



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, FEBRUARY 27, 2013

Members present: Phil Straight, Fran L'Heureux, Tony Pellegrino, Kevin Shea, and Alternate Leonard Worster.

Members absent: Patrick Dwyer, Richard Conescu, and Alternate Nathan Barry.

Staff present: Planning and Zoning Administrator Nancy Larson.

1. Call to Order

Phil Straight called the meeting to order at 7:00 p.m., and designated Leonard Worster to sit for Patrick Dwyer.

2. Roll Call

Fran L'Heureux led the pledge of allegiance. Kevin Shea read the preamble. Phil Straight swore in members of the public who would be testifying.

3. Wigston Properties, LLC. & Edgebrook Heights, LLC. / Q. Peter Nash, Trustee of the Q. Peter Nash 1987 Revocable Trust (applicants/owner) – Variance under Section 2.02.4(C)(1)(a) of the Zoning Ordinance to permit a Conditional Use Permit where each of the five (5) subject properties is less than 50 acres in size, individually and collectively (approximately 35.70 acres total). Subject parcels are located in the I-1 (Industrial) District located at 1, 37, 39, 55 and an unnumbered parcel, D. W. Highway, Merrimack, NH. Tax Map 1E, Lots 4-1 & 4-2, Tax Map 2E, Lots 6-2, 7 and 8. Case # 2013-02.

Attorney Brad Westgate, Winer & Bennett, LLP, said the property is bounded by the former Nashua Corporation facility immediately to the north, D.W. Highway and Harris Pond plaza to the west, the former proposed Circumferential Highway right-of-way to the south, and Pennichuck Brook and the Boston and Maine Railroad to the east. Immediately behind Harris Pond plaza are the Harris Pond condominiums (a multi-family residential facility). Of the 35.7 acres, each lot is less than 50', but there are 1400' if one counts all five lots together. Primary access is directly across from the signalized driveway entrance Harris Pond. Secondary access is at the common drive easement on the north at the Nashua Corporation site. The site was approved for an office complex, but that is not realistic in this market. The site is flattest in the southeasterly section, but the proximity to the Merrimack River and Pennichuck Brook make this area limited for development purposes due to various buffer and setback requirements. The topographical challenges, including a bisection of the site from north to south by a 140'-wide and 50' high ridgeline render traditional manufacturing and industrial uses difficult to develop. Therefore a mixed use is envisioned. There is a lot of undeveloped land; it will not be among the fully developed abutters. The five lots meet the criteria for a

Conditional Use Permit: a minimum of 50 acres, municipal sewer, Pennichuck water, and 500' of continuous frontage on D.W. Highway. The lot lines may change according to which use is developed. Attorney Westgate read the points of law into the record.

Questions from the Board

Criterion 2 (spirit of the Ordinance): Kevin Shea asked about the intended use, which Attorney Westgate said would be mixed residential and commercial. Specific uses have not yet been decided. Detailed plans must receive Planning Board approval.

Chairman Straight said the case was well made and agreed that the topography is unusual for industrial use.

There was no public comment.

Deliberations of the Board

Tony Pellegrino was not comfortable with granting the variance because the use is unknown. Phil Straight explained that the request is for permitted uses and only with Planning Board approval. Kevin Shea agreed with Tony Pellegrino, but trusts the Planning Board. It would be different if the parcel were in the center of town. It cannot do much harm to Merrimack's livelihood. Location is the reason to approve. Tony Pellegrino agreed that the application meets all the criteria, but was still uncomfortable.

The Board voted 4-1-0 to grant the Variance, on a motion made by Kevin Shea and seconded by Fran L'Heureux. Tony Pellegrino voted in the negative.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because the uses are allowed under the Conditional Use Permit process on parcels of land adequate in size and ideal in location to accommodate such uses, such as being adjacent to industrial property to the north and across from an existing mixed use development (Harris Pond) to the west. As a collection of lots, the premises have more than 500' of continuous frontage on D.W. Highway. Given the virtual lack of other undeveloped properties meeting all the criteria for a Conditional Use Permit, it is in the public interest for the premises to receive relief from the 50-acre requirement. Mixed use would complement existing nearby uses;
2. The spirit of the Ordinance is observed because mixed uses allow a creative integration of industrial, commercial and residential housing developments and provide for the appropriate use of the land, fiscally beneficial development, efficient provision of public services and expanded opportunities for diversity of residential development. The land is uniquely situated to accommodate mixed uses, has excellent access, is more than adequate to accommodate its traffic loads, and is located where there are other mixed uses. The topography can accommodate various uses. The shape and size are substantial enough to handle uses contemplated by the Conditional Use Process, with adequate land for open space and buffers. There is a very limited number of undeveloped parcels 50 or more acres that qualify for Conditional Use; this land can meet the criteria of the master site plan requirements;
3. Granting this variance would do substantial justice. There is a virtual lack of qualifying parcels in Merrimack. The State terminated plans to construct the

Circumferential Highway and traditional industrial uses of the premises are not viable. The premises can accommodate an expanded scope of uses in a manner complementary with the nearby uses;

4. The values of the surrounding properties would not be diminished because the premises are adjacent to, similar to and compatible with or complementary to existing uses. There will be adequate access and traffic design and appropriate buffering and setbacks;

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 specific conditions applicable to the premises that distinguish it from other properties in the area and between the general public purpose of the Zoning Ordinance and the specific application of the 50-acre minimum size requirement. Special conditions of the premises are location in a section of Merrimack already consisting of a variety of mixed uses, primary access at a signalized intersection, over 1400' of contiguous frontage on D.W. Highway, accommodations for open space land, adequate size to accommodate mixed uses, and among a very few groupings of parcels that can adequately meet the goals of the Conditional Use Permit. The 50-acre requirement frustrates these general public purposes of the Conditional Use Permit. The premises also have additional topographic characteristics that render traditional manufacturing and industrial uses difficult to develop: the flattest portions are severely limited from development because of buffer requirements due to the proximity to the Merrimack River and Pennichuck Brook and the bisecting ridgeline is problematic for uniform industrial development. Additional acquisitions to increase the acreage are not possible. A hardship exists when the strict 50-acre minimum site requirement of the I-1 District is applied to the premises without relief by a Conditional Use Permit;
- 2) The proposed use is a reasonable one because the uses are permitted by the Conditional Use Permit in the I-1 District and the premises are adequate to accommodate such uses. Adequate access exists and the premises would complement existing, adjacent or nearby mixed uses.

4. Wigston Properties, LLC. & Edgebrook Heights, LLC. / Q. Peter Nash, Trustee of the Q. Peter Nash 1987 Revocable Trust (applicants/owner) – Variance under Section 2.02.4(C)(1)(d) of the Zoning Ordinance to permit a Conditional Use Permit where one or more of the five (5) properties have less than 500 feet of continuous frontage on the State maintained portion of D.W. Highway located in the I-1 (Industrial) District located at 1, 37, 39, 55 and an unnumbered parcel, D. W. Highway, Merrimack, NH. Tax Map 1E, Lots 4-1 & 4-2, Tax Map 2E, Lots 6-2, 7 and 8. Case # 2013-03.

Attorney Westgate stated that the same boundaries, conditions and criteria for a Conditional Use Permit apply as in agenda item #3. He read the points of law into the record.

Questions from the Board

Criterion #2 (spirit of the Ordinance): Tony Pellegrino asked whether the lots would remain the same. Attorney Westgate said they would not. Although the lots would conform to a master site plan, flexibility will allow them to differ depending on the owner and use. Nancy Larson added that the Zoning Ordinance permits parcels to be consolidated and re-subdivided. Phil Straight said it is understandable that the petitioner wants options to be left open because there are no buyers yet.

Criterion #4 (no diminishment of surrounding properties): Kevin Shea suggested that a casino might diminish the values of surrounding properties, but the Planning Board would not allow one. Chairman Straight said the Planning Board would ensure that the uses would work together. The question before the ZBA is whether this is a reasonable use of the land, which is a gray area. Attorney Westgate explained that a Conditional Use Permit has specific criteria for each use (industrial, residential, office, research and development, restaurant, hotel, church, PUD). Chairman Straight said that the ZBA always held that new construction generally increases surrounding values.

There was no public comment.

Deliberations of the Board

Tony Pellegrino asked whether there would be development in the near future or if the owner would sell parcels. Attorney Westgate replied that the owner can sell lots, but they must all be developed according to the master site plan and the requirements of the Conditional Use Permit. Planning will take more than six months.

The Board voted 5-0-0 to grant the Variance, on a motion made by Fran L'Heureux and seconded by Kevin Shea.

Findings of Fact

1. The granting of the variance would not be contrary to the public interest because, as a collection of lots, the premises meet all criteria required for a Conditional Use Permit: in excess of 1400' of continuous frontage on D.W. Highway (nearly three times the required amount), significant size to accommodate the uses, and are consistent with existing mixed uses. There is a virtual lack of undeveloped properties meeting all the criteria for a Conditional Use Permit;
2. The spirit of the Ordinance is observed because, when developed as a whole, the lots meet the letter (contiguous frontage, adequate provision for utilities, access roads and parking, sufficient land for public or private open space, adequate size for appropriate buffers) as well as the spirit of the Ordinance (mixed use, size of land, fiscally beneficial development, efficient provision of public services, expanded opportunities for diversity of residential development);
3. Granting this variance would do substantial justice because of the size and nature of the premises, variety of uses on nearby and adjacent parcels, virtual lack of qualifying parcels of the Conditional Use Permit, the nature of present day land use, the State's termination of plans for the Circumferential Highway, and no viability for traditional industrial uses;

4. The values of the surrounding properties would not be diminished because the premises are adjacent to and would be compatible with or complementary to existing mixed uses. Adequate access and traffic design criteria will be implemented and appropriate buffering and setback requirements will be imposed. Lot lines do not affect the values of surrounding properties;
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 specific conditions applicable to the premises that distinguish it from other properties in the area and between the general public purpose of the Zoning Ordinance and the specific application of the 500' continuous frontage requirement. Special conditions of the premises are location in a section of Merrimack already consisting of a variety of mixed uses, primary access at a signalized intersection, over 1400' of contiguous frontage on D.W. Highway, accommodations for open space land, adequate size to accommodate mixed uses, and among a very few groupings of parcels that can adequately meet the goals of the Conditional Use Permit. As a whole, the properties have about three times the frontage required by the 500' continuous frontage criterion; a hardship is imposed since the lots individually do not all have them. It could be met with a comprehensively developed whole. A hardship exists when the strict 500' of continuous frontage requirement of the I-1 District is applied to the premises without relief by a Conditional Use Permit;
 - 2) The proposed use is a reasonable one because the uses are permitted by the Conditional Use Permit in the I-1 District and the premises are adequate to accommodate such uses. Adequate access exists and the premises would complement existing, adjacent or nearby mixed uses.

5. Mark E. Twardoski & Three Palms, LLC. (applicant/owner) – Special Exception under Section 2.02.4(E)(3) of the Zoning Ordinance to permit a caretaker residence in the I-1 Industrial, Elderly Overlay and Aquifer Conservation Districts. A portion of the property is subject to the Flood Hazard Conservation District located at 25 Greeley Street, Merrimack, NH. Tax Map 4D-1, Lot 002. Case # 2013-04.

Mark Twadorski, 25 Greeley Street, said the property is bounded by Greeley Street to the north, Jennifer Drive to the east and south, and other industrially zoned but residentially used property to the west. The site has two detached buildings, a gravel parking area and two paved parking areas. Both buildings contain office uses. The subject building is a former barn renovated into office space approved by the Planning Board in 2003. Mark Twadorski wishes to convert a portion of the former barn to a caretaker unit to allow him as owner to live on the premises because of vandalism over the past six years. He has no tenants and is not comfortable leaving the complex unattended. He wants to watch construction in the new office space in the building next door. The barn conforms to other Colonial-style buildings in the area. Dr. Vacca next door received approval to live in his building. Mark Twadorski read the points of law into the record.

Questions from the Board

Criterion #1 (appropriate location): Phil Straight asked who would live in the building. Mark Twadorski said that he and his wife would take over the entire building for living space. Kevin Shea asked about parking. Mark Twadorski said there are three spaces in front, some below for tenants and employees, and paid parking at 3 Jennifer Drive. There have been no parking issues for nine years. There is a large snow storage area. He will use the front parking area; there are no tenants. Nancy Larson asked for clarification about living space. Mark Twadorski said the first floor is office space and that he would live on the second floor. There are no employees to use the parking lot.

Deliberations of the Board

Criterion #2 (diminution of surrounding values): Kevin Shea noted that an absentee landlord would diminish the value; one on site would add to the value.

Criterion #4 (adequate parking): Kevin Shea said his concerns were addressed.

The Board voted 5-0-0 to grant the Special Exception, with the following conditions, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux.

1. The Petitioner shall modify the submitted plan and submit detailed floor plans that clearly delineate the limits of the proposed residential use at the property. The plans to contain the following key pieces of information:
 - Location of the proposed residential caretaker use within the building;
 - A floor plan of the first floor to show how the residential use(s) on the second floor will access the building;
 - List the total square footage of the proposed caretaker residence;
 - Identification of any area, such as parking, that is to be dedicated for the proposed caretaker residence.

Findings of Fact

1. The specific site is an appropriate location for the proposed use in terms of overall community development because the property abuts existing single-family residences and is designed to conform to other residences. Other commercial properties have the same allowances for on-site caretaker lodging;
2. The proposed use, as developed, will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area because the building increases values to the neighborhood. Without tenants, it will reduce traffic;
3. There will be no nuisance or serious hazard to vehicles or pedestrians because the building has ample parking. Full-time on-site residence will reduce the amount of cars and parking spots. The building will not be rented to other tenants. Sidewalks are maintained;
4. An adequate parking area is provided for the motor vehicles on the premises as required by the May 6, 2003, Planning Board-approved site plan.

5. Discussion/possible action regarding other items of concern

None.

7. Approval of Minutes – January 30, 2013

The minutes of January 30, 2013, were approved as submitted, by a vote of 5-0-0, on a motion made by Fran L'Heureux and seconded by Phil Straight.

8. Adjourn

The meeting adjourned at 8:15 p.m., by a vote of 5-0-0, on a motion made by Tony Pellegrino and seconded by Fran L'Heureux.