

ZONING BOARD OF ADJUSTMENT

MINUTES

APRIL 17, 2019

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, April 17, 2019 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; Steven Steiner; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **WILLIAM AND LINDA BARTON** in regards to §190-20.B.(5)(c) of the Conway Zoning Ordinance to allow a foundation and steps to encroach within the front and side setbacks at 93 Garmish Road, Conway (PID 299-90). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, April 5, 2019.

William Barton appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Barton stated this was discovered after it was completely constructed, when he had an as-built done for the septic system. Mr. Barton stated when they measured for the foundation, he thought he was 25-feet from the side property line, and on the front, he went from the center of the street because one of the corner boundaries was in question. Mr. Barton stated he believes that is where the mistake was made; it was not malicious.

Mr. Colbath asked for Board comment; Mr. Bartolomeo asked if he is the contractor. Mr. Barton answered in the affirmative. Mr. Bartolomeo asked how did this happen. Mr. Barton stated he measured it with the excavation contractor, but after it was dug for the foundation maybe it wasn't measured correctly for the foundation forms. Mr. Barton stated he assumed they measured correctly, as he did not go back to measure it at that point and he should have.

Mr. Colbath stated that this whole lot is buildable so it could have been back further. Mr. Barton agreed and stated when they measured it out, they thought they were well out of the setbacks. Mr. Chalmers asked if they had located any of the boundary markers. Mr. Barton stated they found three of them, it was the right front corner that was in question. Mr. Barton stated there was nothing to be gained, if he knew it then he could have done something about it.

Mr. Bartolomeo stated how do you go from thinking you are 25-feet from the side property line to having a setback encroachment. Mr. Barton stated the excavator digs the footings and then has to re-stake the foundation. Mr. Barton stated he did not check when it was re-staked and he should have. Mr. Chalmers asked Mr. Barton if he is a General Contractor. Mr. Barton answered in the affirmative. Mr. Bartolomeo stated this whole lot is buildable, yet it is crowding this one corner; this didn't need to happen.

Adopted: June 19, 2019 – As Written

CONWAY ZONING BOARD OF ADJUSTMENT – APRIL 17, 2019

Mr. Bartolomeo stated you did not know this until Ron Briggs surveyed the property for an as-built of the septic system. Mr. Barton answered in the affirmative. Mr. Bartolomeo asked if Mr. Briggs suggested the equitable waiver. Mr. Barton answered in the affirmative. Mr. Colbath stated there is a note on the plan that states the steps are being moved to be conforming. Mr. Barton stated they could be if we had to, but it is a safety issue with snow and rain hitting the steps all year round.

Mr. Steiner asked if any abutters have contacted the Town regarding this application. Mr. Irving answered in the negative. Mr. Irving stated he believes that Mr. Barton is indicating if the equitable waiver fails, he would relocate the stairs. Mr. Steiner stated the corner of the house is still encroaching. Mr. Bartolomeo asked if the Board could require the stairs to be moved, but accept the corner of the house. Mr. Barton stated there is a safety issue with the stairs.

Mr. Irving asked if the entrance were moved to the opposite side of the house how would that effect the kitchen. Mr. Barton stated they would go into a bedroom; the current location is the only location for the stairs.

Mr. Colbath asked for public comment; Barry Conley stated he and his wife Jennifer live in Maine and have wanted to move here; they fell in love with the house and it is unfortunate about the setbacks. Mr. Conley asked that the Board approve the application rather than requiring it to be reconstructed; they probably wouldn't purchase if the stairs have to be moved. Mr. Conley stated it is not encroaching on any of the neighbors. Mr. Bartolomeo asked if the stairs could hug against the house. Mr. Barton stated they could but it would change the whole roof line, and he would like to keep the rain and snow of the stairs.

Mr. Chalmers asked what is on the rear of the house. Mr. Barton stated the lower level has a slider. Mr. Colbath asked Mr. Barton how many houses have you built. Mr. Barton answered about 18 homes in the area. Mr. Colbath stated he has built a few houses, is this the first time with this issue. Mr. Barton answered in the affirmative.

Mr. Chalmers stated it is not a tight lot so it is hard to fathom that it is this far off. Mr. Barton stated he always tries to go extra on the setback; it was a mistake, he is guilty of it, and it is nothing he had done before. Mr. Barton stated he had nothing to gain at all from this. Mr. Bartolomeo stated it is not that the area volume is huge, or that there is a room full of cranky abutters, but there is a higher level of standard expected from contractors. Mr. Barton agreed. Mr. Chalmers asked if the building inspector came out. Mr. Barton answered in the affirmative. Mr. Barton stated this will never happen again; he will have a land surveyor place a stake from now on.

Mr. Bartolomeo asked if the stairs hugged close to the house, he could approve the foundation; that would at least reduce the encroachment. Mr. Chalmers agreed with Mr. Bartolomeo. Mr. Irving suggested that the Board go through the finding of facts based on what was requested, if the Board finds that one is not satisfied then they could consider whether or not to amend the application. Mr. Colbath closed the public hearing at 7:28 pm.

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

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 3 is not applicable.** Motion carried unanimously.

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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.** Mr. Colbath asked for Board comment; Mr. Bartolomeo stated the cost of moving the stairs is a minor cost. **Motion carried with Mr. Steiner, Ms. Sherman and Mr. Colbath voting in the affirmative and Mr. Bartolomeo and Mr. Chalmers voting in the negative.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the equitable waiver from §190-13.D of the Town of Conway Zoning Ordinance to allow a foundation and steps to encroach within the front and side setbacks be granted. Motion carried unanimously.

A public hearing was opened at 7:32 pm to consider a **SPECIAL EXCEPTION** requested by **ADVENTURE & ENTERTAINMENT PROPERTIES, LLC** in regards to §190-26.B.(1)(f) of the Conway Zoning Ordinance **to allow the installation of fill in the Floodplain Conservation Overlay District to raise an area above the floodplain** at 1550 White Mountain Highway, North Conway (PID 246-22). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, April 5, 2019.

Adopted: June 19, 2019 – As Written

CONWAY ZONING BOARD OF ADJUSTMENT – APRIL 17, 2019

Seth Burnell and Dan Lucchetti of HEB Engineers appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Burnell stated the property is located in the Highway Commercial District and is overlaid almost entirely by the Floodplain Conservation Overlay District. Mr. Burnell stated the current use of the property is a commercial campground. Mr. Burnell gave an overview of the previously granted zoning approvals. Mr. Burnell stated construction has been completed on 25 of the approved 89 sites; there is on-going construction of the remaining 89 campsites and associated infrastructure.

Mr. Burnell stated the intent of this hearing is to revise some site topography to raise a portion of the property above the 100-year floodplain elevation; and the purpose of that is to move it from the Floodplain Conservation Overlay District and that will support the post infrastructure. Mr. Burnell stated the other purpose is to obtain a revised variance. Mr. Burnell stated we are speaking of all three applications together, but knows they will be voted on separately.

Mr. Irving stated in the past the Board has granted several special exceptions to expand the campground by campsites; the Board has also granted either special exceptions or variances to reconstruct the pool, the patio and the utility building. Mr. Irving stated the intent of this is that the pool, patio and utility building will, if it is granted and the fill is placed, no longer be in the Floodplain Conservation Overlay District, so that the permit granted before would be rendered moot. Mr. Burnell stated the patio and utility building would no longer be in the floodplain, but the pool would still be in the floodplain to a lesser extent than the current pool.

Mr. Burnell reviewed a letter dated March 27, 2019 from Joshua McAllister in regards to the criteria for §190-26.B.(1)(f). Mr. Colbath asked for Board comment; Ms. Sherman asked how is the floodplain going to be protected. Mr. Chalmers stated this is not going to impact downstream if there is a flood. Mr. Lucchetti stated during the construction we are required by the Alteration of Terrain permit to have temporary and permanent erosion control measures in place. Mr. Lucchetti stated the end product would be vegetated slopes, there is no riprap proposed; it is mainly vegetated surfaces. Mr. Lucchetti stated there are some retaining walls for an embankment to hold up fill in that area.

Mr. Chalmers asked if HEB would be overseeing this so if we did have a flood event while this is under construction somebody is paying attention to what is going on. Mr. Burnell stated they do that as a company, it is definitely something they would be keeping tabs on. Mr. Colbath stated there is a letter from the Fish and Wildlife Service, and asked if they were required to apply to assure there were no protected species. Mr. Burnell answered in the affirmative, and stated it was required by FEMA.

Mr. Colbath asked if this would be required to go before the Planning Board. Mr. Irving answered in the affirmative. Mr. Colbath asked for public comment; there was no public in attendance.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that all development and substantial improvements shall comply with the minimum standards of the regulations of the National Flood Insurance Program contained in 44 CFR 60.3 and 44 CFR 60.6 (Code of Federal Regulations), as amended.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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; Ms. Sherman stated she does not believe there is any concern with the floodway. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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 carried unanimously.**

Mr. Colbath made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the Special Exception pursuant to §190-26.B.(1)(f) of the Town of Conway Zoning Ordinance to allow the installation of fill in the Floodplain Conservation Overlay District to raise an area above the floodplain be granted. Motion carried unanimously.

A public hearing was opened at 7:57 pm to consider a **SPECIAL EXCEPTION** requested by **ADVENTURE & ENTERTAINMENT PROPERTIES, LLC** in regards to §190-26.B.(1)(d) of the Conway Zoning Ordinance **to allow the installation of a paved drive and utilities to access the raised portion of the property** at 1550 White Mountain Highway, North Conway (PID 246-22). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, April 5, 2019.

Seth Burnell and Dan Lucchetti of HEB Engineers appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Colbath asked for Board comment; Ms. Sherman asked how much different is this from the plan that was submitted before. Mr. Burnell stated it is very similar to all the previous plans. Mr. Lucchetti stated there will be an additional branch of sewer, water and electrical that would feed the building. Ms. Sherman asked what about the paving. Mr. Lucchetti stated it is once again an extension to another layer of the campsites that was approved; this is for approval of the road to service the campsites and now there will be another one that comes in just below it to the campsites that were approved.

Mr. Burnell reviewed a letter dated March 27, 2019 from Joshua McAllister in regards to the criteria for §190-26.B.(1)(d). Mr. Colbath asked for public comment; there was no public in attendance.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that all development and substantial improvements shall comply with the minimum standards of the regulations of the National Flood Insurance Program contained in 44 CFR 60.3 and 44 CFR 60.6 (Code of Federal Regulations), as amended.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 2 is not applicable.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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 carried unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the Special Exception pursuant to §190-26.B.(1)(d) of the Town of Conway Zoning Ordinance to allow the installation of a paved drive and utilities to access the raised portion of the property be granted. Motion carried unanimously.

A public hearing was opened at 8:04 pm to consider a **VARIANCE** requested by **ADVENTURE & ENTERTAINMENT PROPERTIES, LLC** in regards to §190 – Attachment 2, Permitted Use Table of the Conway Zoning Ordinance **to expand and relocate the previously approved ADA accessible pool, associated concrete pad, and associated concrete walkways** at 1550 White Mountain Highway, North Conway (PID 246-22). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, April 5, 2019.

Seth Burnell and Dan Lucchetti of HEB Engineers appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Colbath asked for Board comment; Mr. Bartolomeo asked how big is the proposed pool compared to the previously approved pool. Mr. Burnell stated compared to the previously approved pool it is 4,000 square feet less that is applicable to the variance. Mr. Burnell stated we have taken some of that infrastructure that was approved under the previous variance, the buildings, walkways, pool and patio area, that was located within the floodplain, and have now raised some of that infrastructure out of the floodplain with the special exceptions. Mr. Burnell stated we are seeking a variance for just the pool to remain within the Floodplain Conservation Overlay District.

Ms. Sherman asked if it was in the same location. Mr. Lucchetti reviewed the previously approved pool and what is currently being proposed. Mr. Bartolomeo asked if it is still an ADA accessible pool. Mr. Burnell answered in the affirmative. Mr. Bartolomeo asked if the pool is still in the Floodplain Conservation Overlay District because of the depth. Mr. Burnell answered in the affirmative. Mr. Lucchetti stated the proposed pool is at a higher elevation than the existing pool and the pool that was previously approved through a variance.

Adopted: June 19, 2019 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – APRIL 17, 2019

Mr. Lucchetti stated it is not possible to balance the cut and fills on the site to raise the entire pool out of the floodplain or else we would be in groundwater. Mr. Lucchetti stated where we did the balance of the cut and fill, we are about a foot above the groundwater table.

Mr. Lucchetti stated the area of the existing pool is being lowered to create a depressed playground. Mr. Bartolomeo asked if the bottom on the pool is below the water table. Mr. Lucchetti stated he does not know the depth of the pool. Mr. Bartolomeo asked if the bottom of the pool is below the water table wouldn't hydrostatic pressure pop the whole thing out of the ground like a cork. Mr. Irving stated if it was empty.

Mr. Burnell stated the proposed pool is going to be in an area of fill, so it is not being placed right on the ground that currently exists; it is in an area that is being filled, the situation is being improved. Mr. Bartolomeo asked all of it. Mr. Burnell answered in the affirmative. Mr. Burnell stated it is an improvement over the current pool, as it is higher than the current pool which is flush with the natural ground. Mr. Irving asked how much fill is being located at the location of the pool. Mr. Lucchetti answered the depth of fill at its greatest is two-feet.

Mr. Irving asked is the bottom of the pool going to be above groundwater. Mr. Burnell stated we have a proposed elevation of the pool at 458. Mr. Burnell stated we don't know the depth of the pool exactly, but he would doubt they are digging a 10-foot pool. Mr. Burnell stated we have a proposed pool elevation of 458, and the playground is being lowered to a little under 454, the lowest part is still above groundwater.

Mr. Irving asked how do they plan to winterize the pool, is there going to be water or anything in the pool during the winter months or is it designed to fill prior to becoming buoyant. Mr. Burnell stated it certainly would fill eventually. Mr. Irving stated what they are proposing now is safer and better than what is already approved. Mr. Burnell agreed. Mr. Irving stated it is a question he will ask again during the site plan review process; will the pool be encroaching into groundwater and is there going to be compensatory storage within the pool to avoid it from becoming buoyant.

Mr. Colbath asked for public comment; there was no public in attendance.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that substantial justice is done.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

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

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Steiner, 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.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

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

Mr. Chalmers made a motion, seconded by Mr. Steiner, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5.b. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 5.b. is not applicable.** **Motion carried unanimously.**

Mr. Colbath read item 6. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 7. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 7 is not applicable to this application.** **Motion carried unanimously.**

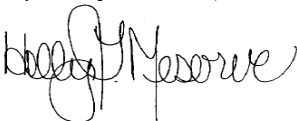
Mr. Colbath read item 8. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the variance is necessary, considering the flood hazard, to afford relief.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the variance from §190 Attachment 2, Permitted Use Table of the Town of Conway Zoning Ordinance to expand and relocate the previously approved ADA accessible pool, associated concrete pad, and associated concrete walkways be granted. **Motion carried unanimously.**

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, to approve the minutes of March 20, 2019 as written. **Motion carried with Ms. Sherman abstaining from voting.**

Meeting adjourned at 8:11 pm.
Respectfully Submitted,



Holly L. Meserve, Planning Assistant