



*Town of Allenstown
Zoning Board of Adjustment*

Application for Appeal

Applicant Name 4NH Homes, LLC c/o Roy Tilsley Phone 623-8700 (office)
Address c/o Bernstein, Shur, Sawyer & Nelson PA Home _____ Work _____
PO Box 1120 Manchester, NH 03105
Owner of Property Concerned Michael Nickerson Map # 102 Lot # 8
Address of Property Concerned NH Rte. 28 ad Pine Acres Road Zoning District R2
Description of Property - Frontage n/a Side _____ Side _____ Rear _____ Acres/SF 32.7 ac A SF _____
Proposed Use A cluster subdivision is proposed on a portion of the Property, with the remainder of the property to be held in common ownership by the lot owners.

COMPLETE SECTION 1, 2, OR 3. DO NOT COMPLETE MORE THAN ONE SECTION

Section 1 - APPEAL FROM AN ADMINISTRATIVE DECISION

The undersigned alleges that an error has been made in the decision, determination or requirement by the Building Inspector/Code Enforcement Officer on 4/5/17, relative to Article XI, Section 1125(6) of the zoning ordinance. Please see attached for further detail.

Section 2 - APPEAL FOR A SPECIAL EXCEPTION

The undersigned hereby requests a special exception as provided in Article _____, Section _____ of the zoning ordinance.

Section 3 - APPEAL FOR A VARIANCE

The undersigned hereby requests a variance to the terms of Article _____, Section _____ and asks that said terms be waived to permit _____

Applicant Signature  Date 5/3/17

PLEASE LIST ADJUTERS TO BE NOTIFIED ON REVERSE SIDE OF THIS APPLICATION

Received Stamp

ALLENSTOWN ZONING BOARD OF ADJUSTMENT

Application for an Appeal from an Administrative Decision

Applicant: 4NH Homes LLC

Property: Tax Map 102, Lot 8;
NH Route 28 and Pine Acres Road

Introduction

The above-referenced Applicant hereby respectfully appeals the April 5, 2017 administrative decision of Dana Pendergast regarding the applicability of the Town's 2017 Zoning Ordinance to the Property. More specifically, on April 5, 2017 Mr. Pendergast and counsel for the Applicant discussed whether a variance application should refer to the provisions of the 2016 zoning ordinance or the 2017 zoning ordinance. That conversation focused on which section to cite in a variance application seeking relief from a 200-foot buffer requirement.

After counsel reviewed the full permitting history of the Property in closer detail, under cover letter dated April 28, 2017, the Applicant has since recently requested an administrative determination as to whether a variance from the 200-foot buffer requirement is necessary in the first instance. While the Applicant is waiting for a determination on such request, out of an abundance of caution, it appeals Mr. Pendergast's April 5th determination at this time to preserve its rights.

In summary, and as explained below, it is the Applicant's position that Section 1125(6) of the 2017 Zoning Ordinance does not apply to the Property in light of the previously granted relief from Sections 601 and 701 of the 2016 Zoning Ordinance, which authorized use of the Property for a cluster residential subdivision in the R2 zone with a density as allowed per the R2 zone. As such, the Property may be used for a cluster subdivision without the 200-foot buffer condition.

Analysis

To begin, it is notable that the Property is located in the R2 zone as well as the agricultural conservation overlay district.

Article XXII of the 2016 Ordinance governs the agricultural conservation district. Interestingly, Section 2203(D)(1) requires that residential subdivision developments on large lots in the agricultural conservation district (*i.e.*, greater than 15 acres and with at least 200 feet of frontage) must be laid out according to the cluster standards in Section 602. As a result of this provision, a cluster subdivision was allowed on the Property as a matter of right under the 2016 Ordinance, conditional upon compliance with the provisions of Section 602. This is an important fact as, otherwise, an owner of a large residential lot in the agricultural conservation district would be prevented from using such land for an otherwise allowed use (single-family dwellings) without a variance.

Application for an Appeal from an Administrative Decision

Tax Map 102, Lot 8

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Keeping that in mind, last year the Applicant applied for and received several variances from the ZBA concerning the project. One such request was for a use variance from Section 701.a of the 2016 Ordinance, to allow the Property to be used for *cluster subdivision purposes in the R2 zone with a density as allowed per the R2 zone*. Such request was granted by the ZBA ("Cluster Use Variance") and, by statute, that approval remains in full force may be exercised by the Applicant for at least two years. See RSA 674:33, I-a.

Because cluster subdivisions were already allowed on the Property as a matter of right, subject to conditions as discussed above, it is unreasonable to think that the Cluster Use Variance would have granted an already allowed use. Rather, the Cluster Use Variance must have authorized some affirmative relief from the 2016 Zoning Ordinance. The relief requested, and granted, was to allow a cluster subdivision on the Property subject only to the densities of the R2 zone. Thus, the Cluster Use Variance removed Section 602's conditions (including the 200-foot buffer requirement) and authorized a cluster subdivision on the Property as long as the density complied with the R2 zone.

Furthermore, the 200-foot buffer requirement was clearly not part of the Cluster Use Variance. In fact, the Cluster Use Variance specifically only references the density requirements of the R2 zone, and the Residential zone's dimensional restrictions are clear in that they do not require a 200-foot buffer. See 2016 Ordinance, § 703.

In light of the above, the impact of the Cluster Use Variance is that the Applicant is entitled to develop a cluster subdivision on the Property without the 200-foot buffer.

Moreover, because the Cluster Use Variance pre-dated the enactment of the 2017 Ordinance, the 2017 Ordinance's requirements regarding cluster subdivisions cannot be retroactively applied to the Property or its vested rights. In other words, because the 200-foot buffer requirement of Section 1125 was enacted in 2017, after the valid issuance of the Cluster Use Variance, it cannot apply to the Property.

Conclusion

In short, the Applicant's Cluster Use Variance, issued under the 2016 Ordinance, controls. It authorizes the use of the Property for a cluster subdivision without a 200-foot condition and obviates the need for a variance from Section 1125(6) of the 2017 Ordinance. As such, the Applicant should be entitled to immediately proceed back to the Planning Board for its review of the Applicant's pending subdivision application.

The Applicant thanks the Board for its time and consideration on this issue.

