

ZONING BOARD OF ADJUSTMENT

MINUTES

FEBRUARY 22, 2006

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, February 22, 2006 beginning at 7:30 p.m. at the Conway Town Office in Center Conway, NH. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Luigi Bartolomeo; Andrew Chalmers; Jeana Hale; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Mr. Chalmers, to approve the Minutes of January 25, 2006 as written. Motion unanimously carried.

PUBLIC HEARINGS

A public hearing was opened at 7:30 p.m. in regard to an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **JOHN DAMORE (RE: JONATHAN WELLS)** in regard to §147.15.68 of the Conway Zoning Ordinance to review the CEO's determination dated 12/19/05 that permits Jonathan Wells to operate a tourist or rooming house at 90 Cranmore Road, North Conway (PID 219-104). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on February 15, 2006.

Claudine Safar of Cooper, Deans & Cargill appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Safar stated that the applicant is an abutter to a 1.5-acre parcel that has been before the Planning Board for a three-lot subdivision, however, that is not why we are here. Ms. Safar stated in the time that Mr. Wells has owned this single-family home he has advertised it through his business for rent. Ms. Safar stated that this property is located in the residential district, which does not permit rooming or boarding houses.

Ms. Safar stated that her client has seen several cars parked in this driveway and at the Planning Board meeting, he admitted to renting the home to church groups. Ms. Safar stated that the applicant believes this to be a non-owner occupied rooming house. Ms. Safar stated that there are more than four double occupancy rooms if it rooms 20 people. Ms. Safar stated that the applicant has contacted the Town and the Code Enforcement Officer did conduct a site inspection, but no one was there at that time. Ms. Safar stated that the Code Enforcement Officer did conduct a second inspection and the home was rented to a camp group at that time. Ms. Safar stated that as a result of that visit we have a letter from Code Enforcement Officer.

Ms. Safar stated that she did speak to the Code Enforcement Officer and was told that anymore than two unrelated persons would be a violation. Ms. Safar stated that it is their

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position that this is not a permitted use and has to go through appropriate channels to exercise this type of use. Ms. Safar stated that they feel the Code Enforcement Officer's determination was in error.

David Pandora, Code Enforcement Officer, was in the audience. Mr. Pandora stated that he believes he was correct in his determination. Mr. Irving stated that if it was to be operated as a Bed and Breakfast or as a rooming house than it would be prohibited, but there is nothing in our regulations that regulates duration of occupancy. Mr. Irving stated that Mr. Pandora's determination is that it is being used as a single-family home. Mr. Irving stated that the ordinance does not break down tenure in the residential district. Mr. Bartolomeo asked if there was a regulation on the number of people. Mr. Irving stated that our ordinance does not regulate the number of people.

Ed Alkalay of Dewhurst Law Office who is representing Jonathan Wells stated that the sole issue tonight is whether or not Mr. Pandora correctly interpreted the ordinance. Mr. Alkalay stated that the owner is permitted to rent his home as a single-family dwelling unit to families and there is no dispute that it is a single-family unit. Mr. Alkalay stated that Mr. Pandora's decision did not give Mr. Wells permission to rent his home as a tourist home, but he can rent it as a single-family home. Mr. Alkalay stated that Mr. Pandora spoke to Mr. Wells and told him that he could not rent it to church groups, boy scouts or other unrelated groups, which is what he was doing. Mr. Alkalay stated that Mr. Wells has refused rentals since December 19, 2006 and has changed his website to advertise for families only.

Mr. Alkalay stated that the Board needs to be careful not to interpret this as a tourist or boarding house. Mr. Alkalay stated that since December 19, 2005 he has rented it as a single-family home to families only. Mr. Alkalay stated that Mr. Wells has turned down several groups. Mr. Alkalay stated that what is before the Board this evening is whether or not Mr. Pandora correctly interpreted the ordinance to rent as a single-family home to families only. Mr. Bartolomeo stated that this unit couldn't be rented to several different families at one time. Mr. Al answered that is correct.

Mark Frydman, an abutter, stated that he is confused about what is going on. Mr. Frydman stated that he was told that Mr. Wells had to get certain permissions and licenses to operate and now that is not the case. Mr. Frydman stated to say that he only rents to families is not true as there were 11 cars there this weekend. Mr. Frydman stated that that is a big family. Mr. Frydman stated that it is obvious that he is renting to large groups. Mr. Frydman stated that he is confused as masking this as a single-family home and renting to families only as that is a bunch of crap. Mr. Frydman stated that this is ongoing and the Town needs to address it as it is. Mr. Frydman stated to say this is a single-family home is just not the case.

Ms. Hale stated that the only reason we are here tonight is to determine if Mr. Pandora interpreted the ordinance correctly. Mr. Chalmers asked who enforces this type of situation. Mr. Irving stated that it is the duty of the Board of Selectmen to generally administer this ordinance through my department and the building inspector's

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department. Mr. Frydman asked if there are certain requirements for a sprinkler system. Ms. Sherman stated that there is not a regulation for a sprinkler system in a single-family home. Mr. Irving stated that there are regulations for sprinkler systems, but it is out of our purview and that of the Fire Marshall’s office. Mr. Pandora stated that there are no sprinkler codes for one- or two-family homes.

Mr. Bartolomeo asked where did the two unrelated people come from. Mr. Irving answered the Fire Marshall’s office. Ms. Safar stated that there is not a definition in the zoning ordinance of a family. Mr. Irving stated that if we do not have a definition in the ordinance then we generally use other common definitions.

Mr. Pandora referred to his letter dated January 11, 2006. Ms. Safar stated that the zoning ordinance does not define a family. Ms. Safar submitted pictures of Mr. Well’s home with many cars parked in the driveway and stated that this is not a single-family rental. Ms. Safar stated that what is going on here are transient accommodations.

Mr. Bartolomeo stated since this was vacation week he probably already rented with deposits and could not cancel. Mr. Alkalay stated that he has not rented the home since December 19, 2005 to anyone other than single families. Mr. Alkalay stated that the Board is making assumptions. Mr. Alkalay stated that the Board is here to determine if Mr. Pandora interpreted the ordinance correctly. Mr. Frydman stated that it is a slap in the face to me as it is not an assumption, but a fact.

Ms. Sherman asked if the fire code has any restrictions on what constitutes a family. Mr. Pandora stated there are different definitions that vary a little. Ms. Safar stated that the Board needs to focus on the definition of a tourist/boarding home, as that is what is happening on this premises. Mr. Bartolomeo stated that Mr. Wells has admitted that that is what they were doing, but since December 19, 2005 it has changed. Ms. Sherman stated if it is a single-family home and the ordinance does not say how long it has to be rented. Ms. Safar stated that this site is not permitted for transient or semi-transient accommodations. Mr. Alkalay stated that the ordinance has to do with the building and not the people itself.

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the Appeal from Administrative Decision be granted. Motion unanimously defeated. Ms. Sherman stated that the Administrative Decision has been upheld. Ms. Sherman reviewed the appeal process.

A public hearing was opened at 8:16 p.m. in regard to an **EQUITABLE WAIVER OF DIMENSTIONAL REQUIREMENT** requested by **NIC-COR REALTY TRUST** in regard to §147.13.1.4 of the Conway Zoning Ordinance to allow 21.87 square feet within the setback at 33 D Street, Conway (PID 278-41). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on February 15, 2006.

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Jack McMahon appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. McMahon stated that he had the corners of the lot pinned, however, the foundation person moved the foundation a bit from where he had it staked. Mr. Irving stated that the property owner brought it to our attention. Mr. Bartolomeo stated that the diagram shows that he tried to comply and wanted to comply and it just got skewed a bit.

Mr. Colbath asked if there was any other land available to add this lot. Mr. Irving stated that the lot behind this lot is substandard. Frank Parent stated that he is an abutter and doesn't know of any abutters that have a problem. Ms. Sherman asked for any other comment from the public; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, 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. Chalmers, 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; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. The Board agreed that item 3 was not applicable to this application.

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, 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. Bartolomeo stated if it was tweaked if was probably better. **Motion unanimously carried.**

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

**Adopted: March 22, 2006 – As Written
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Mr. Colbath made a motion, seconded by Mr. Chalmers, 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 21.87 square feet of within the setback be granted. Motion unanimously carried.

A public hearing was opened at 8:26 pm in regard to a **VARIANCE** requested by **RIVER VALLEY REALTY TRUST** in regard to §147.12 of the Conway Zoning Ordinance to allow overhead utilities over the wetland at the entrance of the subdivision on Swift Valley Road, Conway (PID 263-1). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on February 15, 2006.

Paul Brown appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Irving stated that the Board has reviewed this project before to allow a road to cross the wetland. Mr. Irving stated during that review the utilities were going underground, but the power company has a concern with putting the utilities over a culvert and through a wetland. Mr. Irving stated that they would like to have the utilities come overhead from the street over the wetland and then underground to the rest of development.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the benefit sought by the applicant couldn't be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. 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. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Hale, that, based on the forgoing findings of fact, the variance from §147.12 of the Town of Conway Zoning Ordinance to allow overhead utilities over the wetland at the entrance of the subdivision be granted. Motion unanimously carried.

Meeting adjourned at 8:32 pm.

Respectfully Submitted,

Holly L. Meserve
Recording Secretary