

TOWN OF AMHERST
Zoning Board of Adjustment

February 20, 2024

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In attendance: Doug Kirkwood (Chair), Danielle Pray (Vice Chair), Jamie Ramsay (Secretary),
Charlie Vars, and Tony Ortiz (alternate)
Staff present: Nic Strong, Community Development Director

Doug Kirkwood called the meeting to order at 7:00 pm. He then outlined the process for the meeting. If an applicant does not agree with the decision, they can apply for a request for a rehearing within 30 days of this meeting. In the application for a rehearing, the applicant needs to add a letter explaining why they think the rehearing is necessary. If the applicant is still not satisfied after the rehearing, there is recourse to the Superior Court, within 30 days from the rehearing date.

Doug Kirkwood introduced the Board members. He noted that Tracy McInnis has resigned from the Board due to health issues and he would like Tony Ortiz to sit as a regular member in her place.

Danielle Pray moved to appoint Tony Ortiz in place of Tracy McInnis until the vote at Town Meeting in March. Jamie Ramsay seconded.
Voting: 4-0-1; motion carried [T. Ortiz abstaining.]

PUBLIC HEARINGS:

- 1. CASE #: PZ18354-122823 – VARIANCE**
AZ Realty LLC (Owner) & Northpoint Construction Management (Applicant);
108 Ponemah Road, PIN #: 002-109-000 – Request for relief from Article III
Section 3.11, Paragraph B.1. to construct a building which is set back 60 feet from a scenic road where a 100-foot setback is required. *Zoned General Office. Postponed from January 16th due to winter snowstorm.*

Jamie Ramsay read and opened the case.

Morgan Hollis, Esq., Gottesman & Hollis, P.A., addressed the Board. He explained that this property contains an existing structure and sits on a scenic road. The building has fully depreciated and is obsolete for a future use. The applicant is a construction manager working with the owner of the property, with an intention to create a new dental office business. The existing building is only approximately 45' from the scenic road, where the requirement is for a 100' setback. A new building would need to meet that 100' setback. There is a significant topographic drop on this property from the front of the property to the rear, leading to a utility easement and railroad line at the back of the property. The right-hand side of the property also drops to a wetland area. There is a required 25' buffer to the wetland. If the building was pushed back 100', it would be far down the hill, leading to extreme construction costs. The proposal is to set the building back 60' from the road. This will be less encroaching than the existing building. This proposal will need to go before the Planning Board, if approved by the Zoning Board. The plan proposes no parking between the building and the road and that the building will be parallel to Ponemah Road. The driveway will be kept in essentially the same position. The proposed

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building will be further from the driveway and the scenic road. If the building is required to be pushed further back, parking will be required to be placed in front of it toward the road. This would be contrary to the public interest, in that the public would likely prefer to see an area of grass along a scenic road. The topography severely limits the layout of structures on the site. The plans demonstrate why the setback cannot be complied with.

Attorney Hollis addressed the five criteria:

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

Granting the variance to allow 40' of encroachment into the 100' setback for scenic road Route 122 will not conflict with the express purpose of the particular ordinance provision, which is to preserve and enhance the rural open character of the Town as viewed from the scenic road and to prevent unsightly development along the scenic road because the existing structure, an old building formerly used as a real estate office, which must be demolished because of its state of disrepair, currently encroaches greater than the proposed encroachment, and allowing the proposed encroachment allows parking to be located in the rear of the building rather than in the front yard of the building. The character of the immediate surrounding neighborhood is that most existing structures do not comply with the 100' scenic setback in that they are pre-existing nonconformities, and this proposed encroachment will not alter that character. Granting the variance will not threaten public safety as it will not affect any sight lines for traffic on the scenic road.

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

Granting of the variance will ensure the spirit of the ordinance will be observed by recognizing the need to be setback as far from the road as possible, further than the current encroaching structure, and allowing for parking to be placed in the rear of the building rather than in the front yard closer to the scenic road. The appearance of the development from the scenic road will be better if the variance is granted than if not granted. There will be no alteration of the character of the neighborhood and there will be no threat to the health, safety, or welfare of the public or other private properties.

3. *How will substantial justice be done?*

Substantial justice will be done in that, if the variance is granted, the new building will set back slightly more than the existing building, with no resulting harm to the public or others, in that the current and long standing view from the scenic road will not be different, with no resulting harm to the public or others while the benefit to the applicant is to not be required to perform significant excavation, and import substantial fill, all at great expense, for no valid reason, and not require the parking area to be located in the front yard closer and more visible to the scenic road.

Attorney Hollis noted that his client has offered proof that a 100' buffer would require approximately 3,800 cubic yards of fill, additional retaining walls of 120-140 linear feet at approximately 10'-15' high, guardrails, steps to the building from the parking area, and

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taller foundation walls at approximately 18'-20' tall. These additional items would incur approximately \$320,000-\$380,000 site costs and additional building costs of approximately \$100,000.

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

Granting the variance will not cause any diminution in value of surrounding properties in that the present building on the property encroaches greater than the proposed building and there is no adverse impact on values allowing this new building to be 40' closer than permitted. In fact, pushing the building back will result in parking in the front right along the scenic road which would have greater potential for adverse impact on property values.

A memo from an appraiser was included in the packet which addressed the proposed project's valuation of surrounding properties. It concludes that the plan does not alter the character of the neighborhood, will not distract from the aesthetics, and that granting the variance requested to allow construction of the building with a 60' front setback from a scenic roadway instead of the 100' as required will not adversely affect surrounding property values.

5. *Literal enforcement of the provisions of the ordinance would result in unnecessary hardship because:*

(A) For the purpose of this sub paragraph, "unnecessary hardship" means that owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property,

and

(ii) The proposed use is a reasonable one:

There is currently an old building in total disrepair on the property and the owner desires to construct a new building for its growing dental practice, which is currently located in Amherst. The property itself has unique topographic characteristics in that it slopes tremendously and very steeply to the rear of the property (east) and to the side of the property (south), resulting in elevation changes making construction of a building on the property very difficult if the scenic setback is to be honored. The current building encroaches approximately 55' and the proposed building would encroach approximately 40' into the setback area. The further back the building is required to be located from the scenic road, the more difficult and expensive and less possible the project becomes. The property also abuts the railroad line to the rear, limiting development to the rear, and is located adjacent to a wetland which has a 25' buffer from wetland boundaries. The property also is located along a curve of Ponemah Rd. resulting in an unusual shape of the lot. All of these unique features constrict the ability to develop and use this property in a reasonable fashion.

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The general purpose of the ordinance provision as to the 100' setback from scenic roads is to preserve and enhance the rural character of the Town and to prevent unsightly development. Because of the pre-existing encroachment and the unique features of the lot, enforcing the ordinance against this property does not bear a fair and substantial relationship to these purposes in that, if a variance is granted, the character of the area will remain unchanged. In fact, granting the variance will allow the applicant to provide parking to the side and rear rather than in the front yard, which might have an even more adverse impact on the purposes of the ordinance.

The proposed encroachment is reasonable in that the setback to the scenic road will be slightly greater than the existing building, will not impact the existing character of the neighborhood, and will provide for a better view from the road than if it was filled with parking in the front yard area. Granting the variance will allow a reasonable permitted use without unnecessary significant costs and trucking activity related to the development, thereby allowing an existing Amherst business to remain in Town.

(B) Explain how, if the criteria in subparagraph A above are not established, an unnecessary hardship will be deemed to exist if, and only 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:

If the criteria established in subparagraph A of the statutory requirements as described above are not satisfied, an unnecessary hardship will be deemed to exist if, and only if, owing to special circumstances of the property that distinguish it from other properties in the area, the property cannot be reasonably used in conformance with the ordinance, and a variance is necessary. In this case, because of the topography, the proximity to the wetlands, the proximity to the railroad track, the unusual shape of the lot due to the curves of Ponemah Rd., and the preexisting unrepairable structure, establishing a new building outside of the scenic road setback becomes a near impossibility, and as a result, the property cannot be reasonably used in strict conformance with the ordinance, and the variance is necessary.

Charlie Vars noted that the lefthand corner of the existing building does not include the porch, which is 8'-10' additionally toward the road. From the roadway to the property line, there is an additional 15'. The building likely has a lot of issues for it to be remodeled. The proposed building is probably four times the size of the existing building; moving it back to the 100' setback line would lead to the proposed building being only 2 ½ times the size. The proposal is an enhancement to the area.

Tony Ortiz asked how far the existing walkway is from the road. Attorney Hollis stated that this is approximately 45' from the edge of the right of way.

Danielle Pray stated that the appraisal did not include a map to the comparable properties mentioned, and it is unclear how close they are to this property. She asked what is on either side

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and across the street from this property. Attorney Hollis stated that directly across the street is an office building. Next to that is a condominium building, and to the north is another office building. Nic Strong displayed the NRPC GIS maps of the lots in the neighborhood.

Danielle Pray asked about the width of the proposed building when looking at it from the road. Attorney Hollis stated that this is approximately 100 - 120' long. Danielle Pray asked about the parking lot. Attorney Hollis stated that there would be no parking between the building and the road, and the start of the parking lot would be in line with the front of the building.

There was no public comment at this time.

**Charlie Vars moved to enter into deliberations. Jamie Ramsay seconded.
Voting: 5-0-0; motion carried unanimously.**

CASE #: PZ18354-122823 – VARIANCE

**AZ Realty LLC (Owner) & Northpoint Construction Management (Applicant);
108 Ponemah Road, PIN #: 002-109-000**

**Jamie Ramsay moved no regional impact. Danielle Pray seconded.
Voting: 5-0-0; motion carried unanimously.**

Jamie Ramsay asked if this is one of the two General Office Zones in Amherst. Charlie Vars stated that was true. Jamie Ramsay stated that the residential properties in this area preceded the number of businesses that have since moved in. The building may have outlived its life.

Danielle Pray noted that she would like a condition that there be no parking between the building and the street.

The Board reviewed the variance criteria tests:

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

- T. Ortiz – true, this will not threaten the public health, safety, or welfare. Granting this variance will be a benefit to the public interest and public safety as the proposal relocates the entrance of the building currently facing the road, as well as the walkway from the road, and places them facing northward away from the road.
- C. Vars – true, the proposal is better for sightlines as it will be set back further, and the public will see less of it than the existing building.
- J. Ramsay – true, the proposal keeps with the character of the General Office Zone. This road is not quite what one would think of as a scenic road in Town, as it has continued to be developed along.
- D. Pray – true, the encroachment of 40' in a required 100' setback does not affect the health, safety, and welfare of the public. It does not alter the character of the neighborhood, where there is a current encroachment of 45'.

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- D. Kirkwood – true, the pushback of the building gives more of a chance for the building to blend in with the surroundings. There is no threat to the public health, safety, or welfare.

5 True

2. The Variance will ensure that the spirit of the ordinance will be observed.

- C. Vars – true, the proposal fits the General Office Zone and the alternate plan shown puts extensive parking at the front of the site. The proposal will be better along the scenic road and will not detract from the neighborhood.
- J. Ramsay – true, for reasons previously stated.
- D. Pray – true, the spirit of the ordinance is concerned with the view from the road. This variance would push the current setback further back. Coupled with the condition of no parking in the front of the lot, the spirit of the ordinance would be observed.
- T. Ortiz – true, approving this variance will result in the property being closer in consistency with the scenic setback requirement, as it increases the building setback for a net increase and this proposal will not negatively affect the neighborhood.
- D. Kirkwood – true, this proposal will improve the sight distance along the road.

5 True

3. Substantial justice is done.

- J. Ramsay – true, this allows for a commercial building in a General Office Zone, fitting with the intent and purpose. The owner will get out of the building exactly what is permitted within the Zone and have enjoyment of the property without restriction to the general public.
- D. Pray – true, when balancing the harm to the public versus the benefit to the applicant, the harm to the public in this case is minimal. The proposal is less of an encroachment than what currently exists and the costs of following literal enforcement of this ordinance would require substantial funds from the applicant which do not outweigh any benefit to the public in this case.
- T. Ortiz – true, the proposed use is a reasonable one, as the applicant is looking to improve the property based on current conditions which must be addressed. Denying the application provides no benefit to the public.
- C. Vars – true, this will have a positive impact on the area. The existing garage is also proposed to be removed and is in bad shape. The view from the road will not be much different. The applicant will benefit by being able to use the existing grades and slopes.
- D. Kirkwood – true, for reasons previously stated.

5 True

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

- D. Pray – true, the applicant submitted an appraisal from an appraiser which stated that the property values would not be adversely affected by granting this variance, and there was no evidence presented to the contrary.

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- T. Ortiz – true, there was no evidence provided to indicate the value surrounding properties will be diminished. The proposed structure is a significant improvement from the existing one. It may actually benefit the surrounding property values.
- C. Vars – true, for the reasons already stated.
- J. Ramsay – true, the proposed building is suited to its purpose and will be fairly attractive. This will be at least commensurate with or an increase to surrounding property values.
- D. Kirkwood – true, for the reasons already stated.

5 True

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship

- C. Vars – true, there are unique topographical characteristics of the site. The railroad tracks at the back of the lot also constrain the building area. The proposal preserves and enhances the rural character and the General Office Zone in this location will be unchanged.
- J. Ramsay – true, the slope to the rear of the site is a challenge and predates the existing building. There would be a hardship to not allow the owner to improve the site to the extent proposed. This is an unusual property.
- D. Pray – true, the applicant outlined unique characteristics of the lot, including its unusual shape on a curved road, the topography with steep inclines on the side, and wetland buffers that would need to be considered in any development. The current building and shed on the property are in need of repairs and there is a utility easement on the property as well. All of this limits the opportunity for development on this property. This is a fair and reasonable use of this property as it is in the General Office Zone and the building has been an office in its previous life.
- T. Ortiz – true, the proposed use is a reasonable one and the best option considering the characteristics of the lot. The applicant brought forward a plan that aligns closer to the ordinance. Denying the variance would pose hardship and cause the applicant to consider other options which may conflict with additional ordinances, such as the rear setback and wetland buffer requirements.
- D. Kirkwood – true, for the reasons already stated.

5 True

Doug Kirkwood stated that the application, having passed all of the tests, is granted, with the condition that there be no parking in the front of the building, between the building and the road.

**Charlie Vars moved to exit deliberations. Jamie Ramsay seconded.
Voting: 5-0-0; motion carried unanimously.**

Doug Kirkwood suggested that the next agenda item be taken up in Executive Session. Danielle Pray stated that this item would only be addressed by the Board and could be done in Open Session.

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REQUEST FOR REHEARING

2. CASE #: PZ18136-110223 –VARIANCE

**Divest LLC (Owner & Applicant); County Road & Thornton Ferry Road II;
PIN #: 004-142, 142-10, 142-12, 142-13** – Request for relief from Article III, Section 3.9, Paragraphs B, C & D to maintain three existing reduced frontage lots as previously approved, and from Article IV, Section 4.3, Paragraph C.2. to maintain an existing corner lot as previously approved. *Zoned Residential Rural. Postponed from January 16th due to winter snowstorm.*

Charlie Vars stated that there are three criteria for granting a rehearing and, in this case, this item does not meet these. The Findings of Fact covers what the Board previously discovered for this case. He is concerned with the abutter's approach that the three houses around the cul-de-sac be built close to the front property line, thus leaving approximately 300' from the existing houses on the adjacent road.

Danielle Pray stated that the Board made an error in how it examined the case. The Board reviewed a plan from 2005/2006 that did not closely abide by what the current ordinance is. Changes are made to the ordinance and the Board must review all applications presented to it to with the new ordinance in mind. Even though this was a good plan originally, the ordinances have changed. The applicant for this rehearing spoke to the fact that the spirit of the ordinance was not observed, as the Board needed to review the application within the current ordinance. There was also mention that great deference was given to the developer for the cost of redoing the design. This is not a hardship, or not a hardship that overrides the public interest, which was passed by the voters in this Town with the new ordinance. She would vote for a rehearing.

Tony Ortiz stated that he would also vote for rehearing, as he believes the Board made an error. There are some outstanding issues that the Board needs to address regarding this case and the ordinance.

Jamie Ramsay agreed with Danielle Pray. He stated that the subdivision plan was a thoughtful plan but had lapsed in terms of what is clearly approvable under current zoning.

Charlie Vars stated that he will certainly not stand in the way of a rehearing and, under the circumstances, would vote favorably for one.

Danielle Pray moved to grant a rehearing for CASE #: PZ18136-110223. Tony Ortiz seconded.

Voting: 5-0-0; motion carried unanimously.

OTHER BUSINESS:

1. Minutes: November 30, 2023; December 19, 2023

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Charlie Vars moved to approve the meeting minutes of November 30, 2023, as presented. Jamie Ramsay seconded.

Voting: 5-0-0; motion carried unanimously.

The Board tabled discussion of the meeting minutes of December 19, 2023, until a future meeting.

2. Any other business that may come before the Board

The Board presented Doug Kirkwood with a certificate of appreciation celebrating his years of service on the Board.

Danielle Pray moved to adjourn the meeting at 8:16pm. Tony Ortiz seconded.

Voting: 5-0-0; motion carried unanimously.

Respectfully submitted,
Kristan Patenaude