

**CONWAY ZONING BOARD  
OF ADJUSTMENT**

**MINUTES**

**DECEMBER 5, 2007**

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, December 5, 2007 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Acting Chair, John Colbath; Luigi Bartolomeo; Andrew Chalmers; Jeana Hale; Alternate, Cynthia Briggs; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

**APPOINTMENT OF ALTERNATE MEMBER**

Mr. Colbath appointed Ms. Briggs as a voting member.

**PUBLIC HEARINGS**

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **THE ESTATE OF EUGENE HUSSEY/JUSTIN HUSSEY** in regard to §147.13.14.3.1 of the Conway Zoning Ordinance to allow to construct a meter pit and meter station and allow underground pipes and conduits within the floodway off Valley View Road, North Conway (PID 231-139.03). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Tuesday, November 20, 2007. This hearing was continued from November 28, 2007.

Shawn Bergeron of Bergeron Technical Services, John Pendleton of Dwyer, Donovan & Pendleton, Council for Pennichuck, and John Boisvert of Pennichuck appeared before the Board. Earl Sires, Town Manager, was in attendance. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Pendleton stated that they are anticipating withdrawing the application for the wells. Mr. Pendleton submitted a package to the Board. Mr. Bergeron stated the applicant is looking to construct a meter pit and station on the easterly side of the Saco River within the floodplain and floodway. Mr. Bergeron stated that the only way this would be allowed is to obtain a variance from this Board. Mr. Bergeron stated that the station is less than 100 square feet with a majority of the structure located below ground. Mr. Bergeron stated that the station meets all the applicable standards of the federal regulations for this type of structure.

Mr. Bergeron stated that the uniqueness of this situation is if this was Precinct owned we would not be here. Mr. Bergeron stated that this is similar to the structures that already exist in the floodplain or floodway, but did not have to come before this board because they are owned by the Precincts. Mr. Bartolomeo asked how high above grade the proposed structure is. Mr. Bergeron answered the building is approximately nine-feet with the footings approximately two-feet, making a total of approximately eleven feet. Mr. Colbath asked if there would be a security fence all around it. Mr. Bergeron answered in the affirmative.

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Mr. Colbath asked if the Town had any comment; Mr. Irving stated that he concurs with Mr. Bergeron that it would not be binding on a Precinct, however, the Board of Selectmen has taken a position that they would like to see the infrastructure under the ownership of some unit of local government and they suggested a condition if the application is approved. Mr. Irving read the proposed condition. Mr. Irving stated that whatever the distribution is it is to be mutually agreed between the Board of Selectmen and the Aqueduct Company. Mr. Colbath asked what if there is not an agreement. Mr. Irving stated then the approvals would not be valid. Mr. Bartolomeo stated that Mark Hounsell stated at a previous meeting that there were several privately owned water systems, so why is the town interested in this one.

Mr. Bergeron stated that the Board of Selectmen discussed this matter on October 23, 2007 and he attended the meeting of December 4, 2007 and Selectmen Webster stated that he thought it was an excellent agreement between the North Conway Water Precinct and the Board of Selectmen. Mr. Bergeron stated that the condition is a broad stroke of a brush especially when this application is only pertinent to a particular property. Mr. Bergeron asked if this request came from the Board of Selectmen.

Mr. Sires stated that the request did come from the Board of Selectmen and Selectmen Webster's comments were toward the intergovernmental and interconnection agreement and to not be involved in that agreement. Mr. Bergeron asked if the Board of Selectmen had taken a formal position to make this request to the Zoning Board of Adjustment. Mr. Sires answered in the affirmative. Ms. Briggs asked for Mr. Sires to explain the condition. Mr. Sires stated that the Board of Selectmen has gone on record that it is critical that infrastructure for future growth be owned by a municipality. Mr. Sires stated no one is saying that this is an agreement or an offer to buy the property, but an agreement on how it would be owned in the future.

Mr. Pendleton stated that his client would object to the condition being attached as he believes it is an unlawful condition. Mr. Pendleton stated that the Pittsfield Aqueduct Company has stated that they are willing to do that, but not as a condition of this approval. Mr. Pendleton stated under the statutes, the Zoning Board of Adjustment only has authority to attach reasonable conditions relative to land use and ownership is not relative to use of the property.

Mr. Pendleton stated if an approval is granted with a condition that is unlawful then the applicant could be in a situation where water mains are installed and an agreement has not been reached and there are delays getting water to Birch Hill. Mr. Pendleton stated that the applicant has committed in writing to working on a draft agreement. Mr. Pendleton stated that the goal of the project is to provide a clean water source to the residents in Birch Hill. Mr. Pendleton stated that this Board has already approved variances and special exceptions for other parcels and these are the same types of applications. Mr. Pendleton stated that the Aqueduct Company does not have a problem entering into an agreement, but concerned with problems down the road if a condition is put on the approval that is relative to ownership and not related to the use.

Mr. Bartolomeo asked if the well application is being abandoned since the interconnection was approved. Mr. Pendleton stated that the applicant knew that the Town was concerned with the wells. Mr. Irving read a portion of page 38 of "The Board of Adjustment NH; A Handbook for

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Local Officials” revised January 2005. according to the handbook. Mr. Irving stated that this use would not be regulated under the provisions of the RSA in a manner of a Precinct.

Mr. Colbath asked for public comment; Karen Umberger stated she firmly believes the application should be approved as the horror stories over the last several months justify the approval. Ms. Umberger stated that the Precinct had agreed to sell the applicant 80,000 gallons a day and in order to charge them it needs to go through a meter. Ms. Umberger stated that it appears that there is no disagreement by the applicant and they are willing to negotiate with the Town some type of agreement, so to include a condition, which would mean nothing but a delay for the people of Birch Hill, is, egregious. Ms. Umberger stated that the existing water system is living on a lick and a promise since one of the major wells is off line. Ms. Umberger stated in a situation where the quantity of water is an issue there is a need to get the water line installed.

Jim Umberger stated that he is a North Conway Water Precinct Commissioner, but he is not speaking as a Commissioner as he does not have that authority. Mr. Umberger stated that there is an iron clad agreement and he doesn't see the reason for the condition as we need to get water to the Birch Hill area as soon as possible. Mr. Umberger stated that he would urge the Board to approve the applications without conditions.

Mr. Sires stated cannot argue with the Umberger's. Mr. Sires stated that the Board of Selectmen is asking for some cooperation and looking at the bigger picture. Mr. Sires stated that the Board of Selectmen would ask that the additional incentive and leverage for both sides be added in order to come together and get it done.

Ms. Briggs stated she would be more comfortable with the Precinct receiving it and asked why the Town wants it. Mr. Sires stated there were number of discussions and the Precinct was clear that they did not want to own anything outside of their boundaries. Mr. Bergeron stated Mr. Sires looks for cooperation and leverage, but according to item number 2 in a letter from Donald Ware, President of Pennichuk, dated December 5, 2007, the company is willing to work with the Town under amicable terms. Mr. Bergeron stated that there is an agreement with the North Conway Water Precinct with appropriate restrictions so they cannot just start selling water to anyone. Mr. Sires stated what he said was leverage for both sides for something that needs to be accomplished.

Mr. Pendleton stated on behalf of the Aqueduct Company we don't want any leverage or need any leverage, we will do what we said we would do and would be working on an agreement. Mr. Pendleton stated that we don't necessarily disagree with a municipality owning the system, but we need to take care of the rate payer and there are certain things that bind us and cannot necessarily agree. Mr. Pendleton stated that there are issues that are unique that could delay getting water to Birch Hill. Mr. Pendleton stated that these are the Board of Selectmen concerns and that is why the Zoning Board of Adjustment should not be making conditions. Mr. Pendleton stated that he is confident an agreement will be reached. Mr. Pendleton stated that the Town is not looking to buy the infrastructure, but able to buy it if it makes sense for the Town in the future.

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Mr. Pendleton reviewed page 3 of the handout submitted earlier. Mr. Chalmers asked what the size of the fenced in area is. Mr. Pendleton answered less than 200 square feet. Mr. Bartolomeo stated that he could not support the condition for several reasons; one, the delay, two, he agrees with the Attorney that it is about land use and outside of our purview, three, the applicant has in writing expressed good faith for him, and four, this is an independent Board. Mr. Colbath asked if any work has begun on this project. Mr. Pendleton answered in the negative.

Mr. Colbath read item 1.a. **Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

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

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

**Mr. Bartolomeo 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath read item 2. **Ms. Hale 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath read item 3. **Ms. Hale 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Ms. Briggs, that the granting of this variance will not adversely affect the public interest.** Mr. Colbath asked for Board comment; Mr. Bartolomeo stated that it serves the public interest. **Motion unanimously carried.**

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

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**Ms. Hale made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the variance from §147.13.14.3.1 of the Conway Zoning Ordinance to construct a meter pit and meter station and allow underground pipes and conduits within the floodway to facilitate piping water to the Birch Hill Water District be granted.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

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A public hearing was opened at 8:20 pm to consider a **SPECIAL EXCEPTION** requested by **THE ESTATE OF EUGENE HUSSEY/JUSTIN HUSSEY** in regard to §147.13.14.3.4 of the Conway Zoning Ordinance to allow underground pipes and conduits within the floodway off Valley View Road, North Conway (PID 231-139.03). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Tuesday, November 20, 2007. This hearing was continued from November 28, 2007.

Shawn Bergeron of Bergeron Technical Services, John Pendleton of Dwyer, Donovan & Pendleton, Council for Pennichuck, and John Boisvert of Pennichuck appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath asked for Board comment; there was none. Mr. Colbath asked for public comment; there was none.

Mr. Colbath read item 1. **Mr. Bartolomeo made a motion, seconded by Ms. Hale, that item 1 is not applicable. Motion unanimously carried.**

Mr. Colbath read item 2. **Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, that all fill, new construction, substantial improvements and other development within the floodway shall be prohibited unless the applicant's New Hampshire registered engineer can show the activity would not result in any increase in flood hazard within the Town of Conway.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath read item 3. **Mr. Bartolomeo made a motion, seconded by Ms. Briggs, that the granting of the special exception would not violate the general spirit of the ordinance nor would it create a public health or safety hazard.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

**Ms. Hale made a motion, seconded by Mr. Bartolomeo, that based on the forgoing findings of fact, the Special Exception pursuant to §147.13.14.3.4 of the Town of Conway Zoning Ordinance to allow underground pipes and conduits within the floodway to facilitate piping water to the Birch Hill Water District be granted. Motion unanimously carried.**

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A public hearing was opened at 8:28 pm to consider a **SPECIAL EXCEPTION** requested by **THE ESTATE OF EUGENE HUSSEY/JUSTIN HUSSEY** in regard to §147.13.14.3.4 of the Conway Zoning Ordinance to allow underground pipes and conduits within the floodplain off

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West Side Road, North Conway (PID 231-147). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Tuesday, November 20, 2007. This hearing was continued from November 28, 2007.

Shawn Bergeron of Bergeron Technical Services, John Pendleton of Dwyer, Donovan & Pendleton, Council for Pennichuck, and John Boisvert of Pennichuck appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath asked for Board comment; there was none. Mr. Colbath asked for public comment; there was none.

Mr. Colbath read item 1. **Mr. Bartolomeo made a motion, seconded by Mr. Briggs, that the granting of the special exception would not violate the general spirit of the ordinance nor would it create a public health or safety hazard.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

**Ms. Hale made a motion, seconded by Mr. Bartolomeo, that based on the forgoing findings of fact, the Special Exception pursuant to §147.13.14.3.4 of the Town of Conway Zoning Ordinance to allow underground (waterline) pipes and conduits within the floodplain to facilitate piping water to the Birch Hill Water District be granted. Motion unanimously carried.**

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A public hearing was opened at 8:31 pm to consider a **VARIANCE** requested by **BRIAN AND ALYSSA HUSSEY** in regard to §147.13.14.3.1 of the Conway Zoning Ordinance to allow two wells within the floodway off West Side Road, North Conway (PID 231-106). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Tuesday, November 20, 2007. This hearing was continued from November 28, 2007.

Shawn Bergeron of Bergeron Technical Services, John Pendleton of Dwyer, Donovan & Pendleton, Council for Pennichuck, and John Boisvert of Pennichuck appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Bergeron stated that the applicant, with the letter of December 5, 2007, would like to withdraw the application without prejudice. **Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to accept the request to withdraw the application without prejudice. Motion unanimously carried.**

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A public hearing was opened at 8:35 pm to consider a **VARIANCE** requested by **DOUGLAS AND KATHRYN BURNELL** in regard to §147.13.1.4 of the Conway Zoning Ordinance to replace a 4'x8' shed with an 8'x12' shed to be five-feet from property line at 234 Hillside Avenue, Conway (PID 265-92). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Thursday, November 29, 2007.

Kathy Burnell appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Ms. Burnell stated that the adjacent lot is mostly wooded with only a

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small area in which to build on because of floodplain and they own that adjacent lot. Ms. Burnell stated there is no feasible area to meet the setback and be out of the floodplain. Ms. Briggs asked if the old building would remain. Ms. Burnell stated there are two sheds now and the new shed would replace one of the existing sheds.

Mr. Bartolomeo asked if the propane tank was being moved. Ms. Burnell stated it would be moved to be in between the two sheds. Mr. Colbath asked if the Town has any comment; Mr. Irving stated that the lot is restrictive and he does not have an issue with the request.

Mr. Colbath stated that there was no public in attendance. Mr. Colbath stated there would be some concern if the applicant did not own the abutting land. Mr. Chalmers stated that this is three times the size of the existing shed being removed. Mr. Bartolomeo stated when he first saw the application he made an opinion that he couldn't support it, but once he got into the details and saw there is no other place other than the front yard, he looked at it differently.

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

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

**Mr. Bartolomeo 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath read item 2. **Ms. Hale 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.** Mr. Colbath asked for Board comment; Mr. Bartolomeo stated that there is encroachment on a lot that someone else could potentially own. **Motion carried with Mr. Bartolomeo voting in the negative.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, 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.** Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

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

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

**Ms. Hale made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the variance from §147.13.1.4 of the Conway Zoning Ordinance to replace a 4'x8' shed with an 8'x12' shed to be five-feet from the property line be granted. Motion unanimously carried.**

**REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to approve the Minutes of October 24, 2007 as written. Motion unanimously carried.**

**Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to approve the Minutes of November 28, 2007 as written. Motion unanimously carried.**

Meeting adjourned at 8:47 pm.

Respectfully submitted,

Holly L. Meserve  
Planning Assistant