



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, SEPTEMBER 30, 2015

Members present: Fran L'Heureux, Patrick Dwyer, Tony Pellegrino, Richard Conescu, and Lynn Christensen (arrived 7:07 p.m.).

Members absent: 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

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

Lynn Christensen arrived at 7:07 p.m.

- 3. Madi Choueiri (petitioner/owner)** – Variance under Section 2.02.13(E)(4)(a) of the Zoning Ordinance to permit an enclosed porch 10 ft. from the front property line whereas 30 ft. is required. The parcel is located at 480 Daniel Webster Highway in the Town Center Overlay, C-1 (Limited Commercial) and Aquifer Conservation Districts. Tax Map 5D-3, Lot 046. Case # 2015-32.

Steve Keach, Keach-Nordstrom Associates, Inc., said the applicant received a Special Exception to permit a restaurant from the ZBA as well as conditional Final Approval of the site plan from the Planning Board on September 15, 2015. The architect intended to use the porch, which extends 6.5' toward D.W. Highway, and to extend it to 10'. The stairs are the secondary access in lieu of the existing porch, which will be razed and replaced by an atrium that will extend 10' or less. There are approximately 20' from the porch to the northwest line of the D.W. Highway right-of-way.

Steve Keach read the statutory criteria into the record.

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 Tony Pellegrino.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the enclosed porch would provide more seating for patrons and customers. This would allow higher volume of turnover and result in a positive increase in revenue and tax collection for the Town of Merrimack. It would allow customers to have a more enjoyable experience and provide scenery of the public greenway across D.W. Highway;
2. The spirit of the Ordinance is observed because the proposed porch would accommodate the seating arrangement and would not directly affect D.W. Highway traffic patterns. It would re-use a pre-existing non-conforming structure. The paving and landscaping would create curb appeal. The atrium would be on the same level as the floor area;
3. Granting this variance would do substantial justice because it would double the dining space and provide a pleasant atmosphere;
4. The values of the surrounding properties would not be diminished because the improvements, including landscaping and an attractive exterior, will increase the value of this property and of the surrounding properties and positively impact property tax revenues;
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. The front encroaches on the setback and the property is a pre-existing non-conforming property.
 - 2) The proposed use is a reasonable one because it will increase Merrimack tax revenue.

The Board voted 5-0-0 to take up agenda item #6 before agenda item #4, on a motion made by Richard Conescu and seconded by Patrick Dwyer.

- 6. Sanford Survey and Engineering, Inc. (petitioner) and Ralph & Jeanne Reed (owners)** – Variance under Section 3.02 of the Zoning Ordinance to permit a subdivision of one lot into two lots with less than the required minimum lot areas (70,385 and 43,571 sf. whereas 100,000 sf. is required) and frontages (150' and 133.03' whereas 250' is required). The parcel is located at 50 Wilson Hill Road in the R-1 (Residential) and Aquifer Conservation Districts. Tax Map 4B, Lot 105. Case #2015-35.

Tim Thompson explained that two frontage size and two lot size variances are requested. As of 2000, the lot is in the R-1 (Residential) District by map. If soil standards for the previous R District were applied, the applicant would not have had to appear before the Zoning Board of Adjustment (ZBA).

Earl Sandford, Land Surveyor and Professional Engineer, Sandford Surveying and Engineering, said the open area could have been developed without a Variance into a uniform rectangular lot based on the zoning at the time the house was built. He read the statutory criteria into the record and corrected the frontage footage on the agenda from 133.03' to 158.38'. He showed the lot sizes of other lots on Wilson Hill Road.

As to #2, spirit of the Ordinance, Lynn Christensen said nothing prevents the Boy Scouts from developing their land. Earl Sandford said they would need variances, but it is neither practical nor feasible because of the terrain and the wetland.

Regarding #5, Richard Conescu stated that the applicant presented a good explanation of unnecessary hardship.

Patrick Dwyer asked the reason for the subdivision, which Earl Sandford said is to build a second house. Fran L'Heureux asked if the second lot would be sold. Earl Sandford replied that the owners would do whatever would give them value for their retirement.

Public comment

Patrick Dwyer read a letter from Joseph Herlihy, 49 Wilson Hill Road, into the record. Mr. Herlihy opposes the Variance because the houses on Wilson Hill Road are on wells and septic with a minimum of 2.25 acres to protect groundwater. The applicant's is one of the smallest lots and barely conforms to regulations. The Variance would create two non-conforming lots, which would be the smallest in the neighborhood. There is not enough road frontage. A precedent should not be set for future development. The owners will leave town and the new owners are investors who may not have the best interests of the neighborhood in mind. It will have a negative impact on property values.

David Elliott, 54 Wilson Hill Road, agreed with Mr. Herlihy. The subdivision does not fit the neighborhood's design. Other neighborhood homes are designed to fit at the edge of the woods. This house will be on top of other houses. By this standard, Joseph Herlihy could fit five lots on his property across the street.

Joseph Herlihy said that, in 2000 the zoning changed to make the neighborhood less dense. Earl Sandford showed how small the neighboring lots are, based on the Town's GIS map, which Tim Thompson stated is an accurate representation of the lots existing in the area.

Richard Conescu asked if more variances would be needed for the side setbacks. Earl Sandford replied in the negative. Lynn Christensen asked whether the lots would be consistent with others on the street. Tim Thompson explained that the Variance would allow a subdivision that would be the same as any other on the road could have been prior to 2000. He stated that many of the lots in the area are non-conforming from a frontage standpoint, but that he did not confirm any information about lot sizes of other lots in the area. Earl Sandford said there are 38 non-conforming lots on Wilson Hill Road, 20 of which are also non-conforming in area. The ZBA granted a similar variance before. Tim Thompson said that a similar variance was granted for a different lot in August 2015, but variances do not set a precedent, as each case is decided on the individual circumstances of the lot.

Richard Conescu asked Joseph Herlihy about the statement in his letter that investors would purchase the house. Is he concerned about the dimensions of the house or the future buyers? Joseph Herlihy replied that his concern is the integrity of the development, which would be like a cluster development. He did not want to use the old standards. On that basis, he could put four new homes on his lot. David Elliott said that he was told when he bought his home that no more houses would be built on Wilson Hill Road. Joseph Herlihy said his neighbor was denied a variance for a two-acre lot in 2000. The Reeds would have to build a small house to meet the setbacks. Richard Conescu understood Joseph Herlihy's issue to be the size of the property in comparison with other properties, but the ZBA wants to know whether this lot looks like other lots. Joseph Herlihy warned against two non-conforming lots rather than one. Richard Conescu said the issue of future owners is irrelevant.

Tim Thompson said the buildable area is approximately 200' x 100', so there is a significant building envelope that can easily accommodate a single-family home.

Patrick Dwyer opposed the Variance on the grounds that it does not meet the spirit of the Ordinance because the new lot size would be almost 60,000 square feet less than required and because the cluster appearance would diminish the values of the surrounding properties.

A motion to grant the variance, with one condition, failed 1-4-0, on a motion made by Richard Conescu and seconded by Fran L'Heureux. Fran L'Heureux, Tony Pellegrino, Patrick Dwyer, and Lynn Christensen voted in the negative.

The Board voted 4-1-0 to deny the Variance, based on the reasons listed below, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino. Richard Conescu voted in the negative.

Findings of Fact

1. The spirit of the ordinance was not observed as the proposed lots would be less than 40% of the minimum required size under the requirements of the ordinance; and
 2. The value of surrounding properties could be diminished by the introduction of smaller lots into the existing neighborhood.
- 4. Peter Stoddard of S&H Land Services, LLC. (petitioner) and MDR Rehab and Development, LLC. (owner) – Variance under Section 3.05 of the Zoning Ordinance to permit a single-family home to be built 9 ft. from the front property line whereas 30 ft. is required and 9 ft. from the side property line whereas 15 ft. is required. The parcel is located on 1 Donald Road in the R (Residential) District. Tax Map 6A-1, Lot 138. Case # 2015-33.**

Peter Stoddard, S&H Land Services, LLC., read the statutory criteria into the record.

Tim Thompson explained that there are no rear setbacks because the property has dual frontage. The house is non-conforming. The lots were platted in the 1940s, many years before there were zoning laws in Merrimack.

Richard Conescu said the variance would really extend the encroachment 4'-5'. Tim Thompson said the applicant must have variances to build anything on that lot because nothing would comply.

Public comment

Jeff Mulligan, 34 Scenic Vista Way, said it is in the public interest to replace a rundown, dangerous and uninhabitable house and replace it with a habitable home.

Fran L'Heureux read into the record letters of support from Peter Flood, 6 Shore Drive; Michael Martines, 5 Shore Drive; and Paula Chaffe, 6 Donald Road.

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

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the proposed new house would replace the abandoned run-down house that currently exists on the lot. The public would benefit because it would be an improvement to the neighborhood, whereas the existing house is a blight;
2. The spirit of the Ordinance is observed because the majority of the surrounding neighborhood is comprised of structures that do not meet the setback requirements. The proposed new house would match the characteristics of the surrounding neighborhood;
3. Granting this variance would do substantial justice because of the size and configuration of the lot, which is similar to other lots in this neighborhood. There is no area on the lot where a house could be constructed to meet the setback requirements. The house would be set back on the lot to meet the characteristics of the neighborhood;
4. The values of the surrounding properties would not be diminished because the proposed new house will vastly improve what currently exists and conform to the characteristics of the neighborhood;
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 of the size and configuration of the lot. There is no area where a house can be constructed to meet the required setbacks. The public would benefit from replacing the abandoned run-down house with a brand-new house. There would be no harm to the public because the house would be set back in a manner similar to other houses in the neighborhood;

- 2) The proposed use is a reasonable one because the house would match the characteristics of the neighborhood and vastly improve the overall appearance of the lot.

5. JWS Custom Decks (petitioner) and Steve and Pauline Desmarais (owners) –

Variance under Section 3.05 of the Zoning Ordinance to permit the construction of a garage 27.5 ft. from the rear property line whereas 40 ft. is required. The parcel is located on 25 Amherst Road in the R (Residential) and Aquifer Conservation Districts. Tax Map 4C, Lot 175-1. Case # 2015-34.

Renée Shankle, JWS Custom Decks, read the statutory criteria into the record.

Richard Conescu asked why the garage would be built in that location and not on the other side of the house. Renée Shankle replied that it would look funny. There are two entrances: one on the left and one on the right. The deck would have to be changed, people forced to walk to the front and another driveway put on the other side. Richard Conescu agreed that makes a lot of sense.

There was no public comment.

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

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the garage would improve the existing home and would be in keeping with the neighborhood;
2. The spirit of the Ordinance is observed because a garage is common to a home and surrounding neighbors;
3. Granting this variance would do substantial justice because of the configuration of the lot. There is no area where a garage could be constructed to meet the setback requirements. The only reasonable area would be at the end of the driveway, set back from the road near the house and meeting the characteristics of the neighborhood;
4. The values of the surrounding properties would not be diminished because the garage would improve the overall look of the property and conform to the characteristics of the neighborhood;
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 of the size and configuration of the lot. There is no

appropriate area where a garage could be constructed to meet the required setbacks. The public would benefit because a home with a garage is common. It would appear to be built at the same time as the house. It would be set back from the road at the end of the driveway, similar to the homes in the neighborhood;

- 2) The proposed use is a reasonable one because the garage would match the characteristics of the neighborhood and improve the appearance and function of the lot.

The Board was in recess from 8:25-8:30 p.m.

7. Michael Alukonis (petitioner/owner) – Variance under Section 3.02 of the Zoning Ordinance to permit a shed approximately 5 ft. from the side property line whereas 20 ft. is required. The parcel is located at 6 Mullikin Road in the R (Residential) and Aquifer Conservation Districts. Tax Map 5B, Lot 215-02. Case # 2015-36.

Tim Thompson explained that the District was rezoned to R-1 (Residential) by map in 2000, so there are now 30' setback requirements rather than the 20' stated on the agenda.

Michael Alukonis, who said he already built the shed, read the statutory criteria into the record.

Fran L'Heureux said the shed is good looking.

Richard Conescu asked whether the applicant was aware of the property lines when he got a building permit. Michael Alukonis said that, until his neighbor hired a surveyor, he did not know exactly where they were. He had no idea that the zoning changed the 20' required setback to 30'. Tim Thompson explained that the Building Department did not investigate beyond the 1980 plan that had a 20' setback and erroneously granted a permit with a 20' setback. The Community Development Department was not notified, so he did not know until the neighbor's complaint and the survey, which is accurate.

Fran L'Heureux concluded that the location is not the owner's fault. Richard Conescu said the applicant would still not have met a 20' Variance. Michael Alukonis said the shed is completely on his property.

Lynn Christensen asked why he could not move it 15' away from the property line. Michael Alukonis said it would require a crane and steel beams and it would be in the steep drop off. It is 9' from the ground to the floor. Erin Alukonis added that a very large fence makes it more challenging to get steel beams under the shed.

Patrick Dwyer stated that the applicant knew the shed is non-conforming when he built it. Michael Alukonis said he thought the shed was 10'-15' from the property line.

Richard Conescu noted that the applicant was told where the setback is, but he built into it anyway. Michael Alukonis said he did so the pine trees would hide it more from the neighbors' view when driving down the road. He was probably wrong.

Lynn Christensen noted the dramatic drop off behind the house. Erin Alukonis said it is 50' down, so there is no backyard. Lynn Christensen said that lot lines can be misconstrued, but the applicant intentionally went into the setback, even though he had good intentions. He should have appeared before the ZBA first. There is no good way to move the shed.

Public comment

Denise Levesque, 5 Mullikin Road, refuted each of Michael Alukonis's answers to the statutory criteria. The shed will adversely affect the neighborhood. It is not enclosed by trees and can be seen. The building permit specifies a 16' x 26' shed, but an 18' x 30' shed was constructed 5' from her property line. It was not built according to the building permit. There are no others on the street. This sets an unfair precedent and infringes on the setback rights of 5 Mullikin Road, which shares a similar topography. It is unreasonable to allow a large structure on a property that already has an in-ground pool, pool house and a large cement pad used as camper storage. All the usable property has been used and has a negative effect on Denise Levesque's property value. Michael Alukonis parks a construction trailer and a truck on the side setback 5' from her property line. There is no undue hardship. Michael Alukonis designed the shed in the setback. In June 2015, he conceded on a Facebook message to her that he had not built according to the permit. She and her husband (Robert Grady) did a property line survey. Michael Alukonis should have stopped construction and gone to the ZBA for a variance. He works in the construction business, has a civil engineering degree and is a surveyor, so he should understand building and zoning codes. The use is unreasonable. A structure of this size is not permitted. There are other possibilities. Denise Levesque's photos of the stake that Michael Alukonis put into the ground show that he knew where the property line is.

Fran L'Heureux read the Facebook message into the record because it is pertinent: Michael Alukonis wanted to talk. He was concerned about creating a rift. His goal was to clean up his junk and tools. He did not want to create problems. He tucked the shed over as far as he could to hide it behind the pine trees, but he may have gone too far. He offered to pay to hire a surveyor. If the shed is on the property of 5 Mullikin Road, he will rectify the situation.

Fran L'Heureux stated that Michael Alukonis knew what he was doing.

In answer to Richard Conescu, Michael Alukonis confirmed that what Denise Levesque submitted was the Facebook message that he sent.

Michael Alukonis said the floor was installed eight months before the problems with the footprint of the shed. There was no issue until the surveyor called him to say the neighbors were unhappy with the shed. The stake was not there in November. He sent the Facebook message because the Town GIS showed the property line significantly farther onto his property and the shed half on their property. The roof was on when he sent the message. He had used a tape measure and eyeballed it before then. Only when the survey was done did he see that he was not on their property. The permit is for a 26' x 16' shed. He expanded it because he did not have the equipment to be sure

everything was perfectly aligned and he had to cantilever over the tubes to make the shed square.

Michael Alukonis admitted that he did not return to the Building Department to change the dimensions.

Fran L'Heureux said her problem is that the applicant "assumed", but he did not double check.

Bob McCabe, 30 Wilson Hill Road, who lives behind Mullikin Circle, submitted a copy of the drawing on the building permit. He said that the position of the shed on the plan when Michael Alukonis applied for a building permit was different from where it was built. The fence sticks up and is as large as a large garage. The applicant was not honest. He overbuilt. Bob McCabe stated that Michael Alukonis admitted he knew what he was doing. Bob McCabe stated that the building can be pulled back into the position that is on the permit. It is within 12' of the wellhead. He could have cut down some pine trees and can still correct what went wrong. The ZBA has the power to make it right. The owners of 5 Mullikin Road can see the shed in their front window.

Richard Conescu asked Michael Alukonis whether the drawing that Bob McCabe showed is what he submitted. Michael Alukonis said it is and explained how he got the line. Richard Conescu said the shed is so parallel with the line on the permit that the applicant must have known where the property line was. Lynn Christensen said that what is on the drawing is significantly farther back from the property line than what Michael Alukonis built.

Finlay Rothhaus, 14 Kittredge Lane, who is Erin Alukonis's father, said that Michael Alukonis intended to seclude the shed, as he stated in his Facebook message. He commented that Bob McCabe is a thief who stole property from Michael Alukonis. The Facebook message proves that he has good intentions toward his neighbors.

Patrick Dwyer opposed the Variance on the grounds that the shed does not meet the spirit of the Ordinance: it was put where it should not have been and it is not a reasonable use. Michael Alukonis should have been aware that he was building in the setback.

Tim Thompson asked whether Patrick Dwyer's basis is that Michael Alukonis knew he was putting the shed in the setback rather than the fact that the shed is in the setback. Patrick Dwyer said he was more concerned that Michael Alukonis did so knowingly rather than that there was an encroachment into the setback.

The Board voted 4-1-0 to deny the Variance, based on the reasons listed below, on a motion made by Patrick Dwyer and seconded by Tony Pellegrino. Richard Conescu voted in the negative.

Findings of Fact

1. The petitioner knowingly violated the spirit and intent of the ordinance by deliberately constructing the shed larger than was indicated on the building permit application and knowingly closer to the side property line within the required setback; and
2. Because the petitioner knowingly placed the shed in the location it was constructed, there is no unnecessary hardship specific to the circumstances of the lot that distinguish it from others similarly zoned, and any hardship was self-created.

8. Discussion/possible action regarding other items of concern

The Board 5-0-0 to adopt the 2016 meeting schedule, on a motion made by Patrick Dwyer and seconded by Richard Conescu.

The Board discussed possible procedural/deliberation modifications as it relates to cases where a motion is made to deny a petition. Staff encouraged deliberation and more discussion among Board members before motions are made, and will look to see if video from other ZBA's can be made available to the Board to review.

Tony Pelletier wanted Community Development to discuss the agenda with the ZBA chair before each meeting. Tim Thompson said he is open to doing so, but cautioned that the quasi-judicial nature of the ZBA means that he cannot give specific recommendations as he does with the Planning Board. It is a delicate balance. This month, new staff neglected to send Fran L'Heureux the agenda before it was published. It will not happen again.

9. Approval of Minutes – August 26, 2015

The minutes of August 25, 2015, were approved as submitted, by a vote of 5-0-0, on a motion made by Lynn Christensen and seconded by Tony Pellegrino.

10. Adjourn

The meeting adjourned at 9:38 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Patrick Dwyer.