

**CONWAY ZONING BOARD
OF ADJUSTMENT**

MINUTES

OCTOBER 25, 2006

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, October 25, 2006 at the Conway Town Office in Center Conway, NH. Those present were: Acting Chair, John Colbath; Andrew Chalmers; Jeana Hale; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **MT. WASHINGTON OBSERVATORY** in regard to §147.15.88 of the Conway Zoning Ordinance to appeal a decision that the photographs to be incorporated into the façade of the building are signs at 2779 White Mountain Highway, North Conway (PID 218-55). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006.

Randy Cooper of Cooper, Deans & Cargill and Scott Henley of the Mt. Washington Observatory appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath stated that only three members were present and the applicant is entitled to a five-member Board. Mr. Colbath stated that the concurring vote of all three members is necessary for the appeal to be granted. Mr. Colbath asked if the applicant would like to proceed with three members or continue the hearing for a five member Board. Mr. Cooper agreed to proceed with three members.

Mr. Henley stated that the purpose of installing exhibitory on the outside of the building is to advance our mission of education and they do not consider the large format photographs of Mt. Washington signs. Mr. Henley stated that the cornerstone of any community is cultural institutions and by allowing installation of this exhibit it is giving us tools to flourish. Mr. Henley stated that interpreting Mt. Washington is important for the valley and these photographs definitely do that by connecting people to the mountain, especially those who cannot get up there. Mr. Henley stated that these photographs would be illuminated from above.

Mr. Cooper stated that the photographs would not have any signage on them. Mr. Henley stated that they would like to show case the namesake of our region. Mr. Henley stated that they are looking to add to the North Conway experience. Mr. Cooper stated that there are two parts of the definition of a sign, one is straightforward and the other is so vague that anything becomes a sign. Mr. Cooper stated that the photographs are a part of our culture and they would be using color photographs. Mr. Chalmers asked if the photographs would be blocking any windows. Mr. Cooper answered in the affirmative and stated that there is still 5% window space.

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Mr. Chalmers stated he does not think they are any more heinous than the plastic ice cream cone trashcans. Mr. Irving stated what is before the Board is an Appeal from an Administrative Decision. Mr. Irving stated the Board is determining if staff made an error in deciding that the photographs are signs. Mr. Colbath asked if a building permit was applied for and denied. Mr. Cooper answered in the negative and stated that it was an informal discussion. Mr. Irving stated that the email could be treated as a denial as they have all the signs that are permitted.

Mr. Colbath asked for public comment; there was none. Mr. Chalmers stated that this is not advertising, but artwork. Ms. Hale stated that it is still a sign. Mr. Cooper stated that this is a discrepancy in the ordinance that should be addressed by the Planning Board with warrant season just upon us. Mr. Irving stated that we are entering into Town warrant season, but the Planning Board has not revisited the definition of a sign ordinance and is not something the Planning Board will be able to fix in April.

After a brief discussion, the Board and the applicant agreed to address the Variance request first. **Ms. Hale made a motion, seconded by Mr. Chalmers, to suspend the Appeal from Administrative Decision application until after the Variance request is addressed. Motion carried with Mr. Colbath voting in the negative.**

A public hearing was opened at 7:51 pm to consider a **VARIANCE** requested by **MT. WASHINGTON OBSERVATORY** in regard to §147.15.88 of the Conway Zoning Ordinance to allow photographs to be incorporated into the façade of the building at 2779 White Mountain Highway, North Conway (PID 218-55). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006.

Randy Cooper of Cooper, Deans & Cargill and Scott Henley of Mt. Washington Observatory appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath stated that only three members were present and the applicant is entitled to a five-member Board. Mr. Colbath stated that the concurring vote of all three members is necessary for the appeal to be granted. Mr. Colbath asked if the applicant would like to proceed with three members or continue the hearing for a five member Board. Mr. Cooper agreed to proceed with three members.

Mr. Cooper stated that there are no abutters in attendance, therefore, there is no diminution in value, museums are an allowed use, Mt. Washington Valley is named after Mt. Washington and for similar reasons this is not contrary to the spirit and intent of the ordinance and substantial justice would be done. Mr. Colbath asked for public comment; there was none.

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

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

Mr. Chalmers made a motion, seconded by Ms. Hale, 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. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, 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. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

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

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

Mr. Chalmers made a motion, seconded by Ms. Hale, that, based on the forgoing findings of fact, the variance from §147.15.88 of the Town of Conway Zoning Ordinance to allow photographs to be incorporated into the façade of the building be granted. **Motion unanimously carried.**

Mr. Cooper withdrew the Appeal From Administrative Decision.

A public hearing was opened at 7:58 pm to consider a **VARIANCE** requested by **VIRGINIA HOLLIS** in regard to §147.13.15.5 of the Conway Zoning Ordinance to allow the construction of a year round home within the Shoreline Protection Overlay District setbacks at 458 Mudgett Road, Center Conway (PID 267-5). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006.

Warren Johnson appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath stated that only three members were present and the applicant is entitled to a five-member Board. Mr. Colbath stated that the concurring vote of all three members is necessary for the appeal to be granted. Mr. Colbath asked if the applicant would like to proceed with three members or continue the hearing for a five member Board. Mr. Johnson agreed to proceed as an informational hearing only.

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Mr. Johnson stated that Ms. Hollis' family has owned the property since 1958. Mr. Johnson stated there are three buildings on the property and none are in compliance. Mr. Johnson stated that they would like to retire here and have a year round home. Mr. Johnson stated there is a utility pole in the middle of the property and the line comes in from the Osgood property and then runs to the Lauben property. Mr. Johnson stated there are hydric soils and a septic system at the back of the property precluding the building to meet the setbacks.

Mr. Johnson stated that both of the houses next door are approximately 40-feet from the water and one of the neighbors received a variance for a second story addition. Mr. Johnson stated that they are worried about moving the building further back, as it would harm existing trees. Mr. Johnson stated that there is a fairly wide-open space around the existing house, shed and driveway. Mr. Johnson stated that the area from the driveway toward the lake is all cleared and they are moving the house back 20-feet, but they didn't want to go any further back so they would not have to move the septic tank and the pipes to the leach field.

Mr. Chalmers asked if the septic is directly behind the house. Mr. Johnson stated that the tank is behind the house and the leach field is by the road. Mr. Colbath asked if the garage would remain. Mr. Johnson stated that all three buildings would be removed, but the garage would be used for storage until the construction was complete and then it would be torn down.

Mr. Irving asked if the Lauben's had a variance to build the addition to their house. Mr. Johnson stated that they had an original cabin and then they added to it. Mr. Irving asked when that was constructed. Mr. Johnson answered three or four years ago. Mr. Johnson stated that this proposal would improve property values. Mr. Colbath asked for Board comment; Mr. Chalmers asked if the new construction would have a full basement. Mr. Johnson answered in the affirmative.

Mr. Colbath asked for public comment; Tom Deans, President of Conway Lake Protection Association, stated for 50 years the Association has looked over the protection of the lake and they look upon any waiver to the shoreline zoning as a concern. Mr. Deans stated that they are concerned with the quality of the lake. Mr. Deans stated that Conway Lake is a treasure in this town and it is his responsibility to look over the protection of the lake. Mr. Deans stated that they are extremely concerned with lawns and the running of any nutrients into the water. Mr. Deans asked for a chance to review the proposal and review all options available. Mr. Deans stated that he is not familiar with this property and it could be a positive thing, and asked that the Association be given a chance to review the application.

Mr. Johnson stated that their main concern was protecting the trees along the waterfront as well as the blueberry and raspberries bushes. Mr. Johnson stated that they could use the existing footprint, but they want to bring the building back a bit. Mr. Johnson stated there is a sandy landing area with a lot of run off. Mr. Johnson stated that they are looking to close the boat launch, which will help to decrease the run off. Mr. Johnson stated that the leach field is more than 250 feet from the lake.

Ms. Hale stated that the leach field could not be moved any further back. Mr. Chalmers asked if the utility pole is a dead pole. Mr. Johnson answered in the negative and stated that they would have to deal with the hydric soil as well as the wetlands. Mr. Johnson stated to move

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the pole would require cutting through more woods as well as removing more trees on the Osgood's and the Lauben's property.

Mr. Chalmers stated for something of this magnitude the applicant should want a full board. Ms. Hale stated this is a hard one for her as he can build on that existing footprint, but they are willing to move it back. Mr. Chalmers stated that the existing cabin does not have a full basement. Ms. Hale stated that he could put a full basement under it. Mr. Chalmers asked the current square footage. Mr. Johnson answered 800 square feet. Mr. Chalmers asked the square footage of the proposed house. Mr. Johnson answered approximately 3,000 square feet. Ms. Hale stated that the new house would move further back by approximately 12-feet, but how much longer, parallel to the lake, would the new home be. Mr. Johnson answered approximately 20-feet.

Mr. Colbath stated the applicant could rebuild on the same footprint, but the applicant is expanding that footprint within the Shoreline Protection District. Mr. Colbath asked Mr. Deans what kind of information would he like on this application. Mr. Deans asked for what the Board was reviewing and there is an Association meeting this Saturday. Mr. Deans stated that they would want to make sure there is an adequate buffer; and there are trade offs. Mr. Deans stated that they are mostly looking that quality of the lake is not impaired. Mr. Deans stated that this is a major expansion as it is going from a small cabin to a significant house. Mr. Deans stated that it looks as though they could review a copy of the submitted materials, review and discuss the proposal with the landowner and move forward positively.

Mr. Colbath stated if the Board moved forward with this application tonight, how would it not be contrary to the spirit of the ordinance and what is the fairness to the public. Mr. Johnson stated it would be safer than constructing on the existing footprint. Ms. Hale stated if it were moving the same size structure back it would be better, but this is a substantial expansion. Mr. Johnson stated it is a one-story log cabin.

Mr. Irving asked if a soil scientist determined the hydric soils. Mr. Johnson stated it was referenced on an approved septic system. Mr. Irving asked if the Board was considering the development on the neighboring lot in their decision, he would urge the Board to continue the hearing as after a quick look of the files, he could not find a building permit or a variance request for that project. Mr. Irving stated that he is not saying that they don't have the proper permits, but he just doesn't recall the project.

Mr. Johnson stated that he could not have a decision this evening. Mr. Colbath stated that Mr. Johnson has only agreed to proceed with an informational hearing and has not agreed to three members. Mr. Johnson agreed to proceed with a three-member board. Mr. Colbath asked if Mr. Johnson would be willing to work with the Association. Mr. Johnson stated that they are members of the Association and they would be willing to review our project with them.

Mr. Chalmers stated testimony was given that the adjacent property was allowed to construct inside the setback and he would be interested on how that was approved. Ms. Hale stated if she were to vote on this application tonight she would not vote in favor. Mr. Johnson asked if they moved the building back to be 70-feet from the shoreline, would that help. Mr. Irving stated how far back it could be moved back would be based on the wetlands. Mr. Johnson stated that it is not wetlands, but hydric soils. Mr. Irving stated if it is a wetland it may not be

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able to be moved back. Mr. Johnson stated it was their understanding that it would have to be dredged and filled. Mr. Irving stated if it is a wetland there might be restrictions that would not allow it to be moved back. Mr. Johnson stated that they could move it back to the 70-foot mark.

Mr. Colbath stated that there are too many unanswered questions and if he were to vote tonight he would have to vote in the negative. Mr. Colbath stated that his recommendation would be to continue the hearing in order to obtain information from the Conway Lake Association, determine if there are wetlands and what the leeway is of moving it back, and if there is a similar situation on the abutting property. Mr. Colbath stated that the spirit of the ordinance is to protect the shoreline. Mr. Johnson requested a continuance.

Ms. Hale made a motion, seconded by Mr. Chalmers, to continue the public hearing for Virginia Hollis until November 15, 2006. Motion unanimously carried.

A public hearing was opened at 8:40 pm to consider a **VARIANCE** requested by **CALLFOUR PROPERTIES, INC/JOHN GRAY/G'S DOG WAGGIN, LLC** in regard to §147.16 of the Conway Zoning Ordinance to allow the operation of a hot dog cart in the Village Commercial District at 1828 East Main Street, Center Conway (PID 259-14). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006.

John Gray and Gillian McLean appeared before the Board. Judith Calley, owner of the property, was in attendance. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath stated that only three members were present and the applicant is entitled to a five-member Board. Mr. Colbath stated that the concurring vote of all three members is necessary for the appeal to be granted. Mr. Colbath asked if the applicant would like to proceed with three members or continue the hearing for a five member Board. Mr. Gray agreed to proceed with three members.

Mr. Gray stated they are proposing a mobile concession, with a reach in cooler and an awning over the window. Mr. Gray stated that there would be LP tanks mounted to the front of the trailer and then screened. Mr. Gray stated that the vending cart is not allowed in this district, which would interfere with the reasonable use of the commercial property. Mr. Gray stated that there are two locations on this site that the trailer could be placed; either the grassy spot between the post office and John's TV or adjacent to the Town community center.

Ms. Hale asked if they owned the property. Mr. Gray answered in the negative and stated that it would be a leased space. Mr. Colbath asked if it would be year round. Mr. Gray answered in the affirmative and stated that it would only be operated while the current business was open. Mr. Colbath asked the hours. Mr. Gray answered 9 to 5 and possibly opened when something was going on at the community center. Mr. Chalmers stated that he's surprised no one has done this before.

Mr. Gray stated that they have been in the area for a year and have been looking for a location. Mr. Colbath asked if they have operated a similar business before. Mr. Gray

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answered in the negative and stated that they have been in the restaurant business. Mr. Chalmers asked if it would need State approval. Mr. Gray answered in the affirmative. Mr. Irving stated that it would have to obtain Planning Board approval. Mr. Colbath asked how does this differ from a vending cart. Mr. Irving stated that this does not fit the definition of a vending cart. Ms. Hale asked if this site is in the Center Conway Village Commercial District. Mr. Irving answered in the affirmative.

Mr. Irving read the definition of a vending cart. Mr. Colbath asked for public comment; Judy Calley stated that they had operated a plant stand at this location approximately 10-years ago, which was prior to the property being zoned commercial. Ms. Calley stated that she does not see the difference between the plant stand and a hot dog wagon. Ms. Calley stated that the plant stand required yearly approval even though the shed was allowed to remain. Mr. Colbath asked for any other public comment; there was none.

Mr. Irving stated that the Zoning Ordinance in Conway is a permissive type ordinance. Mr. Irving stated if the item is not specifically permitted in the ordinance then it is not permitted. Mr. Colbath asked if a restaurant is defined. Mr. Irving answered in the negative. Mr. Colbath asked if the town had any other comments; Mr. Irving stated if it is approved it would have to go before the planning Board.

Mr. Chalmers made a motion, seconded by Ms. Hale, that the zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment. Mr. Colbath asked for Board comment; Mr. Chalmers stated the Planning Board would review this proposal if granted by this Board. Mr. Irving agreed and stated that they could grant that this proposal is insignificant to the rest of the development. Mr. Irving stated that this use is not permitted in our ordinance. Mr. Colbath stated that it does not mean that in the construction of this ordinance that it wasn't an oversight. Mr. Chalmers stated that no one knew vending carts would get this big. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on this property. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that the variance would not injure the public or private property rights of others. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that based on the findings of a, b, and c above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Mr. Colbath asked for Board comment; Mr. Chalmers stated that there has been no opposition. **Motion unanimously carried.**

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Mr. Chalmers made a motion, seconded by Ms. Hale, 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. Mr. Colbath asked for Board comment; Mr. Chalmers stated this particular section is tougher for him because there is nothing in the ordinance that says this is a permitted use. Mr. Colbath stated that there has been no testimony against this application and it would require going to the Planning Board to determine if it needs a site plan review. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that the granting of this variance will not adversely affect the public interest. Mr. Colbath asked for Board comment; Ms. Hale stated that there is no public in attendance opposing this application, and she as a public member doesn't oppose the location, but she would not want them to pop up all over town. Mr. Colbath stated perhaps it was an oversight for not having the item on the list. Mr. Irving stated that the list is correct unless he made a mistake when reorganizing the ordinance. Mr. Irving stated if there were an error during the reorganization of the ordinance, it would have been a scrivener's error. Mr. Irving stated that restaurants are a permitted use but not in this type of vehicle. Mr. Colbath stated that it could be argued that this is a restaurant, which is permitted in a commercial district. **Motion defeated with Mr. Chalmers voting in the negative and Ms. Hale and Mr. Colbath voting in the affirmative.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that by granting this variance, substantial justice would be done. Mr. Colbath asked for Board comment; Mr. Chalmers stated that this is another tough one for him. Mr. Chalmers stated that it is a matter of the benefit to the public versus the benefit to the applicant. Mr. Chalmers stated the benefit should be greater to the public then the individual and justice would not be done in this case as it is greater to the individual then to the public. Mr. Colbath asked which is greater. Mr. Chalmers stated to the public. **Motion defeated with Mr. Chalmers voting in the negative and Ms. Hale and Mr. Colbath voting in the affirmative.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that, based on the forgoing findings of fact, the variance from §147.16 of the Town of Conway Zoning Ordinance to allow the operation of a hot dog cart in the Village Commercial District be granted. **Motion defeated with Mr. Chalmers voting in the negative and Ms. Hale and Mr. Colbath voting in the affirmative.**

A public hearing was opened at 9:21 pm to consider a **VARIANCE** requested by **CONWAY HISTORICAL SOCIETY** in regard to §147.13.6.7.1.4.1 of the Conway Zoning Ordinance to allow a sign within the front setback at 110 Main Street, Conway (PID 265-33). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006.

Shawn Bergeron and Kim Frechette of Bergeron Technical Services appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Colbath stated that only three members were present and the applicant is entitled to a five-member Board. Mr. Colbath stated that the concurring vote of all three members is necessary

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for the appeal to be granted. Mr. Colbath asked if the applicant would like to proceed with three members or continue the hearing for a five member Board. Mr. Bergeron agreed to proceed with three members.

Mr. Bergeron stated if the sign were setback 10-feet from the right-of-way it would not be visible. Mr. Bergeron stated that the property has uniqueness from the surrounding properties as it complies with the ordinances. Mr. Bergeron stated that one part of the ordinance that the Board should consider is that a building could be constructed closer to right-of-way than a sign. Mr. Bergeron stated that a wall sign could be closer to the right-of-way than the proposed freestanding sign.

Mr. Colbath asked if there is an existing wall sign. Mr. Irving answered in the affirmative. Mr. Chalmers asked if the existing sign on the building would be removed. Mr. Bergeron answered in the affirmative. Mr. Irving stated that they are entitled to have a wall sign.

Mr. Chalmers asked about traffic coming in and out of that parking lot. Mr. Bergeron stated that that was taken into consideration and was part of the reason for the proposed location. Mr. Bergeron stated that the sign would not be a hazard to incoming and outgoing traffic. Mr. Colbath asked if the sign would be illuminated. Mr. Bergeron answered in the affirmative. Ms. Frechette stated that this is a community building for community events and the sign would be a benefit.

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

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

Mr. Chalmers made a motion, seconded by Ms. Hale, 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. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Chalmers made a motion, seconded by Ms. Hale, 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. Mr. Colbath asked for Board comment; there was none. **Motion unanimously carried.**

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

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

Mr. Chalmers made a motion, seconded by Ms. Hale, that, based on the forgoing findings of fact, the variance from §147.13.6.7.1.4.1 of the Town of Conway Zoning Ordinance to allow a sign within the front setback be granted. Motion unanimously carried.

Meeting adjourned at 9:35 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant