Town of Milford
Zoning Board of Adjustment
October 20, 2016
Case #2016-22
Edward & Christine Medlyn
Appeal of Administration Decision

Present: Kevin Johnson, Chairman
Michael Thornton, Vice Chair
Jason Plourde
Rob Costantino
Steven Bonczar

Absent: Joan Dargie
Katherine Bauer – Board of Selectmen's representative

Secretary: Peg Ouellette

Edward and Christine Medlyn, are making an Appeal of Lincoln Daley's zoning determination letter dated May 23, 2016 issued to Attorney Morgan Hollis regarding expansion of a non-conforming use on property located at 419-425 Nashua Road, Milford, NH Tax Map 31, Lots 3 & 4, in Limited Commercial (LC) District.

Minutes Approved on 11/3/16

Kevin Johnson, Chair, opened the meeting and introduced the Board members. Tracy Steele, potential alternate member, was seated but not voting. He read the notice of hearing.
K. Johnson stated that, because of a full agenda, there might not be time for all cases before a 10 p.m. adjournment. Any cases not heard would be heard at the next regularly-scheduled meeting, with no additional notification to applicants or abutters. Regarding approval of minutes, the Bd would schedule a work session to go over them.
K. Johnson said at the last meeting on this case they received presentations from applicant and representative for the parties who had appealed the administrative decision. He was absent from that meeting; however, he had reviewed the videotape and applicable portions for this case where attorneys had presented their cases. He would be joining the Bd. as it proceeded with deliberations, having reviewed all materials needed. Bd. had left off with general request to see Lincoln Daley explain how he reached his decision. In discussion with Office of Community Development (OCD) and getting consensus of Bd.'s opinion, he didn't feel it was necessary for Lincoln to be there. Letter of decision

should stand on its own without additional justification from him; he would not be attending this meeting. They were at a point of discussion as to the merits of the letter and appeal of the decision. Most of the Bd. already presented some opinion with concurrence of Bd. He would like to present his findings and they could give their thoughts on that and any other issues. He said Rymes' attorney discussed the timeliness of the appeal and whether when the Bd. received it was within reasonable time frame or not. He would like to, for this case, set that argument aside because the underlying RSA says either the Bd. or rules of procedure need to state a time frame. Neither our ordinance nor rules state a time frame for administrative appeals. It says reasonable. Felt it would be in best interest of Bd. to set that issue aside and review the documents on the two points of discussion that Lincoln made. He read part of the letter where L. Daley made decision "I am in general concurrence that under Section 2.03.1.C of the Milford Zoning Ordinance the proposed expansion of the current nonconforming use by the addition of another above-ground fuel storage tank (liquid propane) would be an allowed use conditioned upon the Zoning Board of Adjustment finding that the proposed application meets both the requirements of the section and grants a special exception therein." That was the first part of the decision. He continued reading, "In this instance, to facilitate this process would require the consolidation/merger of Map 31, Lot 3 into Map 31, Lot 4 under one owner." That was the second aspect of his decision. Two things to consider: One, was he correct in saying that to apply for special exception they need to be merged; second, would this be conditioned upon approval of the Zoning Bd. In the presentation attorney focused on whether or not the two properties could be merged. K. Johnson passed out to Bd. excerpts from RSA 674.39A re voluntary mergers, which said *"Any owner of two or more contiguous pre-existing approved or subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes may do so by applying to the Planning Board or its designee. Except where such merger would create a violation of the then current ordinance or regulation, all such requests shall be approved and no public hearing or notice shall be required. No new survey plat needs to be recorded but a notice of the merger sufficient to identify the relevant parcels and endorsed in writing by the Planning Board or its designee shall be filed for recording in the Register of Deeds and a copy mailed to the municipality's assessing official. No such merged parcel shall hereafter be separately transferred without subdivision approval. No city, town, county or village district may merge pre-existing subdivided lots or parcels except upon consent of the owner."* He noted the three specific requirements contained in the RSA for a voluntary merger. 1. There be a common owner; 2. Two or more pre-existing approved lots or parcels; 3. They be contiguous. He said in this case Lot 3 and 4 have a common owners, are pre-existing, and are contiguous. In his opinion, merger of those lots met the requirements of RSA 674.39A. That RSA also says except where such merger created a violation. The application for appeal of administrative decision focused on a couple of aspects of that voluntary merger in that, except where it would create a violation. It was stated that RSA prohibited merger of those lots. RSA didn't say any type of merger prohibited. He was going to cite from NH Supreme Court typical where they say they were using plain and ordinary meaning. If they change that from the exception to the opposite it would be "where such a merger would create a violation then public hearing would be required." Doesn't say you can't do it; just have to have a hearing. What would be the violation? He saw none. It would increase size of Lot 4. Not considered a violation in the ordinance. Merger would not change zoning on that road. Would still be a Limited Commercial Business district zoning. Would not have any effect on any existing structures or existing use. No violation of the merger in and of itself. L. Daley's decision stated that to be able to apply for special exception would require merger of those two lots. That portion stood on its own. The other part is somewhat open to discussion that was held by Bd. in how to interpret L. Daley's statement that it would the expansion be allowed upon the Board of Adjustment's findings. He read that as saying if you merge, you can apply for special

exception but have to get ZBA finding that it met requirements of that section and ZBA granted it. Saw no error in that portion of L. Daley's determination. K. Johnson stated he had more, but would bring up as needed. That would be his justification for denying the appeal. The statements in L. Daley's letter that it would be allowed use upon ZBA determination it met the requirements, Lincoln was saying it was up to ZBA to find if it did or not. Not saying they can or cannot have this expansion, only make application to the ZBA for special exception and that would require merger. Nothing in statute that prevents that merger. Comments?
S. Bonczar disagreed. In his opinion, L. Daley's interpretation was flawed. He was not denying that merger of two lots not allowed in ordinance, but for merger of two lots to take on the characteristics of a nonconforming lot didn't represent intent of the ordinance. Therefore, his interpretation of Sec. 2.03.1 was flawed. S. Bonczar said he took notes and Sec. 2.03.0 and 2.03.1 don't specifically address merger of lots when one lot is nonconforming and another is not. Intent was to allow certain reasonable level of alteration. In his opinion, merger with one lot being nonconforming and one not, would not be a reasonable level of alteration. Precedent of an opinion of such merger would allow bringing benefits of nonconforming lots to existing conforming, causing an unreasonable level of change to neighborhood. Such an interpretation would allow an unlimited amount of conforming acreage be considered nonconforming and allow the total acreage to reap the benefits of nonconforming use. Would have the effect of rezoning without proper authorization. This interpretation, in his opinion, did not support the intent of the ordinance.
K. Johnson disagreed. Could see what S. Bonczar was saying. On the basis of merger, nothing of that property had changed. No difference in buildings, use or structures. Only combining two parcels for regulation and taxation purposes.
S. Bonczar read from L. Daley's letter that in concurrence under Section 2.03.1 of the Milford Zoning Ordinance the proposed expansion of the nonconforming use by the addition of another above-ground storage tank would be allowed. S. Bonczar said the proposal was an above-ground storage tank onto the property next door by adding property that is conforming but merging those two lots allows the two lots to take on the benefits of the nonconforming use. Where would it stop? He could have 1 acre, nonconforming. He decides to buy 100 acres around him. Under Lincoln's interpretation that 101 acres could now take on the benefits.
K. Johnson pointed out the rest of Lincoln's statement that said, if the ZBA found the proposed application met both the requirements of the section and grants a special exception. Yes, now you could have 101 acres but you still couldn't do anything with them without ZBA approval. Simply combining granted them nothing additional. Only allows them to come before ZBA for special exception.
S. Bonczar said when you combine them, you have one nonconforming lot. Intent of this nonconforming use ordinance was to allow for reasonable expansion. Allowing that to happen was unreasonable.
K. Johnson said the underlying question was, can the lots be merged?
S. Bonczar said yes.
K. Johnson said so they merge the lots. Could they take one of their fuel tanks out and replace it with 30,000 gallon one in the exact same place? Not along the old Lot 3, but just in place.
S. Bonczar said no. Not unless they came to ZBA.
K. Johnson said exactly. They come to the ZBA; that is what L. Daley said. That was his interpretation of what he said.
S. Bonczar said it was not his interpretation.
They agreed to disagree.

K. Johnson said NH Supreme Court said, given the exact set of facts, two zoning boards could come up with two different conclusions and both would be correct. That was why there were five members, to have balance.
R. Costantino thought they were trying to decide whether a special exception or a variance.
K. Johnson said only thing before them then were, were two statements that L. Daley made in his decision correct? Where he said to be able to apply for special exception you have to merge the lots, and if you do, he felt this would be an expansion and would require special exception approval by Bd. if it met the requirements.
R. Costantino said part of the discussion last time was it being nonconforming and putting a tank in, and that facility being a propane facility, would be nonconforming or not. Didn't get how they have focused on merging these two lots.
K. Johnson said discussion of the addition of tank was appropriate to the special exception application on Case #2016-19. Bd. must determine if that was reasonable natural expansion of the business.
R. Costantino said special exception list of allowed uses that were not in the normal.
K. Johnson said there were certain uses allowed by right – the first few listed - and other allowed by special exception. In this instance the controlling part of ordinance was Sec. 2.03 re alteration or expansion of nonconforming pre-existing use or structures. Bd. must determine if it was reasonable expansion or alteration of existing nonconforming business. Guiding principle was not list of allowed uses in LCB by special exception, but under Sec. 203 natural growth of nonconforming. That has to be there because when the ordinance enacted they could not say you have to stop their business. Relief to that is pre-existing nonconforming paragraph that says you can alter or expand, but you must meet the specified criteria. ZBA must determine if those applications meet criteria. Whether a 30,000 gal. propane tank is a reasonable expansion or unreasonable alteration of pre-existing use, was for that other case. For this specific issue, it was, were the decisions made in this letter correct.
S. Bonczar said whether merging allows them to take on advantages of nonconforming use of 302.1.
K. Johnson asked if that helped focus on discussion of this particular case because they had two more cases dealing with this entire package of an issue. He said R. Costantino could think on that; if something came up and anybody on Bd. had something to contribute, please speak up.
J. Plourde definitely understood where both of them were coming from. The part of Sec. 674.39A stating the anyone owning two or more contiguous pre-existing approved or subdivided lots or parcels who wishes to merge them for municipal regulation and taxation purposes may do so by applying to the Planning Board or its designee, he understood and agreed with. He understood by merging two lots the owner has right to do that.
K. Johnson said, to clarify, they are not the Planning Bd. designee in this case.
R. Lunn said that was Lincoln, who wrote the letter.
J. Plourde said the part that said such merger would create a violation. In this case where it was already a nonconforming lot.
K. Johnson said it wasn't nonconforming. It was a pre-existing lot with nonconforming use.
J. Plourde said question was, by merging the two, did they create a violation of current regulations? K. Johnson asked what the violation would be.
J. Plourde said same pre-existing nonconforming use would still be there; was not creating anything new that was a violation of the ordinance because that violation would already be there for the propane tank.
K. Johnson said the tank didn't exist. His view of letter was you merge the two lots and can apply for special exception. If granted, you can put up the tank. This letter didn't grant any right to do anything

with the property other than merge it. Was there a violation that could be identified in merging that would require Planning Bd. to hold a hearing?
J. Plourde said the merger in itself probably didn't. Would leave it at that.
K. Johnson said going to the testimony of the Rymes' attorney basically saying it was their position they could merge the two lots and understood there was nothing this Bd. could do to stop them. Trying to look into future. Set that aside. He admitted that even if they merge, the ZBA may not grant permission to put up the tank. This allowed them the process to apply for that process. That was where they were at this point. L. Daley's letter said if you merge the lots you can apply for special exception.
R. Costantino asked why not apply for variance.
K. Johnson said ordinance states if you want to expand an existing nonconforming use you need to apply for special exception.
S. Bonczar said they were getting off topic as to whether they agreed with the letter. Talking about possible special exception and it could be a fuel tank or building. Didn't think they should be going there.
K. Johnson said he agreed, other than if it helped others understand. S. Bonczar had a clear understanding because of their years on the Bd. Will try to make sure they will not discuss qualifications for special exceptions. As said, it didn't matter whether it was another 30,000 gal. tank, a fuel tank, or a truck servicing garage, etc. Ordinance allows expansion of pre-existing uses by special exception. In some jurisdictions it is only by variance; in ours it is special exception.
R. Costantino was not convinced it was an expansion.
M. Thornton had no problem with special exception making it one lot. Had some future concerns about a possible tank.
K. Johnson asked S. Bonczar for any other input. S. Bonczar said focused on second paragraph of L. Daley letter and didn't feel it matched intent of 2.03.1.
J. Plourde said second paragraph, first sentence could be read twenty different ways and interpreted two different ways. Reason he wanted to understand the intent of the sentence. Reading it over and over, it said, if you stopped midway, you could be saying what are you saying there. Because under 2.03.1 of ordinance the proposed expansion of the current nonconforming use by the addition of another fuel storage tank would be an allowed use. He would have problem with that.
K. Johnson would, also.
J. Plourde said, but, it continued that it was conditioned upon ZBA finding that the proposed application meets both the requirements. You can't get lazy and just stop. It was really him leaving it up to ZBA about that second fuel tank. Letter wasn't saying everything was fine, but that this was the process they need to be going through.
K. Johnson said that was his interpretation of the letter. He asked for any further discussion re intent of the letter or appeal of that decision. None. Were they ready to vote?
K. Johnson said Bd. would ask for a motion to either approve the appeal, which would state that this letter was in error; or ask for motion to deny the appeal, which would mean that this information as provided was correct. One other thing, decide on your own whether this had any effect on it or not, but his viewpoint was that this letter was moot. Nothing in statute to prevent applicant for special exceptioin from going to Planning Bd. and merging lots. Planning Bd. may or may not determine whether they may or may not be in violation and may or may not need a hearing. His interpretation of statute, there was nothing to prevent merging those two lots. Once that is done, nothing preventing applicant asking for special exception. Whether Lincoln wrote the letter or not, he saw no change in the process. That was his opinion based on underlying statute and ordinance as to how applicant should have proceeded. Applicant

could have proceeded without asking Lincoln's opinion. He thought they were just looking to strengthen their position.
J. Plourde said in order for two lots to be merged the applicant would need to go to Planning Bd. for that to take place?
K. Johnson said yes. Would be up to Planning Bd. to determine whether they felt it met that exception except for a violation. They would have to identify the violation and hold a public hearing. From his reading of statute and ordinance there was nothing that can't.
S. Bonczar agreed. But K. Johnson was saying taking a lot that was nonconforming and merging with another lot didn't expand that nonconforming use.
K. Johnson said there was no change to the structures, to operation. There was more land there doing nothing.
S. Bonczar said they were a land use Bd. The land adopts the use.
K. Johnson said they were not using it.
S. Bonczar said just owning it was using. In his opinion, it gained the nonconforming use. That was his problem with his interpretation. As sitting, that lot operated in use. Period. Further expansion, you want to put a propane tank or another building, etc., was another story. But in itself, expanding merging that lot, taking on characteristics of the nonconforming use of the original is not intent of the ordinance. Lincoln's interpretation, in his opinion, was incorrect.
K. Johnson said he saw a piece of land sitting there that has not had any effect on existing use. Hasn't altered or expanded use. Still the same number of tanks, buildings and trucks, same operation. Just more square footage.
K. Johnson asked each member if comfortable. All were.
K. Johnson agreed they had pretty much covered points as much as needed. He asked for motion to either approve the appeal, which would find the decision in error; or deny the appeal, which would find no error in the opinion issued by L. Daley. Did everybody understand? All did.
S. Bonczar made motion to approve the appeal.
M. Thornton seconded.

Vote on motion that the appeal be approved and the zoning determination letter issued on May 23, 2016 by Lincoln Daley, Community Development Director, to Attorney Morgan Hollis re expansion of nonconforming use on the properties be reversed. **Yes vote was to reverse the determination and uphold the appeal.**
S. Bonczar – yes; R. Costantino – yes, agreed with Steve's argument; J. Plourde – no; M. Thornton – yes; K. Johnson – no
Administrative appeal granted by 3 to 2 vote.
K. Johnson said, that being the case, they would table the other two Rymes cases (Cases #2016-23 & 2016-19.
K. Johnson asked for motion to table Case #2016-19 pending further information from applicant.
M. Thornton made motion.
J. Plourde seconded.
All voted in favor.
Atty. Morgan Hollis asked for point of order. Did they have to table to a date certain?

K. Johnson said no, they tabled to input from the applicant.
M. Hollis said they would have to advertise. Whatever they decide to do.
K. Johnson said whatever they decide.
Case #2016-19 tabled.
K. Johnson asked for motion to table Case #2016-23 pending further information from applicant, since either Case 2016-19 and 2016-23 cannot proceed without the other.
M. Thornton so moved.
J. Plourde seconded.
All in favor.
Case #2016-23 tabled.