

## ZONING BOARD OF ADJUSTMENT

### MINUTES

JANUARY 19, 2011

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, January 19, 2011 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Dana Hysten; Alternate, Jeana DeWitt; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

#### APPOINTMENT OF ALTERNATE MEMBER

Ms. Sherman appointed Ms. DeWitt as a voting member.

#### PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **CHRISTOPHER POOR** in regard to §147.13.1.4 of the Conway Zoning Ordinance **to allow a garage to encroach 5-feet into the front setback** at 52 Forbes Drive, North Conway (PID 232-108). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, December 3, 2010. This hearing was continued from December 15, 2010.

Christopher Poor appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Poor stated that this was done without a permit. Mr. Poor stated that he thought Forbes Drive was a 50-foot right-of-way and it is actually a 60-foot right-of-way. Mr. Colbath asked how he was informed of the difference. Mr. Poor stated when he applied for a building permit he was told it was a 60-foot right-of-way. Mr. Colbath asked if the garage could meet the setback. Mr. Poor stated probably not until he added fill as there is a drop off.

Ms. Sherman asked if the slab is the only thing constructed. Mr. Poor answered in the affirmative. Ms. Sherman asked if it could be moved parallel to the road. Mr. Poor stated that it could be; just needs a lot of fill. Ms. Sherman stated it could be pivoted on the corner. Mr. Poor agreed.

Mr. Colbath asked if the slab was constructed before a permit was issued. Mr. Irving stated it may have been applied for, but not issued. Mr. Irving stated that Mr. Pandora was going to go look at the property, but the slab was poured before he got there. Mr. Colbath asked if the abutters were notified. Mr. Irving stated to the best of our knowledge, the abutters have been notified. Mr. Colbath asked if there has been any correspondence from the abutters. Mr. Irving answered in the negative.

Ms. Sherman asked how much of a problem do you foresee with moving that section. Mr. Poor stated there is the drop off in the back; it is a slab so it is easier to work with. Mr. Colbath asked

if fill would have to be added in the back for the slab. Mr. Poor answered in the affirmative. Mr. Colbath asked how the location was chosen. Mr. Poor stated he thought he met the setbacks, tried to go back further, but with a slab it wouldn't have been stable if we went back any further. Ms. Sherman asked for Board comment; there was none. Ms. Sherman asked for additional comments from the Town; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Chalmers stated the intent of the ordinance is to protect the right-of-way. **Motion defeated with Mr. Colbath, Mr. Chalmers and Ms. Sherman voting in the negative and Mr. Hylen and Ms. DeWitt voting in the affirmative.**

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

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

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. DeWitt, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Hylen, Mr. Colbath, Ms. DeWitt and Ms. Sherman voting in the affirmative and Mr. Chalmers voting in the negative.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Chalmers, 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.** Ms. Sherman asked for Board comment; Mr. Hylen stated there is nothing about this property that distinguishes from other properties or prevents it from being conforming. Mr. Hylen stated there are no hardships and it could have been constructed in conformance with the ordinance. Mr. Colbath stated there is nothing inherent to this property that precludes from having this done. **Motion unanimously defeated.**

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

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

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Ms. DeWitt, that if the criteria in subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to special conditions of the property that distinguish it from**

**other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.**

Ms. Sherman asked for Board comment; Mr. Colbath stated there has not been any testimony that there are any special conditions. **Motion unanimously defeated.**

**Mr. Colbath made a motion, seconded by Ms. DeWitt, that, based on the forgoing findings of fact, the variance from §147.13.1.4 of the Town of Conway Zoning Ordinance to allow a garage to encroach 5-feet into the front setback be granted. Motion unanimously defeated.**

Ms. Sherman reviewed the process for filing a Motion for Rehearing.

\*\*\*\*\*

A public hearing was opened at 7:50 pm to consider a **VARIANCE** requested by **TARBERRY COMPANY LLC** in regard to §147.13.7.2.2 of the Conway Zoning Ordinance **to increase the density from seven units, one commercial and six residential, to eight units, one commercial and seven residential**, at 2724 White Mountain Highway, North Conway (PID 218-49). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, January 7, 2011.

Joe Berry and Sheila Duane appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Berry reviewed a map to give a visual of the location of the building. Mr. Berry submitted and reviewed an existing conditions sheet. Mr. Berry stated he doesn't think there would be an impact of converting this space from commercial to employee housing.

Mr. Irving asked if they are proposing to restrict this to employee housing. Mr. Berry stated that he doesn't mind restricting to employee housing as that is how we intend to use it at this time; however, would prefer the flexibility of being able to rent it to anyone. Mr. Irving stated that he would prefer not see the restriction as it is very difficult to enforce.

Mr. Colbath asked what level is unit is located. Mr. Berry answered the second floor. Mr. Colbath asked if they are converting all 1,350 square feet of commercial space to residential space. Mr. Berry answered in the affirmative. Mr. Colbath asked if it would be one residential unit. Mr. Berry answered in the affirmative.

Mr. Berry stated allowing an additional residential unit would expand housing that is consistent with the Master Plan; the spirit of the ordinance would be observed as this is expanding an approved use in the village; substantial justice would be done as the use is consistent with the uses in the immediate area and the village as a whole; granting the variance wouldn't diminish the property values; and literal enforcement would cause unnecessary hardship as the proposed expansion is consistent with the area.

Ms. Sherman asked how many commercial businesses are located on the property. Mr. Berry answered four. Mr. Chalmers stated it is the definition of hardship that is really tough.

**Adopted: May 18, 2011 – As Written**

**CONWAY ZONING BOARD OF ADJUSTMENT – JANUARY 19, 2010**

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the variance will not be contrary to the public interest.** 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. Hylen, that the spirit of the ordinance is observed.** 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. Hylen, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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

Mr. Berry stated reading the new law for variances, it says if literal enforcement creates an unnecessary hardship and this would create an unnecessary hardship. Mr. Chalmers stated that he looks at an unnecessary hardship as being something that distinguishes it from other properties in the area. Mr. Chalmers stated neighboring buildings are similar to what is going on in this property. Ms. DeWitt asked what about surrounding properties. Mr. Chalmers stated that they can still use the building as it is being used. Mr. Chalmers stated that he is not suggesting that this is not an appropriate use of the space, but it is the definition of hardship that is difficult. Ms. Sherman stated that the amount of commercial use is going to be greater than one more residential unit.

Mr. Berry stated if it was just hardship, that would be easy; but literal enforcement of zoning on this application would create an unnecessary hardship. Mr. Colbath stated there is a hardship in finding housing for someone that cares for 180-units; this makes residential space available to meet the housing need and affordable for employees working in the village.

Mr. Chalmers stated we are not exclusive to grappling with this as other Board's in New Hampshire have had difficulty with this section. Mr. Chalmers read a clarification from the New Hampshire Municipal Association for this section. Mr. Chalmers stated he thinks it is a great use and there are no abutters present that are concerned. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Hylen, 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.** Ms. Sherman asked for Board comment; there was none. **Motion defeated with Ms. DeWitt, Mr. Chalmers and Mr. Hylen voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

Adopted: May 18, 2011 – As Written

**CONWAY ZONING BOARD OF ADJUSTMENT – JANUARY 19, 2010**

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

**Mr. Colbath made a motion, seconded by Ms. DeWitt, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.** Ms. Sherman asked for Board comment; Mr. Chalmers stated that the definition of hardship would be there were special conditions on the property. **Motion defeated with Ms. DeWitt, Mr. Chalmers and Mr. Hylen voting in the negative and Mr. Colbath and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 5.a. **Mr. Colbath made a motion, seconded by Ms. DeWitt, that if the criteria in subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Ms. DeWitt, that, based on the forgoing findings of fact, the variance from §147.13.1.4 of the Town of Conway Zoning Ordinance to increase the density from seven units, one commercial and six residential, to eight units, one commercial and seven residential, be granted. Motion unanimously carried.**

Meeting adjourned at 8:40 pm.

Respectfully Submitted,



Holly L. Meserve  
Planning Assistant