

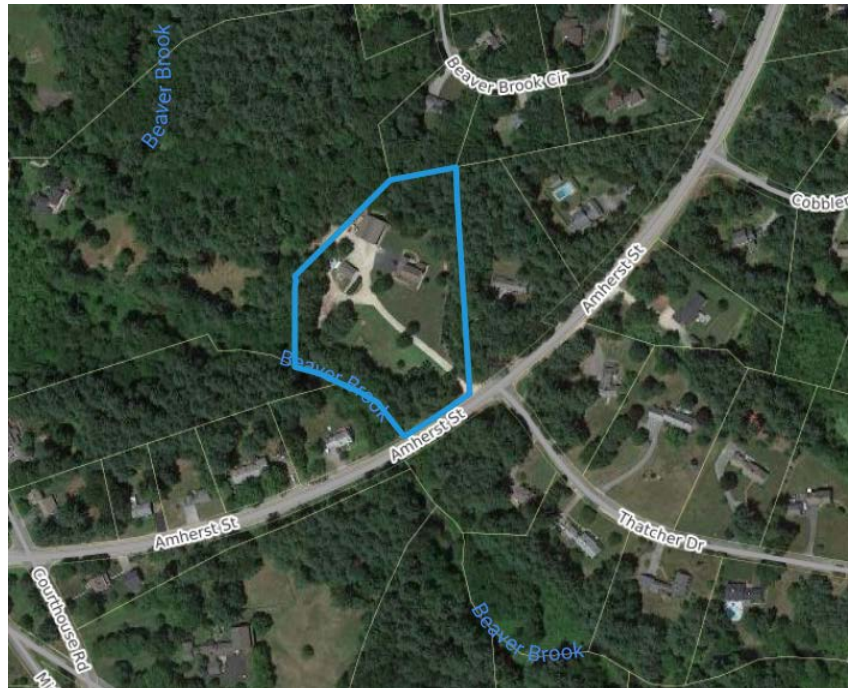


Town of Amherst, New Hampshire
Office of Community Development
Building · Code Enforcement · Planning · Zoning · Economic Development

STAFF REPORT

CASE #: PZ18733-032624
MEETING DATE: April 16, 2024
COMPLETED BY: Nic Strong, Community Development Director
ZONING DISTRICT: Residential Rural (RR), Wetland and Watershed Conservation District (WWCD), Aquifer Conservation & Wellhead Protection District (ACWPD), Flood Plain Conservation District (FPCD), and Historic District (HD) Overlays

APPLICATION DESIGNATION: Variance
PROPERTY OWNER: James & Ellen Sickler, Trustees
APPLICANT/AGENT: James & Ellen Sickler, Trustees
MAP/LOT: Map 18 Lot 47
LOT SIZE: 4.30 acres
LOCATION OF PROPERTY: 166 Amherst Street



REQUEST FOR RELIEF:

- Relief is requested from the provisions of Article IV, Section 4.3, Paragraph A, in order that the applicant may operate a small excavation company.

SUBMISSION ITEMS:

- An application form, completed and signed by Jim Sickler, as owner and applicant, was submitted on March 25, 2024, along with:
 - list of abutters with addresses and mailing labels;
 - one page attachment in answer to #9 on the Application Form;
 - one page "Zoning Variance Responses to the 5 Questions, March 2024";
 - four copies of original Plot Plan of Land dated October 2, 1996;
 - sketch plan with notations by applicant, received March 25, 2024;
 - ten copies of application packet;
 - application fees of \$192 were paid on March 26, 2024.
- There are no outstanding fees.
- Board note: the deadline for the April 16, 2024, meeting was March 15, 2024. However, due to the circumstances surrounding this application as explained below, I made an exception to allow Jim Sickler to submit his application by March 25, 2024.

BACKGROUND/CHRONOLOGY:

- The Sicklers purchased this property in 1995. According to Building Department records, a CO was issued for the house on October 8, 1996.
- On May 3, 1996, a building permit was granted for construction of a 32' x 50' barn denoted as Residential Use Group. See attached building permit application and building permit.
- On October 15, 2009, the HDC granted approval for construction of a three-bay 24' x 36' garage. See attached Certificate of Approval and meeting minutes.
- On November 17, 2009, the ZBA granted a variance for construction of a new garage in the flood plain and to keep an existing barn in the flood plain. See attached application materials, letter of decision and meeting minutes.
- On December 1, 2009, a building permit was issued for a three-bay garage/storage new outbuilding denoted as Residential Use Classification. See attached building permit application and building permit.
- On March 8, 2024, following receipt of a complaint about a similar business in the Residential Rural District and investigation into that and a handful of other such businesses, Bob Clark, Building Inspector/Code Enforcement Officer, sent Jim Sickler and five others Notices of Violation. See attached.
- The Planning Board will be discussing the circumstances of these businesses which are operating without approval in the Residential Rural District at an upcoming Planning Board meeting in May or June. The Board will be discussing the options available to them with regard to the existing businesses and the potential of proposing zoning amendments for 2025. In light of this and in light of the fact that Jim Sickler is the only one who has submitted a variance application so far, I emailed Jim Sickler on April 9, 2024, notifying him of the Planning Board's upcoming discussions, and letting him know that Bob Clark, Building Inspector/Code Enforcement Officer had agreed to temporarily suspend any enforcement action until the Planning Board has held their discussions. I suggested that Jim Sickler might want to withdraw his application at this time so that the process can unfold. See my email attached.
- Jim Sickler responded on April 10, 2024, that he wished to go forward with the variance.

DISTRICT REQUIREMENTS:

- The property is located in the Residential Rural District.
- The following Permitted Uses are allowed in the Northern Rural District:
 1. One-family dwelling and accessory buildings or structures. (3-11-08)
 2. Planned Residential Development. (See Art. IV, Sec. 4.17)
 3. Farm, Agricultural or Nursery Use.
 4. Roadside stand for the sale of farm produce or nursery products. (3-11-93)
 5. Home Occupation. (3-11-93)
 6. (Deleted 3-8-22)
 7. Workforce Housing (See Section 4.14)
 8. Non-commercial sports and recreation uses, subject to obtaining Planning Board site approval, which shall provide at minimum for applicable:
 - a. Setbacks,
 - b. Buffers,
 - c. Sanitary facilities,
 - d. Parking,
 - e. Mitigation of traffic impact, and
 - f. Adequate provision of emergency services, and subject to determination by the Planning Board of the following:
 - i. Such use shall not be the primary use of the lot;
 - ii. Such use shall be non-commercial in nature;
 - iii. Deleted (3-6-04);
 - iv. Deleted (3-6-04);
 - v. Such use shall be compatible with existing neighborhood uses;
 - vi. Such use complies with the spirit and letter of Section 3.1, Nuisance Provision; and
 - vii. No permanent buildings shall be permitted as part of such use, except for sheds to the extent necessary for storage of equipment for such use.
 - g. Noise and lighting. Uses involving motor-driven objects producing sixty (60) or more decibels of sound at a range of ten feet as part of the sport or recreation are prohibited. Night lighting primarily for uses permitted under this section may be allowed by the Planning Board when more than five hundred (500) feet from any abutting lot line, but not between 9:00 p.m. and 7:30 a.m. (3-14-95)
 9. Elderly Housing (See Article IV, Section 4.20) (3-10-15)
 10. Accessory Dwelling Unit (3-8-16, 3-12-24)
- **Businesses are not permitted in the Residential Rural District. Home Occupations are permitted but an excavation company does not meet the definition of a Home Occupation: "An occupation or business activity which is conducted by a resident within his/her own dwelling or in a garage or barn-type outbuilding and which is clearly subordinate to the principal residential use."**

PURPOSE OF ZONING ORDINANCE RESTRICTION IN QUESTION:

- The Town of Amherst's zoning ordinance follows a traditional Euclidean zoning pattern; the term Euclidean coming from a court case in 1926, Village of Euclid, Ohio vs. Ambler Realty Co. In this case the U.S. Supreme Court upheld the constitutionality of a zoning ordinance that would separate uses and control building heights.
- The traditional planning goals associated with Euclidean zoning are providing for orderly growth, preventing overcrowding of land and people, alleviating congestion, and separating incompatible uses.
- The Amherst Zoning Ordinance specifies as its purposes:
"...promoting the public health, safety, and general welfare of the Town of Amherst..." and "...to implement the goals of the orderly development and growth of the Town as set forth in the Master Plan adopted in November 1980 and future revisions of the Master Plan as the needs of the Town dictate."
- The Residential Rural District does not have a specific purpose, but the intent of the district can be extrapolated from the list of permitted uses. The Town of Amherst's Zoning Ordinance is a permissive ordinance, meaning that anything that is not listed as a permitted use or a use allowed by special exception is not allowed.

APPLICANT'S RESPONSE TO VARIANCE CRITERIA:

- See the attached application for the applicant's responses to the variance criteria as listed on the ZBA's application form.

STAFF COMMENTS:

- Jim Sickler notes in his application materials that the town issued a building permit in 2003 to construct a barn to house some of the business and equipment. The Town records I have attached indicate that there was no mention in the record for either the ZBA or HDC applications that the construction of the barn was for business purposes. The building permit application filled out by Jim Sickler and the Zoning Department section of the application form both denote the construction as residential. Additionally, the building permit application filled out by Jim Sickler in 2009 for the garage and the building permit issued in 2009 for the garage both denote the construction as residential.
- Jim Sickler also states as part of the application that "The town has also been aware of the existence and location of this business from its inception. I have completed many jobs for the Amherst Town Hall, DPW and the Amherst School Department from this location. Amherst DPW has often brought damaged benches from the town common, to my location, for repairs."
- I have no way of knowing why this issue has never come up before now.
- For something to be considered a pre-existing non-conforming use, commonly known as being "grandfathered", it has to have been properly approved before the zoning changed to make the use no longer allowed. That use can then continue indefinitely under the same parameters, and may even be able to expand, depending on certain factors being applicable.
- There are no records that Jim Sickler ever received approval from the Town to operate an excavation business from 166 Amherst Street.

DELIBERATIONS:

REGIONAL IMPACT:

- Pursuant to NH RSA 36:56, I. "A local land use board... upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact."
- Pursuant to NH RSA 36:55, "...'development of regional impact' means any proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality, because of factors such as, but not limited to, the following:
 - I. Relative size or number of dwelling units as compared with existing stock.
 - II. Proximity to the borders of a neighboring community.
 - III. Transportation networks.
 - IV. Anticipated emissions such as light, noise, smoke, odors, or particles.
 - V. Proximity to aquifers or surface waters which transcend municipal boundaries.
 - VI. Shared facilities such as schools and solid waste disposal facilities."
- Pursuant to NH RSA 36:57, I. "Upon determination that a proposed development has a potential regional impact, the local land use board having jurisdiction shall afford the regional planning commission and the affected municipalities the status of abutters as defined in RSA 672:3 for the limited purposes of providing notice and giving testimony."
- Pursuant to NH RSA 36:57, II. "Not more than 5 business days after reaching a decision regarding a development of regional impact, the local land use board having jurisdiction shall, by certified mail, furnish the regional planning commission and the affected municipalities with copies of the minutes of the meeting at which the decision was made. The local land use board shall, at the same time, submit an initial set of plans to the regional planning commission, the cost of which shall be borne by the applicant."

DISCUSSION OF VARIANCE CRITERIA:

- See the attached application for the applicant's responses to the variance criteria as listed on the ZBA's application form.

FINDINGS OF FACT:

- Pursuant to RSA 676:3, all local land use boards have to include specific findings of fact that support any decision to approve or disapprove an application for a local permit. The Board should determine at what point in the proceedings to discuss these.

DEADLINE FOR BOARD ACTION:

- Pursuant to RSA 674:33, VIII., upon receipt of an application, the Zoning Board of Adjustment shall begin formal consideration and shall approve or disapprove such application within 90 days of the date of receipt, provided that the applicant may waive this requirement and consent to such extension as may be mutually agreeable. If the Zoning Board of Adjustment determines that it lacks sufficient information to make a final decision on an application and the applicant does not consent to an extension, the

Board may, in its discretion, deny that application without prejudice, in which case the applicant may submit a new application for the same or substantially similar request for relief.

- 90 days from the March 25, 2024, receipt date is June 23, 2024.

BOARD OPTIONS:

- The Board could consider continuing this application to a future meeting date to allow time for the Planning Board discussions to take place.

OR

- After reviewing the application, considering all of the evidence, hearing all of the testimony, and by taking into consideration members' personal knowledge of the property in question, the Board could vote on a motion that approves, approves with conditions, or disapproves with reasons, the application under consideration. All five variance criteria must be met to grant a variance.

NS/

4/11/24

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<u>VARIANCE CRITERIA GUIDELINES</u>	
Statutory Requirements (RSA 674:33, I(b))	Explanation
<i>APPLICANT MUST SATISFY ALL OF THE FOLLOWING</i>	
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure “public rights.”
2. The spirit of the ordinance is observed.	As it is in the public’s interest to uphold the spirit of the ordinance, these two criteria are related.
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
<p>5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways:</p> <p>First is to show that because of special condition of the property that distinguish it from other properties in the area:</p> <p>(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and</p> <p>(b) The proposed use is a reasonable one.</p> <p><i>Alternatively</i>, unnecessary hardship exists if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	<p>The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area.</p> <p>(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a “fair and substantial” way.</p> <p>(b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.</p> <p><i>Alternatively</i>, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</p>