

**CONWAY ZONING BOARD  
OF ADJUSTMENT**

**MINUTES**

**DECEMBER 21, 2005**

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, December 21, 2005 beginning at 7:33 p.m. at the Conway Town Office in Center Conway, NH. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Luigi Bartolomeo; Andrew Chalmers; Jeana Hale; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

**PUBLIC HEARINGS**

A public hearing was opened at 7:33 p.m. to consider a **SPECIAL EXCEPTION** requested by **CHARLES AND NATHAN MACOMBER** in regard to Article 147.13.16.10.7 of the Conway Zoning Ordinance to allow a driveway, replacement of an existing culvert and installation of underground utilities within the wetland buffer at 480 Eaton Road, Conway (PID 279-4). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Doug Burnell of H.E. Bergeron Engineers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Burnell stated they would like to construct a new home and the driveway must cross a wetland. Mr. Burnell stated that there is an existing crossing that was constructed in the 1980's for a logging project. Mr. Burnell stated that the applicant would replace a culvert, upgrade the crossing and install underground utilities. Mr. Burnell stated that fill will not be added nor would the fill that is there be disturbed. Mr. Burnell stated that the wetland is not changing, however, when changing a culvert a wetland permit from the State is necessary.

Mr. Colbath asked if this is a 50-acre parcel, which the applicant is subdividing a three-acre parcel. Mr. Burnell answered in the affirmative. Mr. Colbath asked if this area was on the three-acre parcel. Mr. Burnell answered in the affirmative. Mr. Bartolomeo stated that this appears to be in the buffer and not the wetland itself. Mr. Burnell agreed. Mr. Bartolomeo stated in the future this should be able to be handled administratively. Mr. Irving agreed. Mr. Colbath asked if there was a verbal approval from the State. Mr. Burnell agreed and stated that it is just a formality. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use is essential to the productive use of land not in the District.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use is so located and constructed as to minimize the detrimental impact upon the wetlands.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there is no better feasible alternative, in keeping with State and Federal standards for the issuance of development permits in 404 jurisdictional wetlands.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that a site plan review approval shall not be applicable.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the forgoing findings of fact, the Special Exception pursuant to §147.13.16.10.7 of the Town of Conway Zoning Ordinance to allow a driveway, replacement of an existing culvert and installation of underground utilities within the wetland buffer be granted. Motion unanimously carried.**

**REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, to approve the Minutes of November 16, 2005 as written. Motion unanimously carried.**

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A public hearing was opened at 7:45 p.m. to consider a **VARIANCE** requested by **PMS REALTY, LLC/MEREDITH HARLEY-DAVIDSON SHOP OF CONWAY** in regard to Article 147.13.8.4 of the Conway Zoning Ordinance to allow covering the existing handicap entrance that is located within the setback at 1275 White Mountain Highway, North Conway (PID 246-15). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Amanda Jordan of Meredith Harley-Davidson Shop of Conway appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Jordan stated that there is only a small portion of the existing walkway that is within the front setback. Ms. Sherman asked if the walkway would remain the same size. Ms. Jordan answered in the affirmative. Ms. Jordan stated with the snow and ice coming off the roof the ramp becomes a hazard. Ms. Jordan stated that it would be an opened area with railings. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that an area variance is needed to enable the applicant’s proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the benefit sought by the applicant couldn't be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers that the granting of this variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that he always provides latitudes for public safety and removing the ice from the ramp is in the public interest. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the variance from §147.13.8.4 of the Town of Conway Zoning Ordinance to allow covering the existing handicap entrance that is located within the setback be granted. Motion unanimously carried.**

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A public hearing was opened at 8:00 p.m. to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **SHAWS REALTY COMPANY** in regard to Article 147.13.8.5.1 of the Conway Zoning Ordinance to allow the construction of a 62-foot tall observation tower at 1456 White Mountain Highway, North Conway (PID 246-20). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Mark Lucy of White Mountain Survey and Roger Williams, Agent for Shaw's Realty Trust, appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Lucy stated that the applicant would like an observation

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tower in the place of the existing hopper. Mr. Lucy stated that Mr. Irving has looked at the ordinance in a black and white state and his opinion is that the existing hopper is a structure since it has no roof. Mr. Lucy stated that the existing hopper exceeds the present zoning structure height limit.

Mr. Lucy stated since there is a roof on the observation tower, the town is considering it a building. Mr. Lucy stated by definition the existing hopper is a structure. Mr. Lucy stated the proposed tower is the exact same height as the hopper. Mr. Lucy stated that the applicant is suggesting replacing the existing hopper with the observation tower to compliment the overall build out of the existing Irving, former Yield house and former White Mountain Oil sites.

Mr. Chalmers asked why does the tower need to be so tall. Mr. Lucy stated that the architect wants to get the viewing public as high as possible to prevent the cutting of existing trees to obtain a view. Mr. Bartolomeo stated that the definition of a structure states that it includes buildings. Mr. Irving stated that the maximum structure height is 55 feet and the maximum building height is 45-feet. Mr. Bartolomeo asked if the observation tower did not have a roof would it fall under the structure height. Mr. Irving answered in the affirmative. Mr. Irving stated in most cases a building requires walls, but in this case it is a roof.

Mr. Colbath asked would it be acceptable if the roof was removed. Mr. Irving stated it would then be a structure. Mr. Colbath stated that they could put stairs around the existing hopper. Mr. Lucy stated that he has suggested that to the applicant. Mr. Bartolomeo stated that this is for visitors to view the scenic view. Mr. Williams stated that there would be a picnic area attached to the hopper. Mr. Bartolomeo stated the observation tower should be 45-feet rather than 62-feet.

John McClure, owner of the campground, stated they have always had a sense of privacy even though they are surrounded by retail. Mr. McClure asked if people would be looking into the campground from the tower. Mr. Williams answered in the negative and stated that the river is not visible from the top of the hopper. Mr. Williams stated that the ledge can be seen. Mr. McClure asked if they would be cutting any trees. Mr. Williams answered in the negative.

Joan McClure stated that a building holds people and 45-feet would be much more comfortable for her than the proposed 62-feet. Ms. McClure stated that it should be considered a building that will hold people. Ms. McClure stated that she thinks it would be too much. Mr. Bartolomeo asked if the roof on the existing building made the structure a building too. Mr. Irving stated that the roofed area is a building, but what is on top of the building is a structure. Ms. McClure asked if there would be lights in the building, which they would definitely be able to see it. Mr. Williams stated that he doesn't think a light would be necessary.

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**Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to grant the appeal from the Administrative Decision pursuant to Article 147.13.8.5.1. Motion was unanimously defeated.** Ms. Sherman stated that the administrative decision stands.

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A public hearing was opened at 8:21 p.m. to consider a **VARIANCE** requested by **SHAWS REALTY COMPANY** in regard to Article 147.13.8.5.1 of the Conway Zoning Ordinance to allow the construction of a 62-foot tall observation tower at 1456 White Mountain Highway, North Conway (PID 246-20). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Mark Lucy of White Mountain Survey and Roger Williams, Agent for Shaw's Realty Trust, appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Bartolomeo asked why the applicant is protecting the trees. Mr. Lucy stated that the trees could be cut. Mr. Lucy stated that the roof could be eliminated and another platform added and still be 62-feet.

Mr. Bartolomeo stated without a roof it would look like a fire tower. Mr. Bartolomeo stated that it is an interesting architectural event, but constrained by the ordinance, as the ordinance is not black or white. Mr. Colbath asked how integral is the observation tower to the rest of the project. Mr. Williams stated that it was just a fun architectural element. Ms. Sherman stated that the building height restriction was based on fire and rescue and being able to get to the habitable spaces.

Mr. Irving stated that this is an area variance not a use variance as the proposed use is permitted; if you look at the standards the application has some merit. Mr. Irving stated that the intent and purpose of the height restriction has to do with the tree canopy and the Board should look at the standards and the merits of the application. Mr. Colbath asked if the abutters could see the structure from the campground. Ms. McClure answered in the wintertime. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that they could take the roof off and add another level. Dot Seybold stated that the tower without a roof would have to be closed during inclement weather and would not be able to be used as it is intended. Ms. Sherman stated that this is an area variance and not a use variance. Mr. Chalmers stated that the viewing area is outside of the roofline. Mr. Chalmers asked if the Board is looking just at the tower or the use of the remainder of the lot. Mr. Williams stated that they could have retail space without the tower.

Mr. Bartolomeo voted in the negative and stated that there are other options. Ms. Hale voted in the negative and stated that the proposed use is retail space. Mr. Chalmers voted in the negative and stated that he concurred with Mr. Bartolomeo and Ms. Hale. Mr.

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Colbath voted in the negative. Ms. Sherman voted in the negative. **Motion was unanimously defeated.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the benefit sought by the applicant couldn't be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; Mr. Colbath stated that under the area variance the issue is the roof. Mr. Colbath stated that they could have a tower that is not functional and ugly without a roof.

Mr. Bartolomeo voted in the negative and stated that it could be achieved by some other method. Ms. Hale voted in the negative and stated that the applicant could remove the trees or construct it without the roof. Mr. Chalmers voted in the negative. Mr. Colbath voted in the negative. Ms. Sherman voted in the negative. **Motion was unanimously defeated.**

**Ms. Hale made a motion, seconded by Mr. Chalmers, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it.** Ms. Sherman asked for Board comment; there was none. **Motion was unanimously defeated.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. Mr. Bartolomeo voted in the affirmative. Ms. Hale voted in the negative and stated that there was public comment that the campground located behind the property could be impeded upon. Mr. Chalmers voted in the negative and stated that there was public comment that this would negatively impact their site. Mr. Colbath voted in the affirmative. Ms. Sherman voted in the negative and stated it was due to public comment. **Motion was defeated.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that this is a permitted use. Mr. Colbath stated that the area could not be used for a roof. Mr. Irving stated that it is the use of the area that they are seeking the area variance. Mr. Bartolomeo voted in the negative and stated that it is contrary to the spirit and intent of the ordinance. Ms. Hale voted in the negative. Mr. Chalmers voted in the negative. Mr. Colbath voted in the negative and stated that a roof is not allowed in the proposed area. Ms. Sherman voted in the negative. **Motion was unanimously defeated.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; there was none. Mr. Bartolomeo voted in the negative and stated that it was over the allowed height. Ms. Hale voted in the negative

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and stated that they had heard from the public. Mr. Chalmers voted in the negative. Mr. Colbath voted in the negative and stated that the roof cannot be there, which is unfortunate. Ms. Sherman voted in the negative and stated she is not actually sure if there is any public interest one-way or the other. **Motion unanimously defeated.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. Mr. Bartolomeo voted in the negative and stated based on all other finding of facts. Ms. Hale voted in the negative. Mr. Chalmers voted in the negative. Mr. Colbath voted in the negative and stated that the landowner is better served with a roof and the public is better served without a roof. Ms. Sherman voted in the negative. **Motion was unanimously defeated.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the variance from §147.13.8.5.1 of the Town of Conway Zoning Ordinance to allow the construction of a 62-foot tall observation tower be granted. Motion was unanimously defeated.**

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A public hearing was opened at 8:43 p.m. to consider a **VARIANCE** requested by **THE MEMORIAL HOSPITAL** in regard to Article 147.13.16.4 of the Conway Zoning Ordinance to allow the construction of a 24-foot wide parking lot access lane, utility duct bank and one parking space within the 50-foot wetland buffer at 3073 White Mountain Highway, North Conway (PID 215-61). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Jay Poulin of H.E. Bergeron Engineers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Poulin stated that the wetland in question would eventually be removed upon the construction of the bypass. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Hale, that the zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Hale, that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on this property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.c. **Mr. Colbath made a motion, seconded by Ms. Hale, that the variance would not injure the public or private property rights of others.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a, b, and c above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. Mr. Colbath made a motion, seconded by Mr. Chalmers, that the granting of this variance will not adversely affect the public interest. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the variance from §147.13.16.4 of the Town of Conway Zoning Ordinance to allow the construction of a 24-foot wide parking lot access lane, utility duct bank and one parking space within the 50-foot wetland buffer be granted. Motion unanimously carried.**

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A public hearing was opened at 8:57 p.m. to consider a **SPECIAL EXCEPTION** requested by **MARC AND KATHLEEN THEOPHELAKES** in regard to Article 147.13.1.2.4.2 of the Conway Zoning Ordinance to allow an accessory apartment at 1717 Brownfield Road, Center Conway (PID 284-7). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on December 13, 2005.

Marc Theophelakes appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Theophelakes stated that the previous owner had living space above the garage and then built the house. Mr. Theophelakes stated he purchased the property with two units. Mr. Theophelakes stated that his parents are elderly and he would like them to live above the garage. Mr. Theophelakes stated that he would like to legitimize an existing situation.

Mr. Theophelakes stated that the house was constructed approximately 25 years ago. The Board agreed that this could be a grandfathered situation, but went forward with the

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application in case enough information could not be found to determine grandfathering. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Hale, that the apartment is accessory to an owner-occupied single-family dwelling.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the apartment is no less than 300 square feet and no greater than 800 square feet and was identified as 724 square feet.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Hale, that the subject property is serviced by precinct water and has been issued a permit for construction for sewerage or waste disposal system.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Hale, that the apartment is architecturally compatibility with the neighborhood.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Hale, that sufficient parking is located on site.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Hale, that an Accessory Apartment Application was submitted for the ZBA review.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Ms. Hale, that based on the forgoing findings of fact, the Special Exception pursuant to §147.13.1.2.4.2 of the Town of Conway Zoning Ordinance to allow an accessory apartment be granted.** Mr. Irving stated that this is accessory apartment to an owner occupied home. Mr. Theophelakes agreed. **Motion unanimously carried.**

Meeting adjourned at 9:15 p.m.

Respectfully Submitted,

Holly L. Meserve  
Recording Secretary