



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, NOVEMBER 29, 2017

A regular meeting of the Merrimack Zoning Board of Adjustment was conducted on Wednesday, November 29, 2017 at 7:01 p.m. in the Matthew Thornton Room.

Chairman Patrick Dwyer presided.

Members of the Board Present: Lynn Christensen
Richard Conescu
Anthony Pellegrino
Leonard Worster, Alternate

Members of the Board Absent: Fran L'Heureux, Vice Chairman

Also in Attendance: Tim Thompson, Community Development Director
Kellie Shamel, Assistant Planner

1. CALL TO ORDER

Chairman Dwyer led the Pledge of Allegiance, and swore in members of the public who would be testifying. Richard Conescu read the Preamble.

2. ROLL CALL

Chairman Dwyer appointed Leonard Worster to serve as a voting member in the absence of Fran L'Heureux.

The next meeting of the Zoning Board of Adjustment will be conducted on December 27, 2017.

- ### **3. William Lastowka and Land of Goshen, LLC. (petitioner/owner)** - Variance under Section 3.08.9 of the Zoning Ordinance to permit the existing improvements (barn, shed, home, etc.) to remain within a 100-foot landscape buffer proposed as part of a cluster subdivision. The parcel is located at 6 Watkins Road in the R (Residential) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 4C, Lot 449. Case # 2017-39. This item is continued from the September 27 and October 25, 2017 Zoning Board of Adjustment meetings.

Greg Michael, Esq., Bernstein Shur, spoke of having been before the Board last March to discuss the cluster subdivision, which was approved by the Board. At that time, improvements that are on what he referred to as lot 1 (corner lot on plan) were not brought up as an issue. The improvements are already in place. The lot is a conforming size in accordance with regulations. His belief, at that time, was that these were in place, and in fact grandfathered structures. Upon further review, the Community Development Department indicated it to be a grey area; now that the approval is in place for a cluster subdivision, the 100' buffer should be applied to the parcel. If you apply the 100' buffer, the barn, which has been on the parcel for many years, would be in violation. The corner of the house has a slight encroachment into the buffer, as does part of the septic system. The shed is beyond the buffer. The lot is interesting from a configuration standpoint; on the lot is a single-family residential dwelling with a barn. There are higher elevations to the rear of the lot that buffer the barn without the 100' buffer. Attorney Michael indicated he does not necessarily agree a variance is required.

Attorney Michael read the statutory criteria into the record.

With regard to the public interest criterion, Director Thompson stated in response to the question of why the petition was before the Zoning Board by explaining that when the plan was brought before the Planning Board, former Planning & Zoning Administrator, Jillian Harris, discovered the 100' buffer was labeled on the plan, and that the existing structures were located within that buffer. Consistent with how it has been interpreted by past Zoning Administrators, a variance is required for that type of encroachment regardless of the fact that the structures are existing.

With regard to the spirit of the ordinance criterion, Chairman Dwyer stated the Ordinance calls for a 100' buffer. What is being stated is the belief the 100' buffer applies more to the house and not the existing structure.

Attorney Michael stated his opinion it applies to new construction; disingenuous to think that they bring a proposal before the Board that has an existing house and barn on it and that somehow, they are supposed to lift it up, move it, or demolish it. He does not believe the 100' buffer has any significant impact to the project itself as the project itself will comply with all buffer requirements.

Chairman Dwyer questioned how that stacks up against Lot 4C-449-1, which is the one that seems to be right next to it. Attorney Michael stated that to be one of the new cluster lots.

Director Thompson stated that does not require the buffer. The buffer is the exterior of the entire "parent lot." In a cluster subdivision, setbacks are only 5' from property lines of the lots where homes will be constructed.

Chad Branon, Fieldstone Land Consultants, stated it to be important to understand the property abuts a cluster development to the north. When talking about spirit and intent,

the intent, in his opinion, would be to provide a buffer between different uses. There really is no transitional area.

With regard to the substantial justice criterion, Ms. Christensen questioned the shed, and was informed it is outside of the 100' buffer, and has no influence on the side.

Director Thompson informed the Board, this subdivision has not yet been approved by the Planning Board. The variance to allow for cluster was approved by this Board back in March. The Planning Board has continued the application several times waiting for this decision by the Zoning Board. The item is on the agenda for the Planning Board on December 5th to go forward with the remainder of the subdivision approval process. Should the Board determine the variance should be granted, it should be conditioned upon Planning Board subdivision approval.

Chairman Dwyer opened the Public Hearing at 7:20 p.m.

Testimony in Favor - None

Testimony in Opposition

Dan Ricker, 12 Merrill Road

Stated the parcel is 23.9 acres. Prior to the proposal for the cluster subdivision, the parcel had an established single-family home. The single-family home had the appropriate setbacks required for a single-family residence in conjunction with surrounding abutters located in an R-1 zoning area. Once the parcel was purchased and repurposed for a cluster subdivision, the requirement from the point of the Zoning Ordinance changed.

The owner/developer of the parcel should be required to abide by the rules and regulations set forth by the Town's Zoning Ordinance and Building Code 3.08 of a cluster subdivision. There is opportunity for the Board to set precedent by not granting a variance. Doing so would make the statement, if doing a cluster subdivision in Merrimack you should work within the rules and guidelines.

He spoke of the discussion around topography, commenting if driving down Merrill Road, you can see the existing barn. A vegetative screen is only present for 4-5 months of the year.

Regarding diminishing the values of surrounding properties, one of the reasons he purchased a residence on Merrill Road was for the aesthetics and the amount of space he would get in the cluster subdivision. He is not against that type of development. If taking that 100' buffer away from that part of his development, part of the reason he moved in there is gone.

Chairman Dwyer commented if the variance were not to be granted, the petitioner, if wanting to put a cluster subdivision in, would have to redesign it.

Director Thompson commented, were the variance denied and the petitioner to move forward with the cluster subdivision, the only things that would need to be moved would be the barn and the house. A small portion of the house is in the buffer as is the entirety of the barn.

Mr. Ricker remarked the fact that the structures are within the 100' buffer should have been understood from the start. That kind of information is available on the Town's website (GIS software). He is concerned with the fact that this request is before the Board, and suggested, if addressing it, the Board should handle it correctly and deny the request. The rules exist for a reason.

Attorney Michael spoke of the reason the Board exists. He stated appreciation for the fact that, in a perfect world, every rule is complied with. It is not a perfect world, and the Zoning Ordinance is not a perfect document. He stated the case to be, without question, appropriate for variance relief. They are doing nothing, and did not hide the ball. Moving the barn and the house makes no sense, is unfair, and quite frankly not required to move ahead with the project.

Chairman Dwyer declared the Public Hearing closed at 7:29 p.m.

Chairman Dwyer stated concern with setting a precedent for other cluster developments. Member Worster stated the 100' buffer on clusters is geared for when clusters are in commercial or industrial type areas, not when it is residential against residential, which is the case here.

Director Thompson noted the Zoning Board sets no precedent except with Appeals of Administrative Decision. A decision on a variance is an individual decision based on the specific facts of that case specific to that property.

He reminded the Board the cluster subdivision is being presented to the Planning Board through the grant of a variance by this Board (in March) to allow a cluster subdivision in a zone where typically they would not be allowed. That part of the discussion has already taken place. The discussion before the Board is the application of the 100' buffer as it relates to the existing structures that were previously on the property.

Member Conescu questioned how far in the setback the barn is located, and was informed it is completely within the 100' buffer. The closest point of the barn to the buffer line is 61.9' from the property line. There is a corner of the house that is clipped based on the configuration of that lot corner that would also be within the 100' buffer.

The Board voted 3-2-0 to grant the Variance, on a motion made by Lynn Christensen and seconded by Leonard Worster. Patrick Dwyer and Rich Conescu voted in opposition.

Findings of Fact:

- *Granting the variance would not be contrary to the public interest:*

To be contrary to the public interest, the variance must unduly and in a marked degree conflict with the Ordinance such that it violates the basic zoning objectives. The stated purpose of Section 3.08(9) is to “provide an adequate division of transition from abutting land uses.”

In this case, it is difficult to conceive of that being an issue because it is already there. The property is in a residential zone with a residential use. The intent of the buffer regulation relates to the new houses. If you are expanding a more condensed residential environment, which a cluster does do in certain instances, then it is important to ensure new construction comply with the Ordinance, and it does. A variance doesn't change anything, doesn't do anything, or modify anything, it just allows the existing structures to remain.

First, it is notable that proposed lot 4C-449 abuts two residential lots. It is not believed allowing this to remain creates any difficulty in terms of transition or screening between existing structures and any other uses in the area.

It is believed the buffer requirement contemplates new use, and is not contrary to the public interest since it, in a marked degree, does not violate the spirit of the Ordinance.

- *The spirit of the Ordinance is observed:*

This analysis is similar to the above. Again, the express rationale behind a cluster buffer is to provide a transition between uses. The courts have stated this to be similar to the contrary to public interest issue. The spirit of the Ordinance, which ultimately seeks to promote the health, safety, convenience, and welfare of the Town, is observed in the requested variances.

Structures are preexisting, and require no transitional area to allow them to remain. Regarding the characteristics of the lot including its topography and vegetation, the barn is almost blocked in 1 or 2 directions, there is not much that can be seen, and realistically no one will know that the house is encroaching by about 19' into the buffer area. It is not believed that the spirit of the Ordinance is in any way being violated.

- *Granting the variance will achieve substantial justice:*

The requested variance simply allows the lot to remain with its existing structures rather than ripping them down, trying to move them, etc. There are topography issues on the lot as well as areas of wet in the northeast corner. It is believed the existing buildings are in an appropriate location. In relation to the other cluster

homes, the existing home is consistent with the location within the lot. The barn is partially buffered by the topography itself, and is a permitted accessory use.

It is believed to be fair and there to be no large gain to the public by tearing the buildings down or trying to re-adjust to make room for the 100' buffer. There is certainly a significant problem for the owner and a wasteful destruction of property.

- *The values of the surrounding properties would not be diminished:*

The requested variance will not diminish the character of the neighborhood, which already includes the subjects of this variance. These pre-existing structures and accessory uses will continue to be used in a manner consistent with these neighboring lots and, thus, should not produce different or significant traffic, noise, or odors or other detrimental impacts to the surrounding area. Granting the variance, therefore, will not result in a diminution of property values for neighboring properties.

- *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 special and distinct from other properties in the area given its shape and wetlands, its topography, and the location and orientation of its pre-existing structures as compared to its abutting lots. It clearly is a hardship to suggest that the existing dwellings be moved or ripped down. It is a clear case that this parcel, with this use on it right now, is unique.

2. *The proposed use is a reasonable one because:*

It contemplates existing structures and accessory uses that are permitted on the property under the Ordinance; single family residential.

4. **Robert A. Curry (petitioner/owner)** - Variance under Section 2.02.1.A.1 of the Zoning Ordinance to permit an event hosting center (place of assembly) in a Residential district. The parcel is located at 2 County Road in the R-1 (Residential) and Aquifer Conservation districts. Tax Map 3A, Lot 065. Case # 2017-44.

Steve Keach, President, Keach Nordstrom Associates, stated the petitioner purchased the property a year ago as a primary residence. The property, which was once known as Hickory Hollow Farm, is unique. Located on the property is an antique colonial built in 1746. That portion of the built environment is located most closely adjacent to County Road.

In 2002, the prior owner did substantial construction maintaining period appearance emanating to the north of the original built remaining construction. There is a great

room that is substantially complete as well as a post and beam barn that is a very unusual structure. The house is situated about mid-point of the length of the frontage on County Road. The lot is 8.84 acres in size, is in the R-1 District, and is bounded to the east by the Souhegan River.

The proposal is to utilize the barn and great room area as a space to host weddings, family events, and other seasonal functions. The Currys intend to retain their primary residence in the portion of the home that they occupy today.

Exterior improvements envisioned would be extremely limited. They envision widening the driveway to 24' to allow for two-way traffic, and constructing a couple of paved parking spaces to accommodate ADA compliance immediately to the entrance to the building. They do not envision any other hardscape improvements around the perimeter of the building or for the site itself.

To the southwest corner of the barn there is a flat lawn area. The Currys anticipate doing some sort of a patio there (slate, etc.). That is one of the most attractive portions of the property as you look to the west and southwest, and would be a great place for wedding photos. A perimeter walkway would be built that would go from the easterly side of the front of the building around to that area. That would pick up any fire escapes that are necessary to accommodate code requirements.

The intent in terms of landscape and hardscape improvements is to go back to the original construction. After the prior owner passed the property sat vacant and somewhat unkept for a period. Some of the garden areas have overgrown a bit. There is one at about mid-length of the building on the easterly side that they have brought back.

They do not propose to pave a formal parking lot, but rather to the north of the barn area would be the primary gathering space for field parking.

While the house does not have access to public water today, the owners understand the necessity of sprinkling the space they would occupy for hosting events. For that portion of the building they would build a separate septic system. When events are being hosted there, there is no intent to have a kitchen. Any food would be catered.

Robert Curry, petitioner, remarked after purchasing the property they had a lot of visitors over the holidays. People were amazed by the post and beam barn, and suggested hosting weddings, etc. They had a visit from a person who had been very close to the former owner who indicated the former owner had a wedding there. It just so happened that a couple driving by saw the property, fell in love with it, and asked to hold their wedding there.

Mr. Keach stated the intent to be a casual use. He had suggested, at the time of the application that someone would want to know a number. They put 150, which may be a reach, in terms of guests that may be there at any given point.

Mr. Keach read the statutory criteria into the record:

- *Granting the variance would not be contrary to the public interest:*

Granting the variance will benefit the public in a variety of ways. The applicant proposes to offer the public a safe, attractive, historic, well-managed and private venue for first class accommodation of small to modest sized weddings and similar special events. In addition to affording residents the convenience of hosting such events locally, it is anticipated these events will likely have a positive effect on a variety of local businesses such as caterers, florists, carriage providers and other vendors. Since special events often attract out-of-town visitors, it is reasonable to expect the proposed seasonal operation could spawn weekend business for local hotels and restaurants. It is anticipated this proposal will ultimately provide the Town of Merrimack a unique asset it currently does not possess at an appropriate scale. In addition, it is anticipated the creative use of this historic property will enhance the potential for sustained preservation of the same.

- *The spirit of the Ordinance is observed because:*

Section 1.01 of the Zoning Ordinance states that the purpose of the document is: "To promote the health, safety, convenience, and general welfare of the Town of Merrimack and make it an attractive place in which to live." The applicant intends to preserve the grounds, buildings, and historic essence of the property to enhance the prevailing setting for adaptation of the planned supplemental use. The large barn and secluded property will appeal to many individuals seeking a small rural wedding or a location to celebrate other meaningful occasions. The existing features of the property make it desirable for this type of use; therefore, few modifications to the exterior of the property are proposed. Planned improvements will include accommodations for compliance with applicable health, life safety and building codes. This proposal will afford residents a beautiful gathering place to host events in close proximity to their homes. Allowing the property to be utilized as a venue for such events will benefit the Town and its residents in many ways, which is in keeping with this spirit and intent of the Ordinance.

- *Granting the variance will achieve substantial justice because:*

Granting the variance will allow the applicant to open the beautiful and historic property to the public. The rural area provides an ideal location for many types of events. The applicant will maintain the existing character of the property and is proposing only those limited exterior improvements necessary to satisfy local code requirements or enhance the prevailing character and appearance that exists today. Substantial justice will be achieved through enabling the owner to pursue a timely and unique use of a special and historic property.

- *The values of the surrounding properties would not be diminished because:*

In order to properly address this criterion, the applicant obtained a qualified professional opinion from Randy Turmel, Principal of Keller Williams Realty. As stated by Mr. Turmel: "It is my opinion, that the variance as requested by Robert A. Curry will not diminish the property values of any of the abutting and nearby properties (including those en route), such as the Souhegan Woods Golf Club."

- *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:*

The generous size and rural setting of the lot in relation to surrounding properties, combined with the presence of a 1746 vintage home and newer additions of consistent vernacular combine to make this site an ideal location for hosting small to modest sized weddings and similar special events on a seasonal basis. The applicant intends to preserve and enhance these unique aspects of the property for adaptation and accommodation of the planned supplemental use.

2. *The proposed use is a reasonable one because:*

The Applicant wishes to preserve, enhance, and ultimately share this historic property and its unique setting with the community by providing a safe and attractive location for the public to gather and celebrate special occasions of limited size and scale. The intent is to preserve the rural essence of the property and offer a unique asset to the Town that will benefit the public.

Chairman Dwyer opened the Public Hearing at 7:54 p.m.

Testimony in Favor - None

Testimony in Opposition

Wade Vaughn, 1 Savanah Way

Stated he is the property owner adjacent to the property being discussed. In response to the 5 criteria, he stated:

- 1) Granting the variance would be contrary to public interest; the likely positive effects to the community are not substantial, the likely benefit to the Town would not be a direct benefit to the immediate area and not specifically to the abutters' property with their proximity to this venue. The proposed venue would not be an attribute to any aspect of the current or added public safety. Elements of the venue include additional outside traffic, noise, etc. associated with the participants, including

service staff, and additional potential exposure with alcohol consumption. The area is a long-standing residential area with contrary facilities that impose commercial characteristics and exposure. This action would establish a precedent for future commercial establishments seated within this community.

Events hosted during the summer would result in exposure to noise, traffic, and unintended consequences for abutters who have extensive use of their outdoor space. This would change the atmosphere established by the code. The added commercial service traffic to support events from vendors and labor services are contrary to the public interest.

- 2) The proposal is in direct conflict with the spirit of the Ordinance as follows: This modified use will not provide the adjacent residents the expected outcome outlined in the zoning ordinances. The additional traffic, noise, and safety exposures will not provide or preserve the existing condition at the venue or the abutters' properties. Allowing a modification to the zoning and associated use will bring several unintended consequences to the community including environmental distractions, noise, lighting, and commercial services associated with this business operation during the period when local homeowners will be utilizing their unique benefits of their homesteads.

The intent of the zoning code will be maintained without any adjustments to establishing a business enterprise in this area. The owners will still provide a community benefit with the continued maintenance of the property and allowing visitors to visit upon request. The newly established modifications and ongoing business enterprise would not support the attractive nature of the long-planned abutters' property.

The proposed business was confirmed not to be as part of the initial residential purchase and long-term enjoyment of the property. This will not afford all residents of the community access to these facilities but only those paying for the right to access the property as such being a primary benefit to others outside the immediate area.

- 3) Granting the variance would not do substantial justice because it would only add financial benefit to the applicant at the expense of the abutters. The rural characteristics of the area are the key outcome of the residential zoning standards, and a requirement to maintain the overall attractiveness to the current and future homeowners in the area. The modifications and associated transitional aspects associated with catering and support staff of the parties and large gatherings would not maintain the current natural environment of the property, and influence the daily lives of others adjacent to the property owners in a detrimental fashion.

The adjacent abutters' properties, as they exist, are also special and unique parcels. They bring collateral benefit to the community as they exist. This type of variance

establishes a lower standard of care to the intent of the residential code without equal benefit to the local community.

- 4) The proposed actions will diminish the values of the abutters' properties. One of the valued characteristics of the abutter's' property is its location, lack of exposure to adjacent properties, and tranquility. Exposures associated with 150 party attendees and support staff will create safety concerns and traffic, potential alcohol consumption, and the exposure to the local area with participants traveling to and from the venue.

The zoning variance will establish an overall negative outcome as it relates to this action and other potential challenges.

Mr. Vaughn displayed a drawing, and indicated the area of his proposed home, which is currently finishing design. The home would be within 150' of the proposed parking area.

When asked about the thickness of vegetation between the proposed home and the property in question. Mr. Vaughn stated the area is not extensive. The trees on his side of the property will be cleared up to the property line so that the home can be centered in the 200' he has to work with.

Director Thompson noted the aerial photos included in the Board packet are 2007 from the Town's GIS. If looking at a current Google aerial image of that area, it is significantly more cleared on the abutter's property.

- 5) There is no unnecessary hardship in denial of the request for variance. The current residents purchased the property as their primary residence, and then later decided to develop the property for a commercial venue for personal gain. The current home configuration provides compliance with both code and environmental boundaries. Proposed utilization will require significant space allotment for traffic flow as well as set aside space for service staff, equipment, and will impact the abutters.

Spatial configuration and proposed use produce a significant amount of general noise and light during evening, including post-evening events of cleanup, and service staff leaving the venue. There are additional concerns associated with the potential change in drainage as well. There is no unnecessary hardship. This action establishes a standard that supports individual commercial gain in lieu of compliance with the residential code criteria, and will allow for future challenges that will deteriorate the natural beauty and serenity of this area.

When asked if what is being proposed is similar to a home occupation type of variance, Director Thompson stated it is beyond what would be considered a home occupation. A home occupation must be limited to 25% of the square footage of the existing residential dwelling unit. In terms of scale, he does not believe calling this a home occupation would be appropriate given the type of business is a place of assembly; that

is completely counter to a home occupation, which is intended to be low volume; one employee, with very minimal visits from the public.

Brett Vaughn, 123 Wilson Hill Road

Spoke of the professional opinion provided by the realtor that the variance “will not diminish the property values of any of the abutting and nearby properties”, and commented on the difference of opinion of an individual residing in the area. He spoke of having helped clear that lot, being familiar with the lot, and understanding the beauty of the views.

Mr. Keach remarked there seems to be a fundamental misunderstanding about the size, scale, and intensity of the proposed use as it relates to the property. During much of the public testimony words such as party, alcohol, etc., were used, which paints a picture that is completely contrary to the intent of the applicant.

Regarding diminishing of property values, it is a non-residential supplementary use in a residential area; however, that is precisely why a professional opinion was sought. The Board is quasi-judicial by its composition and purpose. The basic rules of law in the state of New Hampshire dictate only a professional can refute a professional opinion in a judicial setting. The property that abuts the subject property to the north and west is a perspective home, not a constructed home. The clearing that the Community Development Director spoke of that diminished the buffer that may have existed, is not on the applicant's property; it is clearing that was done on the other property. Given the time of year, the trees are bare. The nature of the business is seasonal. Given weather conditions during the winter months, he is uncertain a wedding would be conducted in an unheated barn.

He commented it is interesting to hear the property to the north will be a home for the owner. The lot is presently listed for sale in the MLS. He understands the gentleman still owns the property, and as such his remarks are appropriate. But to dramatize it the way it was done is a bit disingenuous.

He stated his belief what his clients have done is produced a cogent thought on a good supplemental use of their property. He believes it will be a benefit; at a proper scale and properly managed. They are looking to do something that allows them to effectively enhance and showcase this very special and unique property.

Brett Vaughn remarked the petitioner presented a photo with a thick wooded area, and it is not. It is very open. There are pine trees in that area. Even if thickly wooded, it is 150' from the residence, and whether they want to say it is relaxed or not or 50 people or 100 people, is a very controlled safe wedding, etc. we have all been to very controlled safe weddings. Those are parties, and it is commercial. Mr. Vaughn stated he is not a broker, he is a realtor, but does not believe you have to be a broker to realize the difference in sitting next to what someone perceived as an open farm area and a party venue.

Director Thompson clarified the petitioner did not provide the image that was included in the agenda packet. That was provided by staff.

Wade Vaughn stated that when you talk about multi-use gatherings, large groups of people, independent of what term we use, there will be a substantial number of people within earshot of his front door. There is limited to no buffer. This is a very special area; they both have special lots, and there is no need to create a commercial condition there. They should both be able to enjoy their respective properties; how it was intended to be, a residential area.

Chairman Dwyer declared the Public Hearing closed at 8:20 p.m.

Member Conescu asked for clarification, were the variance granted, in order for alcohol to be served on the premises, a liquor license would have to be provided, and was informed that is the case. It would require site plan approval from the Planning Board as well.

Member Conescu questioned if the Planning Board has control over whether a venue can have a liquor license, and was informed it does not.

Chairman Dwyer stated his concern to be volume from the perspective of zoning; overall public interest or safety. Director Thompson remarked if able to relate traffic to the criteria then it is perfectly legitimate to use that as part of the consideration. Chairman Dwyer stated uncertainty not granting a variance would result in hardship. Member Christensen stated she did not see hardship.

Member Conescu remarked whether or not the variance is approved, the petitioners can have as many people over as they want. If not commercial, they can serve as much alcohol as they want.

A motion to grant the variance (with the condition that the petitioner shall obtain site plan approval from the Planning Board for the proposed event center) failed 1-4-0 on a motion by Rich Conescu and seconded by Tony Pellegrino. Patrick Dwyer, Lynn Christensen, Tony Pellegrino, and Leonard Worster voted in opposition.

The Board voted 4-1-0 to deny the Variance, on a motion made by Lynn Christensen and seconded by Leonard Worster as the petitioner failed to demonstrate a hardship inherent to the property to allow for a commercial place of assembly whereas the property has and continues to be used in accordance with the zoning ordinance requirements as a single family home. Rich Conescu voted in opposition.

5. APMK Ventures, LLC. (petitioner/owner) - Variance under Section 3.02 of the Zoning Ordinance to permit a two-family residence on a lot with 116.62 feet of

frontage whereas 200 feet is required; 14,046 +/- s.f. area whereas 80,000 s.f. is required; 39 feet of rear setback whereas 60 feet is required; 15.10 feet of side setback whereas 20 feet is required; 24 feet of front setback whereas 50 feet is required; and 80 feet of depth whereas 200 feet is required. The parcel is located at 14 D.W. Drive in the R-4 (Residential) and Aquifer Conservation Districts. Tax Map 4D-4, Lot 045. Cases # 2017-45, 46, 47, 48, 49, and 50.

Director Thompson noted six separate applications have been combined into a single petition as they are dependent upon one another. If any one of the 6 were to fail, the proposal, as presented, would not be able to move forward.

Assistant Planner Shamel stated the request to be for multiple variances from Section 3.02.

Peter McClintick, Manager, APMK Ventures, noted the information provided with the agenda spoke of razing the building to put the new building up. The building was taken down the previous day.

Mr. McClintick read the statutory criteria into the record:

- *Granting the variance would not be contrary to the public interest because:*

Two-family residences are a permitted use within the R-4 District and there are multi-family homes in the immediate area.

- *The spirit of the Ordinance is observed because:*

The proposed property use would enhance the appearance of the area, increase property values in the area, and would not change the character of the neighborhood.

- *Granting the variances will achieve substantial justice because:*

It will allow reasonable use of the property and provide rental housing in the marketplace.

- *The values of the surrounding properties would not be diminished because:*

The proposed property would not diminish the character of the neighborhood, which includes multi-family homes and the proposed property will enhance the values in the area.

Member Conescu noted the existence of commercial in the area.

- *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) 116.62 feet of frontage where 200' frontage is needed because the lot only has 116.62 feet of frontage.
 - b) 14,046+- square feet whereas 80,000 square feet is required because the lot only has 14,046 square feet. The proposed footprint of the property is about the same size as the current property.

Member Christensen noted although the footprint is consistent, the height would differ.

- c) 39 feet Rear Setback whereas 60 feet is needed because the lot is only 120 feet deep and the variance is needed to build a functional layout. In addition, there is the desire to keep the home portion front setback at 30 feet which would allow it to be further back from the street. The razed garage was only 6.2 feet from rear property line. Therefore, the 39-foot rear setback will be a big improvement.
 - d) 15.1 feet Side Setback (south side) whereas 20 feet is required; limited with regard to the wetlands setbacks to the north side. the proposed south side setback overall is better than current property.
 - e) 24 feet Front Setback whereas 50 feet is required because adequate space was needed in the rear for parking and space to build a functional layout. The proposed setback is about 6 feet further back from the street than the current property. The home portion will have 30.1 feet setback.
 - f) 80 feet Depth Setback whereas 200 feet is required because the lot is only 120 feet deep.
2. *The proposed use is a reasonable one because:*

Two-family home is allowed in R-4 zone. There are other 2-family homes in the immediate area.

- 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.*

A hardship will exist if the variances are not granted because it will prohibit the property from being re-developed into its "Highest and Best" use, a 2-family home. Repairing the current property was not financially feasible. It was collapsing, and no longer structurally sound. It was demolished, and rebuilding a new home would not be supported by the marketplace.

Chairman Dwyer opened the Public Hearing at 8:36 p.m.

Testimony in Favor

Christine Hugh, 333 D.W. Highway

Spoke of the property having been abandoned for many years. She has resided at her current residence for 13 years, and is aware the property was abandoned 2-3 years prior to that time. She spoke of being pleased to see the property, which was completely run down, be razed, and stated her support of the proposal. She is not too keen about a multi-family home as she has not had a neighbor on that parcel for some time, and has a multi-family on the opposite side of her residence. However, she is pleased to hear the proposed multi-family will be in the existing footprint, and that there will be parking provided in the back.

Testimony in Opposition

Jean Wiseman, 69 Pondview Drive

Spoke of being on the Board of Directors at Horseshoe Pond. She thanked the petitioner for razing the previous structure. She stated concern with parking commenting the residents of Horseshoe Pond are being choked off with the amount of construction occurring in the area. She spoke of the increased amount of traffic, and associated difficulties particularly during morning and evening rush hours.

A multi-family home could result in 6-8 additional vehicles. She spoke of not wanting traffic lights coming out of Horseshoe Pond, but is concerned that will be the result if the crowding continues.

Mr. McClintick stated there would be ample paved parking in the rear of the building (6-8 cars). Driveway access will not be changed. Director Thompson noted minimum parking spaces required by zoning would be 4.

Chairman Dwyer declared the Public Hearing closed at 8:42 p.m.

Director Thompson noted, because the proposal is for a duplex, it does not require Planning Board approval, as State law prohibits Planning Board approval for this.

Member Christensen commented she can see putting in a single-family residence, but a two-family is over-burdening the lot, which is small. She did not agree with hardship. The property was purchased with an existing single-family home.

The Board voted 3-2-0 to deny the Variances, on a motion made by Lynn Christensen and seconded by Tony Pellegrino because the petitioner failed to demonstrate a hardship inherent to the property to allow for a duplex dwelling whereas a replacement single family dwelling would be permitted with reduced setbacks per section 3.05 of the ordinance and would be consistent with the previous use of the property. Patrick Dwyer and Rich Conescu voted in opposition

6. OVP Management Inc. (petitioner) and Apple Development Limited Partnership (owner) -Variance under Section 17.10.10 of the Zoning Ordinance to permit modifications to the previously approved 253 s.f. ground mounted sign in order to utilize an electronic message display. The parcel is located at 360 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Planned Residential Overlay, and Elderly Housing Overlay Districts. Tax Map 4D-3, Lot 001. Case # 2017-51.

Derek Lick, Esq., Sulloway & Hollis, stated the request to be to take a previously approved sign of the same size and in the same location, and utilize it in a couple of different ways. The first variance request relates to allowing it to be an electronic billboard. It is allowed as a matter of right. The sign was before the Board in June and granted a variance at that time; however, it was not clear the sign being requested was an electronic billboard. The Ordinance has certain requirements with respect to brightness, automatic dimming, etc. The petitioner will abide by all provisions.

The second variance request is, if approved to be an electronic sign, both on-premises and off-premises advertising be permitted. This particular sign is on the back property, abutting the Everett Turnpike. The third request is that the sign be allowed to be up to 100' in height.

Attorney Lick read the statutory criteria into the record.

With regard to the public interest criterion, Member Conescu questioned if there would ever be moving content. Attorney Lick responded the petitioner will abide by what is permitted by the Ordinance. When asked if there would be animations as part of a graphics display, Attorney Lick stated his understanding there would not.

Director Thompson noted, were that a desire of the petitioner, it would require a separate variance. The current Ordinance does not allow anything other than a static change every 20 minutes.

With regard to the spirit of the ordinance criterion, when asked to clarify, Attorney Lick responded instead of having a static sign that may identify 1 of the tenants, there would

be an electronic sign that could change every 20 minutes, and identify the 2nd, 3rd, or additional tenants. If off-premises advertising is allowed that would allow the sign to be flexible to accommodate that.

Chairman Dwyer opened the Public Hearing at 8:57 p.m.

Testimony in Favor - None

Testimony in Opposition

Virginia Heald, 3 Pondview Drive

Stated she feels this is a case of asking for one thing, and then wanting something very different. She is supportive of the development of the property as there will be conveniences to the residents. She is of the opinion there is a certain characteristic on this side of the highway, which differs from the other side. She is concerned the light would be a distraction to motorists and residents alike.

Chairman Dwyer noted the sign would be facing the highway. He is uncertain the light would be seen on the other side of the building.

Pete Hinkle, 1 Pondview Drive

Questioned how an electronic message display differs from a static sign, and was provided an explanation of the desire for a static sign that could have the message change every 20 minutes.

It was clarified, there is a sign that has been approved facing the Everett Turnpike on the hill behind the parking lot. The request is for that sign to be allowed to be an electronic message board.

Stuart Hollander, 33 Pondview Drive

Wished to be assured there would be no light from an electronic sign heading in the direction of his residence. Chairman Dwyer stated that to be his understanding; however, offered to request that be clarified/stated by Attorney Lick following public comment.

He asked for clarification of the static nature of the sign. Director Thompson stated regulations dictate that, and the petitioner has not requested a variance to that. They will be required to comply with existing regulations. The Planning & Zoning Administrator has gone over the applications with the petitioner and their attorney to ensure they have the correct variances needed to accomplish what they are looking to do.

Director Thompson stated, if this was the only sign proposed, and on this lot, they wouldn't be before the Board because an electronic sign is permitted by right, but

because this sign required a variance to be established due to the fact that there are multiple ground signs on this property, it requires a variance to become an electronic message sign.

Mr. Hollander questioned the meaning of “spirit of the ordinance”, and was informed that is required statutory criteria for any variance. The petitioner must establish they have met the five points of law.

Attorney Lick stated the sign will be situated so that it can be seen from northbound and southbound traffic on the Everett Turnpike. It will be perpendicular to the highway. Whether electronic or regular, the sign will have lighting. Electronic signs have more strict criteria and require additional steps to ensure it has auto dimming technology, brightness, etc. Whether the light would be visible would depend on where an individual was located, but his understanding in seeing the site is not only do you have the shopping center and all of that in the commercial district (will see it from both the Everett Turnpike and Route 3), you have a buffer of trees along the southern side of the lot. The sign is located in the back of the lot.

Director Thompson stated the two sides would not be projecting towards Pondview Drive, but rather north and south.

Mr. Hollander stated his belief a sign up to 100’ in height is something he will be able to see. He suggested there be further study to determine who would be impacted. He suggested it not be placed perpendicular. He spoke of a condominium complex across the street that has no tree barrier. Although not in attendance, he believes they will be impacted.

Director Thompson noted they were all provided notification.

Virginia Heald remarked perpendicular to Everett Turnpike is a lot different than at an angle or even parallel to the Turnpike. She spoke of Horseshoe Pond and its eco-system. She believes there is the need for studies of the night/light pollution and the impact that would have on fowl. In addition, it would pollute the open sky.

Director Thompson stated the lighting plan that was part of the site plan was reviewed and approved by the Planning Board. Signage was contemplated, and even if this wasn’t an electronic message board, there is lighting associated with this sign. Ms. Heald stated lighting associated with a standard sign differs from 70’ of LEDs.

Jean Wiseman stated she is thrilled the complex is being built, but she is concerned with the traffic that will be drawn onto D.W. Highway from that sign. Chairman Dwyer stated that to not be part of the variance; the variance is regarding the sign. When the petitioner sought a variance to build this, the Planning Board addressed it. What was before the Board was a variance request for a sign.

Chairman Dwyer commented it is important to note that a regular sign with big spots on it will more than likely be a lot brighter than a digital display sign, especially one that the DOT has to approve because it is going to face the highway.

Chairman Dwyer declared the Public Hearing closed at 9:22 p.m.

The Board voted 5-0-0 to grant the Variance, on a motion made by Lynn Christensen and seconded by Rich Conescu

Findings of Fact:

- *Granting the variance would not be contrary to the public interest:*

The sign has already been approved for the proposed location and size, and thus, this variance request is being made to allow for the sign to utilize electronic message display technology.

Not only is this allowed as a matter of right, but the petitioner will abide by all criteria of Section 17.10.10 with respect to speed of message changes, transitions from one message to the next, automatic dimming and brightness.

The sign does not threaten public health, safety, or welfare. All setbacks will be observed, and construction will be undertaken in a professional manner ensuring that the signs are sturdy and stable.

- *The spirit of the Ordinance is observed because:*

Again, the sign itself has already been approved, and the sole issue presented by this application is whether the petitioner will be allowed to use electronic message display technology to provide flexibility in its messaging. The spirit of the Ordinance is observed for all the reasons above. Additionally, in this instance, the parcel is located in the General Commercial District, whose primary function is “to serve regional and/or local shopping and service need.” (See Section 2.02.3.A). This electronic sign will allow that to happen and allow it to happen more efficiently.

- *Granting the variance will achieve substantial justice because:*

Substantial justice would be done in that the approval of the electronic message display technology for the sign is reasonable under the circumstances, particularly where the sign location and size has already been approved. Using the electronic message display technology, with the safeguards imposed by the Ordinance, will not change the original analysis as to why the sign should be permitted.

- *The values of the surrounding properties would not be diminished:*

There is nothing to suggest that the change of a sign from a static one to an electronic message board display will decrease property values in the area.

The sign would help foster the development of a site that was close to abandoned. The proposal would take what has been somewhat of an eyesore in the area and bring it up to a high standard that is aesthetically pleasing and will increase the value of the neighborhood.

- *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.*

This sign has already been approved in this location at this size. It is merely a question of whether or not the electronic message board is allowed. Here it is allowed as a matter of right. The flexibility will help the property to be developed and allow it to be used in the most efficient way possible.

2. *The proposed use is a reasonable one because:*

The desire is to provide adequate and easily readable signage that benefits the public, and the flexibility of an electronic sign will allow the petitioner to do that in a more dynamic way and in a way that serves the tenant needs, and also puts it in the size of type that may make sense given the traffic passing on the Everett Turnpike. The sign would be located on the back of the property, which abuts the Everett Turnpike. The parcel is in a commercial district and a high-traffic highway area.

7. OVP Management Inc. (petitioner) and Apple Development Limited Partnership (owner) -

Variance under Section 17.11 of the Zoning Ordinance to permit modifications to the previously approved 253 s.f. ground mounted sign in order to display off-premises advertising in addition to on-premises advertising. The parcel is located at 360 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Planned Residential Overlay, and Elderly Housing Overlay Districts. Tax Map 4D-3, Lot 001. Case # 2017-52.

Attorney Lick stated the variance to be a request to allow off-premises advertising in addition to on-premises advertising. The ordinance allows a sign to provide either, but not both. It would be an electronic messaging sign that is readily flexible to allow all types of advertising in 20-minute increments, and the petitioner would like the flexibility to utilize the technology.

Attorney Lick read the statutory criteria into the record:

- *Granting the variance would not be contrary to the public interest:*

The petitioner is merely requesting flexibility to use the sign for off-premises advertising as well as on-premises advertising. With such technology, there is an easy option for rotating off-premises advertising along with on-premises advertising.

- *The spirit of the Ordinance is observed because:*

The ordinance language was not clear as to the rationale for a sign to have either or types of advertising. It appeared it could be that the Town would not want to confuse the public that is looking at signs to determine the location of what was being advertised. The sign can be set up so that it is only advertising either on-premises or off-premises advertising at one time.

Though the center is next to the Turnpike, it is not easily accessible from the Turnpike. Even if there were to be some confusion, it is not a situation where passersby could immediately pull into the development.

Member Conescu commented the spirit of the ordinance of having a sign is to let people know what is in the shopping center. Otherwise we would call it a billboard, which is a very different type of sign. What he believes the variance request to be saying is we want to use our sign as a billboard, and thus that is not really in the spirit of the ordinance.

Attorney Lick responded it is a fair comment; however, the parcel is located in the General Commercial District, whose primary function is “to serve regional and/or local shopping and service need.” He does not believe it to be beyond the spirit of the ordinance, particularly in a General Commercial District, to allow for signage for something like a Fidelity for example. Member Conescu questioned how the region is defined, e.g., could advertising be for an online vendor. Attorney Lick stated he cannot interpret that as the ordinance does not address it. It is not that off-premises isn’t allowed on a sign, it is that you can have one or the other. What is triggering the variance is the desire to do both. He reiterated since it is a sign that can change they would not advertise both at the same time on one side for example; either or.

Member Conescu remarked when the sign was discussed previously, the discussion was, as it was presented to the Board, to allow people on the highway to know that this plaza exists and that there are tenants in this plaza as people driving down the highway don’t see the renovations. This is a very different narrative. Now, we’re saying originally, we just wanted to use it to make people aware of our plaza, but now we want to use it as a billboard. Attorney Lick responded he thinks it is a slightly different narrative; still want to make sure we get folks to the site and advertise our tenants.

A balloon test was conducted for height to see what is visible. What they found was it is readily visible from one direction but not the other. The one direction that makes the most sense where you would advertise your tenants is the one where you could, as quickly as possible, get to the site. The petitioner wants flexibility to be able to do both. His tenants want their name up on the billboard as much as possible. On the other hand, the petitioner does not want his hands tied if the opportunity presents itself where the billboard is making no sense for one side for example, and he has someone, Fidelity for example, that wants to put their name up, he would like to be able to do that. That is not the primary purpose, but it is a potential purpose in the future. While they are before the Board they decided to ask for it so that there is maximum flexibility in the future.

- *Granting the variance will achieve substantial justice because:*

The proposed use of the sign is to allow either off-premise or on-premise advertising. The request is to do both in sequence given the electronic message display. The sign location and size has already been approved.

- *The values of the surrounding properties would not be diminished:*

There is nothing to suggest that the change of the breadth of messages allowed on the sign will decrease property values in the area.

- *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.*

The purpose of the Ordinance appears to be to avoid confusion of having both on-premise advertising and off-premise advertising. Here that would not be the case given the electronic billboard is on the Everett Turnpike.

2. *The proposed use is a reasonable one because:*

Next to a high-traffic Turnpike serving both Merrimack residents and others. There is nothing to suggest it is unreasonable to allow two different types of advertising as far as content on the message board that is facing a high-traffic turnpike.

- 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 petitioner contends that the criteria of subparagraph (A), above, are met. However, it also contends that this factor is met as well.

The property is unique in that it abuts the Everett Turnpike, but it is not located in the more well-traveled and more recently-developed area of Town that makes it particularly lucrative for development. However, its location adjacent to the Turnpike will make it an attractive site for placement of signage promoting local and other businesses whose message cannot otherwise reach the high-volume traffic found on the Turnpike. By allowing the sign to display both on-premises and off-premises messages, the petitioner will have the flexibility to use the signage in a way that is most productive to the site, which in turn supports its overall redevelopment. It would be an unnecessary hardship and rather arbitrary to limit the sign at issue to either on-premises advertising or off-premises advertising given that the property is located next to the Everett Turnpike (where unlike on the local roadways in Town) drivers would not be confused to see signs of both the off-premises and on-premises type.

Attorney Lick noted, given the nature of the development, the types of tenants that will be on site, etc., it is not the highest dollar grossing area in Town, and every little bit helps. If his client can avail himself of opportunities of businesses in addition to his tenants wishing to advertise, this would help in the development in making it profitable.

Attorney Lick stated it really comes down to whether there is an interest in the Town in precluding both on-premises and off-premises signage or display on a single sign when it can be rotated through on a basis where essentially it is either one or the other at any given time.

Member Conescu reiterated when the sign was discussed months ago the explicit purpose of the sign was to bring awareness to that plaza, and once we turn to a billboard we are totally defeating that purpose.

Rob Barsamian, OVP Management, remarked as he looked at the development and the signage as a package that is what he talked about; all three signs and how critical they were to the overall development. As they have gotten into this they have learned a lot more. He spoke of the projects on D.W. Highway, the lack of business some of them have had, and their requests to advertise on some of their signs. It gives more flexibility. They could do one or the other. They would like to do both. He provided the example of the credit union located next to the site; not doing great, looking for as much traffic generation as possible to stay in the marketplace. This could be an alternative for them. He stated a lot of examples could be provided. He commented he needs to be successful, and needs the street to be successful.

Member Conescu commented he understands what is being said, but once it is allowed, he does not believe there is legal boundary for the Board to say no Geico ads, political ads, etc.

Director Thompson stated the motion could be conditioned as such.

Ms. Christensen stated the sign could be exclusively off-premise advertising. The request is to allow both.

Chairman Dwyer opened the Public Hearing at 9:43 p.m.

Testimony in Favor

Mike Buckley, OVP Management, addressed the point made that the sign is no longer for the tenant and moving entirely towards being a billboard, commenting the point is it does not have to be one or the other; can do both. That is the flexibility they are trying to capitalize on. He provided the example of the armed forces requesting advertising space.

To the point of confusion, given the sign is on the Turnpike, and that there is no direct access to the center from the turnpike, if other businesses located right off the offramp had the opportunity to, could advertise, e.g., McDonalds located directly off the off-ramp.

Testimony in Opposition

Stuart Hollander, 33 Pondview Drive

Agreed the intent of the sign was to advertise the stores in the center. But the law is the law, and once you allow that things change. He believes the remarks made regarding the rationale for allowing one or the other to be complete speculation. That is not a legal ruling. We don't know the rationale. It is the way it is. He suggested that argument not be considered.

He would argue it is wrong to have off-premises advertising. When you drive into New Hampshire it is because of the scenic nature. With this, visitors will be seeing mortgage signs, etc. The Board will decide what people will see, for years to come, when driving past exit 10 or 11.

In terms of hardship, he does not see any. In terms of motorists seeing the sign and getting off the highway, he commented advertising often is just an awareness of what is there.

Chairman Dwyer questioned if he would be opposed to off-premises advertising if it were for Shaw's, a credit union, etc. Mr. Hollander responded if a proposal is considered that was contingent upon off-premises advertising being for a retail

establishment within a certain distance, that would sound very different. It is a good question. He simply would not want it to be open-ended.

Virginia Heald, 3 Pondview Drive

Stated appreciation for the shopping center coming back to life, and would not want to see it empty and dark again. She would like to see the concentration on the on-premises businesses.

Mr. Barsamian reiterated there is a reason the project was vacant for such a long time. The more flexibility they have the more successful they will be in a lot of areas. The sign is a huge piece for them. The plaza tried things the traditional way, and were not so successful. They are trying to do all they can to make their tenants and the street as successful as possible.

Attorney Lick stated he has not done the legal research on what a Town can and cannot do with respect to restricting what messages can be on signage. He is a little nervous about a restriction that says you can advertise off-premises for someone who has a tie to the Town, but any other off-premises advertising you cannot. It strikes him as potentially running afoul of 1st Amendment issues. He stated understanding there may be a difference of opinion as to what the rationale was.

Director Thompson stated he would be purely speculating as he was not here in the '50s when the Ordinance was originally written, but knowing how the Ordinance is constructed and having been in the Town for 6+ years he knows it to be an agglomeration of multiple years and layers of amendments that have taken place since the mid-1950s. His expectation is that the prohibition on having one or the other came well before the Town had a provision for electronic signs, and the Ordinance was never changed to address that inconsistency with the technology change; the electronic sign section was just tagged on without regard to what was existing in the Ordinance.

Member Conescu questioned, if the Board allows the sign to have dual purpose, what ground does it have to stand on to ensure it is local businesses that are advertising on it. Director Thompson responded the Board would have to be very careful with that. The condition would have to be in such a way that it would be content neutral, and he is uncertain how that could be done.

Stuart Hollander remarked it is a good point. He suggested it be kept simple, and that the sign advertise for on-premises. Member Christensen stated that sign right now, with no variance, can advertise all off-premise entities it wishes with no advertising whatsoever for the center. Mr. Hollander suggested the petitioner be left to choose, and stated his belief they would choose to advertise for their own stores.

Chairman Dwyer declared the Public Hearing closed at 10:00 p.m.

Member Christensen stated agreement a lot of the Zoning Ordinances have evolved in isolation. As it stands, the Ordinance states one or the other can occur. She did not see hardship in restricting to one or the other.

Member Conescu spoke of the differentiation between signage and billboards.

The Board voted 5-0-0 to deny the Variance, on a motion made by Rich Conescu and seconded by Lynn Christensen, because the petitioner failed to demonstrate that the petition was not contrary to the spirit of the ordinance, as the plain language of the ordinance does not intend to allow mixing of on- and off-premise signage on a single sign.

8. OVP Management Inc. (petitioner) and Apple Development Limited Partnership (owner) —

Variance under Section 17.10.3(c) of the Zoning Ordinance to permit modifications to the previously approved 253 s.f. ground mounted sign in order to be raised to a height of up to 100 feet whereas a maximum of 40 feet is permitted. The parcel is located at 360 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation, Planned Residential Overlay, and Elderly Housing Overlay Districts. Tax Map 4D-3, Lot 001. Case # 2017-53.

Attorney Lick stated the request focuses solely on the height of the sign. The desire is to have the opportunity to raise the sign up to 100'. What it comes down to is a choice between cutting down trees or raising the sign height.

A balloon test was done to observe at what point you could see the sign from the Everett Turnpike. Given the topography, which puts the sign lower than the Turnpike and the trees, to be visible from the Turnpike the sign height would need to be in the range of 100'. This will have to go through a second review by the DOT. What is being asked for is for the Town to allow up to that height, which would allow the DOT to approve up to that height, if they see fit.

Attorney Lick read the statutory criteria into the record.

Regarding the public interest criterion, Chairman Dwyer questioned if the sign at 100' would go above the trees, and was told it would. When asked for an estimate, Mr. Barsamian stated his opinion the bottom of the sign would be at the top of the tree line. Topography makes it very difficult the lower you go, to see it from both sides of the Turnpike. Coming from exit 12 to exit 11 there is a pretty good view of it. Coming from exit 11 past the site, even at 100' you just get a glimpse of it. When asked about moving it closer to the Turnpike, he stated there to be a buffer from the State road. They could possibly clear out all the trees to make it visible. They would need a little help working through the State process.

Chairman Dwyer remarked were the request to be denied, the petitioner would still be able to mount the sign, it would just be 40' in height. He questioned, and was told, if at

40' and the trees (possibly in the hundreds) were removed, it would be visible from the Turnpike.

Chairman Dwyer opened the Public Hearing at 10:15 p.m.

Testimony in Favor - None

Testimony in Opposition

Pete Hinkle, 1 Pondview Drive

Stated the petitioner has emphasized this is in the General Commercial District, but it is in the C-2 (General Commercial), Aquifer Conservation, Planned Residential Overlay, and Elderly Housing Overlay Districts. There is a lot of residential in the area.

There was talk of the sign being 100' so it will be above the tree line. It will be very visible from D.W. Highway, residential properties, etc. It will be a 100' sign on top of an elevated terrain overlooking a residential district. It does not sound consistent with residential.

Regarding hardship, he commented evidently when they first applied for approval for the property they didn't think the absence of this sign would be a hardship. Now they come back and want you to be reasonable, and maybe it is a hardship.

Chairman Dwyer remarked they are proposing potentially putting the sign at 100'. It will probably be seen from the area of the plaza. However, they are seeking a variance because what they don't want to do is cut down about 200 trees and reshape that hill. Removal of those trees would eliminate a noise buffer from the Turnpike. They did not have to come before the Board seeking a variance, they could have simply removed the trees.

Mr. Hinkle remarked the Turnpike Commission is considering widening the Turnpike in that area. That may be some years off, but they may eventually come along and cut those trees down for them. We may stand to lose those trees one way or another.

Stuart Hollander, 33 Pondview Drive

Questioned if it is possible to grant the request conditional upon the trees not being cut, and that if the State were to, at some point, cut the trees down, the petitioner would erect a sound barrier. Chairman Dwyer remarked if the State cuts those trees down that has nothing to do with the Board. As far as telling the petitioner or any property owner what they can do with their property, that is also not his privy.

Director Thompson stated, in this case, because it is a commercial site plan, if they wished to remove the trees they would have to go before the Planning Board as a

modification to their approved plan because of the existing landscape buffer that was approved as part of the site plan.

Mr. Hollander stated agreement with the remarks made by Mr. Hinkle.

He commented on how visible the sign would be. At 100', those residing in the condominiums next to the plaza will be impacted by visual aspects of the sign. It would be dimmed in the evening so perhaps it will not be that bad. He is unhappy with the idea of the height and how visible the sign would be. He questioned the importance of the sign being visible to motorists on the Turnpike.

Chairman Dwyer declared the Public Hearing closed at 10:26 p.m.

The Board voted 5-0-0 to grant the Variance, on a motion made by Rich Conescu and seconded by Tony Pellegrino.

Findings of Fact:

- *Granting the variance would not be contrary to the public interest:*

The petitioner is seeking this variance to allow the sign to be visible from the Everett Turnpike, which abuts the back of the property near the sign, without cutting down trees that otherwise provide a vegetative buffer and screening between the property and the Turnpike.

- *The spirit of the Ordinance is observed because:*

The parcel is located in the General Commercial District, whose primary function is "to serve regional and/or local shopping and service need." (See Section 2.02.3.A). The redevelopment of this site does exactly that, and this signage, in particular, also does exactly that, and will serve that purpose of the General Commercial District.

- *Granting the variance will achieve substantial justice because:*

The increased height for the sign is reasonable under the circumstances, particularly given the location of the sign; at the back of the lot. The size and location have already been approved, and the height is needed for visibility.

The sign will allow for the development of the parcel. It is proportional with the size of the site and number of tenants, and is aesthetically pleasing. The sign must do automatic dimming at night, and has a certain restriction with respect to its visibility and brightness. The sign itself is going to be basically moderated by the Town's own Ordinance governing electronic billboards.

- *The values of the surrounding properties would not be diminished:*

There is nothing to suggest that the height of the sign, in excess of 40', will decrease property values in the area. The sign is in the back of the lot, and adjacent to the Everett Turnpike. The electronic sign has the dimming technology. It is next to a high-traffic, multi-lane roadway.

- *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.*

The general purpose of the Ordinance is to ensure that there is no proliferation of overly-tall obtrusive signs throughout the Town. Because of the unique nature of this lot and its location with respect to the Turnpike, the additional height is needed for the sign to be visible.

2. *The proposed use is a reasonable one:*

The proposed use is reasonable because it is appropriate to request that signage be of a height to be readily-visible.

9. DISCUSSION/POSSIBLE ACTION REGARDING OTHER ITEMS OF CONCERN

Director Thompson formally introduced Kellie Shamel, Assistant Planner.

Chairman Dwyer informed the Board he met with Kathleen Stroud who has applied to be an Alternate member of the Board.

10. APPROVAL OF MINUTES

The minutes of October 25, 2017, were approved as submitted, by a vote of 3-0-2, on a motion made by Lynn Christensen and seconded by Rich Conescu. Tony Pellegrino and Rich Conescu abstained.

11. ADJOURNMENT

The meeting was adjourned at 10:28 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Rich Conescu.