



Town of Merrimack, New Hampshire

Community Development Department

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Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT

MINUTES

WEDNESDAY, JUNE 26, 2013

Members present: Phil Straight, Fran L'Heureux, Tony Pellegrino, Patrick Dwyer and Alternates Leonard Worster and Nathan Barry.

Members absent: Kevin Shea and Alternate Richard Conescu.

Staff present: Community Development Director Tim Thompson and Recording Secretary Zina Jordan.

1. Call to Order

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

2. Roll Call

Fran L'Heureux led the pledge of allegiance. Patrick Dwyer read the preamble. Phil Straight swore in members of the public who would be testifying and designated Nathan Barry to sit for Kevin Shea.

3. Denis P. & Claudette G. Odesse (applicants/owners) – Variance under Section 3.05(1) of the Zoning Ordinance to permit the construction of a garage (26'x24') to 15 feet 6 inches from the front property line along Park Avenue whereas 30 feet is required in the R (Residential) District. The parcel is located at 9 Forsythia Lane. Tax Map 4C, Lot 189. Case # 2013-17.

Denis Odesse, 9 Forsythia Lane, wants a garage on the side, but it would encroach on the 30' side setback. The proposed garage would not affect traffic turning from Forsythia Lane to Park Avenue. Anything placed on the site would encroach on the setback. Denis Odesse read the points of law into the record.

Phil Straight explained that this is a corner lot that Denis Odesse is treating as two fronts.

Nathan Barry asked about the space on the right side, which Denis Odesse said was a septic area where there are two bedrooms. Placing the garage there would decrease access to the house because it would be lower than the house. Phil Straight said the hardship is that moving the existing drive would require permission for a new road cut. Nathan Barry said he understands the situation, since he also has double frontage. Tony Pellegrino said the applicant is in a bind because of the way the house is situated.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the house was built in 1968. Because there was a septic and leach field at that time, the house is situated closer to Park Avenue. The second owner added an addition that brought the house closer to Park Avenue. A two-stall garage will encroach on the frontage requirement setback of 30'. The encroachment will not harm or detract from the turning views from Park Avenue or Forsythia Lane;
 2. The spirit of the ordinance is observed because there will be no impacts to health, public safety or public interest and would improve the use and functionality of the property;
 3. Granting this variance would do substantial justice because it would allow reasonable use of the property, due to the positioning of the existing house. There would be no changes to street access;
 4. The values of the surrounding properties would not be diminished because the garage will add value to the Odesse property as well as to others;
 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 house has two frontage setback requirements, one on Forsythia Lane and the other on Park Avenue. The frontage on Park Avenue is not parallel to the existing house. The rear of the garage would encroach more than the front of the garage.
 - 2) The proposed use is a reasonable one because it would allow prudent use of the property. It does not detract from the existing neighborhood, nor does it pose a safety or environmental issue.
4. **XTL, Inc. (applicant) and Sam A. Tamposi, Harold Watson, Ethan & Jacob Mitchell, Benjamin M. Bosowski, Jeffrey & Jessica Clegg (owners)** – Variance under Section 3.02 of the Zoning Ordinance to permit the reduction of a front yard setback to 22 feet whereas 50 feet is required. The parcel is located on Mast Road in the I-1 (Industrial) & Aquifer Conservation Districts. Tax Map 2D, Lot 021. Case # 2013-18.

Robert Baskerville, President; Bedford Design Consultants, Inc., said that the Tamposi family owns all the abutting lots. The State Liquor Commission wants the facility built by September. The original intent was to buy the lower lot and have one road come in to access both parcels by means of a shared driveway. In order to avoid a wetland crossing, the entrance had to curve in front of the parcel. The applicant has received subdivision and site plan approval from the Planning board and all State permits. The owners now want a town right-of-way rather than a shared driveway. There is no room for a sign in front. A town road would allow people to turn from another street, would provide more flexibility and would help both parcels. However that would create a double

frontage lot. The original 20' side setback requirement would become a 50' front setback requirement from the new roadway, although nothing would change physically. The shape of the building is important. There would be no lights in back because no one would go there, since it would be completely computer controlled.

Katie Weiss, Project Manager, Bedford Design Consultants, Inc., said there are 22' from property line to the building corner; the length of the building is 26'.

Robert Baskerville said the edge of the wetland is now in a different place from where it is shown on an old plan. The road will be just outside the buffer. The Merrimack Conservation Commission (MCC) approved with recommendations because they feel it is a critical wetland. The MCC recommended that the person who plows must be certified by GreenSnow Pro of UNH. The use of salt will be minimized and will not be used except in a severe ice storm. Phil Straight added that, since the town will maintain the road, it would control the use of salt. Robert Baskerville said there would be an extremely intense infiltration system. Robert Baskerville read the points of law into the record.

There was no public comment.

The Board voted 4-1-0 to grant the Variance, with the condition that the applicant shall obtain approval from the Planning Board for the amended subdivision plan, indicating the change from a "shared driveway" to a public roadway, on a motion made by Nathan Barry and seconded by Fran L'Heureux. Patrick Dwyer voted in the negative.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed front yard setback from Mast Road is about 560'. Looking down the road/driveway, the public will not visibly notice the difference between a 24' cul-de-sac driveway and a town-owned cul-de-sac. The building will be separated from the paved cul-de-sac by 36' and a 6' fence. The side yard setback for this industrial use is 20'. The applicant will maintain a 22' setback from the property line. No other buildings will be located nearby due to the location of the wetlands and the cul-de-sac. The proposed distance from the cul-de-sac should maintain the safety, health and welfare of the public;
2. The spirit of the ordinance is observed because the building will be located 22' from the property line and 36' from the pavement line. The building meets side setback requirements. The building is located 560' from Mast Road, which far exceeds the front setback requirement from Mast Road;
3. Granting this variance would do substantial justice because the proposed cul-de-sac right-of-way will be shared with one other lot and is currently owned by the same entity. The proposed building will be located 560' from Mast Road, which exceeds the town requirement. The absence of a variance will require the future property owner (XTL, Inc.) to lose valuable land to build on in the future. The building will have to be moved 194' farther away from Mast Road;
4. The values of the surrounding properties would not be diminished because the abutting property is also zoned industrial and owned by the same entity. An area variance does not affect property values like a use variance. The owner is aware

of the request and does not see that a variance would affect his or the future property owner's property value and/or the value of the sewage treatment plant;

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 a reduction of the front setback to 22' does not pose a threat to the integrity of the zoning scheme. The public will not visibly notice the difference between a private cul-de-sac and a town-owned cul-de-sac;

2) The proposed use is a reasonable one because one special condition of the land is a large wetland that greatly reduces the accessible frontage along Mast Road and creates a bottleneck at the front of the lot. Another special condition of the land is the Boston & Maine Railroad that abuts the entire eastern side of the parcel. This area requires room for a future spur. The land will be used in the same way for the cul-de-sac either as a town road or as a private cul-de-sac. Trucks will enter and leave in the same manner. The building is currently proposed about 560' from Mast Road. XTL Inc. would prefer to be closer, but was not able to move the building closer due to the land restrictions. To relocate the building out of the 50' yard setback, it would need to be moved 194' farther north from Mast Road, thus reducing the amount of land for future use behind the building and increasing unusable area at the front of the building.

- 5. First Sign, Inc. (applicant) and Gamache Enterprises (owner)** – Variance under Section 17.10 (5) of the Zoning Ordinance to permit a directional sign to be installed as a wall sign and in excess of four square feet. The parcel is located at 416 Daniel Webster Highway in the C-2 (General Commercial) the Elderly Overlay & Aquifer Conservation Districts. Tax Map 5D-4, Lot 003. Case # 2013-19.

Jason Haley, First Sign, Inc., said there is not enough room on the sign for all of the building's tenants. The building is perpendicular to the main path, so a sign is needed to make the public aware of the businesses and where to enter.

Ben Gamache, Gamache Enterprises, said the building is dated. Because the building and parking spaces are very large and it is hard to get long-term tenants, he cut the mall in half and made more units. The original sign had only nine spaces. Something is needed on the building to direct customers to the tenants. It would be an LED sign illuminated from the interior. Jason Haley read points of law.

There was no public comment.

Nathan Barry said he had to drive around the building because he did not know the location of the pre-school. The variance would be a benefit and the sign is a great idea. Phil Straight appreciated the improved exterior, which makes a very nice looking building.

The Board voted 5-0-0 to grant the variance, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the purpose of the proposed sign is to allow better visibility to assist customers in locating a commercial establishment and local businesses by advertising their location;
 2. The spirit of the ordinance is observed because the addition of this sign is not contrary to the typical allowable signage;
 3. Granting this variance would do substantial justice because it will allow the commercial tenants the visibility necessary to be located and to advertise and, therefore, prosper;
 4. The values of the surrounding properties would not be diminished because the sign is proportionate and aesthetic, with a minimum approach with the architecture and scale of the building in mind;
 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 tenant entrances are located perpendicular to the street on which there is building frontage, so there is limited visibility from the street. The provision in the Ordinance is for a directional sign at the entrance intended for one or two tenants. The request is for a building-mounted tenant directory that would also act as a directional sign;
 - 2) The proposed use is a reasonable one because the position and scale of the sign are not disproportionate for the building and represent an appropriate minimum size to allow for safe identification of the businesses and allow drivers of vehicles to identify the property easily.
 - B. If the criteria in subparagraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property. The entrance is a lighted intersection. While awaiting the light it is difficult to see tenants' business entrances and signage. This diminishes possible advertising opportunity and creates confusion for the customer when entering the property in a vehicle. With the building facing away from the intersection, the property is unique in that it reduces the effect of current signage.
6. **Merrimack Premium Outlets, LLC. (applicant/owner)** – Variance under Section 2.02(4)(D)(9)(b)(7)(i) of the Zoning Ordinance to permit the reduction of the parcel for the Outlet Village Shops to a nonconforming lot size of 32 acres whereas 100 acres is required. The parcel is located at 30 Premium Outlets Boulevard in the I-2

(Industrial), R (Residential) & Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 3C, Lot 191-1. Case # 2013-20.

Phil Straight recused himself from discussing and voting on this item. He passed the gavel to Fran L'Heureux to chair the Board for this item and designated Leonard Worster to sit in his stead.

Attorney Morgan Hollis, Gottesman and Hollis, said the applicant received a Conditional Use Permit from the Planning Board in February 2008, so it is a permitted use with 600,000 square feet of gross leasable space. Phase 1 was the 410,000 square feet that has been open for one year. Phase 2, 150,000 square feet of gross leasable area in the rear, is ready for construction. Lenders treated the two phases separately and want collateral for two separate loans, one for the operating facility and one for construction. To get separate loans necessitates separating the property. The property will be subdivided into the existing structure and the proposed area. There are cross-access easements for the driveway, parking lots, and utilities and a reciprocal easement agreement. The problem is that the C-2 zone requires a minimum of 100 acres for each lot. The already-constructed lot of 111 acres and the to-be constructed lot of 32 acres will be operated as one property. A variance is needed because the second lot is not 100 acres. There are no changes to the site plan. The applicant agrees to the condition that a reciprocal easement must be approved by Town Counsel. Attorney Hollis read the points of law into the record.

Tony Pellegrino questioned criterion #1, public interest. Gordon Leedy, Managing Director Land Development/Certified Planner, Vanasse Hangen Brustlin Inc., said there would be four buildings on the second lot.

Patrick Dwyer questioned criterion #5, hardship, asking about adding more buildings and a bi-level parking garage. Gordon Leedy said it is not an addition to what was approved; rather it is an addition to what is there today. The north is now all parking. It will be replaced with a parking deck elsewhere. There will be no blasting except perhaps for some trench blasting for utilities. Everything is in accordance with the originally approved site plan. There will be a few minor changes, but the subdivision is strictly for financing reasons. Both lots will conform in every other respect. Attorney Hollis added that construction would already have begun except for the need to subdivide for financing purposes.

Public comment

Yang Pin Kong, 3 Danville Circle, said his house shook during construction and there has been a significant and annoying increase in traffic. He opined that the proposal would affect the neighbors a lot. He asked whether there would be any big construction like two years ago and how many cars are expected. He can see lights at night. Tony Pellegrino told Yang Pin Kong to testify when the applicant comes before the Planning Board for subdivision approval. Patrick Dwyer said that is why he asked about blasting. If not required by the lender, the building would be done now. The Zoning Board of Adjustment (ZBA) is not voting on the subdivision, just on the variance. Attorney Hollis said there would be no change to the neighborhood. The variance would have no impact on development of Phase 2. The impact of construction is a Planning Board issue.

Tim Thompson suggested modifying the conditions to include Attorney Hollis's suggestion that a reciprocal easement requiring use and management as if a single tract must be approved by Town Counsel.

Patrick Dwyer noted that the plan has already been approved and the Planning Board will review it. This is just a matter of lending red tape about which he has no qualms.

The Board voted 5-0-0 to grant the Variance, with the condition that the applicant shall obtain approval from the Planning Board, including appropriate reciprocal easements to be reviewed by Town Counsel, on a motion made by Patrick Dwyer and seconded by Leonard Worster.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because this is a proposed division of the Premium Outlets project into two lots, one of which is less than the minimum lot size but combined are in excess of the 100 acres required. The proposal is necessary for financing Phase 2 of the project as a separate project. Because of a reciprocal easement agreement for sharing of parking, driveways, roadways, utilities, and management, there will be no impact on the public in granting the variance;
2. The spirit of the ordinance is observed because, although this lot will be less than the required 100 acres, it is really just Phase 2 of the approved project. It will be owned and managed pursuant to a reciprocal easement agreement, treating this parcel and the abutting developed parcel as if they were a single lot;
3. Granting this variance would do substantial justice because it will allow the original approved project to continue to be constructed as designed and approved, with separate financing for each phase. Denial of the variance will cause significant harm to the owner, who will not be able to construct Phase 2, while gaining nothing for the public. Granting the variance will allow the intended development to be completed without any adverse impact upon the public;
4. The values of the surrounding properties would not be diminished because there will be no change in the proposed development from the original approval except a property boundary line drawn between the Phase 1 and Phase 2 buildings. Creating two lots instead of one lot, with one lot being less than 100 acres, will not affect the value of surrounding properties so long as the reciprocal easement agreement is in effect and development occurs as approved by the Planning Board. It will not affect the neighbors and will increase their property values;
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 combined area will be at least 100 acres. The lot is in back and cannot be used for anything else. It makes no sense to make it 100 acres. The Planning Board has approved the entire project.

- B. If the criteria in subparagraph (A) are not established, explain how an unnecessary hardship will be deemed to exist if and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property. The overall approved outlet shopping project is in excess of 100 acres. As Phase 2 is ready for construction, economic conditions and legal requirements necessitate that it be separately financed from Phase 1. In order to do so, a second lot of 32 acres must be created. The requirement of the development being over 100 acres will be honored in spirit by the reciprocal easement agreement requiring use and management as if a single tract. Requiring Phase 2 to be on a separate lot of 100 acres is unreasonable and cannot be achieved as there is not enough land. The property has received a Conditional Use Permit. This parcel can only be developed as such given the sole access points, parking needs and utilities in place. The property is unique given its size and location. A variance is necessary to allow reasonable permitted use under the Ordinance.

- 7. Northview Homes & Development, Inc. (applicant) and Raymond A. Cota and David R. & Dorothy E. Cota (owners)** – Variance under Section 3.08(9) of the Zoning Ordinance to permit less than the required 100 foot landscape buffer within a proposed residential cluster development. The parcels are located at 14 & 16 Pearson Road within the R (Residential) District. Tax Map 6D, Lots 046, 047, 047-2, 047-3, & 047-4. Case # 2013-21.

Phil Straight returned to the Board.

At the applicant's request, the Board voted 5-0-0 to continue this item to July 31, 2013, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Fran L'Heureux and seconded by Patrick Dwyer.

8. Discussion/possible action regarding other items of concern

Tim Thompson announced that there are two finalists for the Assistant Planner position and that he hopes to hire one of them by August 2013.

9. Approval of Minutes – May 29, 2013

The minutes of May 29, 2013, were approved, with changes, by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux.

Patrick Dwyer asked the status of ADUs since the April 24, 2013, meeting. Tim Thompson replied that, on August 6, 2013, the Master Plan Public Hearing would propose specific recommendations about ADUs, making their approval an administrative or Planning Board process. It will reduce or modify the family member restriction as a reasonable alternative to multi-family housing in response to the Workforce Housing Law. Phil Straight said an ADU should be expedited only when it meets ZBA criteria.

10. 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 Fran L'Heureux.