

ZONING BOARD OF ADJUSTMENT

MINUTES

MARCH 20, 2013

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, March 20, 2013 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Luigi Bartolomeo; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **HANCOCK WHITE MOUNTAIN LLC** in regard to §147.13.7.6.14.2 of the Conway Zoning Ordinance **to request that the ZBA find that the sign incentive applies to this property** at 2451 White Mountain Highway, North Conway (PID 219-228). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013.

Shawn Bergeron of Bergeron Technical Services appeared before the Board. James Yeager, Code Enforcement Officer, was in attendance. Ms. Sherman read the application and the applicable section of the ordinance.

Mr. Chalmers stated that he worked for Mr. Bergeron, but does not think there is an issue. Ms. Sherman stated that there were only four members present and asked if the applicant would like to proceed with four members or continue the hearing until there is a five-member Board. Mr. Bergeron stated that he would like to proceed with four members and he did not feel Mr. Chalmers's decision would be tainted. Mr. Irving stated that the applicant will not be able to appeal the decision based on only having four members. Mr. Bergeron agreed.

Mr. Yeager stated the existing sign is approximately 30 square feet and they would like a 70 square foot sign. Ms. Sherman stated they were denied based upon frontage and asked what the frontage along White Mountain Highway is. Mr. Yeager answered approximately 180-feet.

Mr. Bergeron stated they applied for an increase of the square footage of the freestanding sign, it was denied and the letter of denial referred to §147.13.7.3 frontage, which must have access rights. Mr. Bergeron stated that this lot of land has 180-feet of frontage on White Mountain Highway, 233-feet of frontage on Depot Road and 218-feet of frontage on the North-South Road. Mr. Bergeron stated that the question becomes the right of access.

Mr. Bergeron stated that the section referenced in the denial letter is the amount of frontage required to create a new parcel. Mr. Bergeron stated the ordinance references frontage 42 times and this is the only section in which addressed what is considered qualified frontage.

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Mr. Bergeron stated the incentive under §147.13.7.6.14.2 does not indicate a qualifier and the ordinance does not have a definition of frontage. Mr. Bergeron stated that the qualifier is not in a definition, it is in the section when creating a new lot. Mr. Bergeron stated there is nothing in the sign incentive that says frontage qualifier it just says you have to have frontage.

Mr. Bartolomeo stated he thinks Mr. Bergeron makes a good point as he could not find the language that was used to deny the permit. Mr. Bartolomeo stated that it appears where it does show up is germane to the creation of a new lot, not in the freestanding sign ordinance. Mr. Chalmers asked the common definition of frontage. Mr. Bergeron submitted a definition from Merriam-Webster Dictionary. Mr. Chalmers stated frontage would be front of the building or what the building has direct access to. Mr. Bergeron stated the common definition doesn't consider access.

Mr. Bartolomeo asked if they were proposing to move the sign to Depot Road. Mr. Bergeron stated it would be enlarged in its present location; the ordinance doesn't indicate what street as it is the accumulative total. Mr. Yeager stated Mr. Bergeron is adding the three sides to get the frontage. Mr. Yeager stated in most instances you would have a front, two sides and back, but he is calling it all front and adding them together. Mr. Bergeron stated the permit was denied based on access not length of frontage.

Mr. Irving stated we look at the ordinance as a whole. Mr. Irving read §147.5. Mr. Irving stated in this particular case, the term frontage shows up in many places, but there is this stipulation on frontage in there. Mr. Irving stated that Mr. Bergeron says he has frontage on 3 sides of the lot, the Town's position is frontage is where you have access. Mr. Irving stated there was an agreement signed by the previous owner that released rights of access to Depot Road. Mr. Irving stated that the Town's position is that the qualified frontage is that along White Mountain Highway; the applicant is requesting along Depot Road.

Mr. Bergeron stated during the last few weeks, Mr. Irving has brought to his attention an agreement that was signed in 2001, but never recorded, and now is trying to be recorded by the Town. Mr. Bergeron stated that this agreement is not referenced on any legal document. Mr. Bergeron referred to page 3, Article 11 of this document that states they don't have rights, but Article 10 grants us right to access.

Mr. Bartolomeo stated the agreement allows for access in Article 10. Ms. Sherman stated if approved and that would be up to the Board of Selectmen. Mr. Bartolomeo stated regarding accumulative, §147.13.7.6.14.2 indicates "a", singular; doesn't say adding up to your advantage. Ms. Sherman stated there is a discrepancy on the application as the frontage indicates 244.5' and Mr. Yeager is stating there is 180-feet on White Mountain Highway.

Mr. Irving stated the usual and customary definition of frontage is usually that which has access. Mr. Irving read "lot frontage" from the Zoning Development and Planning Terms booklet. Mr. Bergeron asked the Board to do a finding of fact on the amount of frontage this lot has.

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Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to the finding of fact that the frontage involved in this lot is that which exists on White Mountain Highway where the access is. Motion defeated with Mr. Colbath, Mr. Chalmers and Mr. Bartolomeo voting in the negative and Ms. Sherman voting in the affirmative.

Ms. Sherman asked for public comment; there was none.

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to grant the Appeal from Administrative Decision. Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that he does not agree with adding up all of the frontage. **Motion defeated with Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Colbath and Mr. Chalmers voting in the affirmative.**

A public hearing was opened at 8:07 pm to consider a **VARIANCE** requested by **HANCOCK WHITE MOUNTAIN LLC** in regard to §147.13.7.6.14.2 of the Conway Zoning Ordinance **to allow the sign incentive to apply to this property** at 2451 White Mountain Highway, North Conway (PID 219-228). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013.

Shawn Bergeron of Bergeron Technical Services appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated that there were only four members present and asked if the applicant would like to proceed with four members or continue the hearing until there is a five-member Board. Mr. Bergeron asked that the application be continued until there is a full board.

Mr. Colbath made a motion, seconded by Mr. Chalmers, to continue the variance requested by Hancock White Mountain LLC until April 17, 2013 at 7:05 pm. Motion unanimously carried.

A public hearing was opened at 8:10 pm to consider a **VARIANCE** requested by **ANGELL FAMILY TRUST OF 2011** in regard to §147.14.4.2 of the Conway Zoning Ordinance **to allow the lot to become more non-conforming** at 226 Beechnut Drive, North Conway (PID 232-15). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013.

Seth Burnell of H.E. Bergeron Engineers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated that there were only four members present and asked if the applicant would like to proceed with four members or continue the hearing until there is a five-member Board. Mr. Burnell agreed to proceed with four members. Ms. Sherman stated that the applicant will not be able to appeal the decision based on only having four members. Mr. Burnell agreed.

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Mr. Burnell stated the original subdivision had the property lines at an angle to the street and the slope of the land is running in the opposite direction of the property lines. Mr. Burnell stated that the property corners were never marked in the first place. Mr. Burnell stated that the subdivision was created in 1973 and then sold to another developer in 1978. Mr. Burnell stated that both lots were constructed around 1978; lot 14 has been through 6 different owners and no one has ever questioned or cared where the boundaries were.

Mr. Burnell stated in 2003 HEB did a survey on lot 15 and uncovered some of these encroachments. Mr. Burnell stated in 2010 lot 15 was trying to sell and wanted the boundary marked; it was discovered that the leach field is almost completely on the other lot and the sale fell through. Mr. Burnell stated that the Angell's purchased the property to try to clean this up.

Mr. Burnell stated that this area is not subject to the ½ acre requirement because it is a privately owned water system, but receives water from North Conway Water Precinct. Mr. Burnell stated in 2010 the Town went with State soil suitability calculations. Mr. Burnell stated that the State allows a community water system as a factor in reducing the lot size as a well radius is not required, but the Town only allows the reduction if it is on a municipal system, not a privately owned system. Mr. Burnell stated that the spirit of the ordinance is not in conflict; they are simply trying to resolve an issue.

Mr. Bartolomeo asked what is the existing size of lot 15 and what will it be reduced to. Mr. Burnell answered it is .70 of an acre and would like to be reduced to .60 of an acre. Mr. Bartolomeo stated it is an assumption by the owner that the property line was a 90-degree line. Mr. Burnell stated that is a good assumption. Mr. Irving stated would be difficult to say that they all assumed that; plus the septic designs knew the relative alignment of the property lines, but doesn't mean the installer followed the plan. Mr. Bartolomeo asked about a septic easement. Mr. Burnell stated there are also the retaining wall and the shed.

Mr. Chalmers asked if there is anything to prevent having the leach field on its own lot of record. Mr. Irving stated he is not sure. Mr. Chalmers stated there could be a septic easement with the requirement that when the leach field fails it is to be constructed on its own lot of record. Mr. Bartolomeo stated a septic easement is a way to resolve this without the variance. It was determined that the house is a legally existing, grandfathered structure, the rock wall does not need to meet the setbacks and the shed can be moved.

Ms. Sherman asked for public comment; there was no public in attendance.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Chalmers stated reducing the lot makes it more non-conforming. **Motion defeated with Mr. Chalmers and Mr. Bartolomeo voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

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Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; Mr. Chalmers stated that the spirit and intent of the ordinance is clear; it is to become more in conformance with the ordinance and this does not make it closer to conformance. **Motion defeated with Mr. Chalmers and Mr. Bartolomeo voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Chalmers voting in the negative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Chalmers voting in the negative.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that 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.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that the applicant has been presented with alternatives to a variance; so this can be resolved by other means. **Motion defeated with Mr. Chalmers and Mr. Bartolomeo voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Ms. Sherman asked for Board comment; there was none. **Motion defeated with Mr. Colbath, Mr. Chalmers and Mr. Bartolomeo voting in the negative and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that if the criteria in subparagraph a are not established, an unnecessary hardship will be deemed to exist, 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.** Ms. Sherman asked for Board comment; Mr. Chalmers stated that the property can be reasonably used and there are ways to resolve this without a variance, therefore, there is no hardship. **Motion defeated with Mr. Chalmers and Mr. Bartolomeo voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

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Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the variance from §147.14.4.2 of the Town of Conway Zoning Ordinance to allow the lot to be more non-conforming be granted. Motion defeated with Mr. Colbath, Mr. Chalmers and Mr. Bartolomeo voting in the negative and Ms. Sherman voting in the affirmative.

A public hearing was opened at 8:50 pm to consider a **VARIANCE** requested by **ANGELL FAMILY TRUST OF 2011** in regard to §147.13.1.2.3 of the Conway Zoning Ordinance to **allow the lot to become more non-conforming** at 226 Beechnut Drive, North Conway (PID 232-15). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013.

Seth Burnell of H.E. Bergeron Engineers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated that there were only four members present and asked if the applicant would like to proceed with four members or continue the hearing until there is a five-member Board. Mr. Burnell asked that the application be continued until there is a full board.

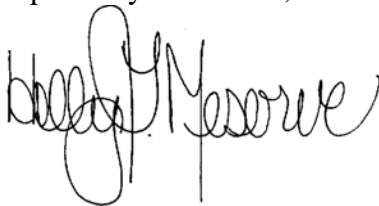
Mr. Colbath made a motion, seconded by Mr. Chalmers, to continue the variance requested by Angell Family Trust of 2011 until April 17, 2013 at 7:10 pm. Motion unanimously carried.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Bartolomeo made a motion, seconded by Mr. Colbath, to approve the Minutes of February 20, 2012 as written. Motion unanimously carried.

Meeting adjourned at 8:53 pm.

Respectfully Submitted,



Holly L. Meserve,
Recording Secretary