



# Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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## **MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, OCTOBER 26, 2022**

**Board members present;** Rod Buckley, Ben Niles, and Lynn Christensen.

**Board members absent:** Chair Richard Conescu, Patrick Dwyer, and Alternate Charles Mower

**Staff present:** Robert Price, Planning & Zoning Administrator.

### **1. Call to Order**

Vice Chair Rod Buckley called the meeting to order at 6:30 p.m.

### **2. Roll Call**

Rod Buckley led the pledge of allegiance and swore in members of the public who would be testifying. Ben Niles read the preamble. Vice Chair Buckley advised the petitioners that since only three Board members are present, a petition would require a unanimous vote of the Board in order to pass. He stated that anyone wishing to continue their petition until more Board members are present could do so. All petitioners indicated they wanted to proceed.

- 3. William Lastowka (petitioner) and Joan A Lester, trustee of the Joan A. Lester Revocable Trust (owner)** – Variance under Section 3.02 of the Zoning Ordinance to allow the creation of a proposed lot (requiring subdivision approval from the Planning Board) containing approximately 167.11 feet of road frontage whereas 200 feet is required. The parcel is located at 94 Amherst Road in the R-2 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 4C, Lot 460. Case # ZBA 2022-40.

Attorneys Gregory Michael, Esq. and Eli Leino presented the petition to the Board. Mr. Michael shared a copy of the exhibit plan to demonstrate the layout of the property and frontage dimensions. He also provided some details on the history of the ownership of the land and the Trust that currently owns it. Mr. Michael then shared a conceptual subdivision plan in which the minimum required lot frontage could be achieved with a lot line adjustment and explained that this approach is not preferred by the petitioner as it leaves an awkward strip of land along the front of the property that could not be used. He commented that the zoning regulations when the lot was originally created only required 100 feet of frontage, which is still available. Mr. Leino then read the responses to the statutory criteria (outlined below).

### **Public Comment**

Janet Pinet (64 Meetinghouse Road) asked for clarification on how the land is being subdivided.

Mr. Michael shared the subdivision concept plan to show the layout of the subdivision that may be presented to the Planning Board. He also clarified that nothing will happen as a result of the ZBA decision and that the variance is necessary to ensure any lots created are conforming.

**On a motion made by Lynn Christensen and seconded by Ben Niles, the Board voted 3-0-0 to determine that the petitioner's responses to the statutory criteria were sufficient, proved that each criterion was met and adopted the responses as the Board's finding of fact, and further, to grant the Variance under Section 3.02 of the Zoning Ordinance to allow the creation of a proposed lot containing approximately 167.11 feet of road frontage whereas 200 feet is required, subject to the following condition:**

- 1. The petitioner shall obtain plan approval from the Planning Board for the proposed subdivision.**

***Findings of Fact:***

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

*The proposed Lot 4C-460 is zoned for residential use. The purpose of the ordinance frontage requirement is to prevent overcrowding and congestion. Proposed Lot 4c-460 will be 13.60 acres in size far exceeding the 100,000 sq foot zoning requirement. Residential use of this lot will not create "overcrowding or congestion" and it can be used without any adverse impact to public rights. There will be no "threats to public health, safety or welfare" since all other ordinance lot size requirements can be met.*

***2. The spirit of the ordinance is observed because:***

*Because it is in the Public Interest to uphold the "spirit of the ordinance", the Supreme Court has held both criteria are related. Thus, if you meet one of them you almost certainly meet the other. Farrar v. Keene, 158 N.H. 684. That said residential use of the lot is consistent with the residential character of the neighborhood. Therefore, the essential character of the neighborhood will not be affected by this variance thus, the spirit of the ordinance will be observed.*

***3. Granting the variance would do substantial justice because:***

*Balancing test: public versus private rights. There is absolutely no gain to the public if this variance is denied. The loss to the applicant is significant since a large residential lot will be unusable unless a Class V public road is constructed which will be very expensive and difficult to complete. Based on the size of the lot and the available frontage no zoning purpose is supported by denial of this variance.*

***4. Granting the variance would not diminish the values of surrounding properties because:***

*If used residentially all other zoning size and setbacks will be met. As noted, the property is 13.5 acres in size, thus, no nearby property will be diminished in value by granting a frontage variance.*

***5. Unnecessary Hardship:***

***a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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 minimum frontage is to reduce overcrowding and congestion. This will not be an issue due to the size of this parcel. This property is unique in size and configuration. The plan reflects slopes and wetlands which make it difficult to install a road to create frontage. Taken together, the purpose of the ordinance will not be violated.*

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

*The proposed use, single family residential, is permitted by right. Thus, it is reasonable. Malachy Glen Assoc., Inc. v. Town of Chichester.*

- 4. 8 Jennifer Drive, LLC (petitioner/owner) –** Variance under Section 2.02.4 (B) of the Zoning Ordinance to permit a memory care use to be added to an existing assisted living care facility in the I-1 (Industrial) District where it is not a permitted use. The parcel is located at 8 Jennifer Drive in the I-1 (Industrial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 4D-4, Lot 64. Case # ZBA 2022-41.

Matt Peterson (Keach-Nordstrom Associates) and John Marino, presented the petition to the Board. Mr. Peterson began by sharing an aerial view of the property in question which is the home to an assisted living facility known as Rose Haven. He went on to provide a brief history of the ownership of the property and reminded the Board that the new owners were before them in March to request an increase to the number of beds allowed on site from 28 to 40. Since the time of that approval, the petitioner has learned that the current need for assisted living is more in memory care which has a different set of criteria than normal assisted living. The current facility does not meet the code requirements for memory care patients so the petitioner would like to construct a new 50 bed memory care facility behind the existing building, but is in need of a variance because the use is different than basic assisted living. Mr. Peterson also explained that the 12 additional beds that were approved in March are not likely to be constructed as originally proposed in order to allow room for the construction of a kitchen and recreational area for the residents of the memory care building. He shared a copy of the conceptual site plan to give the Board an understanding of the proposed layout. Mr. Peterson then read the responses to the statutory criteria (outlined below).

Vice Chair Buckley asked if the existing building would be renovated to be brought up to code and Mr. Peterson explained that the memory care standards are so specific that it would be impossible to bring the existing building up to the code for memory care. Ben Niles asked about the number of parking spaces on site and Mr. Peterson stated there are currently seven on site and they are mostly used by staff. He added that there will be a total of 24 spaces when the addition is constructed. He reminded the Board that assisted living residents do not typically have cars and the parking is just for staff and visitors. Lynn Christensen asked if the existing building is up to code for basic assisted living and Mr. Peterson confirmed that it is.

No public comment was received.

**On a motion made by Lynn Christensen and seconded by Ben Niles, the Board voted 3-0-0 to determine that the petitioner's responses to the statutory criteria were sufficient, proved that each criterion was met and adopted the responses as the Board's finding of fact, and further, to grant the Variance under Section 2.02.4 (B) of the Zoning Ordinance to**

**permit a memory care use to be added to an existing assisted living care facility in the I-1 (Industrial) District where it is not a permitted use, subject to the following condition:**

- 1. The petitioner shall obtain site plan approval from the Planning Board for the proposed memory care use and the associated site improvements.**

***Findings of Fact:***

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

*Granting the use variance will not be contrary to the public interest. More specifically, the requested variance will not unduly conflict with the basic purposes of the relevant zoning provisions as it will neither alter the essential character of the area nor threaten public health, safety, or welfare.*

*The existing neighborhood will remain unaffected by this expansion, as the proposed use of the property is not expected to change. The purpose of the zoning and ordinance is to ensure similar uses throughout an existing zone and where this has been an operating assisted living facility for decade there would be no character change to the area and as such the applicant believes this variance would not be contrary to the public interest.*

***2. The spirit of the ordinance is observed because:***

*Again, the applicant believes that the spirit of the ordinance is to ensure similar uses throughout the industrial zone and this use has been operating for decades and as such the applicant believes the spirit of the ordinance is met.*

***3. Granting the variance would do substantial justice because:***

*As the board knows, the applicant sought, and was granted, a variance earlier this year to increase available assisted living beds. Substantial justice would be done for the applicant if the memory care addition were to be approved because it will further assist families in the area who require special care*

***4. Granting the variance would not diminish the values of surrounding properties because:***

*Again, this is an expansion of the existing use of the property therefore it will not diminish the value to surrounding properties.*

***5. Unnecessary Hardship:***

***a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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:***

*Lastly this is an existing facility that is looking to expand for the purpose of providing a safe space for memory care patients and as such there is no substantial relationship that exists between the general purpose of the ordinance and the specific use of the property.*

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

*The proposed use is simply an expansion of the existing use to provide a safe place for many families seeking memory care assistance. The applicant believes this is a reasonable request to expand the facility as it offers a vital service for those in need.*

- 5. Robert Hanson (petitioner) and Sure Oil & Chemical Corp (owner) – Variance under Section 2.02.4 (B) of the Zoning Ordinance to permit an automotive sales use in the I-1 (Industrial) District where it is not a permitted use. The parcel is located at 254 DW Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 6. Case # ZBA 2022-42.**

Robert Hanson presented the petition to the Board. Mr. Hanson began by explaining that he has been a mechanic for 35 years and he currently owns a business in Nashua but he has outgrown the facility he is currently in. He stated that he is hoping to use the lot in question for both used car sales and automotive service and repair. He is in the process of buying the land but has not completed the sale yet because he needs to ensure he can operate his business there first. He added that he is still in the beginning phases of design but anticipates having roughly 25 parking spaces. Mr. Hanson then read through his responses to the statutory criteria (outlined below).

No public comment was received.

Mrs. Christensen asked if the existing structure would be demolished and the petitioner confirmed that it will be. Vice Chair Buckley commented that he thinks the use is well suited for the property and that it will be good for the neighborhood to have the property cleaned up. Mrs. Christensen agreed and added that she does not see the use as a burden to the property itself.

**On a motion made by Ben Niles and seconded by Lynn Christensen, the Board voted 3-0-0 to determine that the petitioner's responses to the statutory criteria were sufficient, proved that each criterion was met and adopted the responses as the Board's finding of fact, and further, to grant the Variance under Section 2.02.4 (B) of the Zoning Ordinance to permit an automotive sales use in the I-1 (Industrial) District where it is not a permitted use, subject to the following condition:**

- 1. The petitioner shall obtain site plan approval from the Planning Board for the proposed automotive sales use.**

***Findings of Fact:***

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

*There are already many other service and sales garages on this road. I am a small establishment that would not be creating any traffic or safety issues at this address.*

***2. The spirit of the ordinance is observed because:***

*My business is a small operation that would be used car sales (NH Dealer license #2375) and service work. I would not be creating any issue concerning the public or overall safety concerns in this area.*

***3. Granting the variance would do substantial justice because:***

*The variance would be for strictly automotive sales. I run a very respectful business. Also, there are many other used car sales very close on this road.*

**4. Granting the variance would not diminish the values of surrounding properties because:**

*It will be a new construction and total revamp of the property that has been vacant for many years.*

**5. Unnecessary Hardship:**

***a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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:***

*Actually, I am only asking for the property to conform to the other properties in the area. I would need to see automobiles on this property in order for it to work for me and my state licenses. This is reasonable because there are several other uses auto dealers within close proximity of the address. So I think this would not put a burden on the public or town.*

**6. Discussion/possible action regarding other items of concern**

None

**7. Approval of Minutes – September 28, 2022**

**The Board voted 3-0-0 to approve the minutes of September 28, 2022, as submitted, on a motion made by Ben Niles and seconded by Lynn Christensen.**

**8. Adjourn**

**The Board voted 3-0-0 to adjourn at 7:22 p.m. on a motion made by Lynn Christensen and seconded by Ben Niles.**