



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, OCTOBER 27, 2021

Board members present: Richard Conescu, Patrick Dwyer, Ben Niles, Lynn Christensen (arrived at 7:06 p.m.)

Board members absent: Rod Buckley and Charles Mower (Alternate)

Staff present: Tim Thompson, AICP, Community Development Director

1. Call to Order

Richard Conescu called the meeting to order at 7:01 p.m.

2. Roll Call

Chairman Conescu led the pledge of allegiance and swore in members of the public who would be testifying. Patrick Dwyer read the preamble.

- 3. Innovation Acquisition, LLC (petitioner) and Solon Properties, LLC and Innovation Acquisition, LLC (owners)** – Variance under section 2.02.4.B of the Zoning Ordinance to permit multi-family residential use in the Industrial District. The parcel is located at 1 Innovation Way in the I-1 (Industrial) and Aquifer Districts. Tax Map 2D, Lot 041-15. Case # ZBA 2021-32. **This item is continued from the August 25 and September 29, 2021 Zoning Board meetings.**

This item was heard simultaneously with agenda item #4.

- 4. Innovation Acquisition, LLC (petitioner) and Solon Properties, LLC and Innovation Acquisition, LLC (owners)** – Variances under section 3.02 of the Zoning Ordinance to permit a density of 90 units whereas a maximum of 12 units is permitted and a side setback of 20ft whereas 50ft is required. The parcel is located at 1 Innovation Way in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 2D, Lot 041-15. Case # ZBA 2021-38.

John Cronin (Cronin, Bisson, & Zalinsky, P.C.) and Arthur Sullivan (Brady Sullivan Properties) were present to discuss the project with the Board. Mr. Cronin began by providing an overview of the parcel in question which was previously used as the headquarters building for Brookstone and has been sitting vacant for a few years. He went on to explain that Brady Sullivan acquired the property and has been attempting to lease it for commercial/industrial users without success for the past 2 years. They are now considering converting it to apartment units as they have done with other properties throughout the state. The statewide need for housing coupled with the downsizing of office space throughout the region makes this property a good location for an apartment conversion. He spoke briefly about the proposed plan, which would include renovating the existing structure into market rate apartments which will fit in nicely with the neighborhood as it is already a mixture of housing and businesses.

Mr. Cronin then summarized his responses to the statutory criteria (outlined below) and referenced several documents to support the variances being requested. The first was a letter from a Real Estate agent (Calley Milne) stating that in her opinion, the apartments will fit nicely into the area and the value of surrounding properties will not be diminished as a result of this project. The second was a summary report on the impact of school aged children in apartment buildings that was prepared by an economic consultant (Mark Fougere). Mr. Cronin used this report to argue that the public assumption is that apartment buildings mean more children in the school system but the data shows that the impacts are minimal because people are not having as many children as they used to. The final document that Mr. Cronin referenced was an article published by the Josiah Bartlett Center for Public Policy (written by Andrew Cline) that supports the need for adaptive re-use of buildings for housing.*

Public Comment

A letter from Governor Chris Sununu supporting the project was read by the petitioner.

Chairman Conescu asked for clarification on the square footage of the building and the number of bedrooms proposed for each unit. Mr. Sullivan responded that the building is roughly 100,000 sf and they are aiming to have mostly 2 bedroom units with a few one bedroom options. He also stated that the rents are likely going to be roughly \$1,600-\$1,800 per month.

Patrick Dwyer asked for clarification on the number of units because the application states 90 and the letter from the Governor stated 84. Mr. Cronin confirmed that the proposal is for 90 units. Tim Thompson added that the Board should make its decision based on 90 units as a maximum but the number could change to less than 90 once the project is reviewed by the Planning Board.

Ben Niles asked about amenities that will be offered to the residents and Mr. Sullivan responded that their buildings do usually include fitness centers and other places to gather such as small libraries. Mr. Thompson added that he had the opportunity to tour the building recently and it is a very unique space that was custom built for Brookstone so it will be interesting to see how it is converted if the petitions are granted.

*All of the documents that were referenced in the discussion can be found in the project file located in the Community Development Department at Merrimack's Town Hall.

The Board voted 4-0-0 to grant the 3 variances, with the following condition, on a motion made by Lynn Christensen and seconded by Ben Niles:

1. The petitioner shall obtain site plan approval from the Planning Board for the proposed multi-family residential conversion.

Case #2021-32 and 38 Findings of Fact

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

Under the law as set forth in *Harborside Associates. L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 (2011), "[t]he requirement that the variance not be contrary to the public interest is related to the requirement that [it] be consistent with the spirit of the ordinance. [...] As the provisions of the ordinance represent a declaration of public interest *any* variance would in some measure be contrary thereto. Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, we must determine whether to grant the variance would "unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Thus, for a variance to be contrary to the public

interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's "basic zoning objectives" [and mere] conflict with the terms of the ordinance is insufficient." !d. at 514. In order for a variance to unduly violate an ordinance's "basic zoning objectives," granting the variance must "alter the essential character of the neighborhood" or "threaten the public health, safety or welfare." !d.

Here, the grant of the requested variance will not be contrary to the public interest. More specifically, the grant of the variance will not unduly conflict with the basic objectives of the relevant zoning ordinance as it will not substantially alter the essential character of the area one abutting property is a condo development and there is a housing development within 200 feet of the Property.

The variance will not threaten the public health, safety and welfare, because the infrastructure is already in place to accommodate the proposed project. There is already ample road access, as well as parking to accommodate the potential tenants as there was ample road access and parking to accommodate a busy office building. In many ways the variance will act to bolster the public health, safety and welfare by providing housing in a period where New Hampshire needs more housing opportunities.

Moreover, the structure already has in place all the relevant life and safety requirements (*i.e. sprinklers, fire exits, etc.*) thereby promoting safety, prosperity, security, safety from fire, adequate area between buildings and ROWs. The adaptive re-use of an existing building is beneficial as it allows the Property to be put to its highest and best use. The residential property proposed will add net value to the tax base and not burden public schools or public services.

2. The spirit of the ordinance is observed because:

It is important to note that this test is in the negative. That is to say that it does not require the Applicant to prove that the proposed use is *in* the public interest, but only to prove that it is *not contrary to* the public interest.

In keeping with the law as outlined above in *Harborside*, here, the spirit of the ordinance element is related to the public interest element and the factors are the same. As such, for the reasons set forth above, the grant of the variance will not be contrary to the spirit of the ordinance.

Moreover, the spirit of the ordinance is still observed as the proposed project will not alter the essential character of neighborhoods since the proposed project seeks to improve an existing building by creating needed residential dwelling in an area that is already surrounded by residential dwellings.

3. Granting the variance would do substantial justice because:

While a residential use is not permitted in this zoning district, there is certainly ample acreage to allow for such use on the Property. There is ample room for parking to accommodate the proposed project, the site lies in a mixed-use area with offices and condominiums in the neighborhood, and, the 'bones' and infrastructure for the building are already in place. The apartments proposed will be developed within the existing structure and the density and setbacks will not have a factor on building size or setback impacts.

Currently, the Brookstone Building, which is significant in size, is merely "sitting there" at a time when demand for residential housing is high and much needed statewide but commercial leases are not in high demand due to the increase in remote working opportunities which resulted from work changes during the pandemic. In fact, office use declined during the pandemic and the success many businesses have enjoyed with work at home policies is projected to increase office

vacancy and decrease office rents and market values. The Brookstone Building is a special property that was designed and constructed for a specific use for a single user. The space does not subdivide well for multiple office users. The Property has been on the market for an extended period of time -three years - for office users with no takers and no expression of interest. As such, the proposed use will not diminish surrounding property values but rather arguably enhance the value of properties in the area by breathing life into a dormant piece of real estate. The parcel is large and with use of the current building, the apartments will be well buffered from the neighborhood.

Notably, the Property is in an area with significant residential development and the abutters include several condominium communities who would not be harmed by the creation of additional housing. The relief for density is in the public interest as there is a statewide need for additional housing to support the economy and business community. The density per the ordinance of 40,000 square feet per unit when sewer and water is available is unsustainable and far greater than density requirements throughout New Hampshire. The setback impacts will not differ based on occupancy of the building as the structure exists and will remain.

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

The loss to the applicant, in the event that a variance is denied, outweighs any gain to the general public. In fact, the public stands to gain nothing from an empty property which is not usable and which has not been rented in three years. Accordingly, substantial justice would be done by granting the requested variance.

Notwithstanding its size and proximity to major roads, the Property has remained dormant with a large unused structure in place. The variance would breathe new life back into the Property, which, in turn, would add to the aesthetics of the Property, add to the aesthetics of the surrounding community, increase the tax base, and develop this Property in a responsible manner.

As discussed above, the public interest in this actually favors the grant of the variance by revitalizing an uninhabited building wherein provides a boom to the local businesses in the immediate area.

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 ordinance was drafted at a time when land use demands were very different and businesses were more interested in commercial leases and office space. When constructed, the site was proper for office development and was zoned accordingly. Since construction, markets have changed drastically with housing being an everyday crisis for the economic well-being of New Hampshire and due to changes brought about by the pandemic, more businesses are downsizing their office spaces and shifting to a hybrid/remote model. Currently there are insufficient housing opportunities to maintain and support the workforce. Recent articles underscore the brain drain of our best and brightest leaving New Hampshire due to the lack of housing opportunities. While housing is needed, office space is not. Prior to the pandemic, office vacancies were high and growing. With the success of work at home opportunities, the forecast for office space is bleak.

Here, due to the unique characteristics of the Property, including but not limited to: its existing layout, the large and ample parking already in place, the existing buffer between the Property

and the abutting properties, the access to a safe road, and the existing layout of the existing building renders a perfect conversion of an empty building into a safe apartment property. The location and infrastructure around it can already accommodate an apartment full of people and the utilities and roads which service the Property are able to support the proposed apartment use. The Property is in a neighborhood with a mix of residential and office uses and will sit in the footprint of an already built structure. As such, given that the project would add residential dwellings in an area already improved with residential dwellings, the project does not offend that general public purpose of the ordinance. Furthermore, even if the proposed project did offend the public purpose of the ordinance, it would not as applied to this Property because of its size.

In short, there is no fair and substantial relationship between the residential use limitation of the Ordinance and its application to the Property where the Applicant proposes to add residential apartment units.

b. The proposed use is a reasonable one because:

The proposed use is reasonable. Generally, there is a greater need than ever for residential dwellings in this current real-estate market. There is a public service in restoring the Brookstone building to a more beneficial use for the Town of Merrimack as opposed to just wasting away unused despite three years' worth of efforts to rent out the building. Further, as set forth above, the proposed use is reasonable as the Property is perfectly situated to be converted to apartment housing based on its pre-existing layout, infrastructure, ample parking and proximity to other housing developments.

- 6. Powell Realty of Merrimack (petitioner) and Thomas K Powell (owner) – Special Exception** under Section 2.02.2 (C) of the zoning ordinance to permit residential use in the C-1 (Limited Commercial) District. The parcel is located at 595 Daniel Webster Highway in the C-1 (Limited Commercial), Elderly Housing Overlay and Aquifer Conservation Districts, and Wellhead Protection Area. Tax Map 6D-1, Lot 041. Case # ZBA 2021-35.

Mr. Thompson provided some history on this project by explaining that it came to be as a result of a fire inspection that was conducted this past spring. During the inspection, the Fire Inspector noted that there were living quarters on the second floor of the Tortilla Flat building that were never permitted. As a result, the petitioner is now seeking a Special Exception to allow the mixed use to remain and if granted, they will still need to seek approval through the Planning Board or Community Development Department.

Brittany Smith (Tortilla Flat) presented the case on behalf of the petitioner and explained that the space is only used as residential on a few occasions a year when the owners (who live in Vermont and Maine) sleep there when they visit the restaurant. Mr. Thompson interjected to add that staff has no concerns with the use being approved but the approvals need to be granted to legalize it.

Mr. Thompson added that the only condition of approval that staff is recommending is that the petitioner obtain the appropriate approvals from the Planning Board or Community Development Department (whichever staff decides is necessary).

Ms. Smith advised the Board that the space is up to code and does contain a sprinkler system and the she read through the application responses to the ordinances criteria (outlined below).

There was no Public Comment.

The Board voted 4-0-0 to grant the special exception, with the following condition, on a motion made by Patrick Dwyer and seconded by Lynn Christensen:

1. The petitioner shall obtain the appropriate approval (Administrative, Waiver of Full Site Plan, or Site Plan) as determined applicable by the Community Development Department for the mixed use of the property.

Case #2021-35 Ordinance Criteria

a. The specific site is an appropriate location for such a use or uses in terms of overall community development because:

The space will continue to be used as office space, storage and occasional overnight stays for owners who need to travel to this location or employees working between locations of restaurants.

b. The use as developed will not adversely affect the neighborhood because:

It has been an existing use for these purposes for these purposes for almost 40 years.

c. There will be no nuisance or serious hazard to vehicles or pedestrians because:

No change in use or traffic flow since it has been in place for the past 40 years.

d. Adequate and appropriate facilities will be provided for the proper operation of the proposed uses or uses because:

The restaurant/building has been in use for 40+ years.

7. **Anheuser-Busch, LLC (petitioner/owner)** - Variance under section 2.02.4 of the zoning ordinance to permit residential use (2 "caretaker" apartment units) in the I-1 (Industrial) District. The parcel is located at 221 Daniel Webster Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D, Lot 031. Case # ZBA 2021-36.

Mr. Thompson clarified that there are two caretaker buildings that are in question with 3 apartment units in each building. He also explained that this is not a new use; the apartments were previously used when the Clydesdales were on site but have been vacant since they left. Since it has been more than a year since they have been used, the non-conforming use is no longer valid which is why they are now seeking a variance.

Tom Hildreth, (McLane Middleton, P.A.) was present to discuss the variance request on behalf of the petitioner. Mr. Hildreth described the location of the buildings in question and explained that the apartments (a total of six 2 bedroom units) were used for over 40 years as living quarters for the Clydesdale caretakers and have been vacant since the horses were transferred to another site several years ago. The company would like to start using the units again as a housing solution for employees transitioning from out of state, vendors or employees visiting for short term assignments or even entertainers that are performing at one of their on-site events. Mr. Hildreth then read through the responses to the statutory criteria (outlined below).

There was no Public Comment.

The Board voted 4-0-0 to grant the variance, with the following conditions, on a motion made by Patrick Dwyer and seconded by Ben Niles:

- 1) The petitioner shall obtain the appropriate approval (Administrative, Waiver of Full Site Plan, or Site Plan) as determined applicable by the Community Development Department;

- 2) The residential use of the 2 buildings shall be limited to temporary, short-term usage accessory to the brewery and event usage of the property, as described in the petitioner's request.

Case #2021-36 Findings of Fact

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

It will not unduly or in a marked degree violate the basic zoning objectives of the ordinance. The proposed project would not alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public. The current Merrimack Zoning Ordinance permits quasi residential use in the I-1 zone in the form of hotels/motels. Moreover, the 46year use of The Hamlet for residential purposes helped establish the essential character of the neighborhood. It appears that the Property was zoned I -1 during the occupancy of The Hamlet apartments and that the zone designation itself was predicated on the then-existing use. In other words, the Property was sufficiently unique at the time of zoning to accept use of the apartments. Allowing the resumption of residential use of the apartments would be restoring the Property to its roots.

The proposed use will be less impactful than the previous use because it will not include horses and tourists. Finally, the proposal is actually in furtherance of the public interest by modestly taking some pressure off the local housing stock at a time of acute shortage.

2. The spirit of the ordinance is observed because:

The proposal would not alter the essential character of the locality nor threaten the public health and safety or welfare.

3. Granting the variance would do substantial justice because:

There is no individual loss that is not outweighed by a gain to the general public. In fact, there is no individual loss, at all. And the gain to the general public is tangible. The proposal is consistent with the nearly 50 year use of the Property in the exact same manner.

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

All of the surrounding properties were developed and built during years when the exact use now proposed was already being made of the Property. The resumption of the use after a brief hiatus will have no effect on the values of surrounding properties. Given the location of The Hamlet on the Property, it is not visible anywhere but from the Property itself.

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 requested relief can be granted to this Property without frustrating the purpose of the ordinance. The proposal represents a reasonable use considering the long-standing historical use of the apartments and the unique characteristics of the Property's setting and environment.

The application of the provision limiting residential uses in the I-1 zone would not advance the purpose or intent of the ordinance given that hotels and motels are permitted in the zone and

that the apartment buildings here were- until less than two years ago - used for the exact same use as now proposed for 46 years.

b. The proposed use is a reasonable one because:

Of its small, modest scale, its longstanding duration, and its location on the Property which makes it invisible to all passersby.

- 8. 260 DWH, LLC (petitioner/owner)** – Variance under section 3.02 of the zoning ordinance to permit construction of a materials storage building 22.3 feet from the rear property line whereas 40 feet is required. The parcel is located at 17 Smith Road in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 09-02 Case # ZBA 2021-37

At the petitioner's request, the Board voted 4-0-0 to continue this item to the November 17, 2021.

9. Discussion/possible action regarding other items of concern

10. Approval of Minutes - September 29, 2021

The Board deferred action on the minutes until the November 17 meeting.

11. Adjourn

The Board voted 4-0-0 to adjourn at 7:49 p.m. on a motion made by Lynn Christensen and seconded by Ben Niles.