

ZONING BOARD OF ADJUSTMENT

MINUTES

DECEMBER 15, 2021

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, December 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; Steven Steiner; Richard Pierce; Planning Director, Jamel Torres; and Planning Assistant, Holly Whitelaw. Alternates, Phyllis Sherman and Jac Cuddy were in attendance.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **HUNTINGTON RAVINE MANAGEMENT CO., LLC** [FILE #21-38] in regards to §190-22 and §190-Permitted Use Table of the Conway Zoning Ordinance **to appeal the administrative decision that live outdoor entertainment [Visual/Performing Arts, outdoors] is only a permitted use if granted a special event permit by the Board of Selectmen** at 66 Hobbs Street, Conway (PID 277-182.1 & 183). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, December 3, 2021.

Chris Meier of Cooper Cargill Chant appeared before the Board. Kirsten Neves, Nik Stanciu and Victoria Blake of Tuckerman Brewing Company were in attendance. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Meier stated in addition to the brewery and tasting room there has been a beer garden outside for the last few years. Mr. Meier stated there is a 250 square foot covered stage where they do have outdoor performances and a 2,400 open pavilion where people can congregate to enjoy the music. Mr. Meier stated there is a 180 outdoor capacity as set by the Fire Department.

Mr. Meier stated to-date the applicant has been obtaining special event permits through the Board of Selectmen, and they would not like to seek this as a regular use. Mr. Meier stated they are located in the Industrial-1 District which visual/performing arts outdoors is allowed in the permitted use table with restrictions.

Mr. Meier stated the previous Planning Director pointed out there are no restrictions offered by the zoning ordinance or in the permitted use table, so he determined that this special use permit is the requirement by the zoning ordinance. Mr. Meier stated we disagree with that decision as it puts it on par with the other districts if you could just get a special use permit for outdoor musical performances, then it could be done in any zoning district; its superfluous having this be a permitted use in the zoning district.

Mr. Meier stated it is not the Board of Selectmen that are allowed to put on those restrictions to the use permitted in that zone; it is either this Board through an appeal on how to interpret the zoning ordinance or the Planning Board. Mr. Meier stated it is not the purview of the Board of Selectmen.

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Mr. Meier stated the applicant has to go to the Board of Selectmen each time they have a musical performance and each time pay a fee for each performance when it is permitted in the zone. Mr. Meier stated he goes into more detail in his *Addendum to Application for Appeal from Administrative Decision* [in file] submitted with the application.

Mr. Colbath asked for Board comment; Mr. Bartolomeo stated they have been holding these events with regularity. Mr. Meier agreed. Mr. Bartolomeo stated it must be permitted. Mr. Meier stated what they have been doing at the request of the Board of Selectmen is obtaining a special event permit. Mr. Meier stated they have now challenged the position of the Planning Director; they shouldn't have to have a special event permit because it is permitted.

Mr. Meier stated it costs the applicant unnecessary fees for each event since it is a permitted use; they should not have to come back for each event. Mr. Meier stated §190-20, which is the special event permitting process, is for an event that is not allowed by the zoning ordinance and for an event that is not in the ordinary course of business. Mr. Meier stated this is an event that is in their ordinary course of business and is permitted under the permitted use table.

Mr. Chalmers stated his opinion is that the Town acted appropriately of their denial of the permit. Mr. Meier stated they disagree with that as there are other uses that have more than 150 people that doesn't require police presence because there is a musical performance. Mr. Meier stated the musical performance does not add more people, it does not add the need for additional municipal services for this use, because it is part of the normal course of the business on this spot and it is permitted within the district it does not require a special use permit.

Mr. Steiner asked where in town is an additional 150 people that does not require a special event permit. Mr. Meier stated any restaurant on a good night has more than 150 people. Mr. Chalmers stated that is not a special event. Mr. Chalmers stated an event a Schouler Park or at Whitaker Woods he's sure the Board of Selectmen require a permit; it is a pretty normal thing that has to be done. Mr. Meier stated those are special events that don't normally occur, and Schouler Park is public property and this is private property.

Mr. Chalmers stated under the special event permit guidelines issued by the State this is a prime example of what would require a special event permit. Mr. Chalmers stated it is permitted in all the commercial districts, not just the industrial district, with a restriction, and it is a reasonable restriction to have a special event permit. Mr. Chalmers stated it has become less special and has become more their normal course of business.

Mr. Colbath asked for public comment; Ben Colbath, Conway resident, taxpayer and Planning Board member, stated he does not think these are special events. Mr. Ben Colbath stated they came before the Planning Board for a site plan review process, they proposed a stage with the intention of having live music. Mr. Ben Colbath stated at that point does it become normal purview of business. Mr. Ben Colbath stated this is the type of thing we want to see in the community.

Mr. Ben Colbath stated it is nothing but obstinance to deny this; it is something that should fall on the Planning Board's lap to make this right. Mr. Ben Colbath stated we want to foster this type of business in town. Mr. Ben Colbath asked when does something become normal course of business,

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how many years do they have to be doing it; who has to be the one who approves that. Jac Cuddy stated the Board of Selectmen have allowed this so they have created a normal. Ms. Blake stated this is an evolution of breweries.

Mr. Torres stated as of right now this is the way it has been done, and agree that the Planning Board wants to make change in the Town and he is willing to work with them on a solution. Mr. Torres stated, however, at this point the special event permit is the avenue and that is why the application was denied.

Mr. Bartolomeo stated indoor beer tasting and the outdoor beer garden is part of what they do, but one could make that argument that music is not part of the normal course of business. Mr. Ben Colbath asked when does it become normal purview of business when they have a stage and they use it regularly, what is the mechanism the Town uses to measure that metric. Mr. Torres stated he is not sure when something becomes normal, but it is a brewery and tasting room, not a concert venue.

Mr. Bartolomeo made a motion, seconded by Mr. Steiner, to uphold the decision of the town to deny the zoning permit. Motion carried unanimously.

A public hearing was opened at 7:42 pm to consider a **VARIANCE** requested by **HUNTINGTON RAVINE MANAGEMENT CO., LLC** [FILE #21-39] in regards to §190-22 and §190-Permitted Use Table of the Conway Zoning Ordinance **to allow live outdoor entertainment [Visual/Performing Arts, outdoors] as a regular part of the business without the need to file for a Special Event Permit** at 66 Hobbs Street, Conway (PID 277-182.1 & 183). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, December 3, 2021.

Chris Meier of Cooper Cargill Chant appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Kirsten Neves, Nik Stanciu and Victoria Blake of Tuckerman Brewing Company were in attendance. Mr. Meier stated the facts are all the same; this is a reasonable use within the district. Mr. Meier stated he addresses the variance criteria in the *Addendum to Application for Variance* [in file] submitted with the application.

Mr. Meier stated this is a reasonable use and an appropriate use on the property; it fits within the business model of the property. Mr. Meier stated this does not bring additional persons to the property, it has the capacity by the Fire Chief for 180 people outside. Mr. Meier stated the Fire Chief has already signed off on that occupancy throughout the summer, so to come back for each individual event is superfluous and causes additional expense for the business.

There was a discussion regarding the site plan review to increase the number of people, the pavilion, the stage and to construct a parking lot; the music was removed from that process because it was a zoning issue. The Board agreed that zoning ordinance needs to be revised in general.

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Mr. Colbath asked for public comment; Ben Colbath stated there is a lot about our town ordinances that need to be modified, as a lot of these things are not a problem until they are a problem. Mr. Ben Colbath stated with the amount of development and the speed of development and the work load of staff, it is very difficult to get to all of it.

Mr. Torres suggested the Board review the unnecessary hardship language. Mr. Colbath stated the hardship inherent in the property is always a hard one to prove; which makes it unique that it cannot be used for any other use. Mr. Meier stated it is not so that it cannot be used for any other use, it's that it causes a hardship unique to the property. Mr. Meier stated you want to encourage uses like this within the zone, there is no other use in the zone that is appropriate and to require the special use permit for an event or use like this in this zone pushes it to other zones.

Mr. Bartolomeo asked if he is contributing that to special conditions of the property. Mr. Meier answered in the affirmative and stated the conditions of the property can be not only physical characteristics but can be zoning characteristics of the property. Mr. Meier stated here there is a unique property within the industrial district that is being used for this purpose. Mr. Bartolomeo stated it has always been hardship inherent in the land.

Mr. Meier stated the Supreme Court has melded the use and area variances; use variances are not addressing setbacks, but looking at what is conducive to the zone, and why this is a uniquely appropriate use for this property. Mr. Colbath stated we are still under hardship in the land; unnecessary hardship means owning to special conditions of the property that distinguish it from other properties in the area. Mr. Meier stated it is how this property is zoned; it requires a special use permit for this unique use within that zone.

Mr. Meier stated a special use permit would not be required if there were 150 workers on the next property, even if they were outside, but because they are having music, their particular use of the property is unique; the town is requiring a special use permit under your interpretation of the ordinance and that is why it is different from other properties within the Industrial zone. Mr. Meier stated an area variance looks at physical characteristics, and a use variance looks at how the property is zoned and how the zoning ordinance particularly effects the property.

Mr. Cuddy stated since it has been established that this is in the normal course of their basic operations and their basic operations is light manufacturing and if they were not able to do this could cause them to relocate in a different area of New Hampshire and take those jobs out of Conway. Mr. Cuddy stated it is a hardship to not be able to continue doing what they are doing. Mr. Colbath stated hardship is never financial, it is inherited in the land.

Mr. Chalmers stated he can wrap his head around a tasting room being a part of that business, but a music venue is a stretch. Mr. Cuddy stated you can go anywhere to a brewery and there is always music and entertainment, it is a part of their culture.

Mr. Meier stated when granting a variance, you want to be consistent with the neighborhood, want to make sure you are not affecting the abutters; there has been this use since 2016. Mr. Meier stated the abutters are used to that use, it is not affecting them, there is no one here and the abutters enjoy the use. Mr. Meier stated it is not going to cause a detriment to the neighborhood.

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Mr. Meier stated they are only needing the variance because of the strict letter of the ordinance. Mr. Chalmers stated it is not something that is not being allowed, there is a means to allow that to continue and that is through a special event permit.

Mr. Bartolomeo stated the whole point of this is to avoid the hoops that have to be jumped through and all the paperwork for the permitting and the fees, and make this just a regular part of the business. Mr. Bartolomeo stated if the variance is denied they can still go through the permitting process and hold these events. Mr. Chalmers stated there is nothing prohibiting them from doing exactly what they want to do. Mr. Meier stated it is an unnecessary cost on a business where it meets the criteria for a variance.

Ms. Blake stated the Fire Chief and the Police Chief are very supportive, they trust us and we have been working really hard with them and it becomes a nuisance for them as well to sign paperwork. Ms. Blake stated it is a lot of work for the same exact thing. Mr. Cuddy stated if the Selectmen feel they have consistently given a special event permit with their power, the Zoning Board of Adjustment has the ability to grant a variance for the same purposes that support business in this community.

Mr. Cuddy stated he doesn't see any difference in the mindset of what this accomplishes; there are no abutters complaining, there are no abutters here. Mr. Cuddy stated this is what variances are for, to make logical sense and to continue a situation that makes sense and doesn't hurt abutters or surrounding towns. Ms. Sherman stated in this particular case it is a use variance hardship rather than a land hardship. Ms. Sherman stated it is been going on for seven years under the special event permit with no complaints. Ms. Sherman stated it is not a question of lot size, but of what the use is.

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 unanimously carried.**

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; Mr. Chalmers stated that the hardship test is tough, and it seems the ordinance is

very clear in wanting to regulate noise off property in an industrial zone. Mr. Chalmers stated that the brewery and tasting room could still function without the music venue.

Mr. Pierce stated the fact that it has been going on for so long, it is a hardship because it has been going on so long to now just say no. Mr. Chalmers stated were not saying no, but that it is still going to require a permit; this isn't to prevent them from doing it, it is to say that they still have to continue getting the permit.

Mr. Colbath stated we always talk about it being inherit in the land, but with these changing times this really addresses the use of the land then the hardship in the land itself. Mr. Colbath stated he is alright with carrying this one in this individual circumstance. Mr. Pierce stated he finds the permit process an unnecessary exercise. Mr. Steiner stated he doesn't want to wipe out the life safety features of obtaining the permit. Ms. Blake stated in the beginning the police were present, but we found that they just were not necessary. Ms. Blake stated the police do conduct a sweep just to remind people that there is a police presence. **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. 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. Chalmers made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the variance from §190-22 and §190-Permitted Use Table of the Town of Conway Zoning Ordinance to allow live outdoor entertainment [Visual/Performing Arts, outdoors] as a regular part of the business without the need to file for a Special Event permit be granted. Motion carried unanimously.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Chalmers made a motion, seconded by Mr. Steiner, to approve the Minutes of November 17, 2021 as written. Motion carried unanimously.

Meeting adjourned at 8:27 p.m.

Respectfully Submitted,

Holly L. Whitelaw
Planning Assistant