Middleton Zoning Board of Adjustment
October 5, 2021
Minutes

Members Present:
Lorri Gunnison
James Keegan
Joe Varga (Selectmen's Representative)
Ken Anderson (Chair)

Public Present and Speaking:
Chuck Therriault

Ken opened the public meeting at 6:03

Victoria isn't here. Chuck deserves a full board—up to him whether to proceed. Chuck chooses to proceed.

Pledge of allegiance

Lorri moved to have James serve as a regular member; Joe seconded—passed 3-0

Approval of minutes of pubic hearing of September 22, 2021—minutes have been sent to the members who have had a chance to review them—Lorri moves to approve, James seconds—passed 4-0

Ken states that the main purpose of tonight is to deliberate on the 7 variances. The board has held public hearings, the last one on September 22. At that hearing, the board thanked everyone for their input and closed the public hearing.

There's no public input tonight but everyone is welcome to stay and witness.

Ken noted that the board has had town counsel here throughout. She's very familiar with everything that's been going on, so board asked counsel to write up what was presented, give board her analysis and recommendation for each of the variances. She has done that and we're going to call on her tonight to participate in the discussion of each of the variances.

With that, we'll get into the variances with a little bit of an introduction.

We're all familiar with the 7 variances we're talking about and we'll name and describe them as we discuss them. We've also spent a lot of time talking about the 5 criteria and analyzing them—we'll hit on each of them as we discuss but won't go through a general discussion of those criteria.

Ken asked counsel to read the draft decision. Counsel noted that she had prepared the draft after consulting with the board—she had not done it on her own. She also noted that this is the board's decision, and it is free to change it however it likes.

Counsel then read from the draft notice of decision.

The requested variance from Article 6(B)(3) to allow a front setback of 85 feet where a 100 foot setback is required is GRANTED

Article 6(B)(3) of the Middleton Zoning Ordinance requires that commercial structures be at least 100 feet from any property line abutting a public or private road and at least 50 feet from all other property or right of way lines.

As an initial matter, the Applicant argues that the setback requirement is inconsistent, because he argues that a set back of 50 feet is required from the right of way, but 100 feet is required from the paved road. The Board disagrees with this analysis. The Ordinance is clear that for commercial uses, a 100 foot set back is required from a road; while 50 feet is required from other types of rights of ways.

With regard to the variance criteria, the Applicant testified that the newly created 5.9 acre lot is sloped towards the rear, and that complying with the Ordinance would require fill and additional work costing approximately $300,000-$400,000. He said this variance is in keeping with the spirit of the ordinance and would not be contrary to the spirit of the ordinance because other commercial buildings on abutting properties are really close to the road and there are safety/sight distance issues which require it to be closer than 100 feet. He said substantial justice is done because it would be difficult and expensive to move the building back. He said he does not believe this will decrease surrounding property values because it is further back than other abutting commercial uses and other towns require 75 feet. Finally, he said the unnecessary hardship was the slope of the land.

The Board finds the variance criteria are met. The Board acknowledges that there is a slope to the property at the rear of the 5.9 acre lot Applicant proposes to create from his 200+ acre parcel of property. It also believes there will be an additional cost to moving the building further back and complying with the setback, though it has no way of verifying that that cost would be thousands of dollars as the Applicant suggests. The Board further notes that a storage facility on a nonabutting but nearby parcel of property was approved by the planning board in the past couple of years without apparent adherence to the required setback.

The general purpose of setback requirements is to prevent overcrowding, prevent safety issues, and prevent overbuilding on lots. The Board believes these purposes are met with an 85 foot setback instead of a 100 foot setback. Allowing the building to be 85 feet from the road will not alter the essential character of the neighborhood given the location of the surrounding buildings, and the gain to the public from enforcing the ordinance is outweighed by the cost to the Applicant of complying with it. The hardship arises from the usual slope of the land, and the proposed use is permitted, and therefore reasonable.

Ken asked if any of the board members had any comments. All board members agreed that this draft reflected the law and the evidence that has been presented.

For these reasons Lorri moved, and James seconded a motion to grant the requested greenbelt variance. That motion passed 4 to 0.

The requested variance from Article 6(B)(5) to allow a greenbelt of 20 feet along the right of way to the adjacent street where a 30 foot greenbelt is required is DENIED.

Article 6(B)(5) of the Middleton Zoning Ordinance requires, for commercial uses, a minimum thirty foot wide greenbelt of open space along right of way to the adjacent street.

At the hearing, the Applicant testified that the variance would not be contrary to the public interest or the spirit of the zoning ordinance because while only a 20 foot greenbelt is proposed on the property, there is an additional 10 feet of greenspace within the public right of way. Therefore, there will be 30 feet of green belt. He stated that substantial justice would be done because a smaller greenbelt would result in better sight distance. He noted that usually greenbelts are required between commercial and residential properties, but for commercial properties you do not want a berm so that you can have the appropriate sight distance. He testified that he did not think the reduced greenbelt would result in diminished property values. Finally, he testified that there is an unnecessary hardship because it would be hard to maintain sight distance with a deeper green space. He noted that the green belt will not have any trees—just flowers. He said that the greenbelt has to be smaller based upon the location of the building, sidewalk and parking.

This Board finds that the variance criteria are not met. The variance is contrary to the public interest and the spirit of the ordinance, because it would alter the essential character of the neighborhood. The property is located on Kings Highway in a rural and residential neighborhood. On one side of the

property is an alpaca farm, and on the other side is a single family home. Likewise, the properties directly across the street are residential. Most of these properties provide for the 30 foot greenbelt. Although, as discussed above, there is a nearby commercial storage operation which does not appear to comply with the greenbelt requirement, the nature of that use (sporadic day time visits by a minimum number of people at one time) is very different from the nature of the proposed mixed use structure. Moreover, as the applicant pointed out, the purpose of the greenbelt is to provide a visual buffer between commercial and residential properties. Given the residential properties across the street from and next to the proposed development, this buffer is necessary and appropriate.

This Board further finds that while the greenbelt may be 30 feet wide at this time (20 feet on the property and 10 feet within the right of way), there is no guarantee that the green belt will remain 30 feet in width, because the green space in the right of way may be necessary for road expansion or other viatic uses. The additional 10 feet of green space provides additional visual buffers for those living across the street and those traveling on the road.

The Board also finds that substantial justice would not be done by the grant of the variance. Substantial justice is done when the loss to the individual from the denial of the variance is outweighed by the gain to the public from denial of the variance. Although the Applicant testified that a smaller buffer was necessary to protect sight distance, he also testified that currently there would be an actual 30 foot buffer, and he testified that he planned no berms or trees within the greenbelt—only flowers. The Board fails to see how sight distance is impacted by the required buffer.

The Applicant is responsible for providing evidence on each of the variance criteria. The Applicant here presented no evidence that the reduced greenbelt would not result in a diminution of surrounding property values—he testified that he did not believe that it would. The Board finds this testimony to be inconsistent with its own knowledge, experience and observations. As set forth above, the property is located in a rural area. Putting a mixed use building close to the road and without the buffer could, in the board's opinion, reasonably be expected to reduce the values of the surrounding properties.

To demonstrate unnecessary hardship, the Applicant was required to demonstrate that the greenbelt requirement burdens his property in manner which is distinct from other similarly situated properties. Here, the Applicant testified that his decision to move the building forward on the proposed 5.9 acre lot results in the need for a smaller greenspace. This is not a hardship arising

from the property—it is a hardship arising from the Applicant's decision to create a 5.9 acre parcel of property out of his 200+ acre parcel, his decision to orient the building in such a way that it is within the front setback, and his design decision to locate an equal number of parking spaces in the front and the back of the building.

Ken asked if any of the board members had any comments. Joe stated that he believed that removing one row of parking spaces would not diminish the use of the property. Ken noted that the decision fully covers the evidence presented to the board.

For these reasons James moved, and Lorri seconded a motion to deny the requested greenbelt variance. That motion to deny passed 4 to 0.

The variance from Article 6(B)(7) to allow a building height of 43 feet where a 35 foot high structure is allowed is DENIED.

Section 6(B)(7) of the Middleton Zoning Ordinance provides that the maximum height for buildings is 35 feet. Applicant seeks a variance to allow the proposed building to be 43 feet, but testified at varying times that the actual height of the building will be anywhere from 33-38 feet. This testimony demonstrates an issue that permeates all of the Applicant's variance requests—as of yet, he has no engineered plans illustrating exactly what is proposed and his requests for variances therefore continue to morph. These moving targets have made consideration of the variances even more difficult for the board.

The Applicant testified that the variance is not contrary to the spirit of the ordinance or the public interest because the latest design is to have a top ceiling height of 28 feet, but to have it look like a barn, the peak is 38 feet (he later testified that the ceiling height would be 26 ½ feet with a peak of 33 feet). He noted that different towns measure height differently. He stated he could build the project with a flat roof and meet the height requirements but it would be ugly. With regard to substantial justice, he reiterated that he could meet the height requirement. He said he does not believe 3 feet would make a difference in property values. He said that the unnecessary hardship is that the property is in a rural area and not a city. If it were in a city he would build a flat roof. He said he is trying to satisfy the architectural design standards and the building is sprinklered.

At the Board's request, the Fire Chief testified regarding what, if any concerns he had about this variance. The Fire Chief's comments were hindered by the fact that he has not seen final plans for the building. However, in general, he testified that Middleton does not have a ladder truck, and therefore reaching

the roof of the building, regardless of whether that roof is 33, 38 or 43 feet high, would require mutual aid from surrounding towns. Accessing the roof is important, the Fire Chief noted, because when battling a fire, one of the first things the department does is vent the roof. With the town's 24 foot ladders, it will not be able to do so. Moreover, the Fire Chief expressed concerns about being able to reach and rescue multiple residents on the third floor of the proposed building given the town's limited inventory of equipment. He further testified that he could not speak to whether there is sufficient area on the property for many fire trucks to navigate safely without seeing plans.

The Board finds that the requested variance should be denied. The alleged need for the height variance arises not from a special condition of the land, but from the Applicant's design choice. The Applicant stated several times that he could build the project and meet the height requirement. Because he is able to do so, there is no unnecessary hardship.

Moreover, a building of 43 feet in height would alter the essential character of the neighborhood, a rural and residential area of town consisting of homes, an alpaca farm and further down the street, the elementary school and a park. The board is also concerned that granting the variance will result in harm to the public health, safety and welfare if the fire departments are not able to access the roof and the residents. Therefore, it would be contrary to the spirit of the ordinance, not in the public interest and would not do substantial justice.

Ken asked if any of the board members had comments. Lorri stated that she does appreciate that he is trying to keep it like a farm because of the Alpaca farm, but it is too high. Ken believes the decision covers the testimony received from everyone and has nothing to add.

For these reasons James moved, and Lorri seconded a motion to deny the requested height variance. That motion to deny passed 4 to 0.

The requested variance from Article 6(B)(7) to allow a water tower of 66 feet where a 35 foot high structure is allowed is DENIED.

The Applicant explained that the water tower is an extra expense (purportedly $40,000 extra) but it was included because it can be used by the town for a future water system. He said the water tower was not necessary for the sprinklers for the building, which can be fed with tanks. He stated that he proposing the water tower to mutually benefit the town. He noted that the height of the water tower must be taller than the building, but the tower may not need to be 66 feet tall if the building height is lowered.

The Applicant attempted to address the variance criteria. He claimed the tower is in the public's interest, not his. He said the justice is to the town. He believes the value of surrounding properties will increase because of the water source; and he acknowledged that there was no hardship in the land necessitating the variance.

The Board finds that the requested variance should be denied because the Applicant conceded that there is nothing unique about the land which necessitates the variance and that the project can be constructed without the water tower.

Moreover, a water tower of 66 feet in height would alter the essential character of the neighborhood, a rural and residential area of town consisting of homes, an alpaca farm and further down the street, the elementary school and a park. Therefore, it would be contrary to the spirit of the ordinance, not in the public interest and would not do substantial justice. Additionally, the Applicant offered no evidence regarding whether granting the variance would result in a diminution of surrounding property values.

Ken asked if any of the board members had any comments. Joe said he has lots of thoughts that go in all different directions. His opinion about the water tower in general is that it would be extremely beneficial to the public because there is a limited water supply in town and this would provide a water supply and could be the starting point for a town wide system. Unfortunately, the way the draft decision is written is correct because we're looking at the variance and we have to follow the rules. Joe would have loved to say yes, but he's stuck with the way the rules are written.

James concurred with Joe. He felt like he understands the need for the water in this town especially in case of a fire—we've been lucky this year with the rain but don't have to look that far back to know that it's an issue. But there's a process here and it's a multi-step one and he agrees that the finding is right and the criteria aren't met. His opinion is with a heavy heart.

Lorri had no comments.

Ken said that everything is covered—he leans most heavily on the surrounding neighborhood.

Joe stated that for him the water tower is like a silo next to a barn.

For these reasons James moved, and Joe seconded a motion to deny the requested height variance. That motion to deny passed 4 to 0.

The requested variance from Article 5A(D)(4) to allow a drive through facility where such is prohibited is DENIED.

The Applicant testified that there is a need in town for a coffee shop drive through. He said the substantial justice is that the drive thru makes the project more feasible for the convenience store. He said that he believed it would increase surrounding property values but acknowledged that he had not done a study on values near drive thrus, so he cannot affirmatively state whether surrounding property values would be diminished. He said the hardship is that he needs the variance to put in the convenience store.

The Board finds that the requested variance should be denied. The burden is on the Applicant to demonstrate that all of the variance criteria are met. For this variance, the Applicant barely attempted to do so. The fact that he perceives a need for a drive thru in town does not render the proposed drive thru not contrary to the public interest or the spirit of the ordinance. There are no other drive thrus in the area, and adding one in this location would alter the essential character of the rural and residential neighborhood. Moreover, granting the variance might threaten the public health safety or welfare if the cars were to queue onto the road, and the abutters expressed concern about the emissions from the waiting cars.

The gain alleged by the Applicant is for one of its proposed tenants; not the Applicant. Moreover, the Applicant admitted that he had no evidence regarding whether adding a drive thru to this largely residential neighborhood would diminish surrounding property values. Finally, the Applicant alleged nothing about the property which renders it differently burdened by the application of the zoning provision.

Ken asked if any of the board members had any comments. Joe said that based on the zoning laws this is correct, but to him drive thrus are a thing for every little coffee shop you see. So based on our current laws, this is a no, but maybe the planning board should look into this. Ken agrees that the Ordinance is out of date.

James agreed. If the criteria was met he's not opposed to a drive thru and he probably would have voted for it, but it's a multi-step process that is not met so you can't approve it.

Lorri agrees. In Milton there is a drive thru for a Dunkins but it's not near a day care and a housing complex. Taking into consideration everything the public was saying and the lack of clarity about the traffic flow on the site, she would move to deny it.

Ken focuses on health and safety and character of the neighborhood.

For these reasons Lorri moved, and James seconded a motion to deny the requested drive-thru variance. That motion to deny passed 4 to 0.

Variance from Article 25(F)(1)(c) to allow 34 residential units on one lot where 2 units are permitted is DENIED

Article 25(F)(1)(c) of the Middleton Zoning Ordinance provides that the density for workforce housing shall be determined by the Density and Minimum Dimensional Requirements for each of the Middleton Zoning Districts. Article 5A(D)(1)(c) allows mixed uses with up to 2 dwelling units per lot in the Middleton 4 Corners District.

The Applicant stated that, as to the public interest/spirit of the ordinance, the request to allow 34 units is the minimum amount that he needs for the project to be financially feasible and fundable by the New Hampshire Housing Finance Authority. The Applicant stated that the substantial justice is that the project would not be built if he was only permitted to have two units. He stated that he is not an appraiser so he is not sure how he would answer the question of whether the variance would diminish surrounding property values; and he acknowledged that he has not done any analysis of that issue. With regard to unnecessary hardship, the applicant stated that the hardship is that the project won't be built without the variance. Applicant also argued that the town's Zoning Ordinance violates RSA 674:58, et seq.

While the Board understands that the Applicant is working with New Hampshire Housing Finance Authority and that it has its standards for funding a project, that does not obviate his need to comply with the Middleton Zoning Ordinance and/or to demonstrate the variance criteria. Again, the Applicant barely attempted to do so, focusing his arguments instead on his claim that the town's zoning ordinance violates state law. This Board, however, has no authority or jurisdiction to determine whether the town's zoning ordinance complies with state law.

The Board finds that the requested variance should be denied. Allowing 34 residential units in this area would alter the essential character of the neighborhood, which, as set forth above, consists of single family homes and a farm. It therefore violates the spirit of the ordinance, is contrary to the public interest and would not result in substantial justice. Moreover, there is nothing about the property which necessitates this variance. Applicant's arguments were all either financial or legal. While the applicant's ability to receive a reasonable

return on his investment is one of the factors this Board may consider in determining if the use of the property is reasonable, it is only one, non-dispositive factor that this Board must consider. That factor is here outweighed by the alteration of the essential character of the neighborhood which would result from the grant of the variance. Finally, the applicant admitted that he has no evidence regarding whether the grant of the variance would diminish surrounding property values.

Lorri is all for something like this and we're in need of lower income housing but not here in Middleton—we're not ready. She assumes workforce housing is a successful use, though the applicant presented no such evidence. She agrees with the character of the neighborhood we're not ready for this.

Joe agrees that this might need to be looked into further by the planning board, beside the fact that we seem to have competing unit requirements may need to be discussed and corrected. But as our ordinance is written and what was presented (would have liked more information on workforce housing) because we're left on our own to find that information and that's not the process. He agrees with the decision

James had no comments.

Ken says it's the spirit of the ordinance and character of the neighborhood and that's why we have these requirements.

For these reasons Joe moved, and Lorri seconded a motion to deny the requested height variance. That motion to deny passed 4 to 0.

A variance from Article 25(F)(1)(a) to allow 34 residential units of workforce housing in one building where 8 units are permitted is DENIED

Article 25(F)(1)(a) of the Middleton Zoning Ordinance provides that the maximum number of units of workforce housing per building shall be eight.

The Applicant testified with regard to the public interest and spirit of the ordinance, NHHFA has approved three projects with 8 units per acre in non-city, nonconfined areas. This project is at 5 ½ units per acre; so the spirit of the ordinance of 8 units total for the project is lower than what the NHHFA has now allowed and deemed for a standard. He does not believe that the project is not in the best interest or the general welfare. The Applicant stated that substantial justice is done because the project will be able to be built and that is justice. With regard to diminution of surrounding property values, the Applicant stated that he does not believe there would be any, but he is not an appraiser and has no expertise. He stated that studies will be done soon. As to unnecessary

hardship, the applicant stated that for the project to be financially feasible for NHHFA it needs to be at that minimum number of units, so that is the hardship—the land could not be built upon without the variance.

The board finds that the variance should be denied. The Applicant's testimony misses the point. The limitation at issue here is the number of units permitted *in one building*, not per acre. As one abutter pointed out, the Applicant would be permitted under this provision to have 34 units, as long as they were divided into various buildings. Instead, he seeks to locate all 34 units in one building. Doing so would alter the essential character of the neighborhood, because there are no other large, tall buildings consisting of 34 units in the area. In fact, the Fire Chief testified that there were no other buildings similar to this in Middleton or in the surrounding towns. Therefore, granting the variance would be contrary to the spirit of the ordinance and the public interest and substantial justice would not be done. With regard to unnecessary hardship, the Applicant presented no argument that anything about the property necessitated the variance to enable its reasonable use, and his statement that the land cannot be built upon without the variance is simply false. Perhaps it cannot be developed as the Applicant proposes, but it can be built upon. Finally, the Applicant was required to present evidence that there would be no diminution of surrounding property values. While he acknowledged that studies of the issue are necessary and alleged that they would be provided "soon," the Applicant bears the burden of proof now and in connection with this application.

James had no comments. Lorri says if it was a different situation with the 200 acres and not a high rise, it would be different. But she agrees with everything that is said here. Ken again looks to the ordinance which tries to maintain the rural character of the community and that's why we have that standard; that's one of the five criteria we act on, and if even one is not met we deny. Joe understands that the state has taken action against other towns, but he hasn't seen those decisions to read and hasn't seen any data regarding property values.

For these reasons Lorri moved, and James seconded a motion to deny the requested height variance. That motion to deny passed 4 to 0.

The board noted that it will get the decision finalized, signed, posted and to Chuck. Ken noted that this decision can be appealed—the appealing party would first need to file a motion for reconsideration and the town decides whether to rehear it. If we don't, it goes to court.

Chuck noted that court was not the only option. Counsel and the board briefly discussed the option to appeal to the Housing Appeals Board.

Motion to adjourn by Lorri, second by Joe—vote 3-0 (James left the table).

Meeting adjourned at 6:50