



Town of Merrimack, New Hampshire

Community Development Department

6 Baboosic Lake Road

Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, SEPTEMBER 27, 2023

Members Present:

- Richard Conescu (Chair)
- Lynn Christensen
- Patrick Dwyer
- Brian Dano
- Wolfram von Schoen (alternate)
- Charles Mower (alternate)

Members Absent:

- Ben Niles

Staff Present

- Colleen Olsen, Assistant Planner

1. Call to Order & Roll Call

Chair Conescu called the meeting to order at 6:28 p.m., led the Pledge of Allegiance and swore in members of the public who would be testifying.

Brian Dano read the preamble and Chair Conescu welcomed Wolfram von Schoen to the Board and sat him as a voting member for Ben Niles.

Chair Conescu decided to hear agenda item #6 first.

6. Request for Re-Hearing regarding Case # ZBA 2023-27, John Flatley Company.

Chair Conescu explained that a request was submitted to re-hear ZBA case #ZBA 2023-27 because the Board failed to give the abutters a chance to rebut comments given by the petitioner. He clarified that granting a rehearing has nothing to do with the outcome that was decided originally and that a new hearing would be condensed and he would be limiting the time for public comments.

The Board voted 4-0-1 to grant the request for rehearing, with new notice to be issued to abutters, on a motion made by Lynn Christensen and seconded by Brian Dano. Wolfram von Schoen abstained.

2. The Lobster Boat Restaurant (petitioner) and Janet Johnston & John Thistle (owners) - Variance under Section 17.05.31 of the Zoning Ordinance to permit a mural to not be categorized as a sign as defined in the Zoning Ordinance. The parcel is located at 453 Daniel Webster Highway

in the C-1 (Limited Commercial), Aquifer Conservation, Elderly Housing Overlay, and Town Center Overlay Districts. Tax Map 5D-4, Lot 71. Case # ZBA 2023-28.

Janet Johnston (owner) presented the petition to the Board. She began by explaining that the Lobster Boat had a contest that was open to all children in town to create a mural for their restaurant. The winner would have their mural painted on one of the outside walls of the restaurant and would also receive a \$500 prize. After the winner was chosen and the plans were in place to begin the project, someone told them about a similar mural in North Conway that was in the news because the Zoning Board of that town had declared it a sign. It was then that they reached out to Merrimack's Community Development Department and learned that the Zoning Ordinance in our town also considers a mural a sign which is why they are seeking the variance. Ms. Johnston read through the responses to the statutory criteria (outlined below) and took questions from the Board.

Public comment

Bill Behrens (Island Drive) spoke in favor of the petition. He began by reading the Webster Dictionary definitions of both a sign and a mural and spoke about the many different ways that the Lobster Boat restaurant has contributed to the town of Merrimack. He encouraged the Board to grant the variance to allow the young artist's work to be seen. Mr. Behrens also shared a copy of the Manchester Union Leader article dated September 27, 2023 that shows a picture of what the mural will look like when completed.

Chuck Mower spoke in support of the mural stating that he feels this is exactly the type of thing that Merrimack needs and is missing from the community. He then stated that the silo at the Homestead restaurant was also painted as a result of a student competition, as was the Town's seal.

Chair Conescu read a letter from the Bill Olsen, Chief Educational Officer of the Merrimack School District in favor of the mural.*

**A copy of the letter can be found in the project file for this case at Merrimack Town Hall in the Community Development Department.*

Mr. Mower suggested to Ms. Johnston that if the variance is passed and the mural moves forward, that she contact the school's Director of Extended Learning to see if this can be an extended learning opportunity for the student's that are involved.

Lynn Christensen respectfully disagreed with Staff's interpretation of the Zoning Ordinance that the mural is a sign.

The Board voted 5-0-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the variance under Section 17.05.31 of the Zoning Ordinance to permit a mural to not be categorized as a sign as defined in the Zoning Ordinance, on a motion made by Patrick Dwyer and seconded by Lynn Christensen.

Findings of Fact:

1. ***Granting the variance would not be contrary to the public interest because:*** *It does not affect the common good of any person or persons in town or the flow of businesses.*
 2. ***The spirit of the ordinance is observed because:*** *This is not a sign. There is no lettering or advertising anywhere on the artwork. It will be located on the back of the building.*
 3. ***Granting the variance would do substantial justice because:*** *It honors the winner of a contest that was held amongst the students of the Merrimack School system and will be painted by them in conjunction with a professional mural artist. This project was designed to enrich community spirit and bring joy to the town.*
 4. ***Granting the variance would not diminish the values of surrounding properties because:*** *It will demonstrate what a wonderful sense of community and teen spirit we have here in Merrimack, it will beautify the area and add to the landmark that is The Lobster Boat Restaurant. To that effect it will improve property values.*
 5. ***Unnecessary hardship:***
 - a. ***Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how 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:*** *Although we are a business in town the artwork that will be painted on the backside of the building is in no way a sign as there is no advertisement or business name anywhere with-in the design. Full disclosure: we would like to invite all of the students who submitted entries to the mural contest to work with the mural artist and we would like to ask them to put their signatures on the piece once it is completed if that is allowed. That would be the only text.*
3. **Kerry Pillsbury (petitioner/owner)** – Variance under Section 3.02 of the Zoning Ordinance to permit construction of a two car garage 7 feet from the side property line whereas 20 feet is required. The parcel is located at 269 Baboosic Lake Road in the R-3 (Residential, by soils) District. Tax Map 6A Lot 18-1. Case # ZBA 2023-29.

Brian Caldwell (petitioner's husband) presented the petition to the Board. He began by explaining that they are seeking a variance for the side setback in case the garage is not constructed exactly as designed. Mr. Caldwell read through the responses to the statutory criteria (outlined below) and took questions from the Board.

Chair Conescu asked if there is a reason they are not doing an attached garage and Mr. Caldwell explained that they could not do an attached garage because of the location of the leach field and septic tank. He then asked him if he has spoken to the neighbor whose house is on the side of the garage and Mr. Caldwell stated that he has and the neighbor has no concerns. He also explained that the garage will most likely be no more than 12 feet from the property line but they asked for seven just to be safe. It was noted that the petitioner did not provide a plot plan to depict the proposed location of the garage in relation to the property line.

No public comment was received.

The Board voted 5-0-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses

as the Board's findings of fact, and further, to grant the Variance under Section 3.02 to permit construction of a two car garage 7 feet from the side property line whereas 20 feet is required, on a motion made by Lynn Christensen and seconded by Patrick Dwyer.

Findings of Fact:

1. ***Granting the variance would not be contrary to the public interest because:*** *Granting the variance would not alter the essential character of the neighborhood, threaten the public health, safety, welfare or otherwise injure "public rights."*
2. ***The spirit of the ordinance is observed because:*** *In granting this variance the spirit of the ordinance will be observed as it will not alter the essential character of the neighborhood, threaten the public health, safety, welfare or otherwise injure "public rights."*
3. ***Granting the variance would do substantial justice because:*** *Granting the variance would not in any way harm the general public.*
4. ***Granting the variance would not diminish the values of surrounding properties because:*** *Granting the variance would not diminish the value of surrounding properties, as many of the surrounding properties have additional garages or structures. This would allow the property owners to secure and remove vehicles from the open driveway.*
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.*** *Due to the exceptional condition of the parcel of land, this variance will not alter character of the locality. Due to the leach field and septic system being located behind the home and to the right of the designated area, we cannot move or alter the plans further to the right without possibly causing issues to the septic.*
 - b. ***The proposed use is a reasonable one because:*** *We believe granting this variance would be reasonable as it would not in any in way alter the characteristics of the neighborhood. Without granting the variance, additional plans and relocation of detrimental household systems would need to be addressed and relocated. By granting the variance it would not cause any of the above and again would not change the essential characteristics of the property of neighborhood.*
4. **Fieldstone Land Consultants, PLLC (petitioner) and Dougherty Zibolis, LLC (owner) –** Variance under Section 2.02.3 (B) of the Zoning Ordinance to permit a warehousing use in the C-2 (General Commercial) District. The parcel is located at 101 Herrick Street in the C-2 (General Commercial), I-1 (Industrial), and Aquifer Conservation Districts. Tax Map 3D-2, Lot 20. Case # ZBA 2023-30.

Chris Guida (Fieldstone Land Consultants) presented the petition to the Board. He began by providing some history of the parcel, explaining that the site was previously owned by Mi-Box who had planned on moving their facility to the site but then later decided to stay on Continental Blvd. They recently sold it to Joyce Heating and Cooling who is planning on relocating to the

Herrick Street location from Nashua. He shared a copy of the recently submitted site plan to show how the building will be situated on the lot, and where the warehouse and retail portions of the business will be. He spoke briefly about the truck entrance on Herrick Street and that it would be utilized by the service trucks and deliveries to the site. They are also proposing an entrance on DW Highway that will need to be approved by the NH DOT. This entrance will be used for customers and employees.

No public comment was received.

Brian Dano asked if there are any concerns with the water coming off of DW Highway and Mr. Guida briefly walked through how the drainage on-site will be handled. Mr. von Schoen asked what size trucks will be visiting the site. Mr. Guida stated he was not 100% sure but thinks it will be box trucks and vans.

The Board voted 5-0-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 2.02.3 (B) of the Zoning Ordinance to permit the warehousing use in the C-2 (General Commercial) District, subject to the conditions that the petitioner shall obtain the variance associated with ZBA Case #2023-31 and the petitioner shall obtain site plan approval from the Planning Board for the proposed warehouse/office building, on a motion made by Wolfram von Schoen and seconded by Brian Dano.

Findings of Fact:

1. ***Granting the variance would not be contrary to the public interest because:*** *The basic zoning objective of the General Commercial District is to serve as a regional and /or local shopping and service need. Joyce Cooling & Heating, Inc., an installation sales and service company, intends to locate their headquarters on this property. The proposed warehousing use of this property complies with this objective as an accessory use to the heating and cooling service business that is proposed as the primary use of this property. The proposed warehouse area of the structure would be accessed via Herrick Street and the portion of the property located in the Industrial District where this use is permitted by right. Granting this variance would allow for the full and productive use of the existing property and nearby infrastructure. Zoning Ordinances are generally written to manage the development in Towns and to allow for responsible and reasonable development and expansion. Considering that the proposed development will enhance the visual appearance from the street, will allow for productive development of a lot in the General Commercial District and will be consistent with the surrounding properties we believe that this proposal is reasonable. It is our opinion that this project will substantially improve the aesthetics of the subject parcel and the surroundings. This investment will add value to the tax base and employment opportunities in the community with very little services in return. Due to the above reasons and the fact that this proposal will not alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public we believe that this proposal would not be contrary to the public interest.*
2. ***The spirit of the ordinance is observed because:*** *Granting the proposed variance will observe the spirit of the ordinance. The proposed variance is consistent with the purpose and intent of the zoning ordinance to promote the health, safety, convenience and general welfare of the Town of Merrimack and to make it an attractive place in which to live. Granting the proposed*

variance for a warehouse use would allow a business to locate its headquarters on this property, providing an attractive development and providing employment opportunities.

3. ***Granting the variance would do substantial justice because:*** Substantial justice is done by granting the proposed variance. Granting the proposed variance for a warehousing use would allow the property owner to fully develop their property and provide much needed employment opportunities to the community. The public would realize no appreciable gain from denying this variance request. Granting this variance would do substantial justice because it would allow for the productive use of the property, as described above, while providing responsible growth in the community.
4. ***Granting the variance would not diminish the values of surrounding properties because:*** Surrounding properties are a mix of commercial uses. In our opinion this proposal would improve the property and associated values and local tax base which ultimately means it will have a positive impact on the community. It has also been our experience that new construction and development will often times actually increase the value of surrounding properties. This use will be compatible with the surrounding uses and will enhance the 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 subject property has special conditions that distinguish it from other properties in the area. The property has a 28-foot drop in elevation from the adjacent highway, existing drainage from the adjacent highway, and wetland areas caused by highway drainage which limit the developable area. We believe the intent of the provision of the ordinance is to promote economic growth in the district and to provide employment opportunities to residents. The warehousing use is accessory to the office use of this property.

We do not believe that this development will have a negative impact on the general public. Based on the reasons stated above, we do not believe that a fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

A denial of this variance would result in unnecessary hardship as it would not allow for the productive use of the property. The property has been undeveloped due to the special conditions of the property that distinguish it from other properties in the area. The proposed use is a good fit with the property's special conditions which is why we are requesting that the Board grant this variance.

- b. ***The proposed use is a reasonable one because:*** For the reasons previously stated we believe that this proposal meets the spirit and intent of the ordinance. The proposed development will not alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public. It is our opinion that this project will rejuvenate an existing parcel in town which we believe will substantially improve the aesthetics of the subject parcel and the surroundings. The primary use proposed for the property is permitted in the underlying zoning and both uses will be consistent with the surroundings. Since this proposal will improve the neighborhood, be consistent with the

surroundings and result in no negative impacts to the public we believe that the proposed use is reasonable.

- 5. Fieldstone Land Consultants, PLLC (petitioner) and Dougherty Zibolis, LLC (owner) –** Variance under Section 3.02 (Note 6) of the Zoning Ordinance to permit the drive aisle portion of a parking area to be 10 feet from the Daniel Webster Highway whereas 20 feet is required. The parcel is located at 101 Herrick Street in the C-2 (General Commercial), I-1 (Industrial), and Aquifer Conservation Districts. Tax Map 3D-2, Lot 20. Case # ZBA 2023-31.

Chris Guida (Fieldstone Land Consultants) presented the petition to the Board. He used the site plan to show the location of the driveway in question and also took the opportunity to demonstrate where landscaping is planned and spoke briefly about the purpose of the variance.

Mr. von Schoen asked if anything was planned for the DW Highway entrance to ensure vehicles will not drive into the building. Mr. Guida spoke about the landscaping plans at the edge of DW Highway but stated he does not know of any plans for bollards or barriers in front of the building itself.

No public comment was received.

The Board voted 5-0-0 to find that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.02 (Note 6) of the Zoning Ordinance to permit the drive aisle portion of a parking area to be 10 feet from the Daniel Webster Highway whereas 20 feet is required, subject to the condition that the petitioner shall obtain site plan approval from the Planning Board for the proposed warehouse/office building, on a motion made by Brian Dano and seconded by Lynn Christensen.

Findings of Fact:

- 1. Granting the variance would not be contrary to the public interest because:** *The proposed parking area access aisle will encroach 10-feet into the parking setback along Daniel Webster Highway. The intent of the regulation is to provide a buffer zone. The proposed development will fully landscape the 10-foot strip between the parking access aisle and the D. W. Hwy. right-of way. No vehicles will be parked in the encroachment area. We believe the landscaping will beautify the parcel and provide an adequate buffer. Development on nearby properties extends parking access aisles into the 20-foot setback. This investment will add value to the tax base and employment opportunities in the community with very little services in return. Due to the above reasons and the fact that this proposal will not alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public we believe that this proposal would not be contrary to the public interest.*
- 2. The spirit of the ordinance is observed because:** *Granting the proposed variance will observe the spirit of the ordinance. The proposed variance is consistent with the purpose and intent of the zoning ordinance to promote the health, safety, convenience and general welfare of the Town of Merrimack and to make it an attractive place in which to live. Granting the proposed variance for a reduced setback to accommodate a parking access aisle would allow a business to locate its headquarters on this property, providing an attractive development and providing employment opportunities in the community.*

3. **Granting the variance would do substantial justice because:** Substantial justice is done by granting the proposed variance. Granting the proposed variance for a reduced setback would allow the property owner to fully develop their property and provide much needed employment opportunities to the community. The public would realize no appreciable gain from denying this variance request. Granting this variance would do substantial justice because it would allow for the productive use of the property, as described above, while providing responsible growth in the community.
4. **Granting the variance would not diminish the values of surrounding properties because:** Surrounding properties are a mix of commercial uses. In our opinion this proposal would improve the property and associated values and local tax base which ultimately means it will have a positive impact on the community. It has also been our experience that new construction and development will often times actually increase the value of surrounding properties. This use will be compatible with the surrounding uses and will enhance the 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 subject property has special conditions that distinguish it from other properties in the area. The property has a 28-foot drop in elevation from the adjacent highway, existing drainage from the adjacent highway, and wetland areas caused by highway drainage which limit the developable area. We believe the intent of the provision of the ordinance is to promote attractive development, promote economic growth in the district and to provide employment opportunities to residents. The reduced setback allows this challenging property to be developed.

We do not believe that this development will have a negative impact on the general public. Based on these reasons, we do not believe that a fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

A denial of this variance would result in unnecessary hardship as it would not allow for the productive use of the property. The property has been undeveloped due to the special conditions of the property that distinguish it from other properties in the area. The proposed use is a good fit with the property's special conditions which is why we are requesting that the Board grant this variance.

- b. **The proposed use is a reasonable one because:** For the reasons previously stated we believe that this request meets the spirit and intent of the ordinance. The reduced setback will not alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public. It is our opinion that this project will rejuvenate an existing parcel in town which we believe will substantially improve the aesthetics of the subject parcel and the surroundings. Since this proposal will allow this property to be developed in a manner consistent with the surroundings and result in no negative impacts to the public, we believe that the proposed relief is reasonable.

7. Discussion/possible action regarding other items of concern

Chair Conescu reiterated that granting a rehearing of Case #2023-27 was necessary because the ZBA's Rules of Procedure were not followed and that the rehearing will be a condensed hearing as they have already heard the points of the case.

8. Approval of Minutes – August 30, 2023

The Board voted 4-0-1 to approve the minutes of August 30, 2023 as amended, on a motion made by Lynn Christensen and seconded by Brian Dano. Wolfram von Schoen abstained.

9. Adjourn

The Board voted 5-0-0 to adjourn at 7:25 p.m., on a motion made by Lynn Christensen and seconded by Brian Dano.