Keach should have added in some other apartments in his count, but the number is still well below 15%. Finally Rothhaus prefers that the property use remain commercial.

Pete Gagnon, 130 Bedford Road, said this is a very intense project. Traffic lights must be manipulated at peak hours. The Master Plan proposes that the property should be a commercial use. He asked how far Merrimack should deviate from the Master Plan. It is good that the developer will tear down everything on the site, but he should replace it with a commercial use or scale down the project.

Kevin Shea said it is very expensive to own a home in Merrimack, which needs rentals in order to be attractive. A multi-family residential project fits well in the commercial district.

Leonard Worster cited a forthcoming conference about saving energy with mixed-use villages. The Master Plan said there are 1,789 one-person units in Merrimack; these apartments will not house 500 people. This is a logical use. An office building would have 400-500 employees all coming and going at the same time.

Nathan Barry and Patrick Dwyer said the project would be a nuisance and serious hazard for vehicles and pedestrians. Patrick Dwyer said this is not a proper use of the land.

A motion to grant a Special Exception, with conditions, failed by a vote of 2-3-0, on a motion made by Kevin Shea and seconded by Leonard Worster. Fran L'Heureux, Patrick Dwyer and Nathan Barry voted in the negative.

The Board voted 3-2-0 to deny a Special Exception due to nuisance or serious hazard to vehicles or pedestrians (criterion C under Section 2.02.3(c) of the Zoning Ordinance), on a motion made by Nathan Barry and seconded by Patrick Dwyer. Kevin Shea and Leonard Worster voted in the negative.

Tony Pellegrino left at 9:38 p.m.

- 7. SMC Management Corporation (petitioner) and New Stream RE Funding 17, LLC. (owner)** – Variance under Section 3.02 Note 2 of the Zoning Ordinance to allow a multi-family residence which must have public water and public sewerage, west of the F.E. Everett Turnpike whereas Note 2 limits multi-family housing to those areas east of the F.E. Everett Turnpike. The parcel is located at 4 Executive Park Drive in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 4D, Lot 076. Case #2014-11.

At the petitioner's request, the Board tabled this item without prejudice.

- 8. SMC Management Corporation (petitioner) and New Stream RE Funding 17, LLC. (owner)** – Variance under Section 3.02 of the Zoning Ordinance to allow the construction of multi-family residential apartments with a total density of 14.27 units per acre whereas 1 unit per 40,000 square feet is permitted. The parcel is located at 4 Executive Park Drive in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 4D, Lot 076. Case # 2014-12.

At the petitioner's request, the Board tabled this item without prejudice.

10. Discussion/possible action regarding other items of concern

Donna Pohli announced the OEP Conference scheduled for May 3, 2014, and to let the Community Development office know if members wish to attend.

Fran L'Heureux queried the ZBA as to whether the members would like a training session with Legal Counsel on a particular topic, but no one was interested.

11. Approval of Minutes – February 26, 2014

The minutes of February 26, 2014, were approved, by a vote of 5-0-0, on a motion made by Patrick Dwyer and seconded by Kevin Shea.

12. Adjourn

The meeting adjourned at 9:40 p.m., by a vote of 5-0-0, on a motion made by Kevin Shea and seconded by Nathan Barry.