



# Town of Merrimack, New Hampshire

Community Development Department

603 424-3531

6 Baboosic Lake Road

Fax 603 424-1408

Town Hall - Lower level - East Wing

[www.merrimacknh.gov](http://www.merrimacknh.gov)

Planning - Zoning - Economic Development - Conservation

## MERRIMACK ZONING BOARD OF ADJUSTMENT

### APPROVED MINUTES

WEDNESDAY, AUGUST 28, 2013

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

Members absent: Kevin Shea and Alternate Nathan Barry.

Staff present: Planning and Zoning Administrator Nancy Larson, Assistant Planner Donna Pohli 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 Leonard Worster to sit for Kevin Shea.

Nancy Larson introduced Assistant Planner Donna Pohli, whom the Board welcomed.

#### 3. **Global Companies, LLC. (owner) and Nayla Aoude (petitioner)** - Special Exception under Section 2.02.3 (C)(1) of the Zoning Ordinance to permit the addition of a drive-thru car wash as an accessory use to the existing Mobil on the Run gasoline station located at 468 Daniel Webster Highway in the C-2 (General Commercial) the Elderly Overlay & Aquifer Conservation Districts. Tax Map 5D-3, Lot 125. Case # 2013-25.

Attorney Greg Michael, Bernstein Shur, said a car wash is a permitted use. All the traffic data/relevant analysis were not available in 2007, when a Special Exception was sought. Since then, filling stations have changed and this has become a standard accessory use. All new Mobil on the Runs have one. When the building was erected, room was left to create a 15'-wide roadway around the rear going through and out a car wash, consistent with the traffic flow. Better numbers are now available. The car wash was planned when the gas station was built.

Steve Pernaw, Traffic Operations Engineer and President, Pernaw Associates, submitted his traffic inspection and projections on March 4, 2013 and prepared a traffic impact assessment when a Special Exception to expand the Mobil station was sought in 2003. Traffic on D.W. Highway has declined since then. Morning and evening peak hours generated half of what was anticipated then, but the Planning Board approved the site for much more traffic. This project will have 16 vehicle trips at the evening peak, eight in and eight out. Most customers will already be on site for gas pumps or for the convenience store. Four vehicles will be stacked 95% of the time during the evening peak. The stacking capacity is 11 vehicles. In sum, the site generates less than the approved traffic, the net change is negligible and there is sufficient stacking.

Attorney Chris Aslin, Bernstein Shur, stated that the car wash building would total 1,152 square feet and read the points of law into the record.

Chairman Straight asked about water dripping off cars and freezing in winter and about noise. Attorney Aslin stated that noise is typically 85 decibels 30' from the car wash exit. The car wash will be 50' from the rear property line and 75'-80' from the front line, so there is significant space from other uses. There is a screen of trees. There will be no appreciable extra noise. All fluids will be collected and icing will be addressed. Chairman Straight noted that salt use is prohibited in the Aquifer Conservation District.

Fran L'Heureux noted that there are three driveways on Route 3. She is concerned about safety when a car exits from the car wash and turns left to go north on Route 3. Vehicles waiting in the other driveways will block its sight. Attorney Michael said there would be no change from traffic already on site for the gas station and the convenience store. Steve Pernaw confirmed that most exiting vehicles would already be on site. 13 vehicles per hour made a left turn during the morning peak hours and 17 during the evening peak hours. Queues go past the driveway when the light is red. Some cars will wait in the queue; others will use the Baboosic Lake Road driveway. So there are two options, the same as now. All traffic turning left anywhere onto D.W. Highway has delays.

Nancy Larson asked Steve Pernaw whether he used the same morning peak hours (7:45 a.m.-8:45 a.m.) as he did last time. Steve Pernaw explained that is the typical peak hour period, but it can change daily. The original study covered 7:15 a.m.-8:15 a.m., but both studies have the same two-hour window.

Tony Pellegrino asked about congestion if someone parks in front of the store, someone at the gas station and someone at the car wash and two leave at once while the gas customer pulls out. Attorney Michael said the issue is the same now. The car wash traffic will be isolated on the southern part of the parcel. The rest will pull straight out. There are many variables. The number stacking/potential users at peak hours is not huge. The Planning Board will review the matter. The area can accommodate the numbers, which are much less than originally anticipated.

Attorney Michael said that most car washes usually have little drip and freezing when vehicles leave. It is never an issue. Drainage and slopes already exist. Chairman Straight said it is always wet where vehicles pull out, although it is minimal. He said the ZBA's issue is whether it would be dangerous to pedestrians and vehicles.

Fran L'Heureux asked if the car wash would be open 24 hours. Attorney Michael said no; it would be open during regular business hours.

Chairman Straight said that noise from the blowers is equal to that of a semi truck. Attorney Aslin said it is like a truck driving down the road. Chairman Straight said he had been concerned about noise into Abbie Griffin Park, but the tree buffer is now 60' wide. Previous noise concerns may no longer be legitimate. Attorney Michael said the open ends would face west. The noise would be pointed more toward D.W. Highway and the Town Hall hill.

Tony Pellegrino said there is not much room to drive a car around the building. Attorney Michael replied that the applicant owns a sufficient amount of land to make it work. It would not be on town property and would be within the required setbacks. Nancy Larson said the Planning Board would have to review the matter as part of site plan review.

### **Public comment**

Nelson Disco, 42 Wilson Hill Road, immediate past Chairman of the Planning Board and Chairman when the plan was originally considered, reported that the car wash application had been withdrawn because the Planning Board opposed the internal circulation on site as not safe. Chairman Straight asked whether reduced traffic would make a difference. Nelson Disco said the town consultant would have to vet the numbers and determine whether they are long-term or the result of the recession.

Attorney Michael asked for a postponement to study the matter. Chairman Straight added that the ZBA did not have a chance to review the original traffic study submitted during the meeting.

**At the applicant's request, the Board voted 5-0-0 to postpone this item to October 23, 2013, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Fran L'Heureux and seconded by Tony Pellegrino.**

- 4. MHW 2008 Revocable Trust, Wendy H. Michael, Trustee & Glenn W. Michael (petitioners/owners)** – Variance under Section 2.02.7(7)(6) of the Zoning Ordinance to permit a residential dwelling to be constructed 36.3 feet from a wetland area whereas 40 feet is required. The parcel is located at 53 Pearson Road in the R (Residential) & Aquifer Conservation Districts. Tax Map 7D, Lot 011-1. Case # 2013-26.

Attorney Greg Michael, Bernstein Shur, distributed a snapshot of the area and a letter from Sanford Survey stating that the proposed distance would have negligible impact on the wetland. Chairman Straight allowed the late submissions.

Attorney Michael said the five-acre lot has been vacant since 1979. Sanford Engineering did a soil analysis before constructing the home to determine where things can be put because of the wetland and vegetation. The septic system is within the appropriate setback. The design will have no impact on the wetland and is in keeping with the area. There would be a very small (3.7') encroachment on the east wetland buffer. There would be no construction in the wetland. The agenda item is incorrect; the property is not in the Aquifer Conservation District. Sanford's letter states that the land sloping away from the house site takes away the drainage well beyond the delineated line. It is dry most of the year. Stormwater would be filtered before reaching the wetland. The 3.7' encroachment would have a negligible impact.

Attorney Michael read the points of law into the record.

Chairman Straight said only 10' of the building encroaches only 3'.

There was no public comment.

Attorney Michael said that, since the property is not in the Aquifer Conservation District, there is no need for a condition stating that the applicant must appear before the Merrimack Conservation Commission (MCC). Chairman Straight would not wait for their opinion, since they have not already commented. The ZBA has approved situations worse than this one.

**The Board voted 5-0-0 to grant the Variance, on a motion made by Patrick Dwyer 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 encroachment will not alter the essential character of the neighborhood nor threaten public health, safety or welfare. The small building encroachment will have absolutely no impact on the surrounding area or on any abutters;

2. The spirit of the ordinance is observed because, due to the nature of the wetlands and the fact that the encroachment is small, the engineers for the applicant have clearly stated that there will be no impact to the wetland area associated with the requested setback;
3. Granting this variance would do substantial justice because, at the time the lot was subdivided, there were no “wetlands setbacks”. The only prohibition was building within the wetlands. This has been a residential lot of record for over 30 years and the Town has recognized it as a legitimate building lot. Fairness dictates that the lot be approved for a single-family residential dwelling. It makes no sense to indent the house to go around 3.7’;
4. The values of the surrounding properties would not be diminished because the proposed use is consistent with the zoning in this area. The lot is over four acres in size and can readily support the proposed use;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
  - 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. Since there will be no adverse impact to the wetlands, there is no substantial relationship between the general public policy of the ordinance and the request being made. There will be no impact to the wetland, since the encroachment is not a request to “build within the wetlands” but within the 40’ setback associated with it. The parcel is unique because the wetland determines where the home can be built;
  - 2) The proposed use is a reasonable one because of the current assessment of the parcel and because the proposed use is permitted. Every effort has been made to create a design that minimizes any wetland encroachments.
5. **Wigston Properties, LLC; Edgebrook Heights, LLC. & Q. Peter Nash, Trustee of the Q. Peter Nash 1987 Revocable Trust (petitioners/owners)** – Variance under Section 15.04 (B) of the Zoning Ordinance to permit seven (7) dwelling units per gross acre (where such gross acreage is not reduced by wetland soils, 100 year floodplains, land with slopes greater than 25% and land encumbered by overhead electric power line easements as otherwise require in Section 15.04(B)), where such residential units may be one and/or two bedrooms; provided that the total number of residential units shall not exceed 168. Subject parcels are located in the I-1 (Industrial) District located at 1, 37, 39, 55 and an unnumbered parcel, Daniel Webster Highway, Merrimack, NH. Tax Map 1E, Lots 4-1 & 4-2, Tax Map 2E, Lots 6-2, 7 and 8. Case # 2013-27.

Attorney Brad Westgate, Winer and Bennett, said the five lots total 37.8 acres. Proposed is a mix of one- and two-bedroom units. This use is part of the project’s mixed use. Lot E would have 168 multi-family units on 24.4 acres. Other contemplated uses are an assisted living facility on the front parcel and office space on the rear parcel. There would be retail and commercial space adjacent to the Nashua Corporation property. On February 27, 2013, the ZBA granted two variances: 1) to permit a Conditional Use Permit where each of the five subject properties is less than 50 acres in size, individually and collectively; and 2) to permit a Conditional Use Permit where one or more of the five properties has less than 500’ of continuous frontage on the State-maintained portion of D.W. Highway. There is 1400’ of frontage overall. The abutters are the Boston & Maine Railroad, Pennichuck Brook, the no-longer-planned Circumferential Highway, D.W. Highway, and the Nashua Corporation. Other commercial and retail properties are nearby on D.W. Highway. Access is at the light at the Harris Pond entrance and a common driveway near the Nashua Corporation property. The office complex has 430 parking spaces that were approved, but that was not realistic and never developed. Very few properties qualify for a

Conditional Use Permit, which permits “mixed uses which allow the creative integration of industrial, commercial and residential housing developments based on a master site development plan that permits flexibility in the design and integration of the permitted uses contained therein”. The area already has a variety of mixed uses and meets all the criteria for the Permit. A steep slope runs north to south through the site and acts as a residential buffer in the rear. The parcels cannot be made larger. The project is in the public interest because few properties meet the criteria. It met the criteria for the February 27, 2013, variances. Since then, a master concept plan was developed. The Planning Board must approve the Conditional Use Permit and approve the site plan for each component. Five lots will be reconfigured.

Chairman Straight said the ZBA could address only the seven units per gross acre; the rest are Planning Board issues. He asked why there would be seven rather than six dwelling units per acre. Attorney Westgate said a grid is determined by gross acreage without steep slopes and other natural features, but that does not make sense in this case. The steep slope is a buffer and a backdrop. It separates the two uses of the project. The applicant does not want to subtract those components because of the nature of the property. Density is based on the number of bedrooms, but it should be based on the type of housing.

Attorney Westgate read the points of law into the record.

Patrick Dwyer asked about the buildings that were already approved, but Attorney Westgate said that nothing has been approved. Chairman Straight said that zoning allows six units, but they want seven.

Patrick Dwyer asked about the number of bedrooms, which Attorney Westgate repeated would be a mix of one- and two-bedroom units. Although Nancy Larson said in her August 23, 2013, memo that density should be based not on gross but on net acreage, the applicant wants to compute it on gross acreage.

### **Public comment**

Pete Gagnon, 130 Bedford Road, was a Planning Board member for 39 years. He has no problem with the concept. The flaws in the Ordinance are miniscule. What is missing is what would it look like if wetland soils, etc., were subtracted. There are many ways to use land to make the Ordinance work, but not with this plan because information is missing. The Planning Board might require calculations. Where is the hardship? If the variance is granted, other PUDs could use the same argument. The Planning Board and staff must talk about whether the Ordinance should be changed. Ordinances should not be changed by variance. The types of soils excluded are typically Windsor Soils that erode and are highly permeable. How does this tract differ from others on D.W. Highway? The intent of the floodplain Ordinance is pollution control and soil conservation, not overcrowding land uses in wetlands and the floodplain beyond what the soils can bear. Pete Gagnon opposed granting a variance.

Richard Conescu asked whether granting a variance to use gross vs. net acreage would open the door to other PUDs developing the same way. Pete Gagnon said it would not set a precedent, but people in a similar situation on Route 3 would ask. Chairman Straight agreed there would be no precedent, but if the ZBA were to deny future requests, the applicants would have an advantage if they go to court. Each request is different.

Attorney Westgate said this is distinctly different because the proposed component of the Conditional Use Permit is not a stand-alone parcel. He repeated that only a few parcels in Merrimack meet the criteria, so granting a variance will not generate other requests.

James Petropoulos, Civil Engineer and Project Manager, Hayner-Swanson, Inc., said the purpose of the Conditional Use Permit is flexibility. Multi-family density is generally more than three units per acre. The Ordinance allows for a one- and two-bedroom development. This project blends

uses in a balanced way. It is not balanced if the density for a multi-unit component is low. More flexibility means density based on gross area allows 88-96 units. The suggested density is for a grid or cluster but not for multi-family units. Other communities have different densities. Seven units per acre on 24 acres is a good balance.

Patrick Dwyer questioned seven units rather than fewer and why wetland soils, etc., should not be excluded. Attorney Westgate said there would be three residential buildings. James Petropoulos said that is what the lands gives. There is ample opportunity for 160 units on 24 acres. It is not a high density. Patrick Dwyer questioned the hardship, since the goals can be achieved with six units per acre. Attorney Westgate said there could not be 168 units without a variance no matter how many buildings there are. Patrick Dwyer questioned the need for 168 units. Attorney Westgate explained that the purposes of a mixed-use project must be considered. It is not a stand-alone PUD. The nature of the property allows for nicely spread out buildings, which is a natural fit. The hardship is that, if the land were flat, there would be no need for ZBA approval for 168 units where the applicant proposes, but he would still have the same number of units. Patrick Dwyer stressed that the applicant could build, but not so many units. Attorney Westgate explained that the old hardship criterion was that there is no reasonable or other possible use of the land, whereas the new Simplex criterion is that "no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property" because of "special conditions of the property that distinguish it from other properties in the area". The purpose of flexibility and density is not fostered if wetland soils, etc., are excluded. Why flatten the land just to meet the Ordinance? The project was designed according to the nature of the land. James Petropoulos said that, if two buildings at the corner were eliminated, other types of development would be placed there instead. This provides the best balance and supports other uses, such as retail, etc.

Chairman Straight asked if this would be a hardship if something else could be done and noted that the court that changed the criterion was divided 5-4. Attorney Westgate said that doing something else is not the criterion; fostering the public purpose is. Chairman Straight did not accept that because the ZBA bent over backward when it granted lot size and frontage variances to allow something to be built there.

Richard Conescu's concern is that a variance that disregards a floodplain is excessive. Chairman Straight explained that the variance does not disregard the floodplain. The ZBA is trying to find a fair balance and to meet the criteria. Attorney Westgate said nothing would be built in the floodplain or the wetland.

Chairman Straight suggested that applicant go to the MCC if the Planning Board wants its opinion, even though Nancy Larson said it is not required.

Chairman Straight said this is a judgment call. Building there would not be perfect because it is a difficult site, but the owner has the right to do something with the land. He should stay with the permitted six units per acre until Planning Board review. The unique layout could be so unusual that there would be a little crowding, but it would not be so obvious. He opposed granting a variance.

Nancy Larson stated that, if the ZBA denies the variance, the applicant cannot go to the Planning Board with this application and must change it.

Leonard Worster wanted to see the Planning Board minutes of the preliminary meeting and what happened in the interim. He preferred to postpone the item until September 25, 2013, in order to receive more information. Chairman Straight said the ZBA could approve a variance conditional on Planning Board approval. Nancy Larson said the ZBA could place conditions on a variance, but Planning Board approval is distant. Is the condition Planning Board approval of the final site

plan or of the Conditional Use Permit? Postponing to October is more realistic than September in order to provide enough time for the applicant to change the plan, receive the Planning Board comments and return to the ZBA. Attorney Westgate agreed.

**The Board voted to postpone this item to October 23, 2013, in the Matthew Thornton Meeting Room, at 7:00 p.m., on a motion made by Leonard Worster and seconded by Fran L'Heureux.**

#### **6. Election of Officers and Annual Review of Zoning Board of Adjustment By-Laws**

The Board had no changes to the by-laws.

**The Board voted 4-0-1 to elect Fran L'Heureux as chair, on a motion made by Phil Straight and seconded by Patrick Dwyer. Fran L'Heureux abstained.**

**The Board voted 4-0-1 to elect Patrick Dwyer as vice chair, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux. Patrick Dwyer abstained.**

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

Richard Conescu asked about the attendance policy. Chairman Straight opined that, after three unexcused absences, the chair might ask a member to resign. Nancy Larson suggested placing a policy in the by-laws. She will check state statutes. Richard Conescu suggested a cap on absences whether excused or not. Fran L'Heureux saw no problem if the chair and vice-chair know about an absence ahead of time. Richard Conescu noted that there were only two meetings this year with a full board. It is hard to have a discussion when several members are absent. Tony Pellegrino suggested it be a September 25, 2013, agenda item. Nancy Larson noted that the Community Development Department sends an e-mail asking who will come to a meeting and then informs the chair.

#### **8. Approval of Minutes – July 31, 2013**

None.

#### **9. Adjourn**

**The meeting adjourned at 9:20 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.**