

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: OCTOBER 15, 2014

CASE NO.: 7/16/2014-5 (CONTINUED)

APPLICANT: M + M A SMITH PROPERTIES, LP
31 NASHUA ROAD
LONDONDERRY, NH 03053

LOCATION: 31 NASHUA ROAD, 7-73-2, C-I

BOARD MEMBERS PRESENT: JIM SMITH, CHAIR
JIM TIRABASSI, VOTING MEMBER
ANNETTE STOLLER, VOTING ALTERNATE
JACKIE BENARD, ACTING CLERK

REQUEST: VARIANCE TO ALLOW A RETAINING WALL STRUCTURE WITHIN THE REAR
AND SIDE SETBACKS AS RESTRICTED BY SECTIONS 2.4.3.1.1 AND 2.4.3.1.3.

PRESENTATION: Case No. 7/16/2014-5 was read into the record with 16 previous cases listed. The Clerk also read into the record Exhibit "A," a letter of support from Applewood Learning Center, and Exhibit "B," a letter of support from Londonderry Hampton, LLC.

JIM SMITH: I want to raise a point with the Zoning Administrator. In the letter from Applewood, they talk about a six (6) foot fence. Is there any problem with that, potentially?

RICHARD CANUEL: Problem with installing a six (6) foot high fence?

JIM SMITH: No, I mean is it considered a structure, or not?

RICHARD CNAUEL: Not if it's only six (6) feet in height, it isn't.

JIM SMITH: Okay, I just wanted to clarify that before we got anywhere. Okay, who is going to present.

MORGAN HOLLIS: Mr. Chairman, thank you, Mr. Chairman and Members of the Board. My name is Morgan Hollis. I'm an attorney with Gottesman & Hollis at thirty nine (39) East Pearl Street in Nashua. I'm here this evening representing the owners. Michael and Mary Ann Smith Properties Limited Partnership and also the perspective developer and user of the property, Town Fair Tire. With me this evening are Michael Laham, he's the project engineer. He's sitting at the table with me, and he can answer questions with regard to the site design. Should there be specific questions. Also with me are a representative of Town Fair Tire and John can answer questions about the building and operations, and we have a project traffic engineer as well and she

45 would be available if any questions with regard to traffic came up. Although, it's a preliminary stage of traffic,
46 she is available. The property I'm going to identify is on the plan in front of the. I have a plan facing the
47 audience on the other easel, so it should match along as I describe. The property is at the corner of Route 102
48 and Hampton Drive and Palmer Drive. I'll just point that out – Route 102, Hampton Drive, and Palmer Drive.
49 The property itself is a fairly small, well developed parcel which there sits a gas station. You've heard the
50 litany of variance requests, and variances that have been granted indicating along the way at least the Zoning
51 Board found this site to be somewhat unique and granted some relief from some of the ordinances of the
52 Town. Currently, there are pavement out in front of the property along Nashua Road, pavement along both
53 Hampton Drive and Palmer Drive. All of which encroach in the thirty (30) foot landscape buffer. There's also
54 the overhang, which encroaches granted by variance previously. Even though we plan to cut and reduce the
55 pavement, we will still end up encroaching in these thirty (30) foot setbacks on both Palmer and Hampton,
56 and on Route 102, and we will also encroach in the fifteen (15) foot landscape buffer setback along the rear of
57 the property. The proposed use which is retail tires, is a permitted use. So we are not here seeking a variance
58 for the use itself. These are what as known as dimensional variances. Relief from buffer requirements, and in
59 addition to that because of the topography of the property, the client has looked at numerous ways to
60 engineer this site, and the only real way to use this site property is to install a retaining wall to the rear of the
61 property. It'll be approximately eight (8) feet high. That's what's proposed. With your permission, I'd like to
62 hand out reference plans Exhibit "C," that you can follow along with as I present. The last page is a miniature
63 of what's up there and then the other pages are graphics which I'll be speaking about. I'm just quickly going to
64 run through them. The first (1st) page are elevations, and the elevations reflect which you're going to see on
65 the front which will be Nashua Road. On the sides which are the South and the North view showing how the
66 topography slopes from front to rear, and then the rear which is the bay. If you turn to the second page (2nd),
67 you will see which has been referenced and described both in letter with our abutter immediately to the rear
68 the learning center with whom we've had multiple discussions and reached an. agreement as read into the
69 record. We have a fence. We have some new plantings. We have the retaining wall which is in brown, and
70 then the proposed six (6) foot tall fence at the top of the hill, so that's kind of the scope of what the learning
71 center will see from the rear. The difficulty about this site, as I said, it's a very steep topography in the back.
72 It's heavily treed at the moment for a fairly short distance in from the property line, but those trees while
73 they're on our side of the property line, provide a unique sheltered experience for the learning center, and the
74 concern about what's going to happen when this site is developed from both our perspective and from the
75 learning centers perspective has resulted in an agreement that indeed a retaining wall with fencing both at the
76 bottom and the top and landscaping on their property is the best solution for everyone here. If you turn to
77 page three (3), it gives you a fairly specific graphic picture [indistinct].
78

79 MICHAEL LAHAM: Um no, I do have some handouts for that. Yeah, I can grab these.
80

81 MORGAN HOLLIS: On page three (3), I'm pointing out that you can see a picture that is shows exactly where
82 the building is, how the parking area is so...
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84 JIM SMITH: Morgan, can you please get on a mic?
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86 MORGAN HOLLIS: You can see on the top picture how the parking area slopes to the rear of the lot, and then
87 the graphic shows the retaining wall, the property line, the plantings, and how the fencing would be, so that
88 gives you a better idea of what we are proposing to do at the rear with regard to the retaining wall, and the

89 lower picture of course is the same kind of graphic you saw on page two (2) of this handout. If you turn to
90 page three (3), you see the site plan itself which is yet not a finalized site plan, but fairly close to final
91 engineering in order to give the Zoning Board and idea of what this will be, of course subject to the Planning
92 Board review. I'd like to, if you follow along, I'll point out to you the areas of the encroachment. Along the
93 lower part of the page Nashua Road you can see a green space area, it's the island. You will note it says
94 eleven (11) feet and variance required. That just above that within the paved area, you see the line of the
95 landscape buffer. The landscape buffer in this area is fairly substantial and currently the encroachment is
96 significant. We're going to have less of an encroachment, but it will none the less be an encroachment, so
97 what we require in this area, we're going to have eleven (11) feet of landscape available when thirty (30) feet
98 is required, so we are asking for variance relief of nineteen (19) feet more or less. We will have, as I say, only
99 eleven (11) feet when thirty (30) is required. If you go along Palmer Drive, you can see we are going to have a
100 vegetative swale. You'll also see the dotted line, which is the landscape buffer area thirty (30) feet. We are
101 going to have landscape swale in most of it, but there will also be some encroachment. When you go to the
102 rear, you see the encroachment of the retaining wall along both Palmer Drive and the rear of the property,
103 and you'll see towards the rear where the dumpster and the tire cage is we're essentially going to provide
104 eight (8) feet of landscape buffer where thirty (30) feet is required, so the encroachment is twenty one (21)
105 feet. We're providing eight (8) where thirty (30) is required. When you go to the rear, we're providing
106 nine (9) feet where fifteen (15) feet is required. Again, that set up is going to be the retaining wall, which is
107 deemed a structure, some vegetative swale buffer of some nine (9) feet, and then parking area, which you can
108 see how it encroaches into the dotted line of the landscape buffer requirement to the rear fifteen (15) feet.
109 Then when you move over to Hampton Drive, you will see along Hampton Drive again thirty (30) feet required
110 by the dotted line we're going to end up providing about eighteen (18) feet four (4) inches to the edge of
111 some of the parking spaces. Just a few parking spaces there, so we need relief there. We're providing
112 eighteen (18) feet where thirty (30) feet is required. In addition to that, the rear of the property, as I said, is
113 very wooded and very steep. It slopes from the front of the property line at Nashua Road back. If you've ever
114 driven down Hampton Drive, if you've even driven down Palmer Drive, you have a sense of the topography of
115 the lot because it mirrors the roadway itself. Also, if you've ever driven down on Hampton Drive and looked
116 to the left as you're going down, then first (1st) driveway has about a seven (7) foot retaining wall where the
117 topography is. If you drive all the way down to the bottom and go into Hannaford. Hannaford itself has some
118 retaining walls which are significantly greater. I brought some pictures [Note: none submitted for the record].
119 These are twenty (20) foot tall retaining walls on the Hannaford property, but I just wanted to give you
120 pictures of them to have a sense that this isn't the first (1st) retaining wall in the area that's out there.
121 Retaining walls which are over three (3) feet tall are deemed a structure by the Town of Londonderry Zoning
122 ordinance. Structures in any way or shape are not green and they must be in the rear yard fifteen (15) feet
123 back from the lot. Because we are proposing an eight (8) foot tall retaining wall, it's deemed a structure and it
124 must be thirty (30) feet back and we need a variance to allow this retaining wall. In essence, if these variances
125 aren't granted, you have a property which is not fully developed, but is developed and used. It encroaches, it
126 encroaches more than what we are seeking to encroach. It's not utilized. It is not fully utilized. It is non-
127 conforming, and there's probably no other reasonable use of the property. With these variances, you can see
128 that we are having a good utilization of the lot using portion of the property not currently utilized. We are
129 cleaning up the site. We are reducing the encroachments along Nashua Road, Palmer Drive and Hampton
130 Drive from what exists today, and we're going to have a site which as you can see by the proposed elevations
131 will be significantly different from what's out there today. In addition, the use itself will have a lower demand,
132 traffic demand than the existing gas station site, so all in all with the variances, we are proposing a better

133 utilization of the site, and a improved development of the property. The five (5) point of the variance. The
134 first (1st) point is the proposed use is not contrary to the public interest. That is if you grant the variance, and
135 allow these encroachments, it will not be contrary to the public interest. What is the public interest, which is
136 being affected by these variances, and this go to the same issue as spirit and intent of the ordinance. The use
137 is a permitted use, so we're not really talking about use simply the encroachments, and the purpose of having
138 a landscape buffer and precluding these types of encroachments is to keep green areas particularly where you
139 are abutting roadways, so that buildings, structures, improvement don't sit right there on the roadway either
140 because you might have to widen the roadway in the future, or because structures obstruct the view and
141 prevent good visibility. In the locations that we're suggesting in these buffer setbacks, it will not be an
142 obstruction of the view, so there's no health and safety issue. There won't be anything which would preclude
143 any road widening should that ever take place out there. Although, I think 102 is probably done, and there's
144 nothing that's going to, as I say, impact health safety, or welfare. Will the wall in the back, it allows not only
145 better utilization and development, but it actually will retain that wall from what could be a dangerous
146 condition, erosion coming down the wall when you're out there at the daycare center, you can see where the
147 wall has begun to buckle the existing fence a bit at the foot.. It always happens when the slope comes down
148 and it pushes against the fence and it starts to buckle. This is going to provide a secure retaining wall with a
149 in-ground/underground retention and drainage system, which will ensure better control of all offsite drainage.
150 As I indicated, we met with the daycare center folks, and had good discussion with them. We walked the
151 property, understood what their concerns were, and came up with a proposal which includes not only an
152 effort to allow them to recreate this woodland on their own property, but to be sure whatever fencing we put
153 up assures their safety. The timing of the construction meets with their needs, etc. The standard of whether
154 or not granting the variance would be contrary to the public interest is – will it alter the essential character of
155 the locality, or will it threaten health, safety, or welfare of the public. I believe we've made the case that it will
156 not alter the essential character of the locality. There are other retaining walls. Our nearest neighbor
157 supports us. We really don't think is affects anything other than that neighbor, and we've worked out
158 something which will not threaten health, safety, or welfare. Number two (2) the spirit of the ordinance will
159 be observed if the variance is granted. We'll be retaining green space. It'll be better landscaped buffer area
160 will be larger than what is provided today. By having a retaining wall, in fact, we avoid having to go with a
161 three (3) foot wall and stepped up, and three (3) foot wall stepped in, three (3) foot wall up stepped in which
162 ends up, yes it's landscaped, but it's not a landscaped area in reality. It's a series of retaining walls with
163 retention behind it. We think that this provides a better opportunity to retain that green space. Additionally,
164 the same thing along Hampton Drive. Note that as I said across Hampton lot 7-73-8 has a six (6) foot high
165 retaining wall on its property which it found necessary in exactly the same area of the change in topography as
166 ours, so this is a consistent drop of topography which can only be handled properly by a retaining wall. The
167 criteria as a matter of law is exactly the same as whether or not it'll be contrary to the public interest. Will it
168 alter the essential character of the locality, will it threaten health, safety, or welfare. We're not proposing a
169 use that does not belong in that district. This is simply some encroachments in dimensional requirements.
170 Number three (3) is substantial justice will be done if the variance is granted. This site badly and sorely needs
171 redevelopment. If you've been out there, you've seen it there's some issues that could use some
172 enhancement, cleaning up and we propose to do it. The only way to do it is with these encroachments. There
173 are certain grandfathered rights as to the existing pavement. We are going to remove some of that existing
174 pavement and improve the site. It will not pose a threat of harm to the public if these variances are granted,
175 but if it's denied, it would cause harm to the applicant. Your job is to balance the harm to the applicant if it's
176 denied versus the harm to the public if it's granted. We see no harm to the public if it's granted. This will

177 increase the tax base at the Town because it will promote a higher utilization of the property. Values of
178 surrounding properties will not be diminished. Usually, when I come before this Board and other Boards, I
179 present some form of either appraisal or opinion of value indicating that the proposed variance will not
180 adversely affect the value of surrounding properties. In this case, we're going from a gas station to a retail tire
181 center. The use is not an issue. The use does not require a variance, but the question is do these
182 encroachments affect the value of surrounding properties. We really have one (1) abutter, and that's the
183 Applewood Learning Center. You have a letter in front of you Exhibit "A". They have deemed that it does not
184 affect the value of their property and they are in favor of this, so I felt if they were the ones were in the best
185 place to say whether this affects the value of their property and they've determined with those conditions in
186 place, it does not. I think that letter is the best evidence that's available as to whether it affects the value of
187 abutting properties. Number five (5) the encroachment will result in an unnecessary hardship. An
188 enforcement of this ordinance means not only peeling back a lot of asphalt, but as you can see by the
189 variances in front of you, probably rendering this site physically impossible to use. I'd just like to point out
190 where that dotted line is, you can follow it on the last page of your handout. You can see the dotted line ends
191 up a square area within which the building fits, but little if anything else. No parking on the sides, not parking
192 in the rear, no parking in the front. I would essentially be a travel way around that building, and that building
193 is not a large building. It's proposed to be seven (7) thousand one hundred (140) square foot of flooring
194 there. We think that the topography, the fact that it's surrounded by three (3) roads all create a unique
195 situation. There are few other properties that have this surrounding by three (3) roads situation. There are
196 some that have it on two (2) sides, a lot of corner lots obviously everywhere, but this is three (3), and then
197 when you throw in the is steep topography to the rear which requires the encroachment to the rear, we think
198 it's a unique piece of property. The definition of hardship in the ordinances that owing to special conditions of
199 the property no fair and substantial relationship exists between the purposes of the ordinance and the
200 application of the provision to the property. Here the property is unique and special. Applying the ordinance
201 provision in here has no really fair and substantial relationship. There's nothing to be gained by enforcing
202 these setbacks. You would end up with wide swaths of green which you don't have today; little use of the
203 property; little value to that property, and you'd have very little gain to the public. In fact, we would submit
204 there is no harm in the relief being granted and therefore there's no fair and reasonable connection between
205 the ordinance and the purpose of the ordinance. We believe that it's okay for you to grant this variance and
206 we ask for you to grant the variances as requested. Thank you.

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208 JIM SMITH: Okay, we bring it back to the Board for questions and comments.

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210 JACKIE BENARD: I'd like to ask just one question. So the last page of the handout that you gave us – so the
211 lower part is the fence area, then you have the retaining wall, and then more fencing?

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213 MORGAN HOLLIS: Yeah, on the last page the site plan you're looking at the top of the page of that?

214
215 JACKIE BENARD: Bottom.

216
217 MORGAN HOLLIS: Okay, the bottom. The bottom is Nashua Road. Do you see where Nashua Road is?

218
219 JACKIE BENARD: Um hum.

221 MORGAN HOLLIS: As you go up that it looks sort of a hot dog bun, if you will in green.

222
223 [Overlapping Comments]

224
225 MORGAN HOLLIS: Yes, as you look at the bottom, that's a view of our property from our neighbor,
226 Applewood, and you will see at the bottom there's going to be a proposed – it's says remove existing chain
227 like fence, and replace with new vinyl fence along property line. So match existing fence, style site. So they
228 have some fencing on site. We're going to match it. This will be on their side of the property. It'll be their
229 fence, then behind that is the retaining wall, and if you look at the upper picture.

230
231 JACKIE BENARD: Um hum.

232
233 MORGAN HOLLIS: You can see a gap there between the proposed new vinyl fence and the brown retaining
234 wall. There will be installed weed barrier to prevent vegetation growth between the wall and the fence. You
235 can see how the retaining wall is slightly steps backward, and they'll be a gap between that fence. That fence
236 is important to them to define their space, not be right up against the wall in their face.

237
238 JACKIE BENARD: Okay, so that helps me to understand that picture better. Thank you.

239
240 MORGAN HOLLIS: Then behind it, at the top, is the six (6) foot high vinyl fence and that's again going up to the
241 top picture, you can see, it steps back from the wall a bit. That's both for safety and privacy. They wanted to
242 be sure that there aren't going to be people out there in the parking lot looking down on the daycare
243 operation, and this ensure that.

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245 JACKIE BENARD: Okay, great, thank you.

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247 MORGAN HOLLIS: You're welcome.

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249 JIM SMITH: Any other comments? Okay, we'll open it up to the public. Anyone in favor of this proposal?
250 Anyone in either opposition, or having questions? Everyone must be here for different cases.

251
252 [Overlapping Comments/Laughter]

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254 JIM SMITH: Okay, I'll bring it back to the Board. Any further comments from the applicant?

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256 MORGAN HOLLIS: No, thank you.

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258 JIM SMITH: At this point, the public hearing is closed on this variance request, and back to the Board. Any
259 comments?

260
261 **DELIBERATIONS:**

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263 JACKIE BENARD: Alright, as far as our first (1st) order for contrary to the public interest, I don't' see any
264 anything that is contrary to the public interest?

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[Overlapping Comments]

JIM SMITH: We are talking about a retaining wall location, and that's what we are really talking about. Any other comments?

[Overlapping Comments]

JACKIE BENARD: And then the spirit of the ordinance? Do you have any concerns about that? Did any of you? Okay.

JIM SMITH: It's a very difficult piece of property to develop, so...on the plus side, we're going to be gaining green area in the front which is non-existent at this point, so we're improving it from that point of view. While it still doesn't meet the full dimensional requirement, it's still much better than what's presently on the site. [Indistinct] Yeah, but if you look at the plan, you find that I think that what green area is there is in this the right-of-way, not even on their property. That's what their proposing.

JIM TIRABASSI: Okay.

JIM SMITH: Because I think if you go to this picture. Oh, okay, yeah that shows the same thing.

JACKIE BENARD: Yeah.

JIM SMITH: You can see almost all the green, what appears to be green area is actually on the State right-of-way.

JIM TIRABASSI: Okay.

JIM SMITH: The only real green area is in the back of the property which is a very deep slope.

[Overlapping Comments]

JIM SMITH: Okay, so we are agreed that substantial justice will be done.

JACKIE BENARD: Yes.

JIM SMITH: Ah, would not be...the values, and again, I think his argument that the closest abutter is in support of this so I don't see how it's going to change the values of the surrounding properties. The reasonable use, so if nobody has any objections. Want to obtain a motion?

JACKIE BENARD: Are we ready?

JIM SMITH: Yeah.

309 JACKIE BENARD: Mr. Chairman, I'd like to make a motion to grant the variance for Case number 7/16/2014-5
310 to allow the retaining wall structure within the rear and side setbacks.

311
312 JIM SMITH: Do I have a second?

313
314 ANNETTE STOLLER: Second.

315
316 JIM SMITH: All those in favor?

317
318 ALL: Aye.

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320 RESULT(S): THE MOTION TO GRANT CASE NO. 7/16/2014-5 WAS APPROVED, 4-0-0.

321
322 RESPECTFULLY SUBMITTED,

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326 JACKIE BENARD, ACTING CLERK

327
328 TYPED AND TRANSCRIBED BY NICOLE DOOLAN, PLANNING & ECONOMIC DEVELOPMENT DEPARTMENT
329 SECRETARY.

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331 APPROVED JANUARY 21, 2015 WITH A MOTION MADE BY NEIL DUNN, SECONDED BY ANNETTE STOLLER AND
332 APPROVED, 5-0-0.

