



# 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, JULY 31, 2013

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

Members absent: Fran L'Heureux and Alternate 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

Phil Straight led the Pledge of Allegiance. Patrick Dwyer read the preamble. Phil Straight swore in members of the public who would be testifying and designated Richard Conescu to sit for Fran L'Heureux.

#### 3. Northview Homes & Development, Inc. (petitioner) 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.

Attorney Greg Michael, Bernstein Shur, said the 100' buffer applies to the north and south borders of the lot. Reading the Ordinance about the rationale for a cluster, he stated that 21.47 acres are sufficient for a cluster development; the minimum is 15 acres. Ten additional units are proposed. Three lots exist now: the David Cota lot that would be expanded to be more conforming, the Raymond Cota lot, and a David Cota lot with a duplex and garage. Since sewer and water are available, it is possible to build 13 duplex units with a cul-de-sac on a grid plan without having to seek a variance. Lilac Court needed a variance and had 30' buffers. The Planning Board liked the Lilac Court cluster plan, which the Zoning Board of Adjustment (ZBA) approved. The applicant could have built a grid plan there also. The cluster plan will keep a substantial amount of open space rather than create lots that go all the way to Baboosic Brook. The lots will be equal to or larger than some of the abutting lots on Woodhaven Circle. A grid plan allows a 20' buffer from the lot line; this proposal will have a 30' buffer that does not allow cutting trees. Grid plan owners can clear cut to their property lines. In a cluster, open space cannot be developed. It will be owned in common by the homeowners. Covenants will protect wildlife and natural open space that abuts the Brook. On July 23, 2013, the Planning Board said it likes this plan, which it preferred over a conventional layout with duplexes.

Ken Clinton, Project Manager, Meridian Land Services, Inc., said the maximum buildable/gross area excluding wetland or steep slopes gives a yield of 13 units for either a grid or a cluster plan. A grid plan would have no additional abutter buffers or open space and would have twice as many curb cuts. Each cul-de-sac in this plan would have five units. The Cota lots would be oversized and current structures would be included in the new lots. There is sufficient sight distance on Pearson Road. 12.3 acres of open space exceeds the minimum requirement of 10.9 acres.

Ken Clinton said that Section 3.08(9) requires a 100' buffer for an "adequate division of transition from abutting land uses". That applies to a cluster but not to a grid. On the north, the abutting Woodhaven Circle lots have septic systems, are equal to or less than the size of the cluster cul-de-sac lots and are environmentally safer. The building setbacks added to the landscape buffers create a 125', 150' and 165' separation from #2, #4 and #6 Woodhaven Circle. Cluster homes are not right on the buffer and are less dense than Woodhaven Circle. On the south, there is a field. The Cotas own the abutting land. The buffer would be on the Cota property by recorded easement. The cluster would have a 30' landscape buffer plus 100' of trees, drainage, and wetlands/ natural buffer. Lot 47-6 easement is 300'; 100' would remain as a natural buffer, the plan meets or exceeds the intent of the Ordinance.

Phil Straight read aloud a letter from Alastair Millns, Acting Chairman of the Planning Board at its July 23, 2013, meeting, stating that "the general consensus was that a 13-home cluster development was superior to a conventional development in terms of land use and environmental impact. . . [The Board] did not express any concerns on the potential elimination of the 100' buffer along Pearson Road. . . [and] understood the logic behind the reduction in the northern and southern buffers. . . While we too felt that a wider buffer at the northern side of the project was desirable, on balance we considered that this was probably an inevitable consequence of the better proposal for the property."

Attorney Michael read the points of law into the record.

### **Public comment**

Chairman Straight stated that issues raised in abutters' letters are Planning Board rather than ZBA issues. The ZBA is concerned only with the buffer and the value of the immediate area and of the town.

Darcy LaBrosse, 6 Woodhaven Circle, asked how a figure of 30' was decided and where the houses on the two odd-shaped lots would be located. Chairman Straight explained that the Planning Board decides where homes are to be located. He opined that a 100' buffer for a "transition from abutting land uses" refers to abutting zoning uses that are different from each other, but these are both residential uses, so it does not apply. A 30' setback is common in Merrimack. Darcy LaBrosse said the applicant could not build on a wetland even with a grid plan, so the open space plan is not necessarily better. Chairman Straight said the Merrimack Conservation Commission (MCC) typically prefers a cluster for environmental reasons.

Patrick Dwyer also asked about the 30' figure, which Chairman Straight said was determined by law as a reasonable space between lot lines. Kevin Shea noted that 30' is the space between the lot line and the development. Homeowners in a grid plan could cut all the trees to the property line and build a 20' setback without having to seek a variance. The number of feet is not relevant. A cluster is a better scenario.

**The Board voted 4-1-0 to grant the variance to permit less than the required 100' landscape buffer but not less than 30', on a motion made by Kevin Shea and seconded by Tony Pellegrino. Patrick Dwyer voted in the negative.**

## Findings of Fact

1. The granting of the variance would not be contrary to the public interest because it would not result in an overly dense cluster residential development. Given the surrounding properties, a cluster subdivision is the best use for this parcel. It will blend into the surrounding area, provide better quality housing, and promote conservation and the natural environment;
2. The spirit of the ordinance is observed. The 100' buffer requirement is intended to provide sufficient division of transition from abutting land uses. Although the variance reduces the size of the landscape buffer, it maintains the spirit of the Ordinance by ensuring adequate space between abutting land uses and promotes the goal of providing for efficient use of land. The abutting uses are lots of equal size on septic systems and wells. This is no different in kind. A grid allows clear cutting and a 20' buffer. A cluster is no threat to public health or safety and preserves open space;
3. Granting this variance would do substantial justice because it would promote new approaches to land and community development, while also providing for the efficient use of land, streets and utility systems. It would resemble its northern abutter, Woodhaven Circle, which is an older subdivision that has nearly the same density. On the southern side of the lot, the natural terrain creates a sufficient buffer such that a 100' landscape buffer would be redundant;
4. The values of the surrounding properties would not be diminished because the variance would not substantially alter the surrounding properties. The lots would be the same or larger than Woodhaven Circle. Rather than detracting from their value, they would enhance it;
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 zoning restriction interferes with the reasonable use of the property. The lot's northern abutter, Woodhaven Circle, has a nearly identical density. The landscape buffers strive to reconcile incompatible land uses, but there are none. On the southern side of the lot, the natural terrain creates a sufficient buffer such that a 100' landscape buffer would be redundant;
  - 2) The proposed use is a reasonable one because it facilitates the best use of the land.

4. **The Lynda Tomasian Revocable Trust, Lynda Tomasian, Trustee & The Stephanie Tomasian Revocable Trust, Lynda & Warren Tomasian, Trustees (petitioners/owners)** – Appeal of an Administrative Decision under Section 3.02 of the Zoning Ordinance that determined that lot area on one side of a prescriptive roadway cannot be used to satisfy the minimum contiguous area requirements. The parcels are located at 35 Tomasian Drive & 1 Tomasian Drive respectively, in the R-1 (Residential) & Aquifer Conservation Districts. Tax Map 4B, Lots 009 & 012. Case # 2013-22.

Attorney Christopher Aslin, Bernstein Shur, said that, in order to subdivide Lot 12 into three lots, extra footage from lot 9 is needed through a lot line adjustment to meet the minimum lot size of 100,000 square feet. The lot lines abut at the centerline of the road. The issue is whether the far side of Lester Road can be included. Town Legal Counsel and Nancy Larson say that pieces of land on two sides of the road cannot be used to meet the requirement, but that is not the intent of the Ordinance. It states that "regarding all lots on which a septic system is to be constructed to accommodate residential wastes, the severe, moderate or slight non-wetland soils area must be contiguous, not a number of variously size pockets, whose total area meets the 100,000 square foot, 80,000 square foot, or 40,000 square foot requirement. All principal residential buildings and

septic systems, if any, shall be located within a minimum contiguous non-wetland area.” The 100,000 square foot requirement is to accommodate a septic system. Lester Road is dry land and is contiguous upland area. There is enough dry land for a septic system. It is not appropriate for easements to separate buildable areas of a lot. Lester Road does not break up the non-wet area. It does not eliminate the minimum lot size requirement because it is only one lot that meets all regulations. Town opinion means that any easement would cut a lot in two when measuring lot size.

Richard Conescu asked why the applicant chose to challenge the Administrative Decision rather than seek a variance for a smaller size and how splitting the property in two is beneficial for the septic system. Attorney Aslin responded that the property is not split in two and the septic system is separated from other septic systems. Lester Road is a public right-of-way. Nancy Larson said the town maintains it. Kevin Shea suggested moving it, but Attorney Aslin repeated that it is a public right-of-way.

Leonard Worster said moving the road, which is a “prescriptive” road, is not the major issue. He asked whether test pits were dug. If a soil scientist classifies it as moderate soil, it would reduce the minimum to 80,000 square feet.

Attorney Gregory Michael, Bernstein Shur, said that Nancy Larson’s opinion is that an easement or road destroys the minimum requirement. Just because it is a town road named Lester Road does not change the fact that there are dry uplands and the applicant’s land can be used. Kevin Shea noted that it is not just one way in and out, but it is a passable area. Attorney Michael said the town owns nothing and the applicant owns everything. The road/easement allows people to pass. It does not matter whether it is paved or maintained by the town. A prescriptive highway is an easement. Lester Road does not separate the property into two lots; it is still one lot of 100,000 square feet with a road through it.

Richard Conescu asked whether a leach field could be put there. Attorney Michael said it could if it does not interfere with the easement use. The applicant will not do that. Richard Conescu asked why the applicant does not seek a variance for the septic system. Attorney Michael repeated that the minimum size is based on the severe soil classification and uplands. The applicant decided to meet the full intent of the Ordinance: 100,000 square feet without requiring a variance, although a variance is an option. The Ordinance speaks of a “minimum contiguous non-wetland area”. Lester Road is a non-wetland area and cannot interrupt the “contiguous non-wetland area”. This is an important issue because it has significant ramifications: Any old woods road could be called an easement and divide a parcel, thus preventing the use of the property in a fair and consistent manner.

Nancy Larson said Soil Conservation Service maps are used to determine whether a soil is severe. Phil Straight said that, if the soil is well drained, the minimum size is 40,000 square feet. Attorney Michael said that existing data are the basis for determining soil type. Kevin Shea noted that almost five properties with a septic system in his neighborhood would fit into this lot. Chairman Straight said soil type makes the difference in how much soil is needed for a septic system. Richard Conescu asked why a 100,000 square foot minimum is required for a septic system if it may not be legal to install one. Chairman Straight replied that a septic system would be legal if it were serviceable and provided public access. Because these are severe soils, a septic system would not drain well and would require more square footage. He opined that this is not really severe soil.

Patrick Dwyer said those are Planning Board issues. More research about the soil is needed. The issue is the Administrative Decision that the easement/road divides the parcel. Chairman Straight countered that the soil has everything to do with the issue. Old soils books are

notoriously inaccurate. Patrick Dwyer said a soil test would determine whether “severe” is the correct type.

Richard Conescu read the effect of both upholding and overturning the Administrative Decision: If the ZBA overturns the Administrative Decision, the petitioners may count the land across Lester Road towards satisfying the minimum contiguous upland area. If the home and septic system comply with minimum setback requirements, the area across Lester Road could legally serve as the buildable area for Lot 3, since it would be deemed contiguous to Lot 3. This interpretation can and will apply elsewhere in town. If the ZBA upholds the Administrative Decision, the petitioner would either return to the ZBA with a variance to create a residential lot with less than the required minimum contiguous upland area or revisit the lot line adjustment and subdivision plan to satisfy all dimensional requirements of section 3.02. Richard Conescu said that overturning the Administrative Decision is a big step.

Attorney Michael repeated that soil type is not the issue; rather it is whether a road makes a lot non-contiguous. The road line is not a lot line; the parcels abut.

There was no public comment.

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

Kevin Shea did not want to set precedent about a prescriptive road not making the lots contiguous. He has no problem with this particular petition, but the case needs a variance. Patrick Dwyer and Richard Conescu agreed. Kevin Shea wanted to change his vote.

**The Board voted 3-2-0 to deny the appeal, on a motion made by Kevin Shea and seconded by Richard Conescu. Phil Straight and Tony Pellegrino voted in the negative.**

**5. Heidi A. Hoffman (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a 14'x14'deck with ADA ramp, 21 feet from the front property line whereas 30 feet is required. The parcel is located at 17 Currier Road in the R (Residential) and Elderly Overlay Districts. Tax Map 5C, Lot 556. Case # 2013-23.

Heidi Hoffman, 17 Currier Road, said the rear of her home has no access and a driveway impairs access from the side. She wants space for a deck and ramp access for her elderly parents. Heidi Hoffman read the points of law into the record.

There was no public comment.

The ZBA asked Heidi Hoffman whether she is willing to remove the ramp when it is no longer needed, but she preferred not to because it would be a selling point if an older couple wanted to buy the house later.

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

### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because there would be no impact on the neighbors or people driving by. There is a 6' privacy fence running the entire width and length of the property. It would not negatively impact the views of any abutting properties;
2. The spirit of the ordinance is observed because the 26" high deck will not be visible from the street. There will remain 21' from the property line to the handicap ramp. It will not be visible by any neighbors or abutters;

3. Granting this variance would do substantial justice because there is a need for a handicap ramp for elderly parents. The deck would provide needed leisure space for them. There is no entrance to the home from the rear of the house. The front is the only feasible solution;
4. The values of the surrounding properties would not be diminished because most homes in the area have decks, albeit in the rear. This deck will be done tastefully and with the flavor of the surrounding homes, which will suffer no adverse impact. There is no effect on the space or privacy of neighbors;
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 RSA 674:33(V)(b) states that the hardship criterion is essentially waived as long as the reason for the variance request is due to a “recognized physical disability” of the individual(s) requiring the variance.

- 6. Herron Family Revocable Trust, Robert & Renée Herron, Trustees (petitioners/owners)**  
– Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a 6'x17' workshop addition, 24 ½ feet from the front property line whereas 30 feet is required. The parcel is located at 7 Riverside Drive in the R-1 (Residential) District. Tax Map 4B, Lot 078. Case # 2013-24.

Robert Herron, 7 Riverside Drive, said that when he retires in another year, he wants to expand his woodworking workshop into the garage and use it full time. He wants to be able to set out his tools rather than move them all into the undersized garage when he works. Because there is town-owned property to the east that could be a future street approved as part of the Riverview Park Subdivision in 1975, a 30' front setback is required. The workshop would go 5' beyond into that setback.

Robert Herron read the points of law into the record.

#### **Public comment**

Newton Coryell, 5 Riverside Drive, supports the variance and said that the owners of 7 and 9 Riverside Drive do also. Robert Herron will submit letters of support from three neighbors.

Kevin Shea said the future road is a technicality.

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

#### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because adding 6' to the existing garage will not alter the character of the existing residence and the surrounding neighborhood nor pose any threat to the public safety, health or welfare. It will add aesthetically to the abutters and neighbors and will improve the appearance of the property. The neighbors do not object;
2. The spirit of the ordinance is observed because the deviation of 5' is very minor and improves the neighborhood health, public safety and public interest and improves and enhances the property value;
3. Granting this variance would do substantial justice because the loss of the Herron's use of their property for a reasonable and permitted purpose is not outweighed by any gain to the

public. The property is situated such that the space cannot be reasonably added to the south side due to the presence of underground utilities, a standby generator, an established perennial garden and lack of direct access. It would be difficult to integrate the architectural design with the rest of the residence. It is not possible to add space to the east side of the residence due to the presence of a leach field porch and deck, and established fishpond. Building a similar space in the rear would impose significant additional cost. Gaining access during inclement weather would pose a safety risk. No other place has access to the residence;

4. The values of the surrounding properties would not be diminished because the appearance of the property will be significantly enhanced with the garage addition in the same architectural style as the rest of the property. The neighbors agree that the land and property will be improved and will have no effect on the surrounding property value;
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 property is situated such that the space cannot be reasonably added to the south side due to the presence of underground utilities, a standby generator, an establish perennial garden and lack of direct access. It would be difficult to integrate the architectural design with the rest of the residence. It is not possible to add this space to the east side of the residence due to the presence of a leach field, porch and deck, and established fishpond. Building a similar space in the rear would impose significant additional cost.
  - 2) The proposed use is a reasonable one because the proposed woodworking and crafts shop for personal use is permitted in the residential district and poses no threat to the surrounding properties. Gaining access during inclement weather would pose a safety risk.

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

Richard Conescu asked how the ZBA could overturn an Administrative Decision without setting a precedent. Tony Pellegrino stated that every case is different and every decision stands alone. No precedent is set. The ZBA rather than staff makes the final decision. Nancy Larson said that the Community Development Department tracks Administrative Appeals that are granted until the Ordinance changes to reflect the ZBA's decision. The ZBA is changing the interpretation of the Ordinance and the Office must uphold it in order to be consistent. Otherwise no precedent is set. The ZBA would never see a similar case again. Kevin Shea said it is better to ask an applicant to pursue a variance because the ZBA does not want to set a precedent. Phil Straight said the Zoning Ordinances, which date from 1975, should be updated. Staff can only interpret them. An Administrative Appeal is a higher standard and may set a precedent. The ZBA would lose in court if it decides the same issue in different ways for different petitioners. Chairman Straight asked Nancy Larson to write a memo about administrative appeals and precedents. Nancy Larson stated that she would consult with legal counsel about issuing an opinion on the topic.

Nancy Larson announced that new Assistant Planner Donna Pohli would assume her duties on August 13, 2013.

## **8. Approval of Minutes – June 26, 2013**

**The minutes of June 26, 2013, were approved as submitted, by a vote of 3-0-2, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer. Kevin Shea and Richard Conescu abstained.**

#### **9. Adjourn**

**The meeting adjourned at 8:50 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.**