

ZONING BOARD OF ADJUSTMENT

MINUTES

SEPTEMBER 15, 2021

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, September 15, 2021 at the Conway Town Office, 23 Main Street, in Conway, NH, beginning at 7:00 pm. Those present were: Chair, John Colbath; Vice Chair, Andrew Chalmers; Luigi Bartolomeo; Richard Pierce; Town Engineer, Paul DegliAngeli; and Planning Assistant, Holly Whitelaw. Alternate, Jac Cuddy was in attendance.

APPOINTMENT OF ALTERNATE MEMBER

Mr. Colbath appointed Mr. Cuddy as a voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **STEVEN AND ANITA CHENEY REVOCABLE TRUSTS** [FILE #21-31] in regards to §190-13.B.(3) of the Conway Zoning Ordinance to **appeal the Administrative Decision that the commercial multi-unit storage building is considered a unit for density** at 77 Old West Side Road, North Conway (PID 216-13). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 3, 2021.

Andy Fisher of Ammonoosuc Survey Company and Steve Cheney appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Fisher stated they approached the town last winter with this project to see what the potential hurdles were to have the project approved. Mr. Fisher stated Tom Irving [former Planning Director] indicated that the project did not meet the zoning ordinance due to the district, and it was suggested that we apply for a zoning permit, with the assumption that it would be denied, but then they could apply to the ZBA. Mr. Fisher stated the zoning permit was denied because it was not a permitted use in the district; this Board granted the variance.

Mr. Fisher stated we left here feeling we had satisfied the zoning requirements and could move to site plan review. Mr. Fisher stated two motion for rehearing's were submitted by abutters, and both appeals were denied. Mr. Fisher stated after the variance was granted, they waited 60 days before applying for site plan review. Mr. Fisher stated we applied for site plan review in June and were denied based upon lot sizing; this came as a surprise to us as it never came up before in any discussions with the Town.

Mr. Fisher stated Will Haskell [the Town's Planning Consultant] did the initial review and determined that the proposed new use is considered a unit. Mr. Fisher stated he thinks of a unit as residential with septic loading. Mr. Fisher stated we looked at the lot sizing; the lot sizing they were operating with was based upon a previous survey by Thorne Surveys for the previous site

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plan and subdivision for the residential units. Mr. Fisher stated since lot sizing was not what they were thinking about there was no obvious reason to look into the way the prior surveyors came up with the lot size.

Mr. Fisher stated this property abuts Old West Road and new West Side Road. Mr. Fisher stated there was discussion as to types of rights-of-ways that those roads utilize; rights-of-way can be by easement or by fee title. Mr. Fisher stated some state roads are owned by the state, the title for the land under the rights-of-way is sometimes owned by the state. Mr. Fisher stated we were not sure the status of both roads, so in our discussion it was asked what if we find that this parcel owns the land underneath the rights-of-way to the centerline of the rights-of-way. Mr. Fisher stated if we did own to the center line of those rights-of-way then the lot size increases by a full acre and we would be well-above the lot size requirement.

Mr. Fisher stated we did some research; we asked the State to do some research and the result was that neither the Town of Conway or the State of New Hampshire has any evidence they own that land under either of those rights-of-ways. Mr. Fisher stated we believe this lot extends to the centerline of those rights-of-ways; therefore, we believe we now meet the lot sizing requirement.

Mr. Fisher stated we were then given a letter dated July 30th [in file]. Mr. Fisher stated the Town concurred that the lot does extend to the centerline of the right-of-way, however, this land cannot be used because of subdivision regulation §130-33 as that land cannot be counted for density. Mr. Fisher stated §130-33 is part of the subdivision regulations, not the zoning ordinance. Mr. Fisher stated we find that we meet the zoning ordinance requirement and it seems the Town agrees that the lot size is what we find it to be, which is almost seven acres and we need six acres. Mr. Fisher stated we were told this is the way the Town sees it and we need to go to the ZBA.

Mr. Fisher stated we are appealing an administrative decision, but he feels they have already met the zoning requirement. Mr. Fisher stated the zoning ordinance cited was 190-13.B.(3); all other lots shall have at least one acre for each unit that may be located thereon. Mr. Fisher read the definition of lot and lot, minimum size. Mr. Fisher stated we should have been able to avoid the appeal simply by the conversation that it was denied because the original application did not show the full lot area. Mr. Fisher stated once we did our own lot sizing research, we determined the lot is 6.93 acres, which satisfies the zoning ordinance.

Mr. Bartolomeo asked if §130-33 is a subdivision regulation. Mr. DegliAngeli answered in the affirmative and stated we don't duplicate our definitions. Mr. DegliAngeli stated we contracted out our ordinance maintenance to Ecode and one of the first things they did was eliminate duplicity. Mr. DegliAngeli stated we don't dispute the rights-of-way in the way roads are laid out and owned in the State of New Hampshire. Mr. DegliAngeli stated none of the town roads or the state roads are owned in fee title; they are all easements for viatic purposes. Mr. DegliAngeli stated we don't dispute that; however, we have never used beyond the right-of-way in a lot size calculation.

Mr. Pierce stated being a developer for 40 years, density is fairly common knowledge; he runs into it all the time and it cannot be used in calculations. Mr. Chalmers stated it is common, but it should have been addressed if it was something the Town was concerned about. Mr. Pierce stated there is always something coming up, that is the process; not everybody gets everything the first time.

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Mr. Chalmers stated there is a term for that, it is called Municipal estoppel. Mr. Bartolomeo stated he agrees that the commercial use is one unit relative to density; and it is going to be difficult for him to go against the right-of-way shall not be considered as part of the adjacent lot when determining minimum lot sizing even though it is not in the zoning ordinance. Mr. Bartolomeo stated he is going to accept the answer of duplication of definitions.

Mr. Colbath asked for public comment; Nancy Stewart who lives on the corner of West Side Road and Cathedral Ledge Road stated at the last ZBA meeting she was shocked with what went on when the Zoning Board turned around and said you can build anything you want on your land; she was shocked with Mr. Bartolomeo and Mr. Chalmers on that comment. Mr. Bartolomeo stated that was an unwise comment on his part and has regretted it ever since; he apologizes for it.

Ms. Stewart stated when Mr. Cheney built the units it was 5.6-acres and asked if that is part of the land where he wants to build the storage facility. Mr. DegliAngeli answered in the affirmative. Ms. Stewart stated if you need five for the units how can you use that land twice.

Richard Osada of 22 Old West Road stated he held a real estate license in three states and he has never seen anyone use an easement on a city road as part of their property; that easement is there for public use, and not to be used as part of their property. Mr. Osada stated he doesn't understand why the original variance was granted.

Lorig Basmajian of Forest Park Way stated the Town of Conway zoning ordinance requires one acre per unit; Mr. Cheney owns 5.63 acres and has built 5 units on a 5.63 acres lot he would only have a 0.63-acre lot to build on. Ms. Basmajian stated according to the ordinance there is not room for another building and he should not be granted a variance even though he doesn't need water or sewer. Mr. Colbath stated the Board is currently addressing the appeal from administrative decision.

Ms. Basmajian stated this is very rural and wedged between two state parks, and a lot of people have moved there because it is rural. Ms. Basmajian stated the wholesale building now owned by Smithfield has no commercial activity whatsoever at that building. Mr. Colbath stated he believes they may be using it for storage, which would be commercial.

David Walker of 301 West Side Road stated he attended the May 21st meeting and at no time does he remember anyone admitting commercial use of his property, and he was challenging it on the foundation that it was residential. Mr. Walker stated he is an abutter and he was thinking of suing, but he didn't have the money. Mr. Walker stated if this is a density issue, is it not up to the buyer to be aware of the requirements for the product he is going to buy. Mr. Walker stated so if a builder is going to build on a unit, isn't it his responsibility to know the requirements of that zone; how many acres he needs per unit. Mr. Walker stated ignorance of the law is no excuse; he has developed other properties in the area for years, he would imagine he would know the density requirements.

Mr. Osada asked if a commercial unit is 12-unit storage facility, and that is approved, what is to stop him from building 24 or 48 units because that is one commercial unit. Mr. Colbath closed public comment at 7:57 pm.

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Mr. Fisher stated the lot does extend legally to the centerline of the rights-of-way of Old West Side Road and West Side Road. Mr. Fisher stated the zoning ordinance states all other lots shall have at least one-acre; it does not talk about what is usable land meaning wetlands or steep slopes. Mr. Fisher stated in his reading of the regulation it does not make any distinction as to the character of the land.

Mr. Cuddy made a motion, seconded by Mr. Bartolomeo, to uphold the administrative decision based on 190-13.B.(3). Motion carried unanimously.

A public hearing was opened at 8:14 pm to consider a **VARIANCE** requested by **STEVEN AND ANITA CHENEY REVOCABLE TRUSTS** [FILE #21-32] in regards to §190-13.B.(3) of the Conway Zoning Ordinance **to allow the construction of a commercial multi-unit storage building on an undersized lot** at 77 Old West Side Road, North Conway (PID 216-13). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 3, 2021.

Andy Fisher of Ammonoosuc Survey Company and Steve Cheney appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Fisher stated the information presented during the first part carries over, covering both the zoning/subdivision definitions based on lot sizing and density. Mr. Fisher stated we found that the actual lot size of roughly 6.93 acres which is well over the six acres that would be required. Mr. Fisher stated the storage facility has no water or sewer and has no impact in the sense of density in lot loading. Mr. Fisher stated the use has been approved, we believe that the spirit of the ordinance would be met taking into account there is no impact because there is no sewer to be dealt with.

Mr. Fisher stated this board graciously granted the previous variance to allow this use and we would respectfully ask the Board to grant this variance. Mr. Fisher stated we believe there is an abundance of land. Mr. Fisher stated we believe the Board already understood what the project was intended to be and approved the variance.

Mr. Colbath asked for Board comment; Mr. Bartolomeo stated based on the way the first application went, Mr. Fisher should let go of the 6.9 acres; that is not how it was interpreted. Mr. Bartolomeo stated as this lady [Ms. Basmajian] indicated 5.63-acres, meaning there is only a shortfall of 0.37 of an acre.

Mr. Chalmers stated if you were to take the road out of the equation what is the actual number of acres that are available. Mr. Fisher stated if you discount the areas under the rights-of-way, it is 5.6-acres.

Mr. Cuddy stated looking at the previous process, he didn't see a hardship; looking at this current process the Town has created a hardship for the applicant.

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Mr. Cuddy asked for public comment; Richard Osada stated he still questions the use of an easement as property; we have an easement on the property in front of us for a driveway, without that easement we would not have access to a road. Mr. Osada stated we are not taxed on that property, we don't own that property; we have the right to drive through it, but it belongs to Smithfield.

David Walker asked for an explanation on the process. Mr. Colbath reviewed the process for hearing a variance. Mr. DegliAngeli stated the Board is focusing on a variance for the sixth unit because they are short by four-tenths of an acre. Mr. Colbath closed public comment at 8:30 pm.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; Mr. Pierce stated it is very contrary to public interest; lot density was created to protect everyone around them and it is our job to look after that. **Motion carried with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; Mr. Pierce stated the ordinance is there to protect everyone and this does not. **Motion carried with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that substantial justice is done.** Mr. Colbath asked for Board comment; Mr. Bartolomeo stated given the fact that we had an applicant come to the Town in good faith jump through the hoops and received a variance, he thinks it would be a gross injustice not to take that into consideration especially with an approval last time. Mr. Cuddy stated he believes an injustice has been done. Mr. Pierce stated not knowing the laws is no defense. Mr. Colbath stated substantial justice lies greater with the public here. **Motion carried with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment; Mr. Chalmers stated this is a unique property bordered by two state parks and several commercial buildings directly across the street and a commercial general contractor on the northern end of that abutting property. Mr. Chalmers stated based on the amount of traffic calculations that the trip generation for that storage unit is going to create, he doesn't see it diminishing anyone's property.

Mr. Cuddy stated there are architectural guidelines that dictate what can be built; values are not going to diminish. Mr. Pierce stated he would see them as being diminished; zoning was created to separate residential and commercial for a reason. Mr. Pierce stated that is what people buy into these communities for; for that umbrella of protection. Mr. Pierce stated he would not want to live there. **Motion carried with Mr. Cuddy, Mr. Chalmers, Mr. Bartolomeo and Mr. Colbath voting in the affirmative and Mr. Pierce voting in the negative.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, 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; Mr. Pierce stated the rules are the rules. Mr. Pierce stated you need a certain amount of acreage for whatever you want to do; we all have to live by them.

Mr. Bartolomeo stated possibly a special condition here is that this property has already received a variance from this Board to proceed with this project. Mr. Colbath stated he doesn't think there are any special conditions of the property that distinguish it from other properties in the area. **Motion carried with Mr. Bartolomeo, Mr. Chalmers and Mr. Cuddy voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

Mr. Colbath read item 5.a.ii. **Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that the proposed use is a reasonable use.** Mr. Colbath asked for Board comment; Mr. Pierce stated it is not a reasonable use; it is a commercial operation in a residential zone. Mr. DegliAngeli stated they are available to rent by the tenants; garages seem to be a reasonable use. Mr. Colbath stated it is not a reasonable use considering it is overuse of the acreage. **Motion carried with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, 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 with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.**

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

Mr. Chalmers made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the variance from §190-13.B.(3) of the Town of Conway Zoning Ordinance to allow the construction of a commercial multi-unit storage building on an undersized lot be granted. Motion carried with Mr. Cuddy, Mr. Chalmers and Mr. Bartolomeo voting in the affirmative and Mr. Pierce and Mr. Colbath voting in the negative.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to approve the Minutes of August 18, 2021 as written. Motion carried with Mr. Cuddy abstaining from voting.

Meeting adjourned at 8:01 p.m.
Respectfully Submitted,

Holly L. Whitelaw
Planning Assistant