

Please send this form with Plot Plan and List of Abutters to the Town of Durham, 15 Newmarket Rd., Durham, NH, 03824, Attn: Zoning Board of Adjustment.

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Appeal for Applicant

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State of New Hampshire
Planning, Assessing
and Zoning

Strafford, SS

To: Zoning Board of Adjustment, Town of Durham NH 03824

Name of Applicant: Tropic Star Development, LLC

Address: 321D Lafayette Road, Hampton, NH 03842 Phone # 603-293-4183

Email: _____

Owner of Property Concerned: Cumberland Farms, Inc.

(If same as above, write "Same")

Address: 100 Crossing Boulevard, V1015, Framingham, MA 01702

(If same as above, write "Same")

Location of Property: 3 Dover Road

(Street & Number, Subdivision and Lot number)

Description of Property (Give Tax Map number, length of frontage, side and rear lines and other pertinent descriptive information) Tax Map 4, Lot 49; Plot Plan attached

hereto.

Fill in Section 1, 2, 3 or 4 below as appropriate. Do not fill in more than one section. This application is not acceptable unless all required statements have been made. Additional information may be supplied on separate sheets if the space provided is inadequate.

SECTION 1: APPEAL FROM AN ADMINISTRATIVE DECISION

Appeal must be filed no later than 30 days from the date of the original decision.

Relating to the interpretation and enforcement of the provision of the Zoning Ordinance.

Decision of the enforcement officer to be reviewed: _____

Number _____ Date _____

Article _____ Section _____ of the Zoning Ordinance in question.

SECTION 2: APPLICATION FOR SPECIAL EXCEPTION

Description of proposed use showing justification for a Special Exception as specified in the Zoning Ordinance Article _____ Section _____

N/A

SECTION 3: APPLICATION FOR EQUITABLE WAIVER

The undersigned hereby requests an Equitable Waiver of Dimensional Requirements as provided in RSA 674:33-A of the New Hampshire Planning and Land Use Regulations.

Please give a brief description of the situation: _____

N/A

SECTION 4: APPLICATION FOR A VARIANCE

STANDARD OF REVIEW: The New Hampshire Legislature has declared that each of the following conditions must be found in order for a variance to be legally granted. Prior to seeking a variance, the property owner must have been DENIED a building permit by the Building Inspector or approval by the Planning Board.

1. No decrease in value of surrounding properties would be suffered;
2. Granting the variance would not be contrary to the public interest;
3. Denial of the variance would result in unnecessary hardship to the owner seeking it;
4. By granting the variance substantial justice would be done;
5. The use must not be contrary to the spirit and intent of the ordinance.

A Variance is requested from Article _____ Section _____ of the Zoning Ordinance to permit _____

See attached

Facts supporting this request:

1. No decrease in value of surrounding properties would be suffered because:
See attached

2. Granting the variance would not be contrary to the public interest because:
See attached

Current law requires the existence of unnecessary hardship for the granting of any variance, whether that is for a use not allowed in a particular zone or a deviation from a dimensional requirement.

3(A). Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- a. no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:

See attached

and

- b. the proposed use is a reasonable one because:

See attached

Or

3(B). Owing to special conditions of the property that distinguishes 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.

N/A

4. By granting the variance substantial justice would be done because:
See attached

5. The use will not be contrary to the spirit and intent of the ordinance because:
See attached

NARRATIVE IN SUPPORT OF VARIANCE APPLICATION
OF TROPIC STAR DEVELOPMENT, LLC

This variance application is related to the property located at 3 Dover Road (the "Property"). A Cumberland Farms gas station/convenience store occupies the Property, but has been closed and vacant since 2005. As a result, the Property has deteriorated and fallen into disrepair. Tropic Star Development, LLC ("Tropic Star") seeks to purchase the Property, demolish the existing structure and redevelop the Property as an automobile service station. The development would include a new 4-bay garage with storage area in a partial second floor.

The Property is located in the Courthouse Zoning District. It is a very small lot, containing approximately .27 acre. Due primarily to the small size of the lot, the following variances are required:

Number of Parking Spaces

- 1) A variance from Section 175-113 to allow 12 parking spaces where 16 would otherwise be required;

Parking Lot Landscaping

- 2) A variance from Section 175-116(A) to allow less than 5% of the parking and driveway area to be landscaped;

Yard Setbacks

- 3) A variance from Section 175-11(G)(5) to allow parking in the rear yard abutting a duplex household; and
- 4) A variance from Section 175-55(B) to allow an ADA parking aisle within the front yard and a refuse container in the side and rear yards.¹

DISCUSSION

Pursuant to RSA 674:33, I(b), the Zoning Board of Adjustment has the power to authorize a variance from the terms of the zoning ordinance, if:

- (1) The variance will not be contrary to the public interest;
- (2) The spirit of the ordinance is observed;
- (3) Substantial justice is done;

¹ Pursuant to Section 175-55(B), driveways and walkways are permitted in the front yard, but parking is not. It is unclear whether the ADA parking aisle is properly considered as parking or a walkway. Likewise, it is unclear whether a refuse dumpster constitutes a "building." Under the advice of the Durham Code Enforcement Officer, this variance request is included in this application for consideration by the ZBA whether any variance is required. Inclusion of this request is not intended to be a waiver, and the applicant expressly reserves the right to appeal any determination on that issue.

- (4) The values of surrounding properties are not diminished; and
- (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

Under the last provision, “unnecessary hardship” means either:

(A) Owing to special conditions of the property that distinguish it from other properties in the area: (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; and (ii) The proposed use is a reasonable one; or

(B) 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.

Here, the variances requested by Tropic Star satisfy the statutory requirements.

1. These variances will not be contrary to the public interest.

A variance is contrary to the public interest if “it unduly and in a marked degree conflicts with an ordinance such that it violates the ordinance’s basic zoning objectives.” Farrar v. City of Keene, 158 N.H. 684, 691 (2009) (internal quotations omitted). In determining whether a variance would violate basic zoning objectives, the board should examine whether the variance would alter the essential character of the locality, or whether the granting of the variance would threaten public health, safety or welfare. Id.

Parking Number Variance

The variance for the number of parking spaces will not violate the ordinance’s basic zoning objectives. Allowing 12 parking spaces where 16 are required will not be contrary to the public interest. The proposed garage contains 4 vehicle bays. These bays will house vehicles while they are being serviced, even though they do not count towards the number of required parking spaces. Moreover, due to the nature of the automobile repair service business, vehicles left at the premises can often be “double stacked” and/or parked more closely together than in typical parking lots. And, the building design is geared towards quick service, with pull-through garage bays, which is likely to result in customers waiting while their vehicles are serviced, rather than leaving them parked on the Property until the end of the day when they can be picked up. Consequently, 12 spaces will be adequate to serve the Property. For these reasons, allowing 12 parking spaces will not threaten public health, safety or welfare.

Parking Lot Landscaping

The variance for reduced parking lot landscaping will not violate the ordinance’s basic zoning objectives. The existing development on the Property is generally lacking in landscaping. The proposed development would provide extensive landscaping around the perimeter of the Property wherever space permits. However, because the Property (and the parking lot) is so

small, the lack of landscaping within the parking lot area will not threaten public health, safety or welfare in any way.

Yard Setbacks

Locating the ADA parking space access aisle within the front yard will not violate the ordinance's basic zoning objectives. The ADA access aisle is akin to a walkway. Because walkways are allowed in the front yard, allowing the ADA access aisle within the front yard will not alter the character of the locality, or threaten public safety, health or welfare. Indeed, it is consistent with the ordinance's purpose of allowing the front yard to be used for access ways.

Similarly, locating the refuse container within the side and rear yards would allow the container to be out of the way of parking areas and would provide easy access for loading and removal. The location would still be convenient for the service station's use, but would allow ample screening from abutting properties. Therefore, allowing the container to be located within the side and rear yards would not alter the essential character of the locality, or threaten public health, safety or welfare.

Allowing parking in the rear yard is, likewise, consistent with the public interest. The lot to the rear of the Property (the "Holiday Inn Lot") contains several buildings, some of which are duplexes. Other buildings on that lot include the hotel and an apartment building. The duplexes are located at the furthest end of the Holiday Inn Lot, far from the parking proposed on the Property. Indeed, extensive parking already exists on the Holiday Inn Lot between the duplexes and the Property. Thus, the variance will not be contrary to the public interest.

2. The spirit of the ordinance is observed.

The Supreme Court has determined that the requirement that a variance not be contrary to the public interest "is co-extensive and related to the requirement that a variance be consistent with the spirit of the ordinance." Chester Rod & Gun Club v. Town of Chester, 152 NH 577, 580 (2005). "The public interest is protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest." Id.

Parking Number Variance

Section 175-113 is designed to ensure that there is adequate off-street parking. The proposed parking will be adequate because up to 4 vehicles can be kept inside the building, and vehicles left for service can be "double stacked" and parked more closely together than in typical parking lots. The proposed service station is designed for a quick turnover business, with pull-through garage bays. It is therefore expected that many customers will wait while their repairs are being done, such that fewer vehicles will be dropped off and left on site for extended periods of time.

Parking Lot Landscaping

Section 175-116(A) is designed to enhance the appearance of parking lots by providing ample landscaping. In this case, the parking lot is so small that there are no islands or other spaces within the parking lot to landscape. Rather, the areas to the north and east of the parking lot will be densely landscaped to screen abutters and to provide an attractive appearance. This will serve the spirit of the ordinance.

Yard Setbacks

Section 175-55(B) is designed to minimize the impact of permanent structures on abutters by maintaining a required setback. Allowing the ADA access aisle to be located in the front yard is consistent with this purpose because the aisle will have no different impact than a walkway, which is an allowed use of the front yard. Likewise, allowing the refuse container to be located in the side and rear yards will not unduly affect any abutters given the extensive screening that will be used to shield the container.

Section 175-11(G)(5) is designed to minimize the impact of parking on single family residences and duplexes abutting commercial uses. As discussed above, the proposed parking will not impact the duplexes on the Holiday Inn Lot. As such, the spirit of the ordinance is observed.

3. Substantial justice is done.

Substantial justice is done where granting a variance will not cause harm to the general public that outweighs the benefit to the applicant. See Malachy Glen Associates v. Town of Chichester, 155 N.H. 102, 109 (2007). That is the case here. Given the Property's small size, any redevelopment will require most, if not all, of these variances which relate primarily to parking. Without these variances, the Property is likely to languish.

Parking Number Variance

Allowing 12 parking spaces will not harm the general public because, for the reasons set forth above, those spaces will be adequate for the use of the Property. The benefit to Tropic Star is substantial because the Property does not have sufficient space to construct additional parking. The proposed parking configuration maximizes the number of spaces on the Property and allows the Property to be put to its highest and best use.

Parking Lot Landscaping

Not requiring 5% of the parking and driveway areas to be landscaped will not harm the general public because the Property's landscaping will be dramatically improved from current conditions as part of the redevelopment. Additionally, extensive landscaping will be provided around the perimeter of the parking lot as noted above. The benefit to Tropic Star is substantial because requiring internal landscaping in the parking lot would eliminate further parking spaces, bringing the parking further out of compliance.

Yard Setbacks

Allowing the ADA aisle to extend into the front yard will not harm the general public because the aisle will have no different impact than a walkway, which is allowed. Allowing the refuse container to be located in the side and rear yards will not harm the general public either because the location minimizes visibility from the street, and ample screening will shield it from abutters. Finally, allowing parking in the rear yard adjacent to duplexes will not harm the general public because the duplexes are set back across existing parking on the Holiday Inn Lot, far from the Property. The parking will be located behind the proposed building, and will be largely unseen by the public at all. By contrast, the benefit of these variances to Tropic Star is substantial because without them, a number of parking spaces would be lost. Allowing these minor encroachments into the setbacks allows a vacant property in a prominent location to be improved.

4. The value of surrounding properties is not diminished.

Granting the variances will not diminish surrounding property values because, as noted above, the Property is currently unused and in a state of disrepair. Most, if not all, of the requested variances would be required for any redevelopment of the Property. The redevelopment will enhance the appearance and revitalize business in the area, which will help to drive up property values.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because, owing to special conditions of the property that distinguish it from other properties in the area:

a. 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.

The Property is unique because it is a small lot in the Courthouse Zoning District outside of any overlay districts. It is in a prominent downtown location, yet has sat vacant for nearly 10 years. It abuts a property to the side and rear that is in the Courthouse Zoning District, yet contains residential uses and multiple buildings, including a hotel, an apartment building and duplexes. The general public purposes of the ordinance provisions at issue are to ensure adequate parking, landscaping and screening from neighbors. The redevelopment will provide adequate parking and will improve landscaping, screening and the general appearance of the Property, largely satisfying these purposes. Given the small area of the Property, any sustainable redevelopment will require most, if not all, of the requested variances. Therefore, there is no fair and substantial relationship between the general public purpose of the ordinance provision and its specific application to the Property.

b. The proposed use is reasonable.

The proposed use is reasonable because the Property offers a prime location for redevelopment. It is reasonable to allow fewer parking spaces, given the ability to park vehicles

within the service bays and to park vehicles more closely while awaiting service. Omitting internal landscaping within the parking lot is reasonable because the parking lot is relatively small and will have extensive landscaping around the perimeter as noted. Locating the refuse container in the side and rear yards is reasonable in light of the ability to adequately screen it from neighbors. Allowing parking in the rear yard which abuts a duplex is reasonable given the layout of the Holiday Inn Lot, and the extensive parking that already exists on it. And, the ADA access aisle in the front yard is akin to a walkway, which is allowed within the front yard. Without permitting these minor encroachments into the yards, several further parking spaces would be lost. Therefore, it would be reasonable to grant the requested variances.

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