

**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 (100'x120') 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

traffic. The required setback for this zone of 50'0 is impossible to meet as is the 100' scenic road setback. The proposed location of the garage is the only feasible location for the site on what is now an existing flat, relatively level area, between the road and the existing tennis court which is at a grade approximately 5-6 feet below the proposed garage and driveway. The rural character of the neighborhood will not be compromised. The spirit of the ordinance is met as the proposed driveway would allow vehicles to enter Brook Road in a safer way than always backing into any existing traffic.

3. How will substantial justice be done?

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

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

The original home built in the 1700s with additions in the 1800s was not the subject of ordinances that required the current 50'0 setback or slope restrictions, while the major addition constructed to the left side of the home in 1970 was allowed as it was built no closer to the road. The proposed mudroom, while in the 50'0 setback does not need a variance as by code it is not any closer to the Town's ROW. The addition of both the mudroom and garage will only enhance this property and with an excess of 850 lineal feet of frontage there will be no detrimental effect on any adjacent properties. There are only two homes on the opposite side of the road, both set well back from the road, with the Peabody Mill Environmental Center being the only other building in the area. There will be no diminution of the values of those other properties in the neighborhood. Both neighbors across the street have been approached by the owners and have no issues with this plan.

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

D. Kirkwood arrived at this time.

A. Buchanan asked why the garage can't go between the pool and tennis court. There is a steep drop off. K. Shea asked where the garage doors will be. They will be on the side facing away from the house. You will back out and face forward to exit the driveway.

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

No public comment

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

A. Buchanan recused himself from the next case.

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

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 18th,
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 A9, elderly housing is an allowed use. It says to see section 4.2 but
116 there is no reference to the IIHO there. Looking at the 2016 version of 4.2, number 2 was deleted. That
117 had provided for 1 unit per acre. Number 3 is still there. They applied number 3 to their property with
118 public water and that's how they came up with their units/ bedroom counts. There is no reference to
119 IIHO or 4.16 in this section. If the IIHO was part of this elderly housing ordinance, the ordinance should
120 have referred us to the IIHO in 4.16.

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

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

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

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

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

138 Sections 4.3 and 4.2 give no reference to the IIHO.

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

142 Using C. Mailloux's determination of 11 units would create 11 2-acre lots. That's not what you're looking
143 for with elderly housing. You want smaller units that are clustered together. And just because you have
144 11 units, it doesn't exclude the language from section 4.2 that allows 6 bedrooms per acre. That would

give you 11 units with 12 bedrooms each. (132 bedrooms) That is not what they are looking to do. They want small units.

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

He read from the zoning determination. He then referenced section 4.2 A 3: *net tract density in units shall be limited to a maximum of six bedrooms per acre...* This clarifies that this sub-section changes the underlying density. Section 4.2 modifies section 4.3 because of the public water supply.

The proposal is reasonable and the zoning determination should be overturned.

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

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

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

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

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

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

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

Public comment

Ted Drotleff -10 Ponemah Hill Rd

Regarding public water, is it guaranteed that Pennichuck will supply water to that site? He heard that Pennichuck may have a hard time in that area. D. Kirkwood said he didn't know, but there are many forms of public water supply. Patrick Colburn from Keach-Nordstrom talked with Pennichuck and doesn't foresee any issues. They have not gotten to the point of designing/ engineering the water

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

197
198 Attorney Prolman addressed G. Leedy's comments about the discretionary nature of the IIHO being a
199 negotiation between the applicant and the town for the applicant to gain density bonuses. He listed
200 some of the criteria that could gain density bonuses. Even if they maxed out the 11-unit plan and gained
201 up to 22 units, that's still too few. The units will not be affordable if there are so few units with that
202 acreage.

203
204 S. Giarrusso asked how many units would be single- floor units. They are all planned to be.
205 K. Shea asked if the proposal has been seen by the planning board. He thought the plan should have
206 gone before the planning board first anyway.

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

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

212
213 R. Rowe said there is a proposed change to the zoning ordinance, but since the applicant has started the
214 process, would they be able to keep working within the old ordinance? No, Attorney Prolman replied
215 the statute is clear. If they had been public noticed with a plan in front of the planning board
216 beforehand, then they would be vested from subsequent changes. But because the new ordinance was
217 noticed before the application was noticed, they will be subject to the new ordinance. If the zoning
218 decision is overturned, they could possibly go to the planning board to argue they should have been
219 heard prior to the posting.

220
221 Public comment
222 Ted Drotleff -10 Ponemah Hill Rd
223 He asked about open space and if the 15% of required open space for the development has already
224 been taken out of the total acreage. If it hasn't, the acreage calculations for units would decrease.
225 Patrick explained his calculations that there is 27.9 total acres and then they subtracted out the
226 wetlands, slope and any portions where the soils that aren't class 1 or 2. That leaves them with 22.02
227 acres.

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

229
230 Public comment
231 John Rose – 8 Ponemah Hill rd.
232 This used to be a rural town, but now it is hard to perceive it that way. It looks more like a Nashua
233 suburb.

234
235 The public hearing was closed.

236
237 **R. Rowe moved and K. Shea seconded to enter deliberations. All in favor**

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

239 Discussion

240 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
241 people just want to add a garage. And they are doing the best they can with the resources they have and
242 have planned the new building to be further away than the original construction. It's an honor to be able
243 to help these people and see beyond the strictness of the ordinance. It's his job to approve or deny their
244 application, not to redesign their plan.

245

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

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

248 K. Shea yes they did. It will not be contrary. Not going to be closer to the road than current structure.

249 The garage will make it safer than the current egress.

250 A. Buchanan agree

251 S. Giarrusso yes

252 R. Rowe yes

253 D. Kirkwood abstained

254 4 True 1 Abstention

255

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

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

258 S. Giarrusso agree

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

260 encroaching as much as the house

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

262 D. Kirkwood abstained

263 4 True 1 Abstention

264

265 3. Substantial justice is done.

266 S. Giarrusso yes, it is

267 R. Rowe yes

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

269 A. Buchanan agree

270 D. Kirkwood abstained

271 4 True 1 Abstention

272

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

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

275 K. Shea agree

276 A. Buchanan agree

277 S. Giarrusso yes

278 D. Kirkwood abstained

279 4 true 1 Abstention

280

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

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

283 A. Buchanan yes

284 S. Giarrusso agree

285 R. Rowe agree

286 D. Kirkwood abstained

287 4 True 1 Abstention

288 The chair stated that after having passed the tests, the variance is granted.
 289
 290 A. Buchanan left the meeting at this time.
 291
 292 **CASE # PZ8033-102016- rehearing**
 293 **R. Rowe moved and K. Shea seconded no regional impact. All in favor**
 294 Discussion
 295 K. Shea asked what the tests/ criteria are since it's a rehearing.
 296 D. Kirkwood said the question is: was there an error in the determination of the Community
 297 Development Director?
 298 K. Shea said there's ambiguity in the ordinance. With conflicting ordinances, you need relief from one of
 299 them. Wouldn't that require a variance? Everything presented looks great. With 6 bedrooms per acre
 300 you end up with apartment complexes. I don't want to see that there. I don't see there was a mistake
 301 made. I think they should come for a variance.
 302 D. Kirkwood reminded him the question before us is if there was an error.
 303
 304 R. Rowe it may come back for a variance. He wants to do what is fair for both the applicant and the
 305 Town. There is reasonable interpretation by the applicant for 66 units. We could grant that and the
 306 planning board may reduce the units. Because of the process and cost to the Town and the applicant, he
 307 would like to resolve it as quickly as possible. If there isn't ambiguity, he thinks it should be turned down
 308 and supports the Zoning Administrator's decision. Then if it goes to court the court may uphold it and
 309 the applicant could come back to the planning board and argue for lessor units. He would like to keep it
 310 in the town and move it forward. There is an ambiguity, though not as much as he thought before. He
 311 suggests that there was an error by the Zoning Administrator and to let them go to the planning board
 312 and if it doesn't go through, there are several options of ways to go from there.
 313
 314 D. Kirkwood when he read the ordinance, he didn't see any ambiguity. All density criteria are intended
 315 to come under the IIHO. The catch is that we are judging a determination that came before the posting.
 316
 317 K. Shea suggested doesn't changing the wording in fact confirm there was an error?
 318 R. Rowe and D. Kirkwood said no. That may be logical, but the law doesn't work that way.
 319 K. Shea said the ordinance wasn't clear before.
 320 S. Giarrusso with the documents in hand an individual could argue that the zoning administrator
 321 overstated her reach. She wasn't wrong, there's just a difference of opinion.
 322 R. Rowe if they decide there was an ambiguity, you can see both sides: 1-that there was an error and 2-
 323 how could there have been an error?
 324 K. Shea asked if the letter could be recalled; rather say that it was in error? The board members agreed
 325 it should have gone before the planning board first.
 326 R. Rowe she could have made any number of choices, it's not just yes or no to the proposal. She could
 327 have sent them to the ZBA or the planning board.
 328
 329 The ZBA was ready to make a determination. The Chair asked for a vote on the following:
 330 Was there an error in the interpretation? If yes, the Zoning Administrator's decision will be reversed. If
 331 there is no error, the decision will be upheld.
 332
 333 R. Rowe Yes, the zoning administrator made a premature decision and should have directed the
 334 applicant to the planning board so more detailed plans would have been seen and discussed. Differing
 335 opinions can occur among reasonable people.

336 K. Shea looked at the text of the letter- what's there and what's missing from the letter. He believes
 337 there is information missing from the letter. He doesn't believe there is a mistake in the text. No
 338 S. Giarrusso Yes, there was an error
 339 D. Kirkwood doesn't believe there was an error in the interpretation. No
 340 2 In Favor 2 Opposed therefore, due to a tie, the original decision is upheld.
 341
 342 **CASE #: PZ8007-101416 – Variance Keith & Barbara Allen, 8 Milford Street, PIN #: 025-073-000 –**
 343 **Request for approval to construct a dwelling on the lot notwithstanding that the front, rear and side**
 344 **setbacks required by the ordinance cannot be met and that the building will exceed the floor area**
 345 **ratio. Zoned Residential Rural. Continued from November 22, 2016.**
 346
 347 **S. Giarrusso moved to table case PZ8007-101416 by request of the applicant to the January ZBA**
 348 **meeting. R. Rowe seconded. All in favor**
 349
 350 **R. Rowe moved to exit deliberations. S. Giarrusso seconded. All in favor**
 351 C. Vars re-joined the board at this time.
 352
 353 **OTHER BUSINESS:**
 354 **Minutes: October 18, 2016; November 15, 2016; November 22, 2016**
 355 G. Leedy informed the board that an appeal was received today regarding the LaBelle case. A certified
 356 record needs to be gathered and given to the court; therefore the minutes need to be addressed.
 357 **R. Rowe moved and K. Shea seconded to approve the minutes of October 18th as submitted.**
 358 **Vote: 4 in favor with S. Giarrusso abstaining**
 359 **C. Vars moved and R. Rowe seconded to approve the minutes of November 15th as submitted.**
 360 **All in favor**
 361
 362 **R. Rowe moved and S. Giarrusso seconded to approve the minutes of November 22nd as amended.**
 363 Line 166 change authorized to authored
 364 **All in favor**
 365
 366 R. Rowe mentioned that the ZBA needs to get more people involved with the board. He would like to
 367 step down as Vice-Chair and spoke to Kevin about taking the position and Kevin is interested. When
 368 there is a more complete board in attendance, they should address this topic.
 369
 370 He also inquired as to when positions will be up for election.
 371 G. Leedy looked it up and the terms end as follows:
 372 2017- J. Ramsay, C. Vars, A. Buchanan (Alt) and vacancy (Alt)
 373 2018- S. Giarrusso (Alt), K. Shea, D. Kirkwood
 374 2019- R. Rowe
 375
 376 **S. Giarrusso moved to adjourn at 9:00pm. R. Rowe seconded. All in favor**
 377
 378 Respectfully submitted,
 379 Jessica Marchant