

**Town of Milford  
Zoning Board of Adjustment  
October 19, 2017  
Case #2017-24  
Barbara Livoli  
Variance**

Present: Steven Bonczar, Chair  
Jason Plourde, Vice Chair  
Michael Thornton  
Joan Dargie  
Rob Costantino  
Tracy Steel, Alternate  
Wade Scott Campbell, Alternate  
Karin Lagro, Alternate  
Laura Dudziak, Board of Selectmen Representative

Absent: Robin Lunn, Zoning Administrator

Secretary: Peg Ouellette

Barbara Livoli, for property located at 212 South Street, Milford, NH, Tax Map 30, Lot 131, in the Commercial district, is seeking a Variance of the Milford Zoning Ordinances per Article V, Section 5.05.1.P and 5.03.4.A to allow the conversion of a 1000 square foot commercial space to a residential unit in an existing building.

**MINUTES APPROVED DECEMBER 7, 2017**

Steven Bonczar Chair, opened the meeting and introduced the Board members. He said Tracy Steel, Wade Scott Campbell and Karin Lagro, alternates, could participate in the conversation but did not have voting rights that evening because there were five full members in attendance. He stated there were three cases on the agenda. There were no minutes to approve. He informed all of the procedures of the Board. The Board's rules state that they may adjourn at 10 p.m. if cases were lengthy. Any cases not heard or completed would be continued to the next regularly scheduled meeting with no additional notice to applicants or abutters for the continued or tabled hearing date.

S. Bonczar read the notice of hearing into the record and asked the applicant to state what she planned to do. Barbara Livoli and Paul Livoli came forward. B. Livoli said they had a mixed use building since 2001 with five apartments. They wanted to make a sixth apartment to move into themselves. Her husband is disabled and has difficulty walking. She said her husband's commercial space is also there; it was kind of a retirement store. Want to be able to connect the two (apartment and store). All on one floor. She had pictures of the building for the Board. She also handed out pictures of landscaping she had done a couple of years ago. She pointed out one error – when she made the printout she multiplied wrong. It said it was 25 x 50. That came out to be 1250 SF, not 1000 SF. The drawing was right, but the math was off.

S. Bonczar said it was actually 1250 SF.

B. Livoli said yes. Still leaves two thirds on the South St. side for the commercial space. Not changing that. No intention to rent to anyone else. She said she had started to get some quotes on the place.

S. Bonczar asked if the space was wide open – no partitions or walls?

B. Livoli said the place renting it was second hand furniture. It was very hard to keep anything in there. After the last tenant it was empty for eight months. It becomes financially unfeasible. If they could turn it into an apartment it would cost less than the condo where they were currently. House sits on two streets, South St., where the commercial was, and Marshall St. on the other side. There are two big parking lots. Everyone has their own parking. There was an issue two or three years ago about putting a small car dealership there, but that didn't work out. She understood they had plenty of parking and plenty of room.

S. Bonczar asked for questions from the Board.

W. Campbell said according to the picture they were in the vacant one, not the militaria one?

B. Livoli said yes.

J. Plourde asked, on South St. would be the far right?

B. Livoli said yes.

J. Plourde asked if two parking lots were only accessible from South St.

B. Livoli said yes. There was another parking lot on Marshall St. for 5 cars and room for second car on the South St. side.

J. Plourde asked about the intent on the right side along South St.

B. Livoli said commercial.

J. Plourde commented it was a beautiful building and looked very nice.

B. Livoli said they tried to put a lot of work into it.

R. Costantino asked how long the current tenants had been there.

B. Livoli responded, a long time. One still on a lease. They lease for a year and then go to tenancy at will. Four of the five are tenants at will now.

J. Dargie asked about using one of the other apartments instead of the proposed one.

B. Livoli said you had to go up a hill to get to it. Going up and down stairs to get to the business. She and her husband were getting older and her husband's disability isn't going to get better.

S. Bonczar hoped that everyone had looked at the Building Administrator's administrative review. In 2000 there was a special exception for the fifth dwelling. In 2000 a special exception was requested to allow commercial space back then to be converted to a fifth unit. At that time it was a nonconforming use question. The reason it was a variance question this evening was because, looking at the ordinance in the way it addressed multi-family dwellings, the Commercial refers to Residence B. In Res. B, Paragraph 5.03.4 re density talks about multi-family dwellings being served by municipal sewer and water may have a maximum of five. The maximum may be reduced by the Planning Bd. In this case, they are increasing density of that lot from five to six.

J. Dargie said it was only 0.43 acres.

B. Livoli said it was already a unit. It was just a commercial unit and they were not proposing an additional unit.

S. Bonczar said the unit was there. It just becomes a multi-family instead of multi-commercial or multi-industrial unit. Applicant talked about dwelling mixed use. In the ordinance it refers to mixed use as being dwelling units that are in addition to the primary non-residential use. In reading it and looking at the proposed plan it appeared the residential was more primary than the commercial in this case.

J. Dargie said that was because it was the variances and special exceptions that have been granted..

S. Bonczar said it evolved along the way to what it is today. If no other questions for the applicant, he would open the meeting to public comment. He opened the meeting for public comment. None. He said he would not close the public comment. Wanted more discussion because of the uniqueness of the case. They were dealing primarily with density more than anything else. Otherwise this would be a special exception to a nonconforming use.

J. Dargie thought you could grant a variance with a condition where the variance would survive only so long as this person continued this use.

S. Bonczar asked the applicants if they wanted this to be a permanent thing. Because there was a meaning regarding hardship. As Joan said, there was a physical disability but Bd. could state that the variance survives only so long as the owners continued to use that unit. After that the variance would become null and void.

J. Dargie said then they would have to go back to what it was.

J. Plourde said if they moved out, it went back to being commercial.

B. Livoli responded if they sold it in ten years, the buyers would have to come back if they wanted to keep it.

J. Plourde said if the buyers wanted an apartment they would need to come back before the Bd. If they wanted commercial, it would go back to that use when they move out.

B. Livoli said they hadn't thought that far ahead.

S. Bonczar said in this case it was tricky. They will discuss it. Approval of the variance generally stays with the land but in this case the state made change so there is this clause or modification that states to allow a variance to occur you would not have to prove normal hardship. The criteria for hardship in this case.

J. Plourde said that was one of the hardest to prove. At least the disability was coming in their favor – only way he knew how to express that as part of this case and the variance.

S. Bonczar said they didn't go into detail.

J. Plourde asked applicants if they were okay with the understanding that if this were granted it would be contingent upon their living there, and once they were no longer living there it went back to commercial.

B. Livoli said if that was what it would take to get the variance. Her husband was approached to put in a dog grooming facility but it was on a slab and they would need to put in drainage and sewerage. Felt it would be workable. It wasn't like you had to rip out a whole apartment and have an empty space. Would have all the plumbing for commercial use in the future..

J. Plourde said as long as it was an acceptable use.

S. Bonczar said as long as whatever modifications they were making could be used for a commercial purpose.

S. Bonczar said that was added by a bill in 1998 that said a variance may be granted “for a person or persons having a recognized physical disability, which may be granted for so long as the particular person has a need to use the premises.” He asked for any other questions or comments from the Bd. None. He said they would then go over all the criteria. He asked for questions from the Bd. for the applicants. None. He closed public comment.

The Bd. proceeded to discussion of the criteria.

**1. Granting the variance would not be contrary to the public interest because:**

J. Dargie – it would not be contrary to the public interest. She would be in favor of it as long as there was a condition put on the property. She thought differently without the condition. Zoning Ordinance was put in to stop large buildings. Already five units. Without the condition she would not be in favor.

S. Bonczar – it still remains a mixed use multi-family property. The change was increased density. It was already tipping the scale, in his opinion.

R. Costantino – didn't think it would change anything.

M. Thornton – physical structure was already there. It was currently in use. Very little difference between residential and commercial uses. Residential would be lower density for the same property.

J. Dargie – lower density for the two of them but could be different in the future. Without the condition it would remain 1250 SF with 2, 3 or 4 kids could fit in there. Then you have a problem. There was no yard or place for kids to play. That was why she was comfortable with it with the condition. But didn't believe 1250 SF apartment where it is.

J. Plourde – in general, agreed. Looking at it from the Handbook, whether granting would alter the character of the neighborhood, it was already there. There was already mixed use there with commercial and apartments. He didn't think it would threaten the health, safety or general welfare of the public. He didn't see a problem at all with this proposal, especially with the condition added in.

J. Dargie – if you look at the building you can't tell it is multi-family from the back. But if you add that to the front and with having conditions that follow with the property - without having something else available - is not proper for this.

J. Plourde – if you make that as a condition I will support it.

J. Dargie – correct.

M. Thornton agreed.

S. Bonczar – saying it was hardship because of the disability.

**2. If the variance were granted, the spirit of the ordinance would be observed because:]**

S. Bonczar read from the Commercial District in the ordinance: “The intent of this District is to provide areas for those businesses, institutional, financial, governmental and compatible residential uses which constitute the commercial requirements of the Town.” If he read that and used it as intent of the Ordinance in Commercial C district and fact that multi-family are allowable then overall, the spirit of the ordinance was observed. Where it was not being observed was with regard to specific number of units per the lot size.

J. Dargie - without the condition, didn't feel spirit was met.

S. Bonczar said there was no real condition.

J. Dargie said condition was that the variance survives only with the current owners.

S. Bonczar commented, if they went that way.

M. Thornton – condition of the variance would stay.

S. Bonczar said to remember that in voting, all criteria had to be met to approve the variance.

J. Dargie asked if, when they vote, would they actually vote on setting that condition or not? And then vote on the questions?

S. Bonczar said they would. He asked J. Plourde, R. Costantino and M. Thornton for comments.

J. Plourde – you (Steve) listed all the uses that are allowed in this Commercial District. Only reason they were there was because of lot size relative to the number of units. Spirit was observed because it was still staying a mixed use.

J. Dargie – only allowed two per the lot size. It was already over.

J. Plourde – this was the current starting point as of today and not looking back (from 5 apartments to 6, not from 2 to 6).

S. Bonczar – criteria have to be taken individually without the condition. Condition had to do with the hardship. Instead of using the two areas of the hardship. He quoted the two criteria A & B under “Unnecessary Hardship” criteria. In reading that, granting the variance for a disabled person the law authorizes Zoning Bd. to grant variances, etc. That can be the fact that it can only survive as long as that person continually needs to use the premises. It didn't have bearing on other criteria. They had to take the criteria individually.

M. Thornton said spirit of the ordinance was clear. It said “no more than.” This was more than. In that particular without this consideration of the hardship and the hardship was not only of a physical nature but it was financial. They weren't allowed to take financial into consideration. Looking at it in black and white, it really didn't meet the dedicated spirit of the zoning.

S. Bonczar – the feeling was that what was being asked fit within the spirit of the ordinance. The only area it didn't was with regard to density. It didn't change. Multi-family mixed use was allowed and this didn't change. He felt that it still met the spirit of the ordinance.

M. Thornton said only for this couple.

S. Bonczar said the whole proposal met the spirit of the ordinance and it had nothing to do with this couple. They were asking to convert a commercial unit to a residential unit. That was allowed. You can have mixed use. They thought where it fell down was on the density. Overall, the spirit of the ordinance was still met. The specifics were not but the overall spirit was met.

J. Plourde - quoted from the Handbook re the public interest and spirit of the ordinance that for a variance to be contrary to the public interest and the spirit of the ordinance (talking the first two criteria) must 1. unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance, and 2. alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public. He didn't think so. Based on those two questions, he was good.

S. Bonczar – they had to look at those questions. When they get to hardship they were not going to be looking at basic hardship because in this case it was a physical hardship. When they look at each criteria, they don't want to put a condition on each criteria.

M. Thornton – there was a unit already there. It made little difference if it was commercial with coming and going traffic or residential with more of a steady state.

S. Bonczar said that fell within substantial justice, whether denial was a public gain; in simple terms, will it make a big difference for the public?

**3. Granting the variance would do substantial justice because:**

M. Thornton didn't think so.

J. Dargie – didn't see public gain. She was still struggling with the spirit of the ordinance.

J. Plourde – Easiest was to say it is, is there gain to the public by denying the project.

S. Bonczar – and, does it outweigh gain to the applicant.

**4. Granting the variance would not diminish the value of surrounding properties because:**

J. Dargie – there will not be any change to the look or feel of the building.

J. Plourde – access will be directly off South St. No more cars on Marshall St. No new curb or curb cuts.

Plenty of parking to the right of the building. Commercial was on the left with its own parking

M. Thornton – good access for the two of them.

S. Bonczar – agreed. Not adding units. Adding residential unit, but the same amount of units. Not changing that physical aspect. It was the use that was changing. As far as property values, didn't think it would change whatsoever.

**5. Unnecessary hardship:**

S. Bonczar thought they were all on track to look at the physical disability. He quoted from Criteria 5(C) and 5(C) i. regarding physical disability. And from the Handbook page II-18 that in granting the variance pursuant to this paragraph, the Zoning Board of Adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

J. Dargie commented they had a similar case where it was financial. That seemed to be the only true hardship other than disability access – the building has been used for many things.

S. Bonczar agreed. When it comes to that, talking about i and ii, about the special conditions of the property, he didn't think there was a hardship. But leaning towards hardship of the physical disability with the intent of stating that the variance would only survive for the applicants. If they sold or vacated the property, the variance would go away.

J. Plourde felt they had a general consensus. Should they vote on that?

S. Bonczar said it would be a part of anything to do with voting. He will basically read that into the record.

R. Costantino and M. Thornton agreed the hardship was physical disability and not financial.

S. Bonczar said he would take conditions on Paragraph 5 and will read the whole thing. He said they were ready to vote.

S. Bonczar then proceeded to the vote on the criteria for a variance.

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

M. Thornton – yes; J. Plourde – yes; R. Costantino – yes; J. Dargie – yes; S. Bonczar - yes

**2. Could the variance be granted without violating the spirit of the ordinance?**

M. Thornton – yes; R. Costantino – yes; J. Plourde - yes; J. Dargie – yes; S. Bonczar - yes

**3. Would granting the variance do substantial justice?**

J. Plourde – yes; J. Dargie – yes; R. Costantino – yes; M. Thornton – yes; S. Bonczar - yes

**4. Could the variance be granted without diminishing the value of abutting property?**

R. Costantino – yes; J. Dargie – yes; J. Plourde – yes; M. Thornton – yes; S. Bonczar - yes

**5. Would denial of the variance result in unnecessary hardship taking the following into consideration:**

**A) i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;**

**ii. The proposed use is a reasonable one.**

**B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.**

S. Bonczar read from the Handbook, page II-17 & II-18, Granting Variances for the Disabled, Paragraph V: “Notwithstanding subparagraph I(b), any zoning board of adjustment may grant a variance from the terms of a zoning ordinance without finding a hardship arising from the condition of a premises subject to the ordinance, when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises, provided that (a) Any variance granted under this paragraph shall be in harmony with the general purpose and intent of the ordinance. (b) In granting the variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.” He said they want verbiage to include that the variance shall survive only so long as the particular owner has continued need to use the premises. All members agreed.

Vote on that the variance shall survive only so long as the particular owners are living there and have a continuing need to use the premises:

M. Thornton – yes; J. Plourde – yes; R. Costantino – yes; J. Dargie – yes; S. Bonczar – yes

S. Bonczar said they were then voting on Unnecessary Hardship, #i. an ii:

M. Thornton – yes; J. Plourde – yes; R. Constantino – yes; J. Dargie – yes; S. Bonczar – yes

S. Bonczar tallied the vote as unanimous approval of the variance, with the condition that the variance will survive only so long as the Livolis have continuing need to use the premises that was allowed under state law.

S. Bonczar informed applicants they were approved and informed them of the 30-day appeal period.

B. Livoli asked if she could get a building permit, or wait until the 30 days.

S. Bonczar said she could, but if anyone objected to this decision on the variance, there could be a problem. He suggested talking to the Office of Community Development who could give them guidance.