

ZONING BOARD OF ADJUSTMENT

MINUTES

MARCH 18, 2009

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, March 18, 2009 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Jeanne Hale-DeWitt; Sheila Duane; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **SPECIAL EXCEPTION** requested by **BARRY AND MICHELLE PACKARD** in regard to §147.13.1.2.4.2 of the Conway Zoning Ordinance to allow an accessory apartment at 1475 East Conway Road, Conway (PID 254-70). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, March 4, 2009.

Barry Packard appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman asked if there is a NHDES Septic Approval. Mr. Packard answered in the affirmative. Ms. Sherman asked if the structure is architecturally compatible with the neighborhood. Mr. Packard stated that the apartment would be in the basement. Ms. Sherman asked if there is sufficient parking. Mr. Packard answered in the affirmative. Ms. Sherman asked if an Accessory Apartment Application was submitted. Mr. Packard answered in the affirmative.

Ms. Sherman asked how many bedrooms the septic permit is approved for. Mr. Packard answered three bedrooms. Mr. Packard stated that the apartment is for his daughter and grandson who live in the main house now. Mr. Packard stated that it would be the same amount of people just her bedroom is moving downstairs. Mr. Chalmers asked if the Town would be looking for a second egress. Mr. Irving stated that it would go through the building permit process, but he couldn't guarantee it as the Town of Conway does not have residential ~~egress~~ **inspections**. Mr. Packard stated there is a separate egress and it is sprinkled.

Ms. Sherman asked for public comment; Donald Maihos stated that he is the President of Rivers Edge Subdivision and this is a covenant restricted area. Mr. Maihos stated that Mr. Packard lives in this area and the covenants state that you cannot have a two family house. Mr. Maihos submitted a copy of the covenants. Mr. Maihos stated that he was told by Mr. Packard that he is doing this to obtain a second address for his daughter so she can receive funding. Ms. Duane stated by adding another apartment does not give it a separate E911 address. Mr. Irving agreed.

Mr. Irving asked Mr. Packard if he was a member of the Association. Mr. Packard answered in the affirmative. Mr. Irving asked if Mr. Packard was aware of the restriction. Mr. Packard answered in the affirmative. Mr. Irving stated the Town of Conway does not enforce private covenants and restrictions. Mr. Irving stated it is between the applicant and the Association.

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Mr. Irving stated in order to protect the Town, if there is an appeal of the Board's decision, he would recommend giving the applicant and the Association time to come to an agreement or we might see some sort of litigation.

Mr. Maihos stated he was told he needed a separate address so his daughter could get funding. Mr. Packard stated that he is trying to make it legal so the Town has a record that the apartment is there. Mr. Irving stated as far as the covenants are concerned the Town does not enforce them, it is a civil matter. Mr. Maihos stated if his daughter and grandson are already living in their house he doesn't know why we're here.

Mr. Maihos stated the home could be sold as a two-family home with this approval. Mr. Maihos stated that he doesn't want to be here, but he can say it will go to court if this is granted. Mr. Maihos stated that if we let one do it we have to let the others do it. Ms. Duane stated that she understands the covenants and restrictions, but the Town has its own set of regulations. Ms. Duane stated that this is a civil issue.

Mr. Packard asked if the Association would allow, by deed, him to have a two-family, but that he could only sell as a single family home. Mr. Maihos stated that he could not speak for the Association. Mr. Maihos stated that he doesn't understand why you have to have this. Mr. Packard stated that he is just trying to give his daughter and grandson a place to live.

Ms. Sherman asked as far as were concerned is the Town going to be liable between in a civil matter between the two parties. Mr. Irving stated that he cannot answer that. Ms. Duane stated that this is a civil matter and the Board should let them deal with it. Mr. Maihos asked why the Town would recognize it is a two family house if it is for his own daughter. Mr. Maihos asked what stops him from renting the apartment. Mr. Maihos stated it is his understanding that it is so his daughter can receive aid. Ms. Duane stated his personal business should not be discussed here. Mr. Maihos stated that he has tried to explain it to him that he would have to come to this meeting; and if allowed to do it, you mind as well throw the covenants out the window. Mr. Maihos stated that he is not trying to threaten, but they will have to take action.

Ms. Sherman asked if the abutters were notified. Mr. Packard answered in the affirmative. Mr. Maihos stated that the Association did not receive notice. There was discussion regarding who was an abutter. Mr. Irving stated to the best to his knowledge and belief this application has been properly noticed. Ms. Sherman stated that this is between the two of them and not necessarily with the Town. Ms. Hale stated it will legally be a three bedroom house that would have to advertise as a two bedroom home with one bedroom apartment. Mr. Packard stated that he understood.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Duane, 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 Ms. Duane, that the apartment is no less than 300 square feet and no greater than 800 square feet.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, that the subject property is serviced by precinct water and sewer or that the New Hampshire Department of Environmental Services has 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. Duane, 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. Duane, 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. Duane, that an Accessory Apartment Application was submitted for the ZBA review.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Duane made a motion, seconded by Mr. Colbath, to a finding of fact that the issue regarding the covenants is a civil matter between the home owner and the Association and not a town matter. Motion unanimously carried.

Mr. Colbath made a motion, seconded by Ms. Duane, 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. Motion unanimously carried.

Mr. Maihos asked if the apartment has a separate entrance. Mr. Packard answered in the affirmative. Mr. Maihos asked if they had to go through the garage. Mr. Packard answered in the affirmative. Mr. Maihos stated that that Association has no other choice but to pursue this legally. Ms. Sherman stated that he has thirty days to appeal the Board's decision to this Board.

A public hearing was opened at 8:00 pm to consider a **VARIANCE** requested by **SETTLER'S R1, INC** in regard to §147.16 & §147.13.1.8.5.1 of the Conway Zoning Ordinance to allow additional ray domes to be installed on the existing wireless communication facility between the 56-foot and 64-foot height without increasing the height of the facility at 2 Common Court, Conway (PID 235-99). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, March 4, 2009.

Mr. Chalmers stepped down at this time. Shawn Bergeron of Shawn Bergeron Technical Services appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated that only four-members were present and the applicant is entitled to a five-member Board. Ms. Sherman asked if the applicant would like to proceed with four-members or continue the hearing until a five-member Board was present. Mr. Bergeron stated he would like to proceed with four-members.

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Mr. Bergeron stated we were here on May 28, 2008 to extend the existing wireless communication facility by eight feet for a total height of 64-feet and the applicant would like to be able to add additional ray domes to an existing facility at Settler's Green. Mr. Bergeron stated that these domes attach to the tower legs and are quite small. Mr. Bergeron stated we are before the Board tonight because at the May 28, 2008 meeting Mr. Colbath asked specifically what was going to be going on or in the area of the tower and Ron Frizzell indicated it was for radio equipment.

Mr. Bergeron stated that ray domes are for an extension of the wireless tower facility already on the tower. Mr. Irving stated that the literal reading of the minutes for the additional height was for the radio station to get above the tree height and for nothing more than the radio station. Ms. Duane stated that they are working with the ordinance as the intent is to prevent proliferation and to use existing facilities.

Ms. Sherman asked for public comment; there was none. Mr. Colbath stated that it is obvious that the applicant has been very responsible by being here because these could have been easily added without anyone's knowledge.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, 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. Duane, 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. Duane, 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.**

Mr. Colbath made a motion, seconded by Ms. Duane, 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 Ms. Duane, 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 Ms. Duane, 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.**

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Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, 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 Ms. Duane, 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 Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.16 and §147.13.8.5.1 of the Town of Conway Zoning Ordinance to allow additional ray domes to be installed on the existing wireless communication facility between the 56-foot and 64-foot height without increasing the height of the facility be granted. Motion unanimously carried.

A public hearing was opened at 8:14 pm to consider a **VARIANCE** requested by **REDSTONE PROPERTIES, INC** in regard to §147.13.1.11.12 of the Conway Zoning Ordinance to construct a wireless communication facility off Mountain Street, Conway (PID 245-65). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, March 4, 2009.

Mr. Chalmers rejoined the Board at this time. Jonathan Springer of Bosen & Springer and Ken Kozyra of KJK Wireless appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Springer stated the lot is a large heavily wooded site 75 acre in size and is primarily undeveloped. Mr. Springer stated that they tried to place the tower as far back from Redstone Street and Eastman Road as possible. Mr. Springer stated that the tower meets all the setbacks. Mr. Springer stated that the leased area is 100' x 100' area and the compound area is 50' x 75'.

Mr. Springer stated the only traffic once constructed is one trip a month per carrier. Mr. Springer stated that the top slot on the tower is for US Cellular and there would be four additional spots below that. Mr. Springer stated the antennas are on the top of the pole and within the compound is where the monopole will be. Mr. Springer stated that the monopole will not be lit and we can discuss color. Mr. Springer stated that they do have balloon test results. Mr. Springer stated there will be no noise, smoke or fumes. Mr. Springer stated that they don't believe there would be any drainage issues as they are taking down a minimum number of trees. Mr. Springer stated there is excellent tree cover up there.

Mr. Springer stated that a balloon test is not required by the ordinance, but there is a federal statute. Mr. Springer stated there is no impact on historical sites or wetlands. Mr. Springer stated they floated a balloon at tower height and then a crew went around and took pictures. Mr. Springer reviewed the report.

Michelle LaRue stated that the visibility map is incorrect as that area is now highly built up. Ms. LaRue stated that a more realistic map should have been used. Mr. Springer stated it's the other

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photos you need to look at not the visibility map as the visibility map just gives you locations of where the pictures were taken. Ken Kozyra stated when the balloon is flown they have to travel over all public roads within one mile of the proposed tower and take pictures from where it can be seen. Mr. Kozyra stated if there is not a picture then it could not be seen. Mr. Springer stated there are few spots that the tower can be seen to a certain degree.

Hallie Kenny asked if there is going to be no noise or lights. Mr. Springer stated there will be no noise from the Bolton Hill Road cul-de-sac. Ms. Kenny stated that it's all mountains you cannot say there will be no noise. Mr. Springer stated no one in those developments is going to hear it as it is like an air conditioner. Mr. Springer stated no one from Bolton Hill Road standing at the cul-de-sac is going to hear this compound. Mr. Chalmers asked if the backup generator might be heard. Mr. Springer stated perhaps.

Mr. Kozyra reviewed coverage maps. Mr. Kozyra stated there is a tower to be constructed in Eaton, and there are existing towers in Albany, on the top of Mt. Cranmore and in Fryeburg Maine. Mr. Kozyra stated that this tower is to fill in the gaps. Mr. Kozyra stated ultimately this will fill in all the gaps except for a small area around Lamplighters Mobile Home Park and along the river. Mr. Kozyra stated just about all other elements, except for a few minor areas, US Cellular customers can make or receive phone calls.

Mr. Springer submitted a narrative that goes through the criteria. Mr. Springer stated this is in the residential area, they have notified other municipalities, and they have made every reasonable effort to have the least possible impact. Mr. Springer stated that they originally wanted 190 feet but thought it was too high so we reduced it in height to the minimum of what we needed for coverage. Mr. Springer stated it was asked if we could be added to the tower at Settler's Green and still reach this area. Mr. Springer stated that the next spot on that tower is only 45-feet in height and it would not reach Redstone.

Mr. Irving stated the tower height is 140-feet and is 53-feet from the property line. Mr. Irving stated that there is an 83-foot differential that would affect the Thaddeus Thorne property should the tower fall. Mr. Irving asked if the Board would like to require another balloon test and a decommissioning bond. Mr. Irving stated that the area is heavily wooded, but he understands and has seen a preliminary subdivision plan for this area so there is going to be tree cutting.

Ms. Sherman asked for public comment; Elaine Desjardins asked how far up in the quarry would the tower be located. Mr. Springer reviewed plan with Ms. Desjardins and stated the tower would be about 1,800 feet from Redstone Street. Ms. Elaine Desjardins asked about radiation. Mr. Kozyra stated that it is regulated by the FCC and they hold a FCC license. Mr. Kozyra stated that the FCC requires them to meet certain electronic emission standards, which allows them a credit limit up to 100% of our limit and they typically emit 5% of what we are allowed.

Ms. Elaine Desjardins stated that Redstone is considered historical and asked if the tower was lawful. Mr. Kozyra stated they had to file with the State Historic Preservation department. Mr. Kozyra stated that is why the balloon test was conducted and the results were forwarded to the State.

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Joe LaRue asked the height of the fence around the compound as there is a considerable amount of vandalism in that area. Mr. Kozyra stated that the fence would be 6-feet in height with barb wire around the top. Mr. LaRue asked if the tower could be colored for visual impact. Mr. Kozyra answered in the affirmative and stated that it would be up to the Board. Mr. LaRue asked if as part of the balloon test if any pictures were taken from the Quarry which is a historical site. Mr. Kozyra stated the elements you see here is not the complete filing for the Historical Preservation Department. Mr. LaRue asked if alternate sites were considered. Mr. Kozyra stated they are on every available tower except the one at Settler's Green and the radio station tower in Conway.

Mr. LaRue asked why they located the tower behind the ridge line. Mr. Kozyra stated that they wanted to have height but not so high that they were over shooting the area they wanted to cover. Mr. Kozyra stated that they wanted it high enough off the ground so the signal works but not so high that it over shoots the area they want.

Ms. Sherman stated that a member of the Board has to leave which would only leave four members. Ms. Sherman asked if the applicant would like to proceed with four members or continue the hearing until a five member Board is present. Mr. Kozyra stated that they would proceed with four members. Mr. Irving stated that only having four members is not grounds for an appeal. Mr. Springer stated that he understood. Mr. Chalmers left at this time.

Nancy Desjardin asked if they planned on increasing the tower height within a few years. Mr. Springer answered in the negative and stated that it would be unlikely, but if we did decide to do that it would have to come back to the ZBA. Ms. Nancy Desjardins asked if the gate would remain at the end of Mountain Street. Mr. Kozyra answered in the affirmative. Ms. Nancy Desjardins asked the extent of the road. Mr. Kozyra stated that it would be accessible to SUV's and it is usually not plowed in the winter and accessible only by snowmobiles.

Darlene Leavitt asked for a balloon test from their homes on Bolton Hill Road and not just from the cul-de-sac. Ms. Leavitt stated that the Association maintains Bolton Hill Road and asked that they not use their road. Mr. Springer stated that they would not use Bolton Hill Road. Mr. Springer stated that they would prefer not to do another balloon test as the existing one is a good test. Mr. Kozyra stated that the leaves were off the trees for the existing balloon test so we've given the maximum exposure.

Ms. Kenny asked if the tower would affect property values. Mr. Kozyra answered in the negative. Ms. Kenny asked why they have had a change in cell phone coverage in that area. Mr. Kozyra stated in the winter you have better coverage and there is better coverage during certain times of the years depending on the amount of snow.

Mr. LaRue asked what the expected construction time is. Mr. Kozyra answered six to eight weeks. Mr. LaRue asked about utilities. Mr. Springer stated that there would be overhead utilities to the site. Mr. Irving stated that this is the first step of three significant steps. Mr. Irving stated that they need zoning approval to allow the tower, they need Planning Board approval for the site development, which would include the utilities, and then it will be reviewed

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by the Building Department. Mr. Irving stated one of our site plan requirements is for utilities to be underground which they can ask to be waived.

Ms. LaRue stated she doesn't understand why the tower at Settler's Green couldn't be raised and keep it out of the residential area. Ms. LaRue stated that she would like to see something in writing that you won't be able to hear it. Mr. Irving stated that the Town of Conway's zoning prohibits cell towers in the Commercial District and the Settler's Green tower had to be here today to be above the 55-foot structure height restriction.

Ms. LaRue stated that she would like some consideration given if there is a problem. Mr. Kozyra submitted a standard report and stated when the HVAC unit is running its approximately 23 decibels which relates to a quiet rural area at night time or an empty concert hall. Mr. Kozyra stated that you will not hear this because there are trees between you and the tower. Mr. Kozyra stated that the generator operates only when the power goes out.

Ms. Nancy Desjardins asked why they considered that side of Route 302 and not the other side by the high school. Mr. Kozyra stated being on the side of Route 302 would have actually shot over the desired coverage area.

Mr. Irving asked if the Board is going to require an additional balloon test. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that additional balloon test is not necessary based on what has been presented. Motion unanimously carried.**

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that since the visual impact of wireless communication facilities can transcend town lines, communities that may be visually affected shall be formally notified of applications for such proposed facilities as projects having regional impact. This requirement has been satisfied.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that the applicant must demonstrate that every reasonable effort has been made to cause the facility to have the least possible visual impact on the town at large, including demonstration of realistic analysis of multiple sites, the need for the proposed height, and any impact on significant roadside view points. This requirement has been satisfied.** 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. Duane, that any wireless communication facility shall be designed to accommodate multiple providers of communication services and will only be approved under the condition that the primary developer of the facility will make the facility available upon reasonable terms by lease or other legal instruments to other wireless communication services. This requirement has been satisfied.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Duane, that the Board of Adjustment may request detailed plans from the applicant and may, at the expense of the applicant, engage the services of professional consultants to review and comment on the proposal, and testimony of the applicants or their agents relating thereto. This requirement has been satisfied.** 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. Duane, that a Major Site Plan Approval must be obtained from the Planning Board.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.1.11.12 of the Town of Conway Zoning Ordinance to allow the construction of a 140- foot wireless communication facility within a 50' x 75' compound with associated equipment shelter and generator be granted with a subsequent condition of approval that a \$15,000 decommissioning bond be submitted prior to final site plan approval. Motion unanimously carried.

Ms. Sherman reviewed the appeal process.


REVIEW AND ACCEPTANCE OF MINUTES

Ms. Duane made a motion, seconded by Ms. Hale-DeWitt, to approve the Minutes of January 21, 2009 as written. Motion carried with Mr. Colbath abstaining from voting.

Ms. Duane made a motion, seconded by Ms. Hale-DeWitt, to approve the Minutes of February 18, 2009 as written. Motion carried with Ms. Sherman abstaining from voting.

Meeting adjourned at 9:30 pm.

Respectfully Submitted,



Holly L. Meserve
Planning Assistant