



# 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, OCTOBER 23, 2013

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

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

#### 1. Call to Order

Fran L'Heureux called the meeting to order at 7:00 p.m.

#### 2. Roll Call

Tony Pellegrino led the Pledge of Allegiance. Kevin Shea read the preamble. Fran L'Heureux swore in members of the public who would be testifying.

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. **This agenda item is continued from the August 28, 2013 meeting. The Applicant has requested to be continued to the December 18, 2013 meeting.**

**At the applicant's request, the Board voted 5-0-0 to continue this item to December 18, 2013, in the Matthew Thornton Room, at 7:00 p.m.**

4. **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 required 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. **This agenda item is continued from the August 28, 2013 meeting.**

Attorney Brad Westgate, Winer & Bennett, noted that, at its August 28, 2013, meeting, the Zoning Board of Adjustment (ZBA) deferred action to obtain the Planning Board's opinion about density. On October 15, 2013, Planning Board Chairman Robert Best wrote the following:

"By a 6-1-0 vote, the Planning Board offers the following comments:

Assuming that the applicant is able to establish, to the satisfaction of the ZBA, that the statutory conditions required in order to justify a variance exist, the Planning Board would be comfortable with the proposed higher density for the following reasons, provided that the applicant addresses and manages the various environmental concerns from an engineering standpoint when a formal application is submitted for the Planning Board's review as part of the required Conditional Use Permit process:

1. The site is unique in its topographical circumstances which provide a natural buffer of the residential uses to the other proposed uses that are part of the project;
2. The proposed higher density is consistent with recommendations and goals of the forthcoming Master Plan (in the Land Use, Housing, and Economic Development elements), which has been conditionally adopted by the Planning Board; and
3. If the ZBA granted a variance to the applicant to allow a higher density, the Planning Board retains the opportunity to require the applicant to address any adverse impacts that results from the higher density, such as storm water controls and environmental issues, as part of the Planning Board's review."

The applicant proposes a mixed-use project under a Conditional Use Permit. One component would be 168 multi-family units on 24 acres. The Planning Board is comfortable with a higher density of seven units with the conditions stated above.

Attorney Westgate read the points of law into the record.

Kevin Shea questioned #1, public interest, and asked whether the assisted living facility would be included in the 168 units and how many units would be in each building. Attorney Westgate said it would not. James Petropulos, Vice President/Principal Engineer, Hayner-Swanson, Inc., said one building would have 24 units and four buildings would have 36 units each, or 144 units, for a total of 168. There would be 58 one-bedroom units and 110 two-bedroom units, for a 2:1 ratio.

Kevin Shea questioned #2, spirit of the Ordinance, and asked whether there would be one management company or whether the owners would own and manage their units. Attorney Westgate said all units would be rentals with one owner of the entire complex.

Nathan Barry asked about a particular piece of the property, which James Petropulos said would be loamed, seeded and stabilized as open space with no vegetation. Some areas could be included in the 25% slopes.

Fran L'Heureux asked about the grade of the slopes on the roadways at the curve, which James Petropulos said are 5%-6%. The road will be longer so that the length will flatten it. There will be no parking along that road because it is too steep. The road will be safe. There will be a blend of the 25% and less percent slopes.

Nathan Barry said the density would leave no area to play without running into cars.

Patrick Dwyer questioned #5, hardship, and asked whether it is based on the land or on trying to include as many units as possible and whether there would be a hardship if there were fewer buildings. Attorney Westgate said every variance must meet the hardship criterion. The special conditions of the property serve the purposes of the Ordinance and are fundamental to the land: 1) Location: The town contemplates higher density in this part of Merrimack. 2). The steep slope and wetland floodplain area should not be subtracted from the gross acreage because they enhance the property and form a buffer between the commercial and residential uses. They are a unique amenity that provides a wetland setting for affordable units. Excluding them does not violate the Ordinance. Richard Conescu asked why it is relevant that there would be a different plan that would not need a variance if the property were flat. Attorney Westgate replied that the

two areas to be excluded are enhancements. The design for a flat area would not necessarily be better.

There was no public comment.

Kevin Shea cited Planning Board comments (above) as a basis for granting the variance.

**The Board voted 5-0-0 to grant the variance, on a motion made by Kevin Shea and seconded by Phil Straight.**

### **Findings of Fact**

1. The granting of the variance would not be contrary to the public interest because seven units per acre are permitted as part of a Conditional Use Permit and PUD regulations. There are no other undeveloped properties along D.W. Highway that could accommodate a mixed-use development. The Master Plan recognizes that this land is appropriate for mixed-use development with a higher density if the infrastructure can support it. Primary access is at a signalized intersection opposite the main entrance to Harris Pond. The topography permits a backdrop for the non-multi-family portion of the project, a buffer for a substantial portion of the multi-family building and adequate isolation from other developed properties. The abutting properties to the east, southeast, and south are undeveloped and likely not to be developed;
2. The spirit of the ordinance is observed because the purpose of a Conditional Use Permit is to allow a creative integration of industrial, commercial and residential housing developments, complementary permitted mixed uses, appropriate use of the land, fiscally beneficial development, efficient provision of public services and expanded opportunities for diversity of residential development. This section of Merrimack already accommodates mixed uses. The shape and size of the parcel are substantial enough to handle the nature of uses proposed with adequate land for open space and buffers. The land can accommodate a multi-family community with a density of seven units per acre given the isolated nature of much of the multi-family residential lot, the undeveloped nature of the abutting properties to the south, southeast and east, and the wooded sloped area running through the center of the premises providing separation and buffering between the multi-family residential portion and the other elements of the project. The multi-family residences and buildings have less impact per unit per acre than single-family homes. The Planning Board with scrutinize the site plan closely;
3. Granting this variance would do substantial justice because the plan can achieve Master Plan and Planning Board goals given the site's size, location, accessibility, central ridge, and open space. There is no public gain in denying a variance for affordable residential units in Merrimack. The site would be underutilized if based on net rather than gross acreage. More residences make the mixed-use viable. Substantial injustice is done to permit density on a net acre basis given the uncertainty of the relevant zoning ordinance provisions and the lack of a distinction between multi-family residential communities versus single-family development all lumped under the same PUD density umbrella. The requested density is a necessary component to make this a viable mixed use project, given the land area involved, the need for productive use of that land area and the nature of the nearby mixed-use communities, which contain a significant number of residential units;
4. The values of the surrounding properties would not be diminished because the premises can accommodate such residential density in a well-designed, buffered arrangement and because of the nature of the nearby properties that include mixed uses and substantial residential components. Multi-family uses are similar to the residential uses already existing in the nearby vicinity. The proposed uses would be compatible with or complementary to them. Adequate access and traffic design criteria will be implemented and appropriate buffering and setback requirements will be imposed.

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 density regulations frustrate the public purposes of mixed-use layout and flexibility. The Ordinance does not take into account the substantial difference among the various types of PUDs, whereas the Conditional Use Permit's purpose is to expand opportunities for diversity of residential development outside of traditional residential districts. The Ordinance penalizes the beneficial topographical component of wooded steep slopes greater than 25% and a wetland floodplain, which are two unique conditions that enhance the property. The slope provides a buffer for various multi-family buildings and the wetlands area provides open space. Eliminating the 25% area (over 9.2-acres) would not make the project better functionally or aesthetically, but would make it worse. Filling in or modifying the wetland soils that provide good buffers and views for residents does not benefit the project. This section of Merrimack already consists of a variety of mixed uses. The property is on D.W. Highway, which is more than adequate to accommodate demand. It is one of very few parcels that can adequately meet the goals of a Conditional Use Permit;
- 2) The proposed use is a reasonable one because it is permitted under a Conditional Use Permit. The parcel is more than adequate to accommodate multi-family residential use and the proposed density. Adequate access to the premises exists. Mixed use would complement the existing, adjacent or nearby uses.

**5. Robin and Shawn Smith (petitioners/owners) –** Variance under Section 3.02(A) of the Zoning Ordinance to permit the construction of a 32'x26' garage and a 12'x6' mudroom 13 feet from the side yard property line whereas 20 feet is required. The Parcel is located at 10 Seaverns Bridge Road and lies within the R (Residential) and Aquifer Conservation Districts. Tax Map 2A, Lot 020-03. Case # 2013-31.

Robin Smith, 10 Seaverns Bridge Road, agreed with Leonard Worster that the agenda incorrectly states that the mudroom would be 12'x6', when it is actually proposed to be 12'x16'. Nancy Larson said the depth is 16' and has no impact on the distance to the side property line. It is the garage that encroaches on the side setback.

Robin Smith read the points of law into the record.

Fran L'Heureux stated that the addition is beautiful.

Tony Pellegrino asked whether the bushes on the left side mark the end of the lot. Robin Smith said they do not mark the lot line and are not on her property. Shawn Smith said they were planted by a neighbor on his property in order to buffer it. Fran L'Heureux asked the location of the lot line. Phil Straight said that, if the bushes were the lot line, the side yard property line would be much tighter than 13'; however the neighbor (Cook) is happy with this project being 13' from the line. Shawn Smith said he talked to her.

There was no public comment.

**The Board voted 5-0-0 to grant the variance to permit construction of a 32'x26' garage and a 12'x16' mudroom no less than 13' from the property line, 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 this is a private dwelling. The addition will not alter the character of the surrounding neighborhood and will add aesthetically to the home, increase its value and the values of the other homes in the neighborhood;
2. The spirit of the ordinance is observed because a 13' rather than a 20' setback is a minor deviation. The proposed change will not result in any neighborhood health, public safety issue and would improve and enhance the property value;
3. Granting this variance would do substantial justice because it would allow reasonable use of the property due to its position on the lot. There is no garage. Having one will allow the owners to secure their vehicles. The mudroom will allow for entrance through the garage into the home. Both will allow for the appropriate storage of bicycles, clothing and other articles;
4. The values of the surrounding properties would not be diminished because it will add value to the property and, therefore, to the others in the area;
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, due to the lot plan, only the left front portion of the garage would encroach by 7'.
  - 2) The proposed use is a reasonable one because the property is limited in size. A poor floor plan does not allow for many design changes. The right side of the home has all the electrical, water supply (public and private) and would pose a risk if trying to build on that portion of the lot. The proposal will not detract from the existing neighborhood.
6. **Nanocomp Technologies, Inc. (petitioner) & NIP Owner, LLC. (owner)** - Variance under Section 9.04 of the Zoning Ordinance to permit an expansion of a non-conforming building (roof height expansion) within the required 100' setback. The parcel is located at 57 Daniel Webster Highway in the I-1 (Industrial) & Aquifer Conservation Districts. Tax Map 2E, Lot 006-01. Case # 2013- 32.

Attorney Greg Michael, Bernstein Shur, said Section 9.04 of the Regulations states that a conforming use building that does not conform to the yard setback is not non-conforming; it is grand-fathered. It is not permitted to change or increase non-conformity. The non-conformity is the setback. The front of the property is close to D.W. Highway. There will be no addition to the building or encroachment to the setback area. The only change is to lift 10,000 square feet of the roof in the center of the building. The existing piece is higher than the proposed one and will blend into the existing building. Eight feet of elevation would be added so that the architecture will be indistinguishable from what currently exists. There will be no encroachment into the setback. It is not a height issue. Attorney Michael doubts there is really a violation of the Section, which does not state the height cannot be increased. There will be three pods in the building. Nanocomp wants to move into the next pod and eventually occupy all the building. It will hire 30-40 more employees if it can expand, which would benefit Merrimack's industrial base. The purpose of the expansion is to accommodate large pieces of equipment, not to increase floor space.

Fran L'Heureux asked if the footprint would change, which Attorney Michael said it would not. The anticipated completion date is 2014.

Attorney Michael read the points of law into the record.

There was no public comment.

**The Board voted 5-0-0 to grant the variance, with the condition that the applicant obtain site plan approval from the Planning Board for the proposed addition and related site improvements, on a motion made by Kevin Shea and seconded by Tony Pellegrino.**

### **Findings of Fact**

- 1) The granting of the variance would not be contrary to the public interest because the proposed roof area and the lower brick building section share a continuous roofline and material type. There would be no wasteful demolition and re-purposing of existing office and manufacturing/storage areas. The addition will be consistent with the existing building's form and design and will not negatively impact the surrounding environment. The expansion will generate increased economic activity. Volume will increase but not the footprint. A structural setback was determined so a road could be widened, but the road was widened after the building was erected. The applicant will not build in the road and D.W. Highway will not be widened again;
- 2) The spirit of the ordinance is observed because the addition constitutes a continuation of an existing building form along the site's frontage on D.W. Highway. Added height will allow the continuation of the current pattern of use. There will be no encroachment into D.W. Highway and no adverse impact on the surrounding environment. The building will remain in the same location. It would be wasteful to demolish existing functions to relocate them to other building areas, resulting in added construction debris, less efficient building layout and added costs;
- 3) Granting this variance would do substantial justice because it is not in the public interest to deny re-use of a building that is good for Merrimack. The existing building predates existing setback requirements. It creates little visual impact because it presents its shortest dimension directly to the public way and follows the adjoining high-bay roofline, thus blending in with the existing building massing. Creating the addition enables the most efficient and economical use of existing resources. Denial of the variance would force the applicant to reduce the efficiency of its manufacturing process and add a long-term economic burden by diminishing its competitiveness in the global market and suffer a short-term economic burden for internal reallocation and redevelopment of spaces;
- 4) The values of the surrounding properties would not be diminished because they are light industrial and commercial. Their value would likely increase because the proposed development creates minimum visual impact and is architecturally consistent with the existing building and others in the area. The development would allow for the efficient and economical expansion of an existing and thriving business, assuring its long-term presence at this location, thereby reducing area vacancy rates and boosting business activity. The development is consistent with the Master Plan by reducing vacancy through increased utilization of existing infrastructure, retaining a desirable business, and promoting greater flexibility in zoning and land use regulations;
- 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 large building setbacks typically promote the distant placement of buildings and infill of the intervening area with parking. Current planning trends decrease setbacks, create build-to lines, and emphasize bringing buildings closer to public ways and placing the less visually desirable vehicle parking to the rear. The existing building was constructed in advent of the current ordinance setbacks. It does not directly abut neighboring property nor

adversely impact other uses. It is approximately 20' from the front property line in response to the highly sloping nature of the site and the desire of the initial builders to minimize the amount of site development required to move the building farther back. The close proximity of the façade to the public way does not create a dangerous or distracting condition, does not impede sight lines or use of the adjoining road and does not preclude future pedestrian improvements in the right-of-ways;

- 2) The proposed use is a reasonable one because it is a continuation of an approved use in the I-1 zone, is consistent with the uses in the area, and is consistent with the Town's Master Plan.

#### **7. Discussion/possible action regarding other items of concern – Possible By-law change regarding member attendance**

The proposed wording is as follows:

##### **Section II.D. – Membership, Duties and Terms of Office**

Absences. After three consecutive unexcused absences, the Chair will confer with the member. After five annual unexcused absences, the Chair may recommend to the Town Council that the member be removed from the Board. "Unexcused" is defined as failure by the Board member to notify staff of their planned absence.

The Board agreed that the proposed by-law change exactly states what it had requested. Phil Straight explained that it is not directed toward any particular ZBA member and was discussed five years ago. Most committees have attendance by-laws. The current by-laws already state that a member must notify staff and the chair about missing a meeting.

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

#### **8. Approval of Minutes – September 25, 2013**

**The minutes of July 31, 2013, were approved as submitted, by a vote of 4-0-1, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer. Fran L'Heureux abstained.**

**The minutes of September 25, 2013, were approved, with changes, by a vote of 3-0-2, on a motion made by Nathan Barry and seconded by Tony Pellegrino. Fran L'Heureux and Patrick Dwyer abstained.**

#### **9. Adjourn**

**The meeting adjourned at 8:35 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.**