

**Town of Amherst  
Zoning Board of Adjustment  
Tuesday December 20, 2016**

ATTENDEES: D. Kirkwood- Chair, R. Rowe- Vice-Chair, C. Vars, K. Shea, S. Giarrusso (Alt), A. Buchanan (Alt) Staff: G. Leedy- Community Development Director

The Vice-Chair called the meeting to order at 7:12pm, introduced the board members and explained the ZBA process.

**NEW BUSINESS:**

**CASE #: PZ8159-111816 – Variance William & Karla Bouvier (Owners); 54 Brook Road, PIN #: 010-013-000 – Request for approval to construct an attached mudroom (10’x12’) and an accessory three (3) car garage with finished floor above having a setback no closer to road R.O.W. than closest corner of existing dwelling per Article IV, Section 4.5, Paragraph E1 & E3. Zoned Northern Rural.**

Charlie Vars recused himself from the case. The Vice-Chair stated S. Giarrusso will vote for C. Vars and A. Buchanan will vote for D. Kirkwood.

C. Vars presented the case for the owners. Karla Bouvier was present.

After a subdivision in the 1990s, the property remains at 16.43 acres. Total frontage is 858 lineal ft. It was built back in the 1700s and so it was built very close to the road. This is in the northern rural zone. One of the four items in section 4.5 of the ordinance states: *To ensure that the future development of our town be of a type that is compatible with the area’s extensive physical limitations as well as its unique, rural, scenic and natural character.* The original house was 13.3ft from the road. Additions were put on in the 1800s and 1900s. There are 90 feet from one side of the house to the property line and 700 feet from the other side to the proposed mudroom and 600 feet to the proposed garage. The requirement in that zone is 40ft. The entire house is within the 50ft. setback from the road and it is a scenic road which means there should be 100ft. setback.

The original plan was to attach the garage, but there is an 18-20ft drop off in that area. The garage will be detached and a variance is needed for that, but no variance is needed for the mudroom. The corners of the garage will be 14ft. off the right of way. The cars currently park near the porch which is within the right of way and quite dangerous.

He addressed the tests as follows:

1. How will granting the Variance not be contrary to the public interest?

The home and extensive additions were mainly constructed prior to zoning and constructed very close to the Town road right-of-way. The area closest to the homes right side entrance door has a severe descending slope away from the roadway. We seek a reduction to the front yard setback to erect a detached garage and small mudroom on the only portion of the land that is accessible from the road and is consistent with the current home setbacks all of which are within the 50 ft. setback now required in the Northern Rural District. The setback is 100’ because it’s a scenic road.

2. How will the granting of the Variance ensure that the spirit of the ordinance will be observed?

The current area for vehicular parking has for years encroached on the road right-of-way, thus the creation of the new garage and off-street parking will promote the health, safety and public welfare, especially in the winter months, by minimizing the vehicles directly abutting road traffic. This is especially true now that the Peabody Mill Environmental Center has created additional year round

49 traffic. The required setback for this zone of 50' is impossible to meet as is the 100' scenic road setback.  
50 The proposed location of the garage is the only feasible location for the site on what is now an existing  
51 flat, relatively level area, between the road and the existing tennis court which is at a grade  
52 approximately 5-6 feet below the proposed garage and driveway. The rural character of the  
53 neighborhood will not be compromised. The spirit of the ordinance is met as the proposed driveway  
54 would allow vehicles to enter Brook Road in a safer way than always backing into any existing traffic.  
55

56 3. How will substantial justice be done?

57 The proposed location of the garage is completely consistent with the intent of the ordinance and the  
58 prior development of the neighborhood and will result in no harm to the public. Conversely, there is  
59 benefit to both the applicant and the general public with relocating the applicant's vehicles off the  
60 Town's right-of way. In this instance there is only one feasible location as shown on the plan presented  
61 with this application.  
62

63 4. How will the value of the surrounding properties not be diminished?

64 The original home built in the 1700s with additions in the 1800s was not the subject of ordinances that  
65 required the current 50' setback or slope restrictions, while the major addition constructed to the left  
66 side of the home in 1970 was allowed as it was built no closer to the road. The proposed mudroom,  
67 while in the 50' setback does not need a variance as by code it is not any closer to the Town's ROW. The  
68 addition of both the mudroom and garage will only enhance this property and with an excess of 850  
69 lineal feet of frontage there will be no detrimental effect on any adjacent properties. There are only two  
70 homes on the opposite side of the road, both set well back from the road, with the Peabody Mill  
71 Environmental Center being the only other building in the area. There will be no diminution of the  
72 values of those other properties in the neighborhood. Both neighbors across the street have been  
73 approached by the owners and have no issues with this plan.  
74

75 5. Literal enforcement of the provisions of the Ordinance would result in unnecessary hardship because:  
76 severe slope, original home location on the lot and dimensional conditions. Denial would mean that it  
77 would not be possible to construct any building that does not violate the current setback requirements.  
78 Owing to the special conditions that exist that distinguishes this property from others in the  
79 neighborhood and not being any closer to the front lot line than the current residence (@ 13.3 lf), the  
80 proposed variance request is not only reasonable, but the only solution available.  
81

82 D. Kirkwood arrived at this time.

83 A. Buchanan asked why the garage can't go between the pool and tennis court. There is a steep drop off.

84 K. Shea asked where the garage doors will be. They will be on the side facing the house. You will back  
85 out and face forward to exit the driveway.

86 S. Giarrusso asked where the slope begins. At the road. Where the garage will be is totally flat and even  
87 with the road. C. Vars clarified on the map where the turn-around area will be and that the ground will  
88 be brought up to grade in that area.  
89

90 No public comment  
91

92 C. Vars recused himself from the rest of the meeting.

93 A. Buchanan recused himself from the next case.

94 This left four voting members and Attorney Prolman was ok with four voting members hearing the case.  
95  
96

97 OLD BUSINESS:  
98 **CASE #: PZ8033-102016 – Rehearing Migrela Realty Trust II (Owner); 153, 155 & 169 Hollis Street, PIN**  
99 **#s: 001-008-002; 001-008-000, 002-007-000 – Rehearing of the decision approved by the Zoning Board**  
100 **of Adjustment regarding the determination of elderly housing per Article V, Section 4.16 & 4.20 of the**  
101 **Zoning Ordinance. Continued from November 15, 2016.**  
102

103 Andrew Prolman presented the case. Also present was Patrick Colburn of Keach-Nordstrom.  
104

105 They are here to rehear the case because of the zoning determination that was made on March 18<sup>th</sup>,  
106 2016 by C. Mailloux. He described the application that was presented to her. The property is on Hollis  
107 street with a net tract area of 22 acres. They looked at the elderly housing ordinance and the rural  
108 residential ordinance. They have public water supply available. All of that translates into 66 two-  
109 bedroom units which is what was presented.

110 She determined that was an incorrect interpretation of the ordinance stating the underlying zoning  
111 applies to the IIHO which allows for 11 units of housing. That's the decision they are appealing which  
112 was previously upheld by the ZBA.  
113

114 They believe the zoning determination was in error and will explain why. In the 2016 ordinance section  
115 4.3 Residential Rural Zone, under A.9, elderly housing is an allowed use. It says to see section 4.20 but  
116 there is no reference to the IIHO there. Looking at the 2016 version of 4.20, paragraph 2 was deleted.  
117 That had provided for 1 unit per acre. Paragraph 3 is still there. They applied paragraph 3 to their  
118 property with public water and that's how they came up with their units/ bedroom counts. There is no  
119 reference to IIHO or 4.16 in this section. If the IIHO was part of this elderly housing ordinance, the  
120 ordinance should have referred us to the IIHO in 4.16.  
121

122 At the 2016 town meeting, the town could have inserted a reference to the IIHO, but did not. This is why  
123 they believe the proposed 66 units makes sense. It's allowed with public water access.  
124

125 He referenced the applicable section in DES regulations. He showed the board the table on page 37 and  
126 subsection E. This shows DES allowing a lot size to be cut in half, but not less than 20,000 sq. ft. if there  
127 is public water supply. This makes sense so the same should be true for elderly housing- higher density  
128 with public water. Elderly housing units are close together and they are smaller units with limited  
129 bedrooms. There is no reason for someone to turn to the IIHO for further analysis.  
130

131 He showed a map of the neighborhood and discussed the character of the neighborhood. There are two  
132 other condominium complexes nearby. The ordinance and the proposal fit and it all fits in with the area.  
133

134 There is a proposed 2017 zoning ordinance the town will vote on in March which strikes the 6-bedroom  
135 per acre section and refers to the IIHO.  
136

137 They presented a reasonable interpretation of the elderly housing zoning ordinance and disagree with  
138 the determination made for the following reasons:

139 Sections 4.3 and 4.20 give no reference to the IIHO.

140 Elderly housing is not innovative or integrated. Possibly 20 years ago elderly housing was innovative, but  
141 no longer. There is nothing integrated in this project- there is no mixed use or commercial aspect to the  
142 proposal.

143 Using C. Mailloux's determination of 11 units would create 11 2-acre lots. That's not what you're looking  
144 for with elderly housing. You want smaller units that are clustered together. And just because you have

145 11 units, it doesn't exclude the language from section 4.20 that allows 6 bedrooms per acre. That would  
146 give you 11 units with 12 bedrooms each. (132 bedrooms) That is not what they are looking to do. They  
147 want small units.

148  
149 There are density bonuses if they modify the application in various ways. If they did that, they would get  
150 up to 18 or 19 units which puts them in the same situation and it's not feasible.

151  
152 He read from the zoning determination. He then referenced section 4.20 A 3: *net tract density in units*  
153 *shall be limited to a maximum of six bedrooms per acre...* This clarifies that this sub-section changes the  
154 underlying density. Section 4.2 modifies section 4.3 because of the public water supply.  
155 The proposal is reasonable and the zoning determination should be overturned.

156  
157 G. Leedy responded to comments that were made. He disagrees with Attorney Prolman's analysis and  
158 agrees with the zoning determination. He read from the General Purpose of section 4.16- IIHO which  
159 states it will be the mechanism for implementation for workforce housing, planned residential  
160 development and elderly housing.

161 Innovative zoning has meaning within the state RSA. There are a number of zoning provisions that are  
162 classified as innovative zoning and that was the intention here- to take those uses and put them into  
163 one section of the zoning ordinance.

164 Elderly housing is subject to conditional use permit provisions. The number of units set by the IIHO is  
165 modified by language in 4.20 as '*a maximum number of potential units*' – not by right, but as determined  
166 in the conditional use permit process.

167 The board has the ability to apply the density provisions in the IIHO to grant additional units beyond that  
168 base density up to a maximum of six bedrooms per acre. He thinks the ordinance is clear, but there is  
169 ambiguity as shown through the disagreement in interpretation so you have to look at the intent of the  
170 board when they drafted this ordinance. Their intent was to make the density in the innovative sections  
171 subject to a negotiation with the board whereby the board could make a determination in that  
172 negotiation process as to whether the additional density granted was worth it to the town. Is the town  
173 getting a benefit that's commensurate with the additional density granted?

174 Through these proceedings, the board decided to post a zoning change that would remove all doubt and  
175 clarify what applicants should look at in the ordinance. The proposed zoning amendments were not  
176 intended to deny anyone any rights, but rather to clear up any ambiguity that might exist.

177  
178 S. Giarrusso asked what would be considered a benefit to the town. G. Leedy said density bonuses can  
179 be up to 6 times the underlying density which is a benefit to the developer. The town would get  
180 additional tax revenue. If the units were small and meant for people underserved in town such as  
181 workforce housing or elderly, that would be a benefit. Open space for the town could be incorporated in  
182 the project or benefits to roadways could be negotiated.

183  
184 D. Kirkwood said for a long time, people that help run the town are unable to continue to live in town  
185 because of the cost. We were trying to find more affordable housing to be constructed. The state  
186 defines elderly by 50 years or over. There can be many ways to provide this type of housing.

187  
188 Public comment

189 Ted Drotleff -10 Ponemah Hill Rd

190 Regarding public water, is it guaranteed that Pennichuck will supply water to that site? He heard that  
191 Pennichuck may have a hard time in that area. D. Kirkwood said he didn't know, but there are many  
192 forms of public water supply. Patrick Colburn from Keach-Nordstrom talked with Pennichuck and

193 doesn't foresee any issues. They have not gotten to the point of designing/ engineering the water  
194 extension. Pennichuck has not approved any plans yet. If there are any issues, it would be with the  
195 elevation or pressure. There is a 12" main. He also mentioned that an 18-page plan went to the planning  
196 board. Attorney Prolman handed out the first two pages of that Keach-Nordstrom report to the ZBA  
197 members for review.

198  
199 Attorney Prolman addressed G. Leedy's comments about the discretionary nature of the IIHO being a  
200 negotiation between the applicant and the town for the applicant to gain density bonuses. He listed  
201 some of the criteria that could gain density bonuses. Even if they maxed out the 11-unit plan and gained  
202 up to 22 units, that's still too few. The units will not be affordable if there are so few units with that  
203 acreage.

204  
205 S. Giarrusso asked how many units would be single- floor units. They are all planned to be.  
206 K. Shea asked if the proposal has been seen by the planning board. He thought the plan should have  
207 gone before the planning board first anyway.

208 G. Leedy said they were on the December agenda, but asked to be heard in January after the ZBA  
209 decision.

210 Patrick explained it would be hard to go before the planning board without a favorable ruling from the  
211 ZBA. He thought he was doing what the ordinance asked by taking a conceptual plan to town staff, but  
212 that meeting resulted in an unfavorable zoning determination.

213  
214 R. Rowe said there is a proposed change to the zoning ordinance, but since the applicant has started the  
215 process, would they be able to keep working within the old ordinance? No, Attorney Prolman replied  
216 the statute is clear. If they had been public noticed with a plan in front of the planning board  
217 beforehand, then they would be vested from subsequent changes. But because the new ordinance was  
218 noticed before the application was noticed, they will be subject to the new ordinance. If the zoning  
219 decision is overturned, they could possibly go to the planning board to argue they should have been  
220 heard prior to the posting.

221  
222 Public comment  
223 Ted Drotleff -10 Ponemah Hill Rd  
224 He asked about open space and if the 15% of required open space for the development has already  
225 been taken out of the total acreage. If it hasn't, the acreage calculations for units would decrease.  
226 Patrick explained his calculations that there is 27.9 total acres and then they subtracted out the  
227 wetlands, slope and any portions where the soils that aren't class 1 or 2. That leaves them with 22.02  
228 acres.

229 G. Leedy clarified you don't consider open space within the density calculations.

230  
231 Public comment  
232 John Rose – 8 Ponemah Hill rd.  
233 This used to be a rural town, but now it is hard to perceive it that way. It looks more like a Nashua  
234 suburb.

235  
236 The public hearing was closed.

237  
238 **R. Rowe moved and K. Shea seconded to enter deliberations. All in favor**

239 **R. Rowe moved and K. Shea seconded no regional impact. All in favor**

240 Discussion

241 K. Shea said it's great to be able to sit on a board and be able to see beyond the black and white. These  
242 people just want to add a garage. And they are doing the best they can with the resources they have and  
243 have planned the new building to be further away than the original construction. It's an honor to be able  
244 to help these people and see beyond the strictness of the ordinance. It's his job to approve or deny their  
245 application, not to redesign their plan.  
246

247 **CASE # PZ8159-111816 – Variance**

248 1. The Variance will not be contrary to the public interest.

249 K. Shea yes they did. It will not be contrary. Not going to be closer to the road than current structure.  
250 The garage will make it safer than the current egress.

251 A. Buchanan agree

252 S. Giarrusso yes

253 R. Rowe yes

254 D. Kirkwood abstained

255 4 True 1 Abstention  
256

257 2. The Variance is consistent with the spirit and intent of the Ordinance.

258 A. Buchanan by granting the variance it's not going to violate the spirit of the ordinance

259 S. Giarrusso agree

260 R. Rowe agree garage will be 14 feet from the right of way. The house is even closer to the road. It's not  
261 encroaching as much as the house

262 K. Shea yes 200-300-year-old construction, this is reasonable construction

263 D. Kirkwood abstained

264 4 True 1 Abstention  
265

266 3. Substantial justice is done.

267 S. Giarrusso yes, it is

268 R. Rowe yes

269 K. Shea yes he drove by the property and saw the parking challenges.

270 A. Buchanan agree

271 D. Kirkwood abstained

272 4 True 1 Abstention  
273

274 4. The values of the surrounding properties will not be diminished.

275 R. Rowe yes addition of a garage will not deteriorate the value of surrounding properties

276 K. Shea agree

277 A. Buchanan agree

278 S. Giarrusso yes

279 D. Kirkwood abstained

280 4 true 1 Abstention  
281

282 5. Literal enforcement of the provisions of the Ordinance would result an unnecessary hardship.

283 K. Shea yes special conditions and hardship are the slope, pool, tennis courts and other natural barriers.

284 A. Buchanan yes

285 S. Giarrusso agree

286 R. Rowe agree

287 D. Kirkwood abstained

288 4 True 1 Abstention

289 The chair stated that after having passed the tests, the variance is granted.

290

291 A. Buchanan left the meeting at this time.

292

293 **CASE # PZ8033-102016- rehearing**

294 **R. Rowe moved and K. Shea seconded no regional impact. All in favor**

295 Discussion

296 K. Shea asked what the tests/ criteria are since it's a rehearing.

297 D. Kirkwood said the question is: was there an error in the determination of the Community  
298 Development Director?

299 K. Shea said there's ambiguity in the ordinance. With conflicting ordinances, you need relief from one of  
300 them. Wouldn't that require a variance? Everything presented looks great. With 6 bedrooms per acre  
301 you end up with apartment complexes. I don't want to see that there. I don't see there was a mistake  
302 made. I think they should come for a variance.

303 D. Kirkwood reminded him the question before us is if there was an error.

304

305 R. Rowe it may come back for a variance. He wants to do what is fair for both the applicant and the  
306 Town. There is reasonable interpretation by the applicant for 66 units. We could grant that and the  
307 planning board may reduce the units. Because of the process and cost to the Town and the applicant, he  
308 would like to resolve it as quickly as possible. If there isn't ambiguity, he thinks it should be turned down  
309 and supports the Zoning Administrator's decision. Then if it goes to court the court may uphold it and  
310 the applicant could come back to the planning board and argue for fewer units. He would like to keep it  
311 in the town and move it forward. There is an ambiguity, though not as much as he thought before. He  
312 suggests that there was an error by the Zoning Administrator and to let them go to the planning board  
313 and if it doesn't go through, there are several options of ways to go from there.

314

315 D. Kirkwood when he read the ordinance, he didn't see any ambiguity. All density criteria are intended  
316 to come under the IIHO. The catch is that we are judging a determination that came before the posting.

317

318 K. Shea suggested doesn't changing the wording in fact confirm there was an error?

319 R. Rowe and D. Kirkwood said no. That may be logical, but the law doesn't work that way.

320 K. Shea said the ordinance wasn't clear before.

321 S. Giarrusso with the documents in hand an individual could argue that the zoning administrator  
322 overstated her reach. She wasn't wrong, there's just a difference of opinion.

323 R. Rowe if they decide there was an ambiguity, you can see both sides: 1-that there was an error and 2-  
324 how could there have been an error?

325 K. Shea asked if the letter could be recalled; rather say that it was in error? The board members agreed  
326 it should have gone before the planning board first.

327 R. Rowe she could have made any number of choices, it's not just yes or no to the proposal. She could  
328 have sent them to the ZBA or the planning board.

329

330 The ZBA was ready to make a determination. The Chair asked for a vote on the following:

331 Was there an error in the interpretation? If yes, the Zoning Administrator's decision will be reversed. If  
332 there is no error, the decision will be upheld.

333

334 R. Rowe Yes, the zoning administrator made a premature decision and should have directed the  
335 applicant to the planning board so more detailed plans would have been seen and discussed. Differing  
336 opinions can occur among reasonable people.

337 K. Shea looked at the text of the letter- what's there and what's missing from the letter. He believes  
338 there is information missing from the letter. He doesn't believe there is a mistake in the text. No  
339 S. Giarrusso Yes, there was an error  
340 D. Kirkwood doesn't believe there was an error in the interpretation. No  
341 2 In Favor 2 Opposed therefore, due to a tie, the original decision is upheld.  
342

343 **CASE #: PZ8007-101416 – Variance Keith & Barbara Allen, 8 Milford Street, PIN #: 025-073-000 –**  
344 **Request for approval to construct a dwelling on the lot notwithstanding that the front, rear and side**  
345 **setbacks required by the ordinance cannot be met and that the building will exceed the floor area**  
346 **ratio. Zoned Residential Rural. Continued from November 22, 2016.**  
347

348 **S. Giarrusso moved to table case PZ8007-101416 by request of the applicant to the January ZBA**  
349 **meeting. R. Rowe seconded. All in favor**  
350

351 **R. Rowe moved to exit deliberations. S. Giarrusso seconded. All in favor**

352 C. Vars re-joined the board at this time.  
353

354 **OTHER BUSINESS:**

355 **Minutes: October 18, 2016; November 15, 2016; November 22, 2016**

356 G. Leedy informed the board that an appeal was received today regarding the LaBelle case. A certified  
357 record needs to be gathered and given to the court; therefore the minutes need to be addressed.

358 **R. Rowe moved and K. Shea seconded to approve the minutes of October 18<sup>th</sup> as submitted.**

359 **Vote: 4 in favor with S. Giarrusso abstaining**

360 **C. Vars moved and R. Rowe seconded to approve the minutes of November 15<sup>th</sup> as submitted.**

361 **All in favor**  
362

363 **R. Rowe moved and S. Giarrusso seconded to approve the minutes of November 22<sup>nd</sup> as amended.**

364 Line 166 change authorized to authored

365 **All in favor**  
366

367 R. Rowe mentioned that the ZBA needs to get more people involved with the board. He would like to  
368 step down as Vice-Chair and spoke to Kevin about taking the position and Kevin is interested. When  
369 there is a more complete board in attendance, they should address this topic.  
370

371 He also inquired as to when positions will be up for election.

372 G. Leedy looked it up and the terms end as follows:

373 2017- J. Ramsay, C. Vars, A. Buchanan (Alt) and vacancy (Alt)

374 2018- S. Giarrusso (Alt), K. Shea, D. Kirkwood

375 2019- R. Rowe  
376

377 **S. Giarrusso moved to adjourn at 9:00pm. R. Rowe seconded. All in favor**  
378

379 Respectfully submitted,

380 Jessica Marchant