



Town of Merrimack, New Hampshire

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT VIRTUAL MEETING APPROVED MINUTES WEDNESDAY, OCTOBER 28, 2020 7:00 P.M.

Board members present: Richard Conescu, Patrick Dwyer Rod Buckley and Alternates Ben Niles and Drew Duffy.

Board members absent: Kathy Stroud and Lynn Christensen.

Staff present: Assistant Planner, Casey Wolfe

Due to the COVID-19 crisis, and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, the Zoning Board of Adjustment is authorized to meet electronically.

As stated on the agenda, the meeting was aired live on Merrimack TV. Telephone access was available for members of the public wishing to speak during the Public Hearing or provide public comment. Also identified on the agenda was the opportunity for general public comment to be submitted leading up to the start of the meeting via email to CommDev@MerrimackNH.Gov.

Members of the Board and Town Staff were participating via Zoom. In accordance with RSA 91-A:2 III, each member of the Board was asked to state, for the record, where they were, and who, if anyone, was with them.

1. Call to Order

Richard Conescu called the meeting to order at 7:06 and read the procedures and processes for the virtual meeting and appointed Ben Niles and Drew Duffy into voting positions for Kathy Stroud and Lynn Christensen.

2. Roll Call

- **Richard Conescu:** Stated he was participating alone in the room he was in.
- **Ben Niles:** Stated he was participating alone in the room he was in.
- **Rod Buckley:** Stated he was participating alone in the room he was in.
- **Patrick Dwyer:** Stated he was participating alone in the room he was in.
- **Drew Duffy:** Stated she was participating alone in the room she was in.

Rod Buckley read the preamble.

- ### **3. Request for Re-Hearing**
- Regarding Case # ZBA 2020-11, 2020-12, and 2020-13, in which the Board granted Variances under Section 3.02 of the Zoning Ordinance to permit three lots (following lot line adjustments) without the required minimum area, frontage, and depth (2020-11 & 2020-12) and minimum area and frontage (2020-13). The parcels are located at 15 and 11 Elizabeth Drive and 4 Squires Drive respectively in the R-2 (Residential) District. Tax Map 3A, Lots 013, 014, and 015.

Item cannot be heard, as it was not filed in a timely manner as required by RSA 677:2

4. **RCL Realty, LLC (petitioner/owner)** – Appeal of Administrative Decision that determined pre-existing nonconforming lots of record are required to conform to current zoning requirements upon the modification of the lot following a lot line adjustment even though such adjustments would result in each lot becoming less nonconforming than presently constituted. The parcels are located at Elizabeth Drive, Charles Road and Squires Drive in the R-1 (Residential by soils) and R-2 (Residential) Districts. Tax Map 3A, Lots 010, 013, 014, 015, 025, and 026. Case # ZBA 2020-16. **This item is continued from the July 29, August 26, and September 30 2020 meetings.**

Withdrawn by the Petitioner

5. **Russell Goldman (petitioner/owner)** – Request for an extension regarding Case # 2018-30, 2018-31, and 2018-32, in which the Board granted Variances on December 19, 2018 under Section 2.02.7(6) of the Zoning Ordinance to permit the construction of a single-family dwelling 23 feet from a wetland whereas 40 feet is required (2018-30), and Section 3.02.4 to permit the installation of a septic system 10 feet from the side property line whereas 20 feet is required (2018-32), and granted a Special Exception under Section 2.02.7(A)(4) of the Zoning Ordinance to permit the construction of a single-family dwelling within the 25’ wetland buffer (2018-31). Each approval is scheduled to expire on December 19, 2020. The parcel is located at 12 Carrie Drive in the R-1 (Residential by soils) and Aquifer Conservation Districts. Tax Map 5B, Lot 176.

Casey Wolfe advised the Board that this extension request should be handled like any other hearing however, when it comes time to vote, the 3 cases can either be voted on separately or together as one, as long as long as each is specifically cited.

Russell Goldman (petitioner/owner) explained to the Board that shortly after he purchased the lot in question, the pandemic started and now he is not comfortable developing the lot until a vaccine is developed. He further explained that he has an approved septic design on file with the state and that he intends to build a home on the lot to reside in.

Patrick Dwyer asked for clarification on the original approval from 2018 and the petitioner explained that he bought the land with all of the approvals in place so he does not know the history, however, he does have a plan that shows where the house must be placed and has to install a specific septic system.

Casey Wolfe reiterated that this project is only back in front of the Zoning Board because the two year timeframe on the original approval is set to expire in December 2020 and if it expires, the approvals are no longer valid.

Public Comment

Julie Seltsam-Wilps (8 Carrie Drive) spoke in opposition to the extensions. Ms. Seltsam asked if all of the conditions that were placed on the original approval would still apply. Chairman Conescu asked the petitioner if he is familiar with the conditions that were referenced by Ms. Seltsam-Wilps and if so, is he going to abide by them. Mr. Goldman stated that he is not familiar with all of the conditions that were read by Ms. Seltsam-Wilps but they do not seem unreasonable and he will adhere to all of the conditions from the original approval. Ms. Seltsam-Wilps stated she is concerned that there is no way to enforce the new homeowner to build out the lot with all of the considerations made by previous owner so she is in favor of not granting the extension.

Aidan Seltsam-Wilps (8 Carrie Drive) spoke in opposition of the extensions by stating that the surrounding properties are constantly inundated with water and developing this land is going to make it worse. He feels that the lot should not be zoned residential as it is essentially a swamp and he further feels that the extensions should be denied so that the new owner can present his plan for the land.

Casey Wolfe reminded the Board that they cannot consider any of the previous actions taken and they can only consider the request for an extension and whether or not it is reasonable.

Patrick Dwyer stated the original approval was granted based on the plan presented by the previous owner and now that the land has been sold, they should be able to re-consider the approval. Casey Wolfe responded by explaining the approvals that were granted run with the land and not the owner so the fact that there is now a different owner is irrelevant.

Casey Wolfe confirmed that there is not an appeal process for this request as it is for an extension only.

The Board voted 4-0-1, on a roll call vote, to grant a two year extension of each of the original approvals on a motion made by Rod Buckley and seconded by Drew Duffy. Patrick Dwyer abstained.

- 6. Eric & Jennifer Gould (petitioner/owner)** - Variance under Section 2.02.1.C.2.d of the Zoning Ordinance to permit the petitioner to request from the Planning Board a Conditional Use Permit to allow for the installation of an Accessory Dwelling Unit in an existing detached garage on a lot with less than the required 125% of the minimum lot area. The parcel is located at 12 Springfield Circle in the R-1 (Residential by map) and Aquifer Conservation Districts. Tax Map 4A, Lot 004-71.

Eric and Jennifer Gould, (petitioners/owners) and Annette Dainis presented the project to the Board. Mrs. Gould read their responses to the statutory criteria and clarified that they need the ADU so that they can care for her aging mother. She further explained that she does not want to place her mother in an assisted living facility because she feels that the majority of the COVID-19 cases in her mother's age bracket are residents of assisted living facilities.

Mr. Gould advised the Board that his neighbor (Ronald Fischer) recently reached out to him because Mr. Fischer had his property surveyed and found out that the Goulds' driveway was encroaching onto the Fischer's property. Mr. Gould assured the Board that he has since corrected the issue and although it has nothing to do with the ADU, wanted to mention it anyway.

Public Comment was received via an email from Ronald R. Fischer, 14 Springfield Circle. Chairman Conescu read the comment into the record and offered the petitioners a chance to respond, after adding that the majority of the letter had nothing to do with the ADU request.

Mr. Gould explained that he owns a small construction business, and they personally own a boat and a snowmobile. He has been in other neighbors homes and feels that the view from their backyards is no different than his. He does not feel as if they have done anything wrong and does not feel that his neighbors are relevant.

The Board voted 5-0-0, on a roll call vote, to grant the Variance on a motion made by Patrick Dwyer and seconded by Drew Duffy with the following condition:

- 1) The petitioner shall obtain Conditional Use Permit approval from the Planning Board for the proposed detached ADU.

Case #2020-30 Findings of Fact:

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

There will be no harm to the public since the building already exists and she'll be parking inside the garage. There is no conflict with the basic zoning objectives of the ordinance. She'll be mostly in her ADU. She will be able to have our assistance at all times.

2. The spirit of the ordinance is observed because:

There will be no threat to the public health, safety, or general welfare of the community. The building already exists which is located in the backyard, where no one can really see it. There is adequate light on the building outside. The use will not be detrimental to the character or enjoyment of the neighborhood.

3. Granting the variance would do substantial justice because:

The proposed use is a reasonable one as it will not affect the neighborhood.

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

This does not adversely affect the community. This will not bring the properties around us down since the building already exists.

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:

There will be no changes to the exterior. The building already exists and she'll be parking inside the garage.

b. The proposed use is a reasonable one because:

We will be living in the main house and my mother-in-law (mother), will be living in the ADU. She will be close to us for support and safety. We plan to put a chain lift in when it is necessary.

- 9. Streif, LLC (petitioner/owner) – Variance under Section 3.02, Note 6 of the Zoning Ordinance to permit the construction of a 2,950 sq. ft. building 22 feet from the Daniel Webster Highway right-of-way whereas 50 feet is required. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # ZBA 2020-04. **This petition was continued (indefinitely) by the Board on June 2, 2020.****

This agenda item was discussed before Item 7.

Matt Peterson, (Keach Nordstrom Associates, Inc.), John Bisson, Esq., and Ron Dupont, (petitioner) were all present to discuss the project. Mr. Peterson began by giving a brief history of the project and shared pictures with the Board that show the location and current conditions of the site. He explained that the petitioner had requested an indefinite continuance back in June due to COVID-19 and they are now ready to continue with the project. He went on to explain that

the project team at Keach Nordstrom has worked closely with staff and the owner to design something that makes sense for both the site itself and the surrounding area. The plan that they chose to move forward with is a commercial two story building with office space on the first floor and residential units on the top floor. If the Board does not approve the residential use, the owner is still prepared to move forward with just the office component. Due to the size of the lot, the proposed layout does require relief from the DW Highway front setback requirements regardless of the final use.

Patrick Dwyer asked for clarification on what is being built because Mr. Peterson mentioned a one or two story building. Chairman Conescu referenced the agenda and explained that item #8 is a request for a residential use, so if that item is approved the owner will move forward with a two story building. If it is denied, then they will proceed with the office use only.

Mr. Peterson read through their responses to the statutory criteria (outlined below) and confirmed that if the variance is granted the building will sit 60 feet back from the edge of pavement. Mr. Peterson also referenced a Real Estate letter* that was received from CBRE that states that the values of the surrounding properties will not be diminished with the proposed use of the property. Patrick Dwyer spoke in opposition of this letter and stated that he feels that the neighbor with the house next door would not feel the same. Drew Duffy stated that CBRE is a Commercial Realtor and feels that they based their conclusions on the surrounding commercial property values and not the values of the residential dwellings. Mr. Peterson reminded the Board that the property is zoned for commercial use so that is what the property value letter was based on. Mr. Bisson also commented that the variance being requested is for a reduced setback and the Board should only be considering whether or not they feel that the reduced setback will decrease the value. The use should not come into play for this request. He also touched base on the hardship by stating that the size of the lot makes it difficult to build anything without relief from one or more of the setbacks.

**The letter from CBRE can be found in the project file in the Community Development Department at Town Hall.*

The Board voted 4-0-1, on a roll call vote, to grant the Variance with a motion made by Drew Duffy and seconded by Rod Buckley. Patrick Dwyer abstained. The following condition applies:

- 1) The petitioner shall obtain site plan approval from the Planning Board for the construction of the proposed structure on the property.

Case #2020-04 Findings of Fact:

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

The applicant is seeking relief from the required front setbacks on D.W. Highway. The D.W. Highway requirement is for a 50' front setback and the applicant is asking to reduce this to 20' from the applicant's front property line. This request is necessary for this lot because it is one of the only lots in the area of D.W. Highway that has given 20' of its property to the D.W. Highway ROW, per the enclosed plan. A 20' setback for the proposed building would actually be in line with all the other structures on the West Side of D.W. Highway and actually further back than the buildings on the east side of D.W. Highway. Because of the Extra ROW along this parcels frontage the Town has the ability to widen D.W. Highway in the future as the Town grows. With that the applicant feels this variance would not be contrary to the public interest because the public interest is to be able to widen D.W. Highway in the future without impacts to proposed development and that option already existing for this parcel.

2. The spirit of the Ordinance is observed because;

Based on the previous statements that the setback reduction from 50' to 20' would be in line with existing business along D.W. Highway and that the Town already has the needed extra ROW to expand D.W. Highway in the future, the applicant believes this request would be in the spirit of the Ordinance.

3. Substantial justice would be done because:

As stated above this is one of the only lots on the west side of D.W. Highway that has an extra 20' of ROW along D.W. Highway, so by granting this variance the board would do substantial justice for the applicants ability to develop the parcel.

4. The values of surrounding properties would not be diminished because.

The proposed construction of a 3,000sf retail/office type building with residential units above should only help to increase the values of surrounding properties in the C-2 district as typically commercial property is more valuable in a commercial district.

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:

No fair and substantial relationship exists between the general purpose of the ordinance provisions and the specific application of that provision to the property.

The relationship that exists between this property and the ordinance is that the ordinance is looking to the future of D.W. Highway expansion and making sure uses are located an appropriate distance from D.W. Highway and the facts are that this property already has an extra 20' of ROW. Which allows the expansion of DW Highway and adding another 30' would be double dipping in our opinion. So, this requirement of 50' does not seem to be in line with the general provision of the ordinance based on the lot shape and location of the proposed building and parking area.

b. The proposed use is a reasonable one because:

The use is allowed, which would make it a reasonable one in the applicant opinion, however the applicant is seeking relief from front setback along D.W. Highway for a reasonable use of the property.

7. Streif, LLC (petitioner/owner) – Special Exception under Section 2.02.3(C)(1) of the Zoning Ordinance to allow for a residential use in the C-2 (General Commercial) District. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # 2019-41. **This petition was continued (indefinitely) by the Board on June 2, 2020.**

Matt Peterson, (Keach Nordstrom Associates, Inc.), John Bisson, Esq., and Ron Dupont, (petitioner) were all present to discuss the Special Exception request. Matt Peterson, (Keach Nordstrom Associates, Inc.), presented the project by explaining that the petitioner is seeking a variance to allow residential use in the commercial zone. The petitioner is proposing three

second floor residential units (studio) which are consistent with other properties on Daniel Webster Highway. Mr. Peterson referenced a similar case for 401 DW Highway that went before the Board in June and 12 residential units were approved. He also referenced 385 DW Highway in which a residential use was also approved in the commercial zone. He shared the plans with the Board and demonstrated where the parking areas would be designated. He also explained that the limited parking aided in the decision to propose residential units on the second floor. Mr. Peterson also spoke about a traffic analysis that was conducted citing that a lot of people have concerns about traffic on DW Highway. He pointed out that the proposed residential use of the second floor will have less of a traffic impact than a commercial use would have.

Mr. Peterson read through their responses to the statutory criteria (outlined below) and explained how the traffic analysis was calculated at the request of Ben Niles. Mr. Niles also commented that he feels traffic is already a problem on DW Highway during peak hours. Mr. Bisson responded that their proposal has less of a traffic impact than if they were to have all commercial use in the building. He also referenced the project on 401 DW Highway that was approved for 12 units and Patrick Dwyer reminded Mr. Bisson that the Board treats all projects independently. There were additional discussions about the similarity of the projects and Chairman Conescu reminded everyone that Planning Board approval will still be needed if the special exception is granted. Mr. Peterson also shared a letter* from an abutter (Jeff Kibbie of Custom Electric) who is in favor of the project.

**The letter from Custom Electric can be found in the project file in the Community Development Department at Town Hall.*

The Board voted 4-0-1, on a roll call vote, to grant the Special Exception with conditions on a motion made by Patrick Dwyer and seconded by Rod Buckley. Drew Duffy abstained. The following condition applies:

- 1) The petitioner shall obtain site plan approval from the Planning Board for the proposed mixed use (multi-family residential/commercial).

Case #2019-41 Findings of Fact:

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

The applicant is seeking a special exception to allow 3 residential studio units over a proposed commercial building within the C-2 district. This area of D.W. highway currently has a mix of residential and commercial units on both side of D.W. Highway. Also, the applicant understands that there is a need for all types of housing in Merrimack and that a special exception is in the regulations for exactly this type of mixed use development in an area of Town that has other uses like it. As such the applicant believes this is an appropriate location for second floor residential unit.

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

Based on this applicants request to build 3 second floor residential studio units at this location which is surrounded by multiple mixed use developments and multiple types of uses the applicant believes this use would not adversely affect the neighborhood and is actually very similar to other previous approved parcels and buildings in the area.

3. There will be no nuisance of serious hazard to vehicles or pedestrians:

As stated above, this request is to allow the applicant to construct 3 second floor residential studio units instead of retail/office at the proposed site with required parking and pedestrian access points. As stated previously in our presentation, 3 residential studio units would create a need for less parking and traffic movements than commercial uses and as such the applicant doesn't see that a residential special exception would cause any nuisance or serious hazard to vehicles in the area.

4. Adequate and appropriate facilities will be provided for the proper operation of the proposed use or uses.

The proposed use will have the appropriate facilities to service 3 residential studio units at this location, via required site utilities, parking lot layout and town services.

- 8. Streif, LLC (petitioner/owner) - Variance under Section 3.02 of the Zoning Ordinance to permit a density of 3 multi-family residential units in the C-2 (General Commercial) District whereas 1 per 40,000 square feet is allowed. The parcel is located at 406 Daniel Webster Highway in the C-2 (General Commercial), Aquifer Conservation and Elderly Housing Overlay Districts. Tax Map 5D-4, Lot 099. Case # ZBA 2020-03. **This petition was continued (indefinitely) by the Board on June 2, 2020.****

Matt Peterson, (Keach Nordstrom Associates, Inc.), John Bisson, Esq., and Ron Dupont, (petitioner) were all present to discuss the density variance request. Mr. Peterson explained that he believes the interpretation of the density is meant for single family lots and not necessarily multi floor units. He referenced the allowed density at 401 DW Highway that was approved by the Board in June and stated that the density requirements (1 unit per 40,000 sq. ft.) do not even allow for one unit on this particular lot (which is roughly 34,000 Sq. ft.). Mr. Peterson went on to explain that the petitioner is trying to develop something on this lot that is reasonable and consistent with the surrounding area.

Mr. Peterson read through their responses to the statutory criteria (outlined below).

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

The applicant is requesting the board allow it to construct 3 Residential Studio units on the second floor of a proposed commercial building on D.W. Highway. The public's interest related to the Zoning Ordinance per unit SF is to ensure similar density and character throughout the Town. With this applicant proposing units on the second floor of a proposed commercial building, the applicant believes this variance would not be contrary to the public interest in that it is continuing the trend in the area of Town to Commercial/Residential development as outlined across the street at 401 DW Highway and other parcels in the area of this parcel. The applicant also believes that by allowing residential units on the second floor of a commercial building in this area of town would add a sense of security to the area and adds potential customers to the commercial entities in the area, both of which we believe are also not contrary to the public interest.

2. The spirit of the Ordinance is observed because:

The applicant believes that the spirit of the ordinance in this area is to ensure consistent development throughout the Town and the applicant feels a mixed use building on this site with 3 residential studio units is in character and density with surrounding residential and commercial uses and as such would be in the spirit of the Ordinance.

3. Substantial justice would be done because:

The applicant believes that substantial justice would be done for this parcel in that by granting this variance you would allow the owner to develop the parcel in a manner that reduces on-site parking and extra commercial traffic to and from the site via a second floor residential development compared to a retail/office space on the second floor.

4. The values of surrounding properties would not be diminished because:

The proposed construction of a 3,000sf retail/office type building with residential units above should not diminish the values of surrounding properties in the C-2 district per the submitted enclosed realtor letter.

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:

No fair and substantial relationship exists between the general purpose of the ordinance provisions and the specific application of that provision to the property: and Due to the fact that the applicant is proposing the 3 units over a proposed retail/office building and not stand alone residential units the applicant does not see a fair and substantial relationship between the 40,000sf requirement and adding 3 residential units instead of retail/office on the second floor of a commercial building and as such there is no fair and substantial relationship that exists between the general purposed of the ordinance provision and the specific application of that provision. .

b. The proposed use is a reasonable one because:

The application believes that 3 second floor studio units are a reasonable request in this area of town, based on the other units being approved in Town and the location of the units on the second floor.

There was no public comment.

The Board voted 5-0-0, on a roll call vote, to grant the Variance with a condition on a motion made by Patrick Dwyer and seconded by Rod Buckley.

- 1) The petitioner shall obtain site plan approval from the Planning Board for the proposed mixed use (multi-family residential/commercial).

10. Discussion/possible action regarding other items of concern

Chairman Conescu discussed the vacant Vice Chair position with the Board and asked Casey Wolfe to confirm the process if one of the alternates was interested in becoming a full time member. Casey also confirmed that Lenny Worster has officially resigned from the Board. The Board also discussed the chain of command when the Chair is not present at a meeting and voting requirements when the Board is not at full capacity.

11. Approval of Minutes – September 30, 2020

The Board voted 4-0-1, on a roll call vote, to approve the minutes of September 30, 2020 on a motion made by Rod Buckley and seconded by Patrick Dwyer. Drew Duffy abstained.

12. Adjourn

The Board voted 5-0-0, on a roll call vote, to adjourn at 9:15 p.m. on a motion made by Drew Duffy and seconded by Rod Buckley.