



ZONING BOARD of ADJUSTMENT
Town of Hollis
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Minutes of May 5, 2022

The Zoning Board of Adjustment meeting was held in the Community Room, Hollis Town Hall, and was called to order by Chairman Brian Major at 7:30 pm.

MEMBERS OF ZONING BOARD OF ADJUSTMENT PRESENT: Brian Major, Chairman; Jim Belanger, Vice Chairman; Regular Members –Rick MacMillan, Drew Mason; Alternate Members – Bill Moseley.

MEMBERS ABSENT: Regular Members – Cindy Robbins-Tsao; Alternate Members –Kat McGhee, Meredith West and Stan Swerchesky.

STAFF PRESENT: Bill Condra, Inspector/Code Enforcement; Donna Setaro, Building and Land Use Coordinator.

B. Major explained the policies and procedures.

B. Major stated that the voting members on the case at this meeting will be: B. Major, J. Belanger, R. MacMillan, D. Mason and Bill Moseley.

B. Moseley moved to take File ZBA2022-009 off the table. Seconded by J. Belanger. Motion unanimously approved.

By unanimous vote, the Zoning Board of Adjustment (ZBA) found no regional impact for case ZBA2022-009.

ZBA2022-009

This application was tabled at the April 28, 2022 meeting- Application of Runnells Bridge Realty Trust, property owner, for a Variance to Section XI; Wetland Conservation Overlay Zone, paragraph 3.c, Existing Lots, to construct a 2,508 mixed used structure, located at 88 Runnells Bridge Road, (Map 005, Lot 027) in the Commercial District.

Applicant: Attorney Thomas Hildreth, for Owner, and Jason Hill, P.E., TFMoran, engineer working with the Owner. T. Hildreth shared handouts of the site, to establish the character of the property and the area. Stated that this is a mixed-use area in the Commercial Zone; directly across from the site is the Industrial Zone. The general area is a combination of commercial, retail, industrial, and residential. T. Hildreth also shared pictures of a property similar to the proposed construction, under the same ownership: a convenience store in Hudson, NH, with an apartment above it. There is no prepared food produced at the Hudson site, and none proposed for this site – not even coffee. The store would just be for dry goods typically found in a convenience store. There would be no gasoline sold, either.

J. Belanger asked if the building would be fronted on Route 111; T. Hildreth confirmed that yes, it would.

B. Moseley asked if there would be windows on the back of the roof on the second floor, as an occupied dwelling. J. Hill indicated that the plans are not at that stage yet, but presumably there would be.

J. Hill outlined the project as a 2,508 square foot mixed use convenience store with a second level, a one-unit, two-bedroom apartment, and construction would include a small parking lot. The property is currently vacant. There is an existing single-family residence which is proposed to be removed along with an existing shed. They will utilize the existing gravel driveway to construct a new, full-access curb cut off of Runnells Bridge Road with a two-way driveway leading to the parking field to the east of the building. The primary, front door of the building will be facing south. There will be a walkway around front, and a proposed cooler attached to the building itself for beverages. The project is on the south side of Route 111, and is across the street from The Hatch convenience store. The property was subdivided around 1956, and includes some narrow, disconnected wetlands which bisect the property in an east-west manner, as well as flowing south to the abutting southerly parcel, and which are proposed to be left undisturbed. There is a proposed 100 foot buffer applicable to the wetlands, which will cover about 90% of the property. The property does pre-date the development of the wetlands protection ordinance.

R. MacMillan asked if the entire building and parking lot would be in the wetlands buffer; J. Hill answered yes.

J. Hill stated that the parking field would include a small dumpster site; there would also be a septic system, not yet designed, to be located in the most remote upland area, in the northeast corner of the plan. It would be a small system, similar to that of a three-bedroom house.

J. Hill stated that if the application is successful with the ZBA, their next step will be to go through the Planning Board process. They will need some relief for other improvements within the wetlands protection zone.

R. MacMillan asked where on the plan the engineering stamp may be seen; J. Hill responded that the final engineering details have yet to be developed. R. MacMillan asked if they are presenting this plan to the Board without an actual wetlands survey, or an engineering survey. J. Hill answered that they have a property survey, and they have the setbacks established. R. MacMillan further asked if the plan represents accurate measurements of the property and any wetlands areas, to which J. Hill responded that the wetlands have been flagged, and are shown on the plan. R. MacMillan questioned whether the wetlands are flagged or surveyed, and why the plan is not signed. J. Hill stated that a wetlands scientist has sketched the location of the wetlands on the property for the plan; the wetlands setbacks are so large that the exact dimensions of the wetlands will make little difference. R. MacMillan asked whether the Applicant is asking for a conceptual variance – why else would they present a conceptual drawing? T. Hildreth stated that the presented plan is all that is required for a zoning application; the wetlands buffer encompasses 90% of the property – their application concerns a use issue, not a proximity to wetlands issue.

B. Major asked how many feet the proposed building and parking lot would be from actual wetlands. J. Hill responded that those dimensions are accurately depicted on the plan; if the variance is granted, and they subsequently changed the dimensions for the final project, they would then be in violation of the variance and would have to come back before the Board.

In answer to B. Major's question about the lot pre-existing the wetlands protection ordinance and therefore potentially being grandfathered in, T. Hildreth mentioned the Zoning Ordinance paragraph underneath Section XI(C), Wetland Conservation Overlay Zone, 3, Jurisdiction, (c), Existing Lots: "This ordinance shall not prohibit the construction of principal and accessory structures on an unimproved lot or the expansion of a legally pre-existing use on a lot that legally existed before March 11, 1997."

R. MacMillan pointed out, however, that there was never a store on this lot previously. T. Hildreth responded that convenience stores are permitted in the commercial district. He suggested that this point indeed indicates an issue with the ordinance, and is why the application is before the Board. There is no rational basis why the ordinance would permit new construction of a permitted use on an unimproved lot – so this convenience store could be built on this lot if there were no building there today, or the house could be expanded to be as large as could fit within the building setbacks – both of those instances would be permitted by right, but the ordinance just does not address this phenomenon, of a change of use on a lot that includes an existing improvement. However, there is nothing in

the ordinance that says when the lot is judged to be improved or not. The owner could tear down the existing building today, take out all the improvements, declare that he now has an unimproved lot, and can build as the plan proposes as a matter of right. If the previous owner had torn down the building, and the Applicant had then bought the property, it would be considered an unimproved lot. The ordinance does not say when a lot's improvement status is measured. And, again, there is no rational basis to permit the two above instances and not the third. It seems to be an unintended, uncovered circumstance in the ordinance. There needs to be a rational basis for restrictions that apply in one case and not in another; no rational basis exists here.

B. Major asked for clarification: if this is an unimproved lot, 1.5 acres in size, and the Applicant can come in as a matter of right and put a convenience store there, what restrictions would there be? T. Hildreth responded that the next part of the quoted section of the Zoning Ordinance addresses that question: "However, such construction or expansion will only be permitted upon determination by Planning Staff (or Planning Board per staff recommendation) that:

- (i) it is not feasible to place the structure outside the buffer zone
- (ii) the structure must be set back as far as possible from the delineated edge of the wetland or surface water
- (iii) appropriate erosion control measures must be in place prior to and during construction
- (iv) any disturbance to the surrounding buffer zone must be repaired and restored upon completion of construction
- (v) all available mitigation measures to address changes in water quality and quantity be implemented, if required by Planning Staff/ Planning Board."

T. Hildreth stated that all five of those conditions have already been found to be true by the Town's Planning Staff.

B. Major asked at what point a lot becomes unbuildable; T. Hildreth answered that it would be unbuildable if it were underwater. This lot is not underwater, it is in a buffer. There are no improvements proposed within the wetlands.

R. MacMillan pointed out the Zoning Ordinance's Wetland Conservation Overlay Zone Section 1(j), under Purpose: "Preventing those uses that could harm or degrade the wetland buffer, the wetlands, or surface waters." T. Hildreth responded with the provision stating that lots that preexisted this time have special rights because there were property rights inherent in those lands prior to this zoning. He further argued that a convenience store is a permitted use in a commercial district. R. MacMillan pointed out the issue, however, of whether a convenience store is an expansion of the existing building. T. Hildreth mentioned again that the existing building is coming down – they could demolish it today, and say that they don't need this relief as the lot is unimproved. R. MacMillan asked why that didn't therefore happen, and T. Hildreth answered that they went before the Planning Board first, Staff looked at the application, looked at the ordinance, pointed to the hole in the ordinance, and said that a variance would be required.

R. MacMillan stated that it's as if the Applicant is trying to do the project on the cheap, inasmuch as they are six inches from the boundary, with the building, and yet there is no survey to verify that. It's a conceptual drawing, and that is allowed, but it implies that the Applicant is asking for a conceptual variance. T. Hildreth responded that they are asking for a variance that will permit them to tear down the existing building, and build the proposed mixed-use structure in the Wetlands Conservation Overlay District. R. MacMillan responded that they are asking for a variance against a 100 foot buffer, period. T. Hildreth concurred; the lot is almost totally within the district, and that is the relief for which they are asking.

R. MacMillan stated, though, that when they talk about the public interest, the ordinance represents the public's interest. T. Hildreth responded that the ordinance says that if you have a lot that existed before this date, these rules don't apply. R. MacMillan agreed that that is what the Board will have to determine.

B. Major asked whether a reasonable condition would be that no construction or improvements shall in any way touch or infringe upon actual wetlands. T. Hildreth answered yes, as that is essentially required already.

B. Major added that the trouble is that all of our industrial space in Town, and most of our commercial space in Town, is in the Wetlands Overlay District.

J. Hill stated that the boundary lines of the property are surveyed, and they are proposing to build the structure as far as practical within the constraints of the perimeter boundary building envelopes.

R. MacMillan asked whether the Applicant will have to obtain a fill and dredge permit from the State, pointing out that where the well is located on the plan, there is standing water within 25 feet. J. Hill answered that they will have to do well yields to determine the final location of the well, but that they are allowed to propose a well head within the protected, 100 foot setback; they are not allowed to propose a well within the actual wetland jurisdiction. R. MacMillan answered that they are not allowed to drill a well within 50 feet of standing water. J. Hill responded that the well location will be shown on the final plan approved by the NH DES. They will be required to show the proposed well head, as meeting the requirements of the State of NH as well as the Town of Hollis. They do not anticipate that a dredge permit will be needed.

B. Major mentioned that one of the things the Board agrees on, every time, is the environment. To that point, J. Hill pointed out that one of the things they are proposing is a retaining wall along the edge of the driveway to minimize the amount of fill.

R. MacMillan showed that the Planning Board Staff has already said that it is not feasible to place the structure outside the buffer, and that the structure must be set back as far as possible from the delineated edge of wetlands.

As the site is in the commercial district, B. Major brought up the subject of the intensity of danger to groundwater discharge with this proposed use as opposed to other commercial uses. T. Hildreth responded that this lot is in the APOZ, also, which limits the percentage of impervious surface to 15%, and this proposal meets that standard. This is also a permitted use within the APOZ. The two bedroom residence with convenience store below will have the same water impacts as a three bedroom house, and there is a three bedroom house on the site today – so that impact has been occurring since the 1960s. They will be building a new septic system of modern design, using state of the art equipment and state of the art erosion control – it is going to be an improvement over what has been there, from an environmental perspective.

B. Major and R. MacMillan asked about sanding and salting in the winter, with the parking lot and driveway, and vehicles with salt and sand on them driving in and out. T. Hildreth answered that it comes with the territory; J. Hill added that while this is not a large enough development to need a State permit, per Town regulations they are required to reduce the load of such treatments in terms of storm water management. They will have treatment practices for the salt and/or sand, they will have closed drainage catch-basins, deep sump catch basins, and filtration of the runoff to meet the State standards required of discharge.

R. MacMillan asked about a point on the original site data, showing a maximum lot coverage of 15%, with 18% variance. J. Hill stated that that was associated with an alternative concept they had been considering. This current plan conforms to the 15%; the 18% would have related to a wider driveway and a larger building.

J. Belanger asked to confirm that this request for a variance is to build within the wetland buffer, not within the wetland, and T. Hildreth confirmed that yes, that was the case.

T. Hildreth stated that every existing commercial or industrial operation in Town is within the Wetlands Conservation Overlay District – and when there is a situation like that, where the reality on the ground differs from what the ordinance says, there are certain rights that the next owner will say that everyone else is able to do this; I should be able to do this, too.

D. Mason stated that in looking at the Planning Staff report regarding the conceptual review of this project, he did not see any conclusion showing that the Staff recommends approval. T. Hildreth responded that indeed they aren't recommending it; they are simply finding that the circumstances already exist. They have also set forth conditions, such as that the Applicant must proceed as the Planning Board directs – which of course they will do, as they will need site plan approval.

B. Moseley asked about the section of the application relating to how granting the variance would do substantial justice, and the Applicant's statement that the proposal is in furtherance of the public interest by modestly taking some pressure off the local housing stock at the time of acute shortage. T. Hildreth explained that the house that is on the lot today is decrepit and unoccupied – they will take that out, and put in another, more useable unit. The apartment above the store will serve someone's housing needs.

D. Mason asked what the Applicant would say are the special conditions, as relevant to hardship; T. Hildreth responded that this is a lot of record, located in the commercial zone, surrounded by properties of similar or greater intensity of use. It's the character of the neighborhood, it's the lot-of-record status, it's the zone in which it's located, and it's entirely within the Wetlands Conservation Overlay District. Those are all things that are special conditions that make enforcement of the ordinance a hardship in this case.

In response to a question from R. MacMillan, T. Hildreth stated that every property in the Overlay is burdened by this ordinance.

In response to a question from B. Major, T. Hildreth confirmed that the State as well as the Planning Board will make them put in a state of the art septic system.

There were no speakers in favor of the application.

Spoke against the application:

Mark Archambault, 83 Pepperell Road. Stated that he is the owner of the real estate at 85 Runnells Bridge Road, directly north of the proposed project. He objected to the granting of the variance, stating that the proposed variance is not allowed under the NH law regarding variances, nor is it allowed under the Town of Hollis Zoning Ordinance. The Applicant claims that the property is an expansion of a prior, non-conforming use, and is therefore allowed; this is an incorrect statement of law. M. Archambault pointed to the 1999 case of Joseph Hurley v. the Town of Hollis: the NH Supreme Court recorded the decision that the Hurley case involved a special exception, but the Court denied the expansion because it was excessively changing the non-conforming use. M. Archambault stated that the building currently existing on the lot is a single-story residence of 1,362 square feet; the proposed new building would be 2,508 square feet on the first floor for retail, plus approximately 2,508 square feet on the second floor for residential space – effectively quadrupling the building area of the prior non-conforming use. The proposed application also does not meet the criteria for a variance per NH law; the Applicant claims that the variance would not be contrary to the public interest as it will only unduly or in a marked degree violate the basic zoning objectives of the ordinance. This is an incorrect statement. The ordinance in question, the wetland buffer ordinance, which was enacted “to protect, preserve, and maintain existing and potential groundwater supply and groundwater recharge area of known aquifers.” To protect wetlands and water quality is the purpose of the ordinance and of the wetland buffer. The proposed use would add significant motor vehicle traffic to the property by way of the retail store, which will drastically impact the property within the wetland buffer. The property will have a large parking area and a septic system, both within the 100 foot buffer. If the Board grants the variance as requested, any applicant within any 100 foot buffer would be entitled to seek variance.

Over 20 years ago, M. Archambault went to the Town with a request to have an existing loading dock expanded about 5 or 6 feet to a total of 12 feet, so that trucks could back up to it and not continue to hit the edge and overhang of his building. He was told that he could not build or change any deck at all. It was within the 100 foot

wetland buffer, and he was told that he was wasting everyone's time – all he could do was replace the old one. The site was approximately 85 feet away from the wetland area, up a hill on an almost 20 foot rise, and he still could not make that small change.

Two and a half years ago, in December of 2020, M. Archambault's tenant, Pizzeria Zacharia, applied for a full liquor license. As soon as they applied, the grandfather clause on his current septic system was cancelled even though the leach field passed inspection – he was ordered to construct a new leach field outside of the wetland buffer. M. Archambault read from a letter from Meridian Land Services that he received at the time, and which he also distributed to the Board at this meeting, which stated that, in reply to the inquiry regarding moving a leach field, this was requested by the Town of Hollis at the time that it needed to be replaced. The need for moving it was generated by the 100 foot wetland buffer (WCO) identified by the Hollis Zoning Board. The current pre-conditioned leach field was within the buffer; leach fields are not a permitted use within this zone as noted by section C of the ordinance when previously installed prior to the ordinance. For the existing on-going use, they need to comply with the ordinance to the greatest extent possible, requiring a substantial move of the leach field. M. Archambault had to spend over \$55,000 to replace the leach field, although the new field and the old field are so close as to be touching. He had to take down 35 fully grown pine trees to make room for the new leach field.

B. Major asked M. Archambault if he had come before this Board on his case; M. Archambault answered that this was what he was ordered to do by the Town of Hollis. B. Major asked for clarification: the Zoning Board of Adjustment never heard M. Archambault's case; he never asked for a variance, did he? M. Archambault stated that because the Pizzeria applied for a liquor license, the leach field requirements changed – the leach field and tanks had to be larger in order to handle the new volume. B. Major asked, however, how this matter applies to the current case being considered; M. Archambault answered that he had to go to the full extent of moving his leach field out of the wetland buffer – the Planner had to follow the ordinance, per his discussion with the Town of Hollis. There was no meeting; it was a matter of how do we solve this problem? M. Archambault was told that he had to create a design for a new leach field, out of the wetland buffer.

B. Major stated that the current case being considered is fully within the wetland buffer, and has a pre-existing, non-conforming use of the property as a single-family residence. They could replace the single-family residence. M. Archambault agreed; they could replace the current foundation and expand on it to some degree.

B. Major stated that the case being heard is a matter of whether the property is used for a pre-existing non-conforming use as a single-family home, or used for an allowed use in the commercial district – which would be a convenience store with an accessory dwelling. He stated that it is unfortunate what M. Archambault had to go through, though it isn't about what we are here for at this meeting.

M. Archambault stated that the properties should be treated equally within the ordinance; B. Major replied that the properties that come before the Board are treated equally on their cases for variance or special exception. As the Board never heard M. Archambault's case, it is not part of an argument regarding consistency.

J. Belanger stated that what M. Archambault is trying to point out is that what he couldn't do, a variance would allow to be done on the property in the case being heard. R. MacMillan concurred; M. Archambault is asking for the same treatment to be given to this property as he was subjected to.

M. Archambault stated that he feels it would be very inconsistent to allow this variance. He feels that the damage to the trees on his property, in particular, did more environmental harm than would have been done by leaving the leach field where it was.

B. Major stated that the APOZ, as part of a commercial and industrial space, doesn't make a lot of sense, and that he understands M. Archambault's point.

D. Mason asked M. Archambault if his property is a lot of record; M. Archambault responded that he is not sure of the history, as when he bought it over 27 years ago everything was already there. What he is trying to do, on every level, is to get everything caught up. He has had the land surveyed, had the land and the building appraised, trying to get everything on record.

Applicant rebuttal:

T. Hildreth stated that what M. Archambault was illustrating in regard to his septic system is exactly what the ordinance would require. If the Applicant's lot had space outside of the Overlay District, they would be required to put some of their improvements there, as well – but there is no such space in this instance. The fact that M. Archambault did have such space is what allowed that system to be replaced in an upland that was outside of the Overlay District. T. Hildreth further stated that whatever the history of M. Archambault's lot may be, its use is not permitted by right or by special exception. It's in the industrial zone, which doesn't permit retail or restaurants by right or by special exception. However, he makes the point of what the ordinance would require.

T. Hildreth further stated that M. Archambault characterized their proposal as an expansion of a non-conforming use, but that is not their claim and is not why the application is before the Board. Additionally, M. Archambault was incorrect regarding the dimensions of the proposed residential unit above the convenience store: the ordinance limits that space to 50% of the retail space, so it would be no more than 1,250 square feet.

No further questions from the Board and none from the floor. The hearing portion of the case was closed.

DELIBERATIONS AND DECISION

ZBA2022-009

Discussion of the Application of Runnells Bridge Realty Trust, property owner, for a Variance to Section XI; Wetland Conservation Overlay Zone, paragraph 3.c, Existing Lots, to construct a 2,508 mixed used structure, located at 88 Runnells Bridge Road, (Map 005, Lot 027) in the Commercial District.

R. MacMillan stated that he has no objection to expanding the existing building; they have a right to. However, building a store does not seem to be a continuation of the non-conforming use of the lot. A residence, yes, but a store, in the wetlands buffer zone?

B. Major said that the argument could be made that what is on the lot right now is non-conforming, as single-family homes are not allowed in a commercial district. We have designated commercial districts in Town, we have designated industrial districts, and the problem we can run across in terms of planning is that if we don't have sufficient space devoted to commercial development and devoted to industrial, then we may be forced to re-zone some other parts of Town. We can't basically zone out any retail in Town, or any industrial. A convenience store is an allowed use, so what they'd be doing is bringing this from non-compliance with the ordinance into compliance.

R. MacMillan stated that the ordinance is pretty clear when it states "Preventing those uses that could harm or degrade the wetland buffer, the wetlands, or surface waters." It is clear that we want to prevent those uses. B. Major responded that the issue is that we have to prevent it within the context of that being commercial space. R. MacMillan agreed, but said that they wouldn't be violating the buffer if they expanded the existing residence – which they have a right to do. But as far as a convenience store that is entirely within the buffer, within 30-40 feet of standing water, where there will be continuous traffic, where there will have to be some provisions for winter conditions, there have to be considerations for the wetlands, too.

B. Major stated that we agree that this is an existing lot of record, prior to the Wetlands Overlay Zone, and we agree that this is an expansion of use. The Planning Board made a determination that is not feasible to place the structure outside the buffer zone; the Zoning Board of Adjustment is being asked to approve a variance to the zoning requirements that the construction can be within the 100 foot buffer. We agree that it is not feasible to place the structure outside of the buffer zone. The structure must be set back as far as possible from the delineated edge of the wetland or surface water, and the plan indicates that it is. Appropriate erosion control measures must be in place prior to and during construction – that is something that the Planning Board will take care of. Any disturbance to the surrounding buffer zone must be repaired and restored upon completion of construction – that would probably be part of the bond on this; and all available mitigation measures to address changes in water quality and quantity will be implemented, if required by Planning Staff / Planning Board. The trouble is that this is a grandfathered, commercial lot.

J. Belanger stated that the only thing the Board is being asked to do something with is that the lot is within the wetland buffer zone, and to R. MacMillan's point, if you allow a home and a septic system to be built for the expansion of the home, then you're allowing something to happen within the wetland buffer zone. As far as what they're selling, and how big it is, and where the septic system is, that is for the site plan, and for the Planning Board to look at. The Zoning Board of Adjustment may set some conditions, though it seems that the conditions we're thinking about are Planning Board issues.

R. MacMillan stated that, from a logical point of view, there is an existing residence, and they have a right to expand it. Whether they have a right to a convenience store, he is not so sure. He knows that it is an allowed use, but it's allowed if they're allowed to violate the ordinance and put it within the 100 foot buffer. They can expand the existing home without putting it within the 100 foot buffer. D. Mason pointed out, however, that the existing house is also within the 100 foot buffer zone. The entire lot is within the buffer zone.

J. Belanger stated that they are not asking the Board for a convenience store – the request for the variance cites a paragraph of the ordinance that has nothing to do with kind of building; it just says that it allows construction within the buffer zone. D. Mason stated, however, that the mentioned paragraph also talks about expansion of a pre-existing use. A convenience store would be an expansion of a legally pre-existing use. B. Major responded that that is a difficult point; he does not think it is. If we are mindful of the fact that we want to use commercially zoned spaces in the first instance for commercial uses, which is the intent of the ordinance, this would be bringing the lot more into conformity than what exists now. It's a more intensive use, but it's not necessarily an expansion.

B. Moseley pointed out that the ordinance doesn't address this situation, and that is why the Applicant is here for a variance. T. Hildreth has stated that there is no rational basis for the ordinance to be the way it is, but B. Moseley asked whether it could have been constructed this way because wetlands are so sensitive, are so important, that this makes it possible for the wetlands to revert back to a situation in which they would be better protected. He finds it hard to believe that when the ordinance was changed, updated, modified, they would not have covered the situation that the Applicant brings before us.

B. Major said that that was an interesting argument, and leaves it for the Board to determine what the intention was when the ordinance was passed. B. Moseley offered as a thought that the intention was that this would give the opportunity for the wetlands to revert back to a more protected situation.

B. Major stated that a counter argument is that the ordinance also says that if you have a lot of record, these are the facts to look at.

R. MacMillan pointed out that, however, it does ask us to prevent the uses that would harm or degrade the wetland buffer, the wetlands or surface water – and asks us specifically not to degrade it. The ordinance is clear. And the ordinance represents the public's interest; the public votes on this. This is what they wanted. We're interpreting that they don't really want this, that under certain circumstances, the ordinance should be completely disregarded – because this proposed expansion is completely within the buffer.

D. Mason asked about the point that if they demolished the existing building, which they can do, they could come in and build a convenience store as a matter of right. B. Moseley suggested that that would be playing a game, because the lot is already improved. B. Major pointed out that the Applicant is being above-board, and trying to do everything the right way. R. MacMillan questioned whether this is right, at all – does it protect the wetlands?

B. Major asked R. MacMillan how he would evaluate the lot, and R. MacMillan stated that it's an unbuildable lot. It may be in the commercial zone, and we may be short of commercial space, but this is an unbuildable lot in his opinion. It's all wetlands, and it's running wetlands, not just standing.

B. Moseley stated that we need to be very sensitive; wetlands are an extremely important environmental aspect and if there is a situation in which wetlands can be more protected, we need to take that situation very seriously. B. Major asked what that means, though, with respect to this existing lot; B. Moseley responded that they're allowed to work with the use and the building that are there, but to change them – the ordinance does not take that into account. He would offer, potentially, that the ordinance is the way it is to provide the opportunity for the land to revert back into a protected wetland area.

J. Belanger pointed to RSA 674:19 - Applicability of Zoning Ordinance. – “A zoning ordinance adopted shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.” Further, The Board of Adjustment In New Hampshire: A Handbook for Local Officials discusses non-conforming property that was lawfully established before the passage of the provision in the zoning ordinance that now does not permit that use in that place; non-conforming uses enjoy constitutional protections under State law which allows them to expand to a certain degree. Therefore, in a particular case, a non-conforming use may have the right to expand in a way that would otherwise require a variance. In this State, the common law rule is that an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.

B. Major asked what the owner of this property has as a vested right to, in terms of this parcel, right now. B. Moseley answered that he has a right to improve the existing house.

B. Major pointed out that the proposed use of the lot is an allowed use; the existing use is not an allowed use, but is grandfathered in.

R. MacMillan stated that, when faced with a decision between wetlands and development, he is going to fall on the side of the wetlands. B. Moseley agreed, especially with regard to development that will involve traffic being so close to the wetlands.

D. Mason pointed out that the proposal for this lot is not an expansion of use; it's a change of use. B. Major and B. Moseley concurred – it is a change of use to an allowed use.

R. MacMillan stated that he does not believe that the Town wants continued expansion of prohibited uses, as far as wetlands are concerned.

B. Major acknowledged R. MacMillan's point, but added that we have to work with the ordinance that we have. It's not about the popularity of the decision. He does not believe that they have a basis to deny the variance with this setback.

D. Mason asked whether, if the existing single-family residence were not there, and it was an unimproved lot, would the Applicant be allowed to have a residence above the business? R. MacMillan said no – not in a

commercial zone. B. Major was unsure; as an accessory a residence might be allowed as part of mixed use with occupancy.

B. Major stated that the voters have expressed, by voting on the Master Plan that established the commercial zones, and then voting on the Aquifer Protection Overlay Zone, the voters have said we are putting commercial property in the APO.

B. Moseley stated that he is concerned about protecting the wetlands, with increasing traffic via a use that we know will increase traffic versus what is there now – admittedly what is there now shouldn't be there, but it is.

D. Mason pointed out that they're going to tear down the existing building anyway, so the improvement status of the lot isn't completely hypothetical.

D. Mason moved for the following findings-of-fact;

1. *The board finds that the property was a lot of record since 1997 and is in the commercial zone.*
2. *The Board finds that virtually all of the 1.5 acre lot is affected by the 100' wetland buffer, and a large portion of the property is actually wetlands.*
3. *The Board finds that the proposed variance is for a change of "use" of the property and not for an expansion of a non-conforming "use".*
4. *A convenience store is a permitted "use" in the commercial zone.*

R. MacMillan seconded.

Motion unanimously approved.

Bill Moseley moved for the following conditions of approval;

1. *At no time shall gasoline, petroleum products or food be prepared on site with the exception of residential activities.*
2. *The wetlands are not to be disturbed.*

R. MacMillan seconded.

Motion unanimously approved.

Questions - Variance

- Question 1. The variance will not be contrary to the public interest.
- Question 2. The spirit of the ordinance is observed.
- Question 3. Substantial justice is done.
- Question 4. The values of surrounding properties are not diminished.
- Question 5a(1). 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.
- Question 5a(2). The proposed use is a reasonable one.
- Question 5b. 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.

Board Member	Question #1	Question #2	Question #3	Question #4	Question #5a(1)	Question # 5a(2)	Question #5b	Total Yes	Total No
Major	Yes	Yes	Yes	Yes	Yes	Yes	Yes	7	0

Belanger	Yes	Yes	Yes	Yes	Yes	Yes	Yes	7	0
MacMillan	No	No	No	Yes	No	No	Yes	2	5
Mason	Yes	Yes	Yes	Yes	Yes	Yes	Yes	7	0
Moseley	No	No	No	Yes	No	No	Yes	2	5

THEREFORE, THE VARIANCE WAS GRANTED WITH THE FOLLOWINGS FINDINGS- OF- FACT AND CONDITIONS;

Findings-of-fact;

1. The Board finds that the property was a lot of record since 1997 and is in the commercial zone.
2. The Board finds that virtually all of the 1.5 acre lot is affected by the 100' wetland buffer, and a large portion of the property is actually wetlands.
3. The Board finds that the proposed variance is for a change of “use” of the property and not for an expansion of a non-conforming “use”.
4. A convenience store is a permitted “use” in the commercial zone.

Conditions;

1. At no time shall gasoline, petroleum products or food be prepared on site with the exception of residential activities.
2. The wetlands are not to be disturbed.

Other Business

Non-public under RSA 91-A:3, II (c) Reputation.

The non-public session was postponed until the next ZBA meeting.

Meeting Adjourned

The ZBA meeting adjourned at 9:00 pm.

Respectfully submitted by:

Donna Lee Setaro, Building and Land Use Coordinator,
and Aurelia Perry, Recording Secretary.