



# Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

**WEDNESDAY, MAY 29, 2013**

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

Members absent: Nathan Barry

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

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

Phil Straight called the meeting to order at 7:00 p.m.

#### **2. Roll Call**

Patrick Dwyer read the preamble. Phil Straight swore in members of the public who would be testifying. Fran L'Heureux led the pledge of allegiance.

#### **3. Jeanine Tamulonis (petitioner) and Dennis & Deanna Foley (owners) – Special Exception under Section 2.02.1(B)(2) of the Zoning Ordinance to permit an Accessory Dwelling Unit (ADU) in the R (Residential) District. The parcel is located at 232 Amherst Road. Tax Map 3A, Lot 050. Case # 2013-13.**

Deanne Foley, 232 Amherst Road, said an ADU is for her mother as she ages while still maintaining her privacy. She read the points of law into the record.

Patrick Dwyer questioned #7, whether the square footage of the ADU would be less than 50% than that of the principal dwelling unit. Nancy Larson clarified that the ADU will measure 864 square feet; the principal dwelling unit measures 1,949 square feet.

Fran L'Heureux asked if "cold storage" cited in #8 is really a breezeway. Deanne Foley said it would be an unheated hallway with storage space. Nancy Larson clarified that the most important entry/connection is through the kitchen and dining room and then through the hallway.

There was no public comment.

Should the Board vote to grant the request for the Special Exception, staff recommends two conditions of approval.

**The Board voted 5-0-0 to grant the Special Exception, with the following conditions, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux.**

1. Execution of Declaration of Covenants for the Accessory Dwelling Unit (form will be provided by Staff);
2. Payment of the Hillsborough County Registry of Deeds recording fee for recording of the Declaration of Covenants for the Accessory Dwelling Unit.

### **Findings of Fact**

1. The site is an appropriate location for the proposed use in terms of overall community development because the site is an existing residential lot. It will not impact the abutters and will fit well within the existing property lines. It will attach to the existing family dwelling and will provide additional living space for the family;
  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 it will fit well within the existing property lines. The ADU will be only one level, so it will not be seen over the tree line. It will match the design of the existing dwelling;
  3. There will not be a nuisance or serious hazard to pedestrians because the property has a long driveway. The ADU will not be located close to the street and will not create any change in vehicle traffic on Amherst Road;
  4. Adequate parking will be provided for motor vehicles on the premises because, due to the existing long driveway, there is already ample parking. The construction of the ADU will not affect the existing parking area;
  5. The ADU is contained within or will be an addition to an existing or proposed single-family detached dwelling. The ADU will be added onto the existing dwelling to improve the existing property and provide additional living space for the family;
  6. The ADU contains one bedroom.
  7. The ADU does not exceed 1,000 square feet in area or fifty per cent (50%) of the area of heated living space within the principal dwelling unit in area;
  8. The ADU is connected internally to the principal dwelling unit. It will be attached to the proposed cold storage of the existing dwelling.
  9. The ADU occupancy will be restricted to family members only, with the term “family” as defined as individuals related by blood, marriage or adoption to the fee simple owner-occupant(s) of the principal dwelling unit. The ADU will be occupied by the owner’s mother;
  10. The ADU is designed to remain functionally dependent on the principal unit and will not have provisions for separate utilities, garages, driveways, yards and other similar amenities. All existing utilities will function as primary for both the existing dwelling and the ADU.
- 4. Helen Tognetti (petitioner) and Michael & Mary Super (owners) – Appeal of an Administrative Decision under Section 2.02.1(B)(2)(d) of the Zoning Ordinance that determined that the foyer leading to the ADU does not clearly meet the spirit and intent of the internal connection required by zoning. The parcel is located at 30 Sarah Drive. Tax Map 4C, Lot 048-40. Case # 2013-14.**

Patrick Dwyer recused himself from discussing and voting on items 4, 5, and 6.

Chairman Straight designated Richard Conescu to sit for Patrick Dwyer.

Michael Super, 30 Sarah Drive, said his understanding of the intent of the regulation regarding an internal connection is to prevent the ADU from being used as a rental property in the future. The regulations regarding a common, internal connection are intended to make renting the ADU to strangers as uncomfortable as possible. The characteristics of his design that he thinks meet the spirit of the regulation are:

1. The proposed common area has a 4'-wide permanent opening into the dining room of the existing dwelling without a door. The opening is too large to hang a door;
2. There is a clear line of sight from this opening straight to the other end of the house. There are no doors to obstruct this path. Anyone entering the ADU will be seen or heard from the couch that faces the television in the living room;
3. There is a clear line of sight into the kitchen through another door-free opening;
4. There will be one set of shared utilities at the dwelling.

The ADU is for Michael Super's 80-year old mother-in-law so the family can more easily care for her as she ages. The existing layout of the property makes it difficult to extend the existing dwelling anywhere but above the garage. The staircase needs to be where it is because it must be straight so a stair lift can be installed to make the ADU handicap accessible. It is not possible to make the ADU entrance share the existing front door of the house because his mother-in-law cannot be expected to walk 40' from the garage to the front door in icy winter weather. The entry must be from the garage. It will be like a heated mudroom.

There was no public comment.

Richard Conescu asked for a definition of "internal connection". Nancy Larson explained that the Zoning Ordinance does not elaborate on nor define the requirement. Chairman Straight said it is unfair to ask staff to make that decision and that the Zoning Board should suggest that the Planning Board amend the Ordinance for clarity. Kevin Shea said he would grant a variance rather than an appeal because this is a small 4'-wide common foyer with no door and because he does not want to set a precedent. Chairman Straight explained that, if the ZBA grants the appeal, it is telling staff that this will no longer be an issue. The Ordinance does not work well and the Planning Board should rewrite the zoning law. Nancy Larson reminded the ZBA that an appeal is to determine whether staff made the correct interpretation based on the letter and intent of the language. Review of Planning Board minutes for public workshops held to consider adopting the ADU language provided no insight as to intent. The feeling at the time was that ADUs were too big and becoming duplexes and the Board wanted to limit rental capacity to family members. The internal connection is a very important component of the ADU requirement. It connects through active usable space where family members spend time, thus making it uncomfortable for renters/non-family members to walk through the home to access an ADU. That is what Nancy Larson considers when she reviews the language, which, she agreed, probably should be revised.

Richard Conescu asked if granting the appeal would set a precedent. Nancy Larson listed several conditions on which the ZBA bases its decision. A variance must be based

on normal variance criteria. The ZBA must judge whether Nancy Larson's interpretation is correct, with respect to the appeal of the administrative decision.

Chairman Straight added that staff's decision is correct according to law, but the ZBA has the opportunity to ask the Planning Board to rewrite the Ordinance. Richard Conescu asked whether granting an appeal would be an interpretation of would set a precedent for future ADUs. Chairman Straight said that the ZBA always sets precedent. Staff cannot break the law, but the ZBA can.

Kevin Shea had no issue with the wording. He would approve a variance but he wants to continue to decide each ADU on a case-by case-basis in the future. Tony Pellegrino said it is simple to continue on a case-by-case basis, but the wording would still be wrong in each case and would have to be explained for each application. He wanted to make it easy for staff, the ZBA and the applicant. Kevin Shea objected that an ADU design might be inappropriate in another instance. The ZBA should not set law so that every foyer could qualify as an internal connection. Nancy Larson reminded the Board that granting an appeal at this meeting would not speed up revision of the Zoning Ordinance nor would denying it slow it down. Staff will continue to decide on a case-by-case basis. Tony Pellegrino said apartments are not being built all over town and that Kevin Shea was stretching the case. Fran L'Heureux reminded the Board that it is deciding on a case-by-case basis. Tony Pellegrino wanted to simplify the process for granting an ADU. Chairman Straight asked staff to move quickly, perhaps by scheduling a joint meeting with the Planning Board.

**A motion to deny the appeal, made by Kevin Shea and seconded by Richard Conescu, failed, by a vote of 2-3-0. Phil Straight, Fran L'Heureux and Tony Pellegrino voted in the negative.**

**The Board voted 3-2-0 to grant the appeal, on a motion made by Fran L'Heureux and seconded by Tony Pellegrino. Kevin Shea and Richard Conescu voted in the negative.**

**5. Helen Tognetti (petitioner) and Michael & Mary Super (owners) –** Variance under Section 2.02.1(B)(2)(d) of the Zoning Ordinance to permit the construction of an ADU above the garage where the foyer leading to the ADU does not clearly meet the spirit and intent of the internal connection required by zoning. The parcel is located at 30 Sarah Drive. Tax Map 4C, Lot 048-40. Case # 2013-15.

Not necessary, since appeal of administrative decision was granted (see item #4).

**6. Helen Tognetti (petitioner) and Michael & Mary Super (owners) –** Special Exception under Section 2.02.1(B)(2) of the Zoning Ordinance to permit an Accessory Dwelling Unit (ADU) in the R (Residential) District. The parcel is located at 30 Sarah Drive. Tax Map 4C, Lot 048-40. Case # 2013-16.

Michael Super repeated that the ADU is for his 80-year old mother-in-law so the family can more easily care for her as she ages. The existing layout of the property makes it difficult to extend the existing dwelling anywhere but above the garage. He read the points of law into the record.

Tony Pellegrino asked about #5, “shifting” the garage. Michael Super explained the end wall would be torn down and the foundation extended 8’-10’ to create the foyer, entry, and stair lift. The entire garage would not be moved.

There was no public comment.

Should the Board vote to grant the request for the Special Exception, staff recommends two conditions of approval.

**The Board voted 5-0-0 to grant the Special Exception, with the following conditions, on a motion made by Kevin Shea and seconded by Fran L’Heureux.**

1. Execution of Declaration of Covenants for the Accessory Dwelling Unit (form will be provided by Staff);
2. Payment of the Hillsborough County Registry of Deeds recording fee for recording of the Declaration of Covenants for the Accessory Dwelling Unit.

### **Findings of Fact**

1. The site is an appropriate location for the proposed use in terms of overall community development because the site is an existing residential lot. The design of the ADU fits within the existing property boundaries and will not impact the surrounding neighbors. It will be built as a part of the existing single-family dwelling and will provide space for an additional family member to live;
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 the ADU has been designed to fit within the existing property boundaries and match the motif and flow of the existing structure so it will not look out of place in the neighborhood;
3. There will not be a nuisance or serious hazard to pedestrians because there is already parking for six vehicles on the existing property. No new garage space will be added. The addition will not cause any changes to the traffic patterns on Sarah Drive;
4. Adequate parking will be provided for motor vehicles on the premises because there is already parking space for six vehicles on the existing property. There are only two cars in the family. The single family member who will occupy the ADU has a single compact car;
5. The ADU is contained within or will be an addition to an existing or proposed single-family detached dwelling. The ADU will be built above the existing two-car garage. The garage will be shifted over slightly to provide the open common area connecting the ADU to the existing dwelling;
6. The ADU contains one bedroom;
7. The ADU does not exceed 1,000 square feet in area or fifty per cent (50%) of the area of heated living space within the principal dwelling unit in area, whichever is smaller. The 924 square foot ADU will be located above the garage and will be less than half the heated area of the existing dwelling;
8. The ADU is connected internally to the principal dwelling unit. The ADU is connected through a common area shared with and permanently open to the existing dwelling;
9. The ADU occupancy will be restricted to family members only, with the term “family” as defined as individuals related by blood, marriage or adoption to the fee simple

owner-occupant(s) of the principal dwelling unit. The ADU will be occupied by the owner's 80-year old mother-in-law;

10. The ADU is designed to remain functionally dependent on the principal unit and will not have provisions for separate utilities, garages, driveways, yards and other similar amenities. The ADU will share all utilities with the existing dwelling. There will be no separation of utilities.

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

Patrick Dwyer returned to the Board.

Richard Conescu reported on the May 11, 2013, Office of Energy and Planning 19<sup>th</sup> Annual Spring Planning and Zoning Conference about litigation and changes in the law during the previous year. The following suggestions were made: Ask whether an applicant is willing to have a re-hearing if fewer than five ZBA members attend a meeting. If there is a re-hearing, the alternate(s) who sat for the original hearing should sit for the re-hearing and/or a member should recuse oneself so the alternate can do so. Recusals are a huge issue. Some zoning board chairs ask the public if they wish to ask a member to recuse him/herself in order to prevent future litigation. There should be a joint meeting with the Planning Board and a review of each other's minutes to keep abreast of their votes. The Boccia test can no longer be used for variances. E-mail among ZBA members must be go through an administrator. There should be no private or chain e-mails.

Phil Straight said he has faith that a member knows when to recuse him/herself. Allowing the public to ask for a recusal can open a can of worms. If the ZBA wishes to pursue this, legal opinion should be sought. He has asked for in-house training to update the ZBA. Tony Pellegrino approved of a joint ZBA-Planning Board meeting to discuss the next steps. He also suggested a meeting only of ZBA members to discuss issues of importance, future directions and proposed changes in rules and policy. Chairman Straight reminded the Board that it is permissible to share one-on-one but not to discuss agenda items without public notice. The ZBA can hold a special meeting to discuss an issue.

Chairman Straight urged clarification about whether a foyer qualifies as an internal connection. Kevin Shea said allowing a foyer as an access point makes it easier for non-family to gather. He prefers that the ZBA and staff interpret each case. Tony Pellegrino wants staff to inform the Planning Board that the ZBA thinks it is a problem. In the meantime, the ZBA will continue discussions on a case-by-case basis. Kevin Shea said the ZBA's determination was whether Nancy Larson made the correct decision. Tony Pellegrino agrees, but wants to simplify the procedure. Chairman Straight noted that Nancy Larson said it has been on the drawing board for a long time, but the ZBA never took a stand until tonight.

Tony Pellegrino also wanted a discussion about allowing a front door entry in an ADU. Kevin Shea said that is why the ZBA must continue discussions on a case-by-case basis and decide according to the letter of the law. Chairman Straight noted that most ZBA cases concerning an ADU are rarely denied. He asked whether the rules could be re-written to give staff the ability to approve an ADU if it met all the criteria rather than bring it to a ZBA meeting. Kevin Shea agreed. Patrick Dwyer objected, saying that reviewing

all cases is the reason to have a ZBA. Each case is different and there are too many variables. For that reason and because a meeting allows abutters to speak, Kevin Shea reconsidered his position.

Patrick Dwyer noted that, at its last meeting, the ZBA approved a two-bedroom ADU for “aesthetics”. That is like a two-bedroom apartment. An ADU is for a family member who cannot live alone safely. The ZBA should look closer at such an ADU and not create duplexes that decrease property values. Richard Conescu said the ZBA set a precedent tonight in order to stimulate the Planning Board to change its policy. That is not how to handle the issue. He favors a joint discussion/meeting. Phil Straight said the rules were written 30 years ago, when people were afraid that an ADU would create too many apartments in town. Homeowners have rights. Recent court decisions say that the town cannot dictate minutiae to them the way it did before.

#### **8. Approval of Minutes – April 24, 2013**

**The minutes of April 24, 2013, were approved, with one change, by a vote of 4-0-2, on a motion made by Fran L’Heureux and seconded by Patrick Dwyer. Tony Pellegrino and Patrick Dwyer abstained.**

#### **9. Adjourn**

**The meeting adjourned at 8:20 p.m., by a vote of 5-0-0, on a motion made by Fran L’Heureux and seconded by Patrick Dwyer.**