

ZONING BOARD OF ADJUSTMENT

MINUTES

SEPTEMBER 16, 2009

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, September 16, 2009 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Vice Chair, John Colbath; Andrew Chalmers; Jeana DeWitt; Sheila Duane; Alternate, Martha Tobin; Alternate, Dana Hysten; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBERS

Mr. Colbath appointed Ms. Tobin and Mr. Hysten as voting members.

OTHER BUSINESS

Robert Schor/Marni Madnick – Motion for rehearing in regard to Peter Rattay/Stonehurst Manor (PID 202-182 & 186): Ms. Duane and Mr. Colbath stepped down at this time. Ms. DeWitt took over as Chair. Mr. Irving explained that there are two reasons to grant a rehearing; a technical error or new information that is available now that was not available at the hearing.

Mr. Chalmers made motion, seconded by Mr. Hysten, to grant the rehearing regarding Peter Rattay and the Stonehurst Manor. Mr. Malia stated that a Motion for Rehearing has to be made public at a public meeting, but does not warrant a public hearing. Mr. Malia stated that the Board could hear from Dr. Madnick, Mr. Schor or their council if the Board would like, but you don't have to.

Mr. Malia stated that the information submitted by Mr. Schor and Dr. Madnick is more alleged evidence than new evidence. Ms. Tobin asked about technical errors. Mr. Malia stated that there are several technical errors in their argument, but they have to come here before going to Court. Mr. Malia stated that this is a chance for the ZBA to correct any errors before it goes to Court. Mr. Malia stated if you think you made a mistake then you can correct them, but if you don't think you made any errors then you should deny the Motion for Rehearing. **Motion unanimously defeated.**

PUBLIC HEARINGS

A public hearing was opened at 7:45 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **ANDREW CHALMERS IN REGARD TO JOHN DONOVAN** in regard to §147.14.2.2 of the Conway Zoning Ordinance to that the building permit to John Donovan was issued in error at 72 Kennett Street, Conway (PID 277-153). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, August 7, 2009. This hearing was continued from August 19, 2009.

Mr. Colbath and Ms. Duane rejoined the Board at this time. Mr. Chalmers stepped down at this time. Andrew Chalmers appeared before the Board. John Donovan and Randy Cooper of Cooper Cargill Chant, Attorney for John Donovan; Peter Malia, Town Council; and David Pandora, Building Inspector, were in attendance.

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Mr. Colbath stated the Board continued the hearing because Mr. Donovan's lawyer asked for a dismissal based on the fact that the appeal was not submitted within 30 days. Mr. Colbath stated that the Board asked that the Town Council be present to assist with the dismissal request. Mr. Malia stated that the first question to decide is if the Board can hear this appeal. Mr. Malia stated that the appeal was not filed in a timely manner as it is to be submitted within 30 days and this appeal was not submitted within 30 days.

Mr. Malia stated the applicant was aware of the permit on June 15, 2009 and the appeal was not submitted within 30 days of that date. Mr. Malia stated that he does not think this Board has the right to hear this case. Mr. Malia stated if this Board's Rules of Procedures had a provision that gave you the flexibility to waive the Rules of Procedures then you could do that, but the Rules of Procedures don't have that provision in it. Mr. Malia stated without that provision you have a strict 30 day time period for an appeal to be filed, but this was not filed within the 30 day time period. Mr. Malia stated that the Supreme Court has said permit holders also have to have some comfort that the appeal period has expired.

Mr. Colbath asked if the clock for us would start on June 15, 2009. Mr. Malia answered in the affirmative. Mr. Colbath stated that the appeal should have been submitted in within those 30 days. Mr. Malia agreed. Ms. Tobin asked if the Board could make a motion tonight to have that jurisdiction. Mr. Malia answered in the negative and stated there is a public hearing process in which to change the Rules of Procedures.

Mr. Chalmers asked what constitutes notice. Mr. Malia stated under the Rules of Procedures and RSA 676:5 the 30 day time period would have started in April, but don't think that is fair, because he didn't know until June 15th. Mr. Chalmers asked what would be considered due notice to the Town. Mr. Malia answered the actual filing of the appeal to meet the deadline. Mr. Chalmers stated that he was exhausting all Town remedies during those 30-days. Mr. Malia stated that one should pursue all avenues of relief before going to Court so as not to prematurely file a lawsuit in Court. Mr. Malia asked Mr. Chalmers if he feels he was exhausting his Town remedies through this process. Mr. Chalmers agreed and stated that he worked with the Zoning Administrator and the Town Manager and an appeal wasn't suggested by the Town Manager until day 31.

Mr. Chalmers referenced *Haufman vs. Gilford* which covered the time frame, specifically the 30 day time limit. Mr. Chalmers read a portion of that decision. Mr. Chalmers stated that it is clearly saying it is the Town's responsibility and the first time he had heard of the 30 day time frame was from Mr. Cooper. Mr. Chalmers stated that he has sat on this Board for several years and was embarrassed that he did not know the regulation. Mr. Chalmers stated that it is the Town's responsibility to help both sides. Mr. Chalmers stated that he sat down with Mr. Irving and he did not mention a 30-day requirement. Mr. Chalmers stated it was 12-days before that he was notified of the 30-days.

Mr. Malia stated the communication with the Town muddies the water a bit and suggests that the Town failed to notify him that he had 30 days. Mr. Malia stated in 2008 *Kelsey v. Hanover* [157 N.H. 632] addressed how far the Town has to go with assistance. Mr. Malia stated if this were to go to Court the Judge would probably find that the Town Officials did not have a duty to educate Mr. Chalmers on the process.

Mr. Malia referred to *Daniel v. B & J Realty* [N.H. 174] and stated unless the ZBA gives itself authority to waive their Rules and Procedures, the Board is without power to consider appeals not timely filed.

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Mr. Colbath stated that the Board needs to decide whether we have jurisdiction to hear this or not. **Ms. DeWitt made a motion, seconded by Ms. Duane, that the Conway ZBA has jurisdiction over this appeal.** Ms. DeWitt stated that she agrees with Mr. Malia that the waters are muddy as Mr. Chalmers was talking to Town Officials and he wasn't told the process, but she has contacted Town Hall before to ask what the process is instead of waiting to be told the process. Mr. Hylen stated there is a difference between assist and educate, assisting him with what he was asking, even with questions to Town Staff, doesn't seem to matter in this case as Staff wasn't really required to educate him.

Mr. Cooper stated if majority vote yes to the motion then you're saying you're ignoring Mr. Malia's advice and going to go on the merits of the case. Mr. Colbath agreed. Mr. Cooper stated in your file there is correspondence with Mr. Chalmers dated June 15th, but he didn't file his appeal until July 17th. Mr. Cooper stated that this Board doesn't have the right to hear the appeal as the 30-days has passed. Mr. Cooper stated actual notice trumps constructive notice. Mr. Colbath stated we don't have Administrative Rules to allow us to go beyond 30 days. **Motion unanimously defeated.**

Mr. Colbath asked if the Board needs a motion to dismiss. Mr. Malia answered in the negative. Mr. Colbath asked if Mr. Chalmers has 30 days to appeal this decision. Mr. Malia answered in the negative. Mr. Chalmers stated that it is his understanding that he would have to appeal to the Courts.

A public hearing was opened at 8:22 pm to consider a **VARIANCE** requested by **GANOE, LLC/JOESPH PETERSON** in regard to §147.13.6.5 of the Conway Zoning Ordinance to allow a second egress door and 8' x 12' porch within the setback [changed to 4' x 4' landing with appropriate stairs] at 59 East Main Street, Conway (PID 265-27). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 4, 2009.

Mr. Chalmers rejoined the Board at this time. Mr. Hylen remained the voting member for this application. Joseph Peterson appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Peterson stated that they would like to construct a second egress from their apartment at the hotel. Mr. Peterson stated that this would be in the alley way at the back of the hotel where there is an 8' foot fence on the property line. Mr. Peterson stated that they only have one egress which is through the front lobby and would like to add one from the bedroom with a porch out the back.

Mr. Irving stated that he discussed with the Building Inspector that a minimum landing for an egress would be 4' x 4'. Mr. Irving stated that the Board needs to consider if the larger landing is necessary. Ms. Tobin asked if 4' x 4' was large enough for fire fighters and their equipment. Mr. Peterson stated that they don't have any privacy at the hotel and this is the only place that they could go. Mr. Peterson stated that there is an 8-foot fence on the property line and this is where they could sit and have a grill without everybody there.

Mr. Chalmers asked if this has been required by the Fire Chief and the Building Inspector. Mr. Peterson stated that we started thinking of a second egress when we realized if there was a fire in the lobby we couldn't get out. Mr. Peterson stated that the windows are roll out windows. Mr. Peterson stated that they are asking for extra space for their own enjoyment.

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Mr. Hylen stated it is a really small area back there and the fence is right up next to it; it seems contrary to the intent of the setback. Mr. Peterson stated that the abutters garage is up against the fence. Mr. Colbath asked for public comment; there was none. Ms. Duane asked what is there now. Mr. Peterson stated that it is tarred. Ms. Duane stated that they could remove the tar and replace with patio blocks. Mr. Irving asked if the Fire Chief approved the reduction in width behind the building. Mr. Pandora stated that he is not sure if the Fire Chief is aware. There was a brief discussion regarding egress windows, Fire Chief Approval and the Life Safety Code.

Mr. Colbath read item 1.a. **Ms. Duane 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.** Mr. Colbath asked for Board comment; Mr. Chalmers stated that he can still use the property without having a deck in the setback. Ms. DeWitt stated that there are other ways to accomplish the same thing. Mr. Colbath stated he feels the life safety issues are important in a multi-unit building. **Motion carried with Mr. Hylen, Ms. Duane and Mr. Colbath voting in the affirmative and Mr. Chalmers and Ms. DeWitt voting in the negative.**

Mr. Colbath read item 1.b. **Ms. Duane made a motion, seconded by Mr. Chalmers, 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; Mr. Chalmers stated that the goal is indeed life safety, but the Life Safety Code and the Building Code do not require a landing, a door and a set of stairs. Mr. Colbath stated that the applicant could put in a patio. **Motion defeated with Mr. Chalmers, Ms. Duane, Ms. DeWitt and Mr. Hylen voting in the negative and Mr. Colbath voting in the affirmative.**

Ms. Duane 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 defeated with Mr. Hylen, Ms. Duane, Mr. Chalmers and Ms. DeWitt voting in the negative and Mr. Colbath voting in the affirmative.**

Mr. Colbath read item 2. **Ms. Duane 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. Chalmers stated if the abutters thought there would be a diminution in value of their properties they would be in attendance, however, by the same token the Town has adopted setbacks and it is important to uphold the ordinance. Ms. DeWitt stated that it is not going to have an adverse effect on abutting properties as the garage is right there. Ms. DeWitt stated if someone is not going to purchase the abutting property it is going to be because there is a hotel next door, not because of the deck. **Motion carried with Mr. Hylen, Ms. DeWitt and Mr. Colbath voting in the affirmative and Mr. Chalmers and Ms. Duane voting in the negative.**

Mr. Colbath read item 3. **Ms. Duane 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; Mr. Hylen stated that he thinks that this is directly contrary to the spirit and intent of the ordinance. Mr. Hylen stated that the reason for setbacks is so this type of thing does not happen. Mr. Hylen stated that the buildings are already close together. **Motion defeated with Mr. Hylen, Ms. Duane and Mr. Chalmers voting in the negative and Ms. DeWitt and Mr. Colbath voting in the affirmative.**

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Mr. Colbath read item 4. **Ms. Duane made a motion, seconded by Ms. DeWitt, that the granting of this variance will not be contrary the public interest.** Mr. Colbath asked for Board comment; Mr. Hylen stated if this was granted with these buildings already close together it wouldn't say much for our Zoning regulations. Mr. Hylen stated that granting this variance would go against the public interest. Ms. DeWitt stated that the public interest is cautious of the safety aspect of this and she thinks they should be able to have a second egress. Mr. Chalmers stated that a second egress doesn't require a door and a landing. Mr. Colbath stated that he is always torn on the public ones as there is no public in attendance, but the public also has faith in us to take their interest into consideration. Mr. Hylen stated that he thinks the public would question why we allowed these two properties to get even closer. **Motion defeated with Mr. Hylen, Ms. Duane and Mr. Chalmers voting in the negative and Ms. DeWitt and Mr. Colbath voting in the affirmative.**

Mr. Colbath read item 5. **Ms. Duane made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done.** Mr. Colbath asked for Board comment; Ms. DeWitt stated that he is concerned with the proposed size of the deck. **Motion defeated with Mr. Hylen, Ms. Duane, Mr. Chalmers and Ms. DeWitt voting in the negative and Mr. Colbath voting in the affirmative.**

The Board and the applicant had a brief discussion regarding reducing the size of the landing. **Ms. DeWitt made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.13.6.5 of the Town of Conway Zoning Ordinance to allow a second egress door and 4' x 4' landing and appropriate stairs within the setback be granted. Motion unanimously carried.**

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Chalmers made a motion, seconded by Mr. Hylen, to approve the Minutes of August 19, 2009 as written. Motion carried with Ms. Duane abstaining from voting.

Meeting adjourned at 8:40 pm.

Respectfully Submitted,



Holly L. Meserve
Planning Assistant