



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, OCTOBER 29, 2014

Members present: Fran L'Heureux, Patrick Dwyer, Phil Straight, Tony Pellegrino, Richard Conescu, and Alternate Leonard Worster.

Staff present: Community Development Director Tim Thompson and Recording Secretary Zina Jordan.

1. Call to Order

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

2. Roll Call

Richard Conescu led the pledge of allegiance. Tony Pellegrino read the preamble and swore in members of the public who would be testifying.

3. **College Bound Movers (petitioner) and Benjamin M. Bosowski, Jeffrey L. Clegg, Jessica L. Clegg, Jacob J. Mitchell and Ethan L. Mitchell (owners)** – Request for Re-hearing regarding Case # 2014-40, in which the Board voted to deny a variance under Section 2.02.1.A of the Zoning Ordinance to permit parking for employees, customer vehicles and temporary mobile storage units located in the I-1 (Industrial), R (Residential) and Aquifer Conservation Districts and Wellhead Protection Area at 22 Continental Boulevard. Tax Map 3C, Lot 085. Case # 2014-47.

Phil Straight said that, when he had voted, he thought the Planning Board should review the matter. The Zoning Board of Adjustment (ZBA) did nothing unlawful or unreasonable. Patrick Dwyer said that some issues are more the Planning Board's focus. Tim Thompson said the ZBA denied the Variance because the applicant did not meet the hardship criterion. At the meeting, he asked the Board to be specific, but they were not.

The Board voted 4-1-0 to grant a Re-hearing, on a motion made by Tony Pellegrino and seconded by Phil Straight. Richard Conescu voted in the negative.

By consensus, the Board decided to hear agenda items #5-8 prior to agenda item #4.

5. **Donald Turner (petitioner/owner)** – Variance under Section 3.05 of the Zoning Ordinance to permit a 26'x40' garage and workshop within 23.1 feet of the front property line whereas 30 feet is required and within 15.2 feet of the rear property line whereas 40 feet is required. The parcel is located at 5 John Lane in the R (Residential) and Aquifer Conservation Districts. Tax Map 4C, Lot 265. Case # 2014-43.

Tim Thompson said the previous owner was granted a variance on May 14, 2014, to build a deck 7' from the rear property line whereas 40' is required.

Donald Turner, 6 John Lane, read the points of law into the record.

This is not a home business. He always does his own work. He likes tinkering and needs a place for his tools.

There was no public comment.

The Board voted 5-0-0 to grant the Variance, on a motion made by Richard Conescu and seconded by Patrick Dwyer.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed garage is allowed in a residential neighborhood, where a garage is common;
2. The spirit of the ordinance is observed because a garage would be no threat to public health, safety or welfare. Attaching it to the existing home makes the most sense because there is nowhere else on the property that would comply with current zoning setbacks;
3. Granting this variance would do substantial justice because there is no other location on the property that complies with current zoning setbacks. The garage will add to the tax base of the property without harming the public. There is no public benefit or gain by denying the variance;
4. The values of the surrounding properties would not be diminished because the attached garage should raise the property value and keep the same character as the surrounding properties. Many homes in this neighborhood have garages that are not compliant with the current zoning regulations;
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because it is impractical to place the garage anywhere else on the property, including over the old septic system. The driveway is in the proposed location of the garage, which would allow direct access into it;
 - 2) The proposed use is a reasonable one because the garage/workshop will be attached to the house and will lend itself to the overall continuity of the neighborhood.
6. **Hatfield, Kathleen & Carlyle and Richard & Christine (petitioners/owners) –** Variance under Section 3.02 of the Zoning Ordinance to permit a lot size of less than 100,000 square feet for two lots in the R-1 (Residential) District located at 11 Autumn Lane and 46 Greenwood Road. Tax Map 6A-1, Lots 069 & 070. Case # 2014-44.

Agenda items #6, 7 and 8 were considered simultaneously.

Tim Thompson explained that today there are four lots. The lot numbers on the agenda are the proposed lot numbers.

Steve Keach, Keach-Nordstrom Associates, Inc., said the four parcels are contiguous. Two have a principal residence structure. The proposal and lot line adjustment consolidate the four pre-existing non-conforming lots into two contiguous parcels.

Kate Basso, Keach-Nordstrom Associates, Inc., said that Lots 69 and 70, where Kathleen and Carlyle Hatfield live, are larger than Lots 98 and 99, which are partly in Amherst. She will appear before the Amherst Planning Board on November 5, 2014. The lot with frontage on Autumn Lane is for the septic system. A driveway and septic system easement cuts through Kathleen and Carlyle Hatfield's lot. After the lot line adjustment and consolidation, Lot 70 will still have 169' of frontage and Lot 69 will have 150'. Both lots will remain non-conforming. Lot 69 will be 71,346 square feet and Lot 70 will be 92,330 square feet. Steve Keach stated that the camp on the lake is an eyesore in bad condition and will be torn down. A garage and mudroom will be added to the home in its place.

Steve Keach read the points of law into the record.

Richard Conescu asked whether Lot 69 would still hold Lot 70's septic system. Steve Keach explained that, because the home and septic system parcels are not contiguous, there is an easement over Kathleen and Carlyle Hatfield's lot to construct a force main. It will no longer be needed and will be extinguished when the lot line adjustment makes them contiguous.

Kate Basso distributed a color version of the map showing the proposed lot layout.

Public comment

Fran L'Heureux read into the record a supporting e-mail from Susan and Bruce Sheridan, 15 Autumn Lane.

Tony Augello, 33 Greenwood Road, is concerned about the affect on the quality of Baboosic Lake. There is a wetland on Lot 70, a stream flows into Baboosic Lake under the road, and another stream leads to Kathleen and Carlyle Hatfield's property. He asked if any new homes would be erected. Tim Thompson explained that there would be no new residences; the same two homes would remain and the camp would be demolished.

The Board voted 5-0-0 to grant the Variance, with the condition that the proposed lot line adjustment is granted by the Planning Board, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

7. Hatfield, Kathleen & Carlyle and Richard & Christine (petitioners/owners) – Variance under Section 3.02 of the Zoning Ordinance to permit frontage of less than 250 feet for two lots in the R-1 (Residential) District located at 11 Autumn Lane and 46 Greenwood Road. Tax Map 6A-1, Lots 069 & 070. Case # 2014-45.

The Board voted 5-0-0 to grant the Variance, with the condition that the proposed lot line adjustment is granted by the Planning Board, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

8. Hatfield, Kathleen & Carlyle and Richard & Christine (petitioners/owners) – Variance under Section 3.02 of the Zoning Ordinance to permit a building addition as close as 49.4 feet from the rear property boundary where as 60 feet is required in the

R-1 (Residential) District located at 46 Greenwood Road. Tax Map 6A-1, Lots 070.
Case # 2014-46.

The Board voted 5-0-0 to grant the Variance, with the following conditions, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

1. Approval of the proposed lot line adjustment by the Planning Board;
2. Prior to issuance of a Building Permit for the proposed addition, a copy of the NHDES Shoreland Permit shall be submitted to the building Department and the Community Development Department for filing;
3. Review by the Merrimack Conservation Commission and satisfaction of any comments.

Findings of Fact for Cases 2014-44, 45 & 46

1. The granting of the variances would not be contrary to the public interest because it will have a positive effect by decreasing the number of existing non-conforming lots in the area and reducing the potential for an increase in housing density. The Lot Consolidation and Lot Line Adjustment do not require impacts to any public rights of way or access. The existing principal residential structure on Lot 98 will be replaced with an addition to a second principal residential structure, thus eliminating one pre-existing, non-conforming residential structure;
2. The spirit of the Ordinance is observed because, although Lots 69 and 70 do not meet the 100,000 square foot minimum lot area required by the Residential Zoning District, the existing lots that abut the property are significantly smaller in size. They range from a low of 2,613 square feet (Lots 93 and 94) to a high of 57,063 square feet (Lot 60). In an effort to reduce the overall number of non-conforming lots in the area, the proposal consolidates three lots (70, 98, and 99) into one 71,346 square foot lot and adjusts the lot line with Lot 69 to provide the consolidated lot with frontage along Autumn Lane and allow full access to the existing driveway. The pre-existing, non-conforming frontage distances of Lots 69 and 70 are to remain unaffected. The proposal will not impact the health, safety, convenience or general welfare in the area. The removal of the existing outbuilding and replacement with the new addition will improve the appearance of the property;
3. Granting these variances would do substantial justice because, by allowing the reduction in required area, the consolidated property will have frontage along Autumn Lane and full access to the driveway. A large percentage of the lots in the surrounding area have garages. It is not unreasonable for the owner to propose a garage addition. Due to the existing location of the house, which lies entirely outside the required setbacks, the owner cannot build an addition and convenient covered connection between the house and garage without impacts. The existing outbuilding that is being removed is 44.6' from the rear property boundary. The proposed building addition will be an improvement at 49.4' from the boundary;
4. The values of the surrounding properties would not be diminished by a reduction in the area of Lot 69 or by maintaining the existing non-conforming frontage of each lot and by the lot line adjustment and consolidation because the overall project scope will decrease the number of lots, which will in turn limit the density of homes in the

area. A high-density area can be perceived as less desirable due to smaller yards and proximity to neighbors. By reducing the density, property values will be maintained or increased. An eyesore in poor condition will be demolished. The proposal is not out of character for the local lake community;

5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variances 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 each of the four parcels is pre-existing non-conforming in terms of lot area and frontage. The applicant seeks to eliminate two of these parcels to create two contiguous lots of a geometry as close to conforming as possible;

2) The proposed use is a reasonable one because it allows the Hatfield family to repackage parcels to fit the land best: a single existing principal residential structure will be improved and replace two pre-existing non-conforming structures.

- 4. Robert T. Bevill (petitioner)** – Appeal of an Administrative Decision seeking to overturn the Community Development Department Staff decision to classify a fire arms service, maintenance, transfers and assembly business as being eligible for a Home Occupation, which allowed the Planning Board's approval of such a business located at 11 Blair Road in the R (Residential) and Aquifer Conservation Districts. Tax Map 6C, Lot 170. Case # 2014-42.

Robert Bevill, 12 Blair Road, stated that he filed suit in Superior Court to appeal Planning Board approval and is also appealing to the ZBA the Community Development Department's determination that the business is a Home Occupation and therefore eligible for Planning Board consideration. At its August 19, 2014, meeting, Planning Board Chairman Robert Best stated that, "In the past, the Planning Board has treated firearms as eligible for Home Occupation. Tim Thompson said that is the reason the issue was brought before the Board, since the proposed use has been similarly treated as a Home Occupation in the past per determinations by prior Planning and Zoning Administrators. Chairman Best said the Planning Board could not overturn the Planning and Zoning Administrator." The Planning Board has granted four other gun businesses as Home Occupations dating to 1995. According to Robert Bevill, there was no administrative determination or note from staff whether a Home Occupation was appropriate in 1995. When an Ordinance is vague, staff can render a determination to the Board, but no document exists. There was none in the original case on June 13, 1995. The other three cases refer to that case, which has no administrative determination/gloss. An administrative gloss is a document telling the Planning Board whether or not to approve. It must have existed in 1995, which is why the Planning Board grand-fathered them, but it is not there now. Phil Straight questioned "grand-fathering". Each petition is separate. Robert Bevill said that Planning Board debate as to whether a Home Occupation is appropriate was cut off. The Board relied on an administrative decision and never discussed whether a gun shop is an appropriate Home Occupation. When Robert Bevill objected to gun sales, Tony Pellegrino countered that

the applicant would not sell guns. When Robert Bevill noted that the applicant applied for a sales permit, Fran L'Heureux countered that it is mandatory to apply for one in order to obtain a gunsmith license.

Tim Thompson reminded the ZBA to focus only on whether staff made the correct determination.

Phil Straight asked Robert Bevill the basis for his appeal to the ZBA. Richard Conescu said staff's determination must be the only discussion. Robert Bevill repeated that his two avenues of appeal are the ZBA and Superior Court. If this appeal is granted, there will be no court case against the Planning Board; if it is denied and the Administrative Decision stands, there will be an appeal to Superior Court. Robert Bevill is concerned about a gun store in a residential neighborhood and a license that allows gun sales.

Patrick Dwyer read a section of the Zoning Ordinance that states that a Home Occupation is not subject to Planning Board approval if it meets certain criteria. Tim Thompson explained that the Ordinance refers to the other of the two types of Home Occupation allowed in Merrimack. This type must go to the Planning Board.

Richard Conescu asked whether the decision set precedent. Tim Thompson explained that three of the four previous Home Occupation cases went before the Planning Board for approval. Each one is firearms oriented. Some determination must have been made by the Planning and Zoning Administrator in 1995 in order to place it on the agenda, although it may not be in the written record. It is not uncommon for a Home Occupation to be on a Planning Board agenda because staff says it is eligible. Someone determined in 1995 that this type of business is a permitted Home Occupation and must go to the Planning Board. After conducting limited research, staff found that it is not uncommon for communities in New Hampshire to allow gunsmith type businesses as Home Occupations. Bedford has approved three similar applications and Londonderry has approved at least four. He found that most of the 1,100 federal firearms licenses in New Hampshire are located in residential areas. Town Counsel concurs with the Planning Board's determination based on the doctrine of administrative gloss. Tim Thompson read the 1995 gloss doctrine into the record: "A gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applications over a period of years without legislative intervention. If an administrative gloss is found to be placed upon a clause, the municipality may not change its *de facto* policy in the absence of legislative action because to do so would presumably violate the legislative intent." Tim Thompson said that, based on that doctrine, this cannot be legally classified as anything other than a Home Occupation. To change that Home Occupation now would go against the spirit of the law.

Robert Bevill cited similar Heller cases stating that the Ordinance must be interpreted consistently and must apply over a period of years without legislative interference. The standard is vague. A municipal ordinance must be clear, definite and certain so that an average person can understand it and not violate its provisions. Home Occupation tools must be those that are found in a home rather than those of a commercial nature. The Bedford and Londonderry cases have nothing to do with tooling or gunsmithing. Robert Bevill displayed photo enlargements of a 4'-long typical gap bed lathe used in a gunsmithing business and a 3'x3' metal milling and drilling machine. He stated that they

are used commercially and not in homes. Small engine repairs are noisy and are denied Home Occupation approval. This is an improper use of a Home Occupation license.

Fran L'Heureux asked Robert Bevill how he knows that these tools are in the applicant's home. He replied that he does not know, but that they are the typical tools for gunsmithing. Richard Conescu noted that is a Planning Board issue. Robert Bevill agreed with Patrick Dwyer that engineering and architecture are Home Occupations. Patrick Dwyer noted that they use drill presses and lathes when creating prototypes for customers. Robert Bevill said the tools would be out of compliance because of their size and style and would require a zoning variance. Patrick Dwyer did not consider the equipment to be relevant. Robert Bevill stated that there is legal precedent that commercial equipment violates Home Occupation. Richard Conescu asked for the definition of "commercial nature". Robert Bevill responded he is not competent to answer. Richard Conescu said that tools are not in the ZBA purview. Phil Straight added that the ZBA deals with reasonable use.

When Robert Bevill attempted to submit a protest petition signed by five out of seven abutters, Fran L'Heureux explained that the ZBA does not accept new paperwork at a meeting.

Public comment

David Preysnar, 15 Blair Road, said that information was not disclosed at the August 14, 2014, Planning Board meeting. Community Development recommended that the Board grant final approval with several conditions. One condition concerned the premises served by an approximately 65'-long driveway on Blair Road cutting through to the abutting house with a longer driveway through Brenda Lane to the outbuilding on his property where work is to be done. David Preysnar owns that lot; there is no driveway or access to that property off Brenda Lane. The information given to Community Development was false and incorrect. David Preysnar's attorney sent a letter asking that the information for the Planning Board be corrected. Tim Thompson repeated that the Planning Board's decision is not in the ZBA's jurisdiction. He saw no such letter addressed to Community Development. David Preysnar said it was sent to the applicant to correct his application. Tim Thompson said that nothing has happened since the August 14, 2014, meeting. He would not speculate about the information, suggesting that Robert Bevill discuss it with the applicant and provide a letter to Community Development.

Carol Babel, 6 Brenda Lane, asked for common sense. Precedent is based on a document that cannot be located. This Home Occupation's product can harm the public. Carol Babel was a special education teacher for teenagers who were wards of the state as a result of getting guns, committing crimes and being removed from schools and homes. There are several gunsmith businesses in Merrimack. How many more will be approved? Carol Babel is uncomfortable with multiple gunsmith businesses in her community. She hunts, but that is not the same as selling guns. These businesses are close to schools, where children can get access. The ZBA must decide if the business will benefit or harm the citizens of this community.

Michael Maliar, 11 Blair Road, is the applicant for the Home Occupation. His business will be to repair and clean guns, which will hold absolutely no ammunition. No one will be

in harm's way. He is not a salesman. He wants to do only maintenance. He must have Alcohol, Tobacco and Firearms (ATF) manufacturer and importer licenses in order to be a gunsmith. He was also required to obtain a license from the Merrimack Police Chief. Michael Maliar has all the required licenses and paperwork. He went to school to learn how to be a gunsmith. He will be open only at night and some hours on weekends. Customers will come by appointment only. They will be friends and family only. He would not repair something for someone he does not trust.

Phil Straight asked if Michael Maliar would fix broken non-working guns. Michael Maliar replied that he would maintain, professionally clean and adjust guns that people use. The only ammunition might be what is jammed in a gun. In that case, he would transport it to the Londonderry Fish and Game Club to work in a safe environment. There would be no gunfire at his home. Phil Straight noted that a Planning Board condition of approval is that there be no ammunition. Michael Maliar added that another condition is to have a locked metal gun safe. Tim Thompson explained that there is a specific distinction between a gun cabinet and a gun safe; the Planning Board required the latter. Phil Straight noted the thorough Planning Board discussion. Robert Bevill said the Planning Board is responsible for deciding the criteria to determine whether a Home Occupation is proper. He claimed again that the process was intercepted by a previous administrative decision, but he found none. The process grew out of control.

Tim Thompson explained that, if the ZBA grants the Administrative Appeal and overturns the Community Development staff's determination because it is no longer eligible as a Home Occupation, Planning Board approval for the Home Occupation would be stayed, the original applicant would be required to obtain a variance for a Home Occupation to be permitted on the lot before the Planning Board's approval would be valid and the petitioner's appeal to Superior Court would also be stayed. If the ZBA denies the Administrative Appeal and upholds Community Development staff's determination, the Planning Board's decision on the Home Occupation would be considered valid and the petitioner could request a rehearing and the appeal of the Planning Board decision to Superior Court would continue.

Tony Pellegrino repeated that staff made the best decision they could. The decision is reasonable. No mistake was made.

The Board voted 4-1-0 to deny the Appeal, on a motion made by Phil Straight and seconded by Richard Conescu. Patrick Dwyer voted in the negative.

9. Discussion/possible action regarding other items of concern

Fran L'Heureux asked members to submit topics for discussion for a joint meeting of the Zoning Board of Adjustment and the Planning Board scheduled for December 2, 2104, at 7:30 p.m.

Phil Straight asked if there had been any discussion about changing the Zoning Ordinance concerning gunsmithing as a Home Occupation. Tim Thompson explained that is a policy decision that should be discussed at the joint meeting. It is the Planning Board that must take action.

Richard Conescu is redrafting the preamble to include shutting off other electronic devices. Tim Thompson explained that the goal is to modernize the preamble. Patrick Dwyer

wanted to include that no new material may be presented at a meeting. Richard Conescu suggested adding that it could be accepted, but the application would be postponed until the next meeting. Tim Thompson stated that abutters and citizens could present handouts as part of their testimony. Staff will work with Richard Conescu to develop appropriate language and bring it to the Board for consideration.

10. Approval of Minutes – September 17, 2014

The Board voted 5-0-0 to approve the minutes of September 17, 2014, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino.

11. Adjourn

The meeting adjourned at 9:00 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.