

ZONING BOARD OF ADJUSTMENT

MINUTES

NOVEMBER 20, 2013

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, November 20, 2013 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; Dana Hylen; Luigi Bartolomeo; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve. David Pandora, Building Inspector, was in attendance.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **MELVIN BATCHELDER** in regards to §147.14.2.2.4 and §147.14.2.2.5 of the Conway Zoning **Ordinance to allow a three-dimensional expansion by adding a second story to the existing two-dimensional footprint within the Floodplain Conservation Overlay District** at 27 C Road, Conway (PID 251-115). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, October 4, 2013. This hearing was continued from October 16, 2013.

Melvin Batchelder and Wes Smith of Thaddeus Thorne Surveys appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Smith stated that the existing footprint was there and a second story was added; when told he couldn't do that he stopped immediately and then the flood happened. Mr. Smith stated that he was approved to keep the existing structure without a second floor and a mobile home with a covered porch. Mr. Smith stated there was an exterior stairway that the applicant has enclosed; he did this to get to the fire place without going outside.

Mr. Smith stated that he has received a NHDES septic approval. Mr. Smith stated the applicant would like to remove 320 square feet in the mobile home and covered porch in order to keep the 140 square foot vertical addition that is out of the floodplain.

Mr. Bartolomeo stated that the one story portion of the building exists and he's seeking relief to allow the second story to remain. Mr. Smith answered in the affirmative. Mr. Bartolomeo asked if the applicant was willing to trade the mobile home and porch for the second story. Mr. Smith answered in the affirmative. There was a brief discussion regarding what existed prior to a fire in 2008. Mr. Smith stated that the applicant replaced exactly what existed prior to the fire with the exception of the second floor and enclosing an exterior staircase.

Ms. Sherman asked when the original house was built. Mr. Chalmers stated that the tax card indicates 1978. Mr. Bartolomeo asked if FEMA has any problem with this. Mr. Irving stated that this is in the floodplain. Mr. Chalmers stated there is no expansion of the footprint. Mr. Smith stated there was a vertical expansion, not a horizontal expansion. Mr. Pandora stated that he does not believe there was any expansion of the footprint; it was a vertical expansion only. Ms. Sherman asked for public comment; there was none.

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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; there was none. **Motion carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.**

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

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Mr. Hylen stated that he thinks he and Mr. Chalmers are on the same page and everyone else is on a different page. Ms. Sherman stated that the fact that it is not encroaching any more into the floodplain is why it is not an issue to her. Mr. Bartolomeo stated unless the flood waters get higher, he doesn't see this effecting volume. Mr. Chalmers stated that we need to enforce our regulations in order to keep the flood insurance for the Town.

Mr. Bartolomeo stated that it is a better solution for the stairs. Ms. Sherman stated that the applicant is also removing a mobile home and covered porch. Mr. Colbath stated that he agrees with the removal of the mobile home, plus the expansion is going up. Mr. Hylen stated that he agrees that this is not going to increase the flood volumes; however, he is looking at the technical substantial justice and what we have dealt with over the past year. **Motion carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Hylen, 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; there was none. **Motion carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Bartolomeo, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Hylen voted in the negative.**

Mr. Colbath made a motion, seconded by Mr. Hylen, 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 carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.**

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Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Hylen, that item 5.b is not necessary. Motion unanimously carried.**

Ms. Sherman read item 6. **Mr. Bartolomeo made a motion, seconded by Mr. Hylen, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated because this is above the existing structure he doesn't see how it is adding to the flood heights; unless the water is higher than the structure. Mr. Colbath stated that part of the approval should be a condition to remove the mobile home and the covered porch. **Motion carried with Mr. Bartolomeo, Mr. Hylen, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers voting in the negative.**

Mr. Colbath made a motion, seconded by Mr. Hylen, that item 7 is not necessary. Motion unanimously carried.

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Bartolomeo, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Hylen voting in the negative.**

Mr. Colbath made a motion, seconded by Mr. Hylen, that, based on the forgoing findings of fact, the variance from §147.14.2.2.4 and §147.14.2.2.5 of the Town of Conway Zoning Ordinance to allow a three-dimensional expansion by adding a second story to the existing two-dimensional footprint within the Floodplain Conservation Overlay District be granted with the condition that the applicant remove the mobile home and covered porch. Motion carried with Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Hylen voting in the negative.

A public hearing was opened at 8:00 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **RED BARN SC, LLC/NORTH CONWAY MUSIC CENTER** in regards to §147.14.3.2 of the Conway Zoning Ordinance **to change a single-sided, twenty-four square foot non-conforming roof sign to a double-sided sign on a roof** at 1976 White Mountain Highway, North Conway (PID 235-34). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, November 8, 2013.

Brian Charles of the North Conway Music Store appeared before the Board. Jim Yeager was in attendance. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Charles stated that he would like to take the sign and turn it so people can see it. Mr. Bartolomeo stated that by turning the sign it would become a double sided sign. Mr. Yeager stated there was nothing in the ordinance to allow a grandfathered roof sign to become a projecting sign, which is only allowed in lieu of a freestanding sign; and there are two freestanding signs on this site already.

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Mr. Charles stated that this is not in lieu of another sign, this is a permitted sign. Mr. Bartolomeo stated it is the classification; if you turn the sign, it becomes a projecting sign not a roof sign. Mr. Bartolomeo stated what he wants to do is not unreasonable, but is not allowed by the ordinance.

Mr. Chalmers stated that the request is for an appeal from administrative decision, so asking to overturn Mr. Yeager's decision. Mr. Chalmers stated he thinks it would be better served as a variance. Mr. Charles stated that he was lead to believe this is what I should do, but want to do it technically correct. Mr. Chalmers asked if he asked his landlord for signage on the freestanding sign. Mr. Charles stated he was allowed us to take over what was there.

Ms. Sherman stated that the Board has to make a determination if the Code Enforcement Officer was correct or not; may want to apply for a variance. Ms. Sherman asked for public comment; there was none. Mr. Bartolomeo stated by turning the sign it makes it a projecting sign which is only allowed in lieu of a freestanding and this site already had two freestanding signs.

Mr. Colbath made a motion, seconded by Mr. Chalmers, to grant the appeal from administrative decision and overturn the administrative decision. Motion unanimously defeated. Ms. Sherman stated that the Code Enforcement Officer correctly interpreted the ordinance.

A public hearing was opened at 8:16 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **FRED AND DIANE SOMERS** in regards to §147.13.1.4 of the Conway Zoning Ordinance **to allow a garage to remain within the side setback** at 30 Bow Lane, North Conway (PID 216-41). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, November 8, 2013.

Fred Somers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Irving submitted letters from Robert and Cheryl Arena and Jerry DeCristofaro to the Board and the applicant. Mr. Somers stated the garage was built in 2001. Mr. Somers stated that he spoke to the contractor, showed him the front and rear property markers and asked him to build the garage from the setback line towards the house. Mr. Somers stated that he received a violation letter from the Town in 2012; he did not know there was an issue until receiving that letter.

Mr. Somers stated other than removing the garage or taking a piece of it off, he is not sure what can be done; it has been there for 12 years. Mr. Bartolomeo asked if there was a building permit. Mr. Somers answered in the affirmative. Mr. Bartolomeo asked if he filled out the application. Mr. Somers stated he is not sure.

Mr. Bartolomeo asked if the driveway was on the neighbor's property. Mr. Somers stated after the garage was built the pavement went over the line, but has since been cut off. Mr. Irving stated relative to setback on the permit it states by the building inspector that setbacks must be verified. Mr. Irving stated that the Town of Conway does not do residential building inspections.

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Mr. Chalmers stated there was a concern regarding setbacks as he wanted it checked. Mr. Somers stated he offered to pay the neighbor for the land that the driveway was on, but they refused. Ms. Sherman stated that these lots are undersized and probably would not qualify for a boundary line adjustment.

Mr. Somers stated that he marked his own trees, not his neighbors and he did not indicate the type of tree his neighbor could plant their own property. Ms. Sherman asked if a contractor constructed his garage. Mr. Somers answered in the affirmative. Ms. Sherman stated that the contractor is responsible for the error. Mr. Somers stated in retrospect he should have had the property surveyed. Mr. Bartolomeo asked what the second floor of the garage was being used for. Mr. Somers stated it was a workshop; he started to finish it, but there is no water. Mr. Somers stated that he would like to make it an apartment at some time, but right now it is just a semi-finished area.

Mr. Chalmers stated that this violation is 11 years old. Mr. Somers stated that he heard about it last year and it was constructed in 2001. Mr. Somers stated in 2010 and 2011 the water company had a faulty shut off which ended up flooding his basement. Mr. Somers stated that the water company had to dig up the neighbor's land in order to fix their pipes. Mr. Somers stated that he did not dig up their land.

Ms. Sherman asked for public comment; Cheryl Arena stated that they purchased their lot in 2003 and at that time he knew his garage was out of code. Ms. Arena stated over the next eight years we didn't know what we were going to do; he has accused us of being liars regarding the trees and the paint on the trees. Ms. Arena stated it is important that the rules are followed; they bought into a family neighborhood not a two-family neighborhood. Ms. Arena stated that there is very little land, and in the case of a fire, it is such a large workshop, it is very close to our house and it takes away our privacy. Ms. Arena stated all she sees is a big white wall. Ms. Arena stated that on the original permit the setbacks were to be verified. Ms. Arena stated everything in her letter is to the best of her recollection and true.

Peter Leonard stated that he was the builder for the Arena's. Mr. Leonard stated when we were laying out the site they kept the house centered on the property so there would be good space on each side of the house. Mr. Leonard stated that he received a call from the Arena's because his pavement had come onto their property. Mr. Leonard stated that he went over to speak with Mr. Somers and he was not willing to cut it out. Mr. Leonard stated that they hired Thaddeus Thorne surveys to confirm where the property line was and hired Burney Quint to take a saw and cut exactly on that line and mulch it. Mr. Leonard stated that was in 2009; they had to take on the responsibility of removing what he had put on their property.

Mr. Irving asked Mr. Leonard in 2009 was he aware of the encroachment of the garage. Mr. Leonard stated that it certainly looked it. Mr. Irving asked if he told Mr. Somers. Ms. Arena stated she did and when she contacted the Town she was told they should work it out themselves.

Joy Emerson stated if everyone followed the rules everything would be okay. Mr. Somers stated he first heard about the violation a year ago in 2012. Mr. Somers stated that he disagrees with the comments in the letter.

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Bob Arena asked if the Board received a letter from Jerry DeCristofaro, he is concerned as well. Ms. Sherman answered in the affirmative. Mr. Bartolomeo asked if they were aware of the encroachment when they purchased the property. Ms. Arena answered in the negative and stated that they only thought it was the pavement.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.** 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. Hylen, that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.**

Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that it was not an outcome of ignorance, but a failure to inquire when the building permit clearly stated to verify the setbacks. Mr. Bartolomeo stated that there is no room for error in interpretation. **Motion defeated with Mr. Bartolomeo, Mr. Chalmers and Mr. Hylen 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. Hylen, that in lieu of the findings required by the board under subparagraphs 1 and 2 (above), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.**

Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that the neighbor did go to the Town, but was told try to work it out with the neighbor first and the applicant did not receive a notice of violation within 10 years. Mr. Chalmers stated that the building permit was issued in 2001 and the violation was issued in September 2012. Mr. Chalmers asked if they noticed him about the garage at the time of the driveway encroachment. Mr. Leonard stated he was trying to put out one fire. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.** Ms. Sherman asked for Board comment; Mr. Chalmers stated that an abutter has testified that it does diminish their property. Mr. Colbath stated that it was strongly indicated that it is a nuisance. **Motion unanimously defeated.**

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Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Hylen, that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Bartolomeo, Mr. Hylen and Ms. Sherman voting in the affirmative and Mr. Chalmers and Mr. Colbath voting in the affirmative.**

Mr. Colbath made a motion, seconded by Mr. Hylen, that, based on the forgoing findings of fact, the equitable waiver from §147.13.1.4 of the Town of Conway Zoning Ordinance to allow a garage to remain within the side setback be granted. Motion defeated with Mr. Bartolomeo, Mr. Chalmers, Mr. Hylen and Mr. Colbath voting in the negative and Ms. Sherman voting in the affirmative.

A public hearing was opened at 8:55 pm to consider a **VARIANCE** requested by **SHAWN AND REBEKAH EDWARDS** in regards to §147.14.4.2 of the Conway Zoning Ordinance **to add an acre of land to a non-conforming lot** at 414 Eaton Road, Conway (PID 276-93.2). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, November 8, 2013.

Ron Briggs of Briggs Land Surveying appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Briggs stated that he had submitted an application for a boundary line adjustment to the Planning Board, but returned because one of the lots was non-conforming and cannot change a non-conforming lot unless it is made to be more conforming. Mr. Briggs stated that this lot does not have road frontage and cannot have road frontage. Mr. Briggs stated that the addition of the acre would not make any of the lots more non-conforming.

Ms. Sherman asked how the lot is accessed. Mr. Briggs answered from an existing right-of-way over a gravel driveway. Ms. Sherman asked how wide the existing right-of-way is. Mr. Briggs stated that it is just a right to travel over the gravel driveway; it is roughly 12 feet. Ms. Sherman asked if there was any way of making it 50-feet. Mr. Irving stated it would have to be larger than that and would have to be constructed to town road standards to be qualified frontage. There was no public in attendance.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the variance will not be contrary to the public interest.** 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. Hylen, that the spirit of the ordinance is observed.** 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 Mr. Hylen, that substantial justice is done.** 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. Hylen, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Hylen, 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; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Mr. Hylen, 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. Hylen, 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 unanimously carried.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Hylen, that item 5.b is not necessary.** **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Hylen, that, based on the forgoing findings of fact, the variance from §147.14.4.2 of the Town of Conway Zoning Ordinance to add an acre of land to a non-conforming lot be granted. **Motion unanimously carried.**

REVIEW AND ACCEPTANCE OF MINUTES

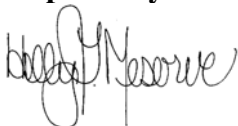
Mr. Colbath made a motion, seconded by Mr. Hylen, to approve the Minutes of October 16, 2013 as written. **Motion unanimously carried.**

ZONING BOARD OF ADJUSTMENT DATES AND SUBMITTAL DEADLINES

Mr. Colbath made a motion, seconded by Mr. Chalmers, to approve the Zoning Board of Adjustment Dates and Submittal Deadlines for 2014. **Motion unanimously carried.**

Meeting adjourned at 9:20 pm.

Respectfully Submitted,



Holly L. Meserve
Recording Secretary