

## ZONING BOARD OF ADJUSTMENT

### MINUTES

JUNE 20, 2012

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, June 20, 2012 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm. Those present were: Chair, Phyllis Sherman; Andrew Chalmers; Dana Hysten; Alternate, Luigi Bartolomeo; Alternate, Martha Tobin; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve. Peter Malia, Town Council, and Thomas Holmes, Tax Assessor, were also in attendance.

#### APPOINTMENT OF ALTERNATE MEMBER

Ms. Sherman appointed Ms. Tobin and Mr. Bartolomeo as voting members.

#### PUBLIC HEARINGS

A public hearing was opened at 7:05 pm to consider a **VARIANCE** requested by **GRJH, INC** in regards to §147.13.6.7.10.1 of the Conway Zoning Ordinance to allow an internally lit sign at 20 Main Street, Conway (PID 265-46). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, June 8, 2012.

Fay Melendy of Melendy, Lee and Santuccio appeared before the Board. Ms. Sherman stated there are five members, but one member had the applicant as a client. Ms. Melendy stated that she is okay with Mr. Bartolomeo acting on the application as long as he was comfortable. Mr. Bartolomeo agreed he could sit on the application. Ms. Sherman read the application and the applicable section of the ordinance.

Ms. Melendy stated this application is to permit internal lighting to a sign that otherwise conforms to the design standards. Ms. Melendy stated that the property previously had an internally lit sign that was voluntarily given up for an externally lit sign. Ms. Melendy stated the signage at that time was too large and to keep the signage they entered an agreement with the Town's Code Enforcement Officer to relinquish the internally lighting.

Ms. Melendy stated that her client would like to install a flat sign with the Sunoco logo and pricing information. Ms. Melendy stated this site is one of four convenience stores on Main Street in Conway Village. Ms. Melendy stated that the other existing convenience stores have internally lit signs. Ms. Melendy stated that this section of the ordinance has already been legally challenged and went to Superior Court.

Ms. Melendy stated from that decision, Asselin vs. Town of Conway, we know what the intent of the ordinance was at the time of enactment; preservation of scenic vistas, discouragement of development competing with natural environments and promoting of community character.

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Ms. Melendy stated that the Court upheld the right of a community to adopt a zoning ordinance provision based on aesthetics, but when the purpose is the protection of the aesthetics of the community they are tying the restriction it is still incumbent of the Board that it applies the regulation so that it does not unreasonably effect a community property.

Ms. Melendy stated that the applicant asserts that the granting of the variance would not be contrary to the public; the stated intent of the ordinance is to a) preserve scenic vistas and Main Street, Conway does not have any scenic vistas in need of protection; b) discourage development from competing with the natural environment and the beginning of the Highway Commercial District the Zoning Ordinance provides that the regulations are primarily designed to accommodate a compatible mixture of uses that are compatible with village centers.

Ms. Melendy stated that businesses in the Town of Conway are predicated on tourism and tourists need gas facilities. Ms. Melendy stated that the business in question is certainly a legitimate business and the business is fully compatible with the businesses in the area in which it is located. Ms. Melendy stated that area also has numerous internally lit signs. Ms. Melendy stated that the proposed internally lit sign will not stand on its own, but will be compatible with all the other businesses in this area.

Ms. Melendy stated c) to promote the community character and changing this sign from externally lit to internally lit is not going to affect the general character of Main Street, Conway. Ms. Melendy stated that the granting of the variance would do substantial justice. Ms. Melendy stated when relief is sought to permit a use that already occurs in the neighborhood it does substantial justice. Ms. Melendy stated that there would be no diminution in value of properties as the use that is sought is consistent with the surrounding properties and should not have ill effect on surrounding properties.

Ms. Melendy stated in regard to literal enforcement, given the location of the business and the fact that all the other convenience/gas stations in the immediate area have illuminated signs, the board should find that the use is a reasonable use. Ms. Melendy stated that Conway Village does not have scenic vistas and does not need protection; it would be keeping with the other businesses in the area. Ms. Melendy stated that this particular location of this business and the fact that it will not impact scenic vistas or natural environment, this board should find that the criteria for unnecessary hardship.

Mr. Bartolomeo asked if the pricing portion of the sign would be internally lit. Ms. Melendy answered in the affirmative. Ms. Tobin asked the location of the sign. Ms. Melendy stated that it would be in the same location and the distant from right-of-way is still non-conforming.

Mr. Bartolomeo stated that he has always favored internally lit signs as they are not glaring into the night sky; they glow. Mr. Irving stated that the applicant knowingly and willingly gave up the internally lit sign. Ms. Melendy stated that they voluntarily, in a compromise with the Town, gave up their internally lit sign; now they would like a variance to have the Board look at its ordinance, and look at the site with regard to the intent of the ordinance.

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Ms. Sherman asked for public comment; Larry Blaney stated he has a diesel truck and Sunoco is one of the only diesel stations; are they planning on closing. Ms. Sherman answered in the negative.

Ms. Sherman read item 1. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Hylen stated in regard to preserving the scenic vista, this would be a matter of staying status quo. Mr. Hylen stated that Conway Village at one time was more scenic than it is now and this seems to go against the public interest by letting things grow bit by bit. Mr. Bartolomeo stated internally lit signs used to be awful, but the technology has changed. Mr. Bartolomeo stated that this section of the ordinance should be restudied.

Mr. Malia stated that the Supreme Court changed the criteria for hardship last September. Mr. Malia stated if you approve item 1 then you should approve item 2 and vice versa, unless granting the variance would alter the neighborhood or effect the health, safety and general welfare of the community.

Mr. Hylen stated adding another internally lit sign would affect the view of Main Street. Mr. Hylen asked what character we are promoting by adding another internally lit sign. Mr. Bartolomeo stated that externally lit signs are better now. Mr. Hylen stated that he does not like the way internally lit signs look on a Main Street. Mr. Hylen stated to him it looks more technology; more city then country. **Motion carried with Mr. Hylen voting in the negative.**

Ms. Sherman read item 2. **Ms. Tobin 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 carried with Mr. Hylen voting in the negative.**

Ms. Sherman read item 3. **Mr. Hylen made a motion, seconded by Mr. Chalmers, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Hylen voting in the negative.**

Ms. Sherman read item 4. **Mr. Bartolomeo made a motion, seconded by Ms. Tobin, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Mr. Hylen asked if there were any other businesses in the same area that did not have internally lit signs. The Board reviewed the signs and it seemed that there were more internally lit signs then not. **Motion unanimously carried.**

Ms. Sherman read item 5.a.i. **Ms. Tobin 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; Mr. Chalmers stated that the property could continue to be used as a gas station without an internally lit sign. **Motion defeated with Ms. Sherman, Mr. Chalmers and Mr. Hylen voting in the negative and Ms. Tobin and Mr. Bartolomeo voting in the affirmative.**

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

**Ms. Tobin made a motion, seconded by Mr. Hylen, 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 carried with Mr. Chalmers and Mr. Hylen voting in the negative.**

The Board determined that item 5.b was not applicable to this application.

**Mr. Hylen made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the variance from §147.13.6.7.10.1 of the Town of Conway Zoning Ordinance to allow an internally lit sign be granted. Motion carried with Mr. Chalmers and Mr. Hylen voting in the negative.**

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A public hearing was opened at 7:43 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **ROGER THURRELL** in regard to §147.14 of the Conway Zoning Ordinance **to request that the ZBA find that the existing structures are legally existing non-conformities** at 43 Brookview Road, Conway (PID 250-176). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, June 8, 2012.

Mr. Malia stated that he and Town Staff have reviewed the documentation submitted by the applicant and concluded that the structures that were on his application were grandfathered. Mr. Irving stated that the violation notice has been revoked so there is no longer a decision that would invoke the jurisdiction of this Board.

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A public hearing was opened at 7:44 pm to consider a **VARIANCE** requested by **LARRY BLANEY AND SUSAN WILSON-BLANEY** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 23 E Road, Conway (PID 251-87). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, December 2, 2011. This hearing was continued from December 14, 2011; March 21, 2012; and April 18, 2012.

Mr. Malia stated that the applicant had submitted a notebook of information and after review of that information, the Town’s information and applicable law the violation notice was revoked and there is no need for a variance. Mr. Irving stated that the violation notice has been revoked so there is no longer a decision that would invoke the jurisdiction of this Board.

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A public hearing was opened at 7:45 pm to consider a **SPECIAL EXCEPTION** requested by **TODD MARSHALL** in regard to §147.13.14.3.6; §147.13.14.3.10 and §147.13.16.10.4 of the Conway Zoning Ordinance **for the proposed bank stabilization project** on West Side Road, Conway (PID 262-56). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, April 6, 2012. This hearing was continued from April 18, 2012.

Todd Marshall and Mike Duffy of Horizons Engineering appeared before the Board. Mr. Duffy submitted a package of information to the Board. Mr. Marshall stated they have now obtained the State permits. Mr. Duffy stated we have addressed concerns from an abutting property owner as well. Mr. Duffy stated that the Conway Conservation Commission has endorsed the project.

Mr. Duffy stated in the early stages of the project they had not identified the property line. Mr. Duffy stated that they had attempted to work with the abutter as it is better to have their permission and gain their cooperation, but we were unable to gain permission. Mr. Duffy stated that NHDES indicated that we did not show the property line, so we determined the property line under the State's strict definition and determined that the project was not within 20-feet of the abutting property, therefore, we did not need a waiver from the abutter and the application has been accepted by the State.

Mr. Duffy showed pictures of rock veins and stated that they don't collect debris and they don't force water onto the abutting property. Mr. Duffy stated there is a steep slope which will be tapered back and the rock veins will be very similar to those shown in the pictures. Mr. Duffy stated that the veins very gently bring the water back to the middle of the river, but not over to the abutting property. Mr. Duffy referred to item #10 in the State's Wetlands permit that addresses the abutters concerns.

Mr. Bartolomeo asked why the rock veins would not they catch debris. Mr. Duffy stated that they will be totally submerged during a flood. Mr. Duffy stated structures from the campground ended up on Todd's property and are still on his property today.

Ms. Sherman asked for public comment; Paul Tobacco, Eastern Slope Campground, stated they first met with good feelings and he thought it would improve his property, not take his property. Mr. Tobacco stated that he thought they were going to only restore what they had and not move the river onto his land. Mr. Tobacco stated that they still have plans to shoot it over to his river banks. Mr. Tobacco stated that he had hoped they would stabilize what they have.

Mr. Tobacco stated that he just learned that the State approved the Wetlands application and he hasn't had time to review it. Mr. Tobacco stated that he was hoping they would be kinder to us as we do have buildings in the floodplain. Mr. Tobacco stated that he refused to sign a waiver to access his property after they threatened to take the land by eminent domain. Mr. Tobacco stated that he didn't realize the State would approve it and he would like time to hire his own engineer. Mr. Tobacco stated that this is premature at this point and he does not see any proof that it will not destroy his land.

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Mr. Hylen asked if the project to stabilize the bank is going to affect anything on the other side. Mr. Duffy answered in the negative and stated there is no eminent domain for Mr. Marshall. Mr. Duffy stated that they understand the abutter's concerns and they have tried to explain that this is not intended to harm the abutter. Mr. Duffy stated that the abutter has gained about five acres in land; we are just trying to stop the erosion.

Mr. Duffy stated that the rock veins will enhance the project, but the true stabilization is the planted buffer. Mr. Duffy stated that the stone will allow interim relief while the long term solution takes root. Mr. Duffy stated that this will not impact the abutter.

Richard Caruthers stated that he is a recreational kayaker and there are numerous places like this along the river. Mr. Caruthers stated that these types of projects should be looked at more aggressively as it seems like a good idea. Nels Liljedahl of the Natural Resources Conservation Service stated that the project has been reviewed and approved by NRCS and this firm has done a substantial amount of river work.

Debbie Kelly asked if they could show where they are going to be set up and how it is going to work. Mr. Duffy explained. Michelle Ricker asked which property line is he referring to, the one in their deed, the one in Mr. Marshall's deed or the one that was just identified. Mr. Duffy stated the one by the licensed surveyor. Mr. Duffy stated that the abutting property has gained 5 acres over the past 55 years. David Weathers stated in regard to the concern about forcing water onto the abutting property, rip rap will dissipate the energy.

Ms. Sherman read item 1. **Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, that the purpose is consistent with the permitted uses represented in §147.16.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Hylen made a motion, seconded by Mr. Bartolomeo, that the amount of fill is not greater than is necessary to achieve that purpose.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, that the fill or other materials shall be protected against erosion by riprap, vegetation cover or bulk-heading.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Bartolomeo made a motion, seconded by Ms. Tobin that all development and substantial improvements comply with the minimum standards of the regulations of the National Flood Insurance Program contained in 44 CFR 60.3 and 44 CFR 60.6 (Code of Federal Regulations), as amended.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 5. **Ms. Tobin made a motion, seconded by Mr. Hylen, the applicant's New Hampshire registered engineer has shown that the activity would not result in any increase in flood hazard within the Town of Conway.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 6. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the granting of the special exception would not violate the general spirit of the ordinance nor would it create a public health or safety hazard.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Hylen made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.14.3.6 of the Town of Conway Zoning Ordinance to stabilize eroding river bank as proposed be granted. Motion unanimously carried.**

Ms. Sherman read item 1. **Mr. Bartolomeo made a motion, seconded by Ms. Tobin, that all development and substantial improvements comply with the minimum standards of the regulations of the National Flood Insurance Program contained in 44 CFR 60.3 and 44 CFR 60.6 (Code of Federal Regulations), as amended.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the applicant's New Hampshire registered engineer has shown that the activity would not result in any increase in flood hazard within the Town of Conway.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Chalmers made a motion, seconded by Mr. Hylen, that the granting of the special exception would not violate the general spirit of the ordinance nor would it create a public health or safety hazard.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Chalmers made a motion, seconded by Mr. Hylen, that based on the forgoing findings of fact, the Special Exception pursuant to §147.13.14.3.10 of the Town of Conway Zoning Ordinance to stabilize eroding river bank as proposed be granted. Motion unanimously carried.**

Ms. Sherman read item 1. **Mr. Bartolomeo made a motion, seconded by Ms. Tobin, that the shoreline is being eroded by action of the waters and the riprap will protect the shoreline from further erosion without enhancing erosion at another location on the shoreline.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Ms. Tobin made a motion, seconded by Mr. Chalmers, there is no better feasible alternative, in keeping with State and Federal standards for the issuance of development permits in 404 jurisdictional wetlands.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Mr. Chalmers made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.16.10.4 & 10 of the Town of Conway Zoning Ordinance be granted with the condition that prior to commencement of construction all required state and federal permits are obtained. Motion unanimously carried.

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A public hearing was opened at 8:31 pm to consider a **VARIANCE** requested by **KATHARINE HERMANN** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 25 Brookview Road, Conway (PID 250-175). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, June 8, 2012.

Howard Hermann appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Hermann stated it was constructed several years back by Rob Weaver. Mr. Hermann stated that they had obtained a permit and were in compliance with the floodplain. Ms. Sherman asked what it is used for. Mr. Hermann stated it has a power saw, lumber and used for storage. Mr. Hermann stated that they have a meadow that he maintains. Ms. Sherman asked how much acreage. Mr. Hermann stated it is about a full acre.

Mr. Hermann stated that this is a slab with a roof over it. Mr. Holmes stated there was a permit issued in 1995 for a gambrel roof shed. Ms. Sherman asked when the addition was constructed. Mr. Hermann answered simultaneous and stated that the timbers are part of the roof. Ms. Sherman stated since there was a building permit there must have been an inspection. Mr. Holmes stated the assessing card does not indicate a date of an inspection. Mr. Holmes stated it was picked up but don't know when that happened.

Mr. Bartolomeo asked if this is a 1979 issue. Mr. Irving stated that the special exception was for a shed building and the primary use for this property is recreational. Mr. Irving stated there is a special exception for properties in the floodplain but out of the floodway for agricultural buildings.

Mr. Bartolomeo asked if they built it. Mr. Hermann stated that he built the first home in 1959. Mr. Bartolomeo stated from the pictures it appears that it was constructed all at the same time. Ms. Sherman stated that the Assessing Department picked up the structures at the same time. Mr. Bartolomeo stated that is why he thinks it is done all at once

Ms. Sherman asked for public comment; Patrick Hill stated let them go they are 90 years old; it is a shame. Susan Blaney stated that their house is almost backed up to the West Side Road; the building is one piece. Ms. Blaney stated that they would have to take down an entire shed and they have already taken down another house.

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Richard Caruthers stated that it seems in all of these cases there is confusion of footprint size and when it was established. Mr. Caruthers stated someone accepted it and they have been taxing him on it for years; seems accepted. Mr. Hylen asked if there were any sort of inspections. Mr. Irving stated that the voters of the Town of Conway have not empowered the Town to do residential building inspections.

Mr. Bartolomeo asked if this is an issue of an unpermitted expansion. Mr. Irving stated it is an unpermitted expansion in the floodplain; albeit the edge of the floodplain. Mr. Caruthers stated it is by elevation and if it was not flooded it would seem that it would be out of the floodplain. Mr. Irving stated that they could apply for a LOMA, but FEMA's map indicates that their property is in the floodplain.

Mr. Malia stated that it is up to the general contractor and the property owner to build what's on the permit. Mr. Malia stated that the Assessing Department goes out every few years but they don't necessarily cross reference what is out there with building permits.

Mr. Hermann asked if the issue is the slab. Mr. Holmes answered in the affirmative. Mr. Holmes stated that the building permit is on the honor system. Mr. Hermann stated that this is not a question of codes, but the way the building permit was written. Mr. Hermann stated that it is inconceivable that he would have submitted a building permit and built something that was not on it.

Mr. Chalmers asked if there is a statute of limitation for this type of situation. Mr. Malia answered in the negative. Mr. Bartolomeo asked if he signed the building permit. Mr. Hermann looked at the building permit and stated that he did sign it. Ms. Tobin stated that she doesn't see making them take it down. Mr. Irving stated there were two other structures on this site and now it just has this home.

Mr. Bartolomeo stated that he thinks it was omitted from the building permit and looks like it was constructed at the same time; they had a legal permit. Mr. Irving stated that the permit references the size that was granted on the special exception. Mr. Bartolomeo stated that he went through the process; don't think the intention was to not get a building permit.

Ms. Sherman read item 1. **Mr. Bartolomeo made a motion, seconded by Mr. Hylen, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Hylen asked how this is different from the way we have been looking at buildings in the floodplain in regard to the flood insurance program. Mr. Irving stated that these are agricultural buildings that are allowed by special exception in the floodplain which are different from recreational buildings and patios. **Motion unanimously carried.**

Ms. Sherman read item 2. **Ms. Tobin 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.**

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Ms. Sherman read item 3. **Ms. Tobin 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. **Ms. Tobin made a motion, seconded by Mr. Bartolomeo, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Mr. Hylen stated because this property was granted a special exception and a building permit was issued, he does not think surrounding properties would be diminished. **Motion unanimously carried.**

Ms. Sherman read item 5.a.i. **Ms. Tobin 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. Chalmers stated that this property could continue to be used as a single family home without the carport. **Motion carried with Mr. Chalmers voting in the negative.**

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

**Ms. Tobin made a motion, seconded by Mr. Chalmers, 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 carried with Mr. Chalmers and Mr. Hylen voting in the negative.**

The Board determined that item 5.b was not applicable to this application.

Ms. Sherman read item 6. **Ms. Tobin made a motion, seconded by Mr. Chalmers, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Ms. Sherman asked for Board comment; Mr. Hylen stated that it appears on the surface that they have met the requirement, but where this property is located, if it floods, is near west side road. Mr. Irving stated that the building it is attached to is permitted. **Motion unanimously carried.**

The Board determined that item 7 was not applicable to this application.

Ms. Sherman read item 8. **Mr. Hylen made a motion, seconded by Mr. Bartolomeo, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Chalmers made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the variance from §147.13.14 of the Town of Conway Zoning Ordinance to allow existing structures to remain in the Floodplain Conservation District be granted. Motion unanimously carried.**

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A public hearing was opened at 9:18 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **EUGENE DUGGAN AND PAMELA LAMONTAGNE** in regard to §147.14 of the Conway Zoning Ordinance **to request that the ZBA find that the existing structures are legally existing non-conformities** at 114 E Road, Conway (PID 251-63). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, June 8, 2012.

Eugene Duggan and Pamela LaMontagne appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. LaMontagne stated that her father originally purchased the property in 1972 which was on a gentleman's handshake. Ms. LaMontagne stated he made the final payment in 1976 and the deed was transferred.

Ms. LaMontagne stated at that time he went to the Town to obtain a building permit for a cement slab as there was already a small shed there; he was told at that time the Town did not require it. Ms. LaMontagne stated so the slab went down and the roof on it installed. Ms. LaMontagne stated the Assessing records indicate that in 1978 that the land was vacant, but we have provided a picture that there was a shed.

Ms. LaMontagne stated in 1980 there was an open porch and shed frame and in 1981 there was just a small shed and the canopy; the slab were not picked up until 1994. Ms. LaMontagne stated that her father paid \$225 for the property and paid it over two years; we didn't have a lot of money obviously, so we didn't take pictures.

Mr. Chalmers asked if these were there prior to 1979. Ms. LaMontagne answered in the affirmative. Mr. Bartolomeo stated that it doesn't show up on the assessing records until 1994. Mr. Bartolomeo asked if the shed there now is the original shed. Mr. Duggan answered in the negative. Mr. Malia asked Mr. Homes if he thought if the slab and canopy were there it would be picked up in 1981. Mr. Holmes stated that the assessing records indicate that the lot was inspected and then re-inspected by someone else verifying the first person's inspection.

Ms. LaMontagne stated that his brother's owned property down by the river and they were grandfathered in January and the assessing records indicated that it was a vacant lot. Ms. LaMontagne stated that they were able to produce pictures, same with the Stones. Ms. LaMontagne stated that she doesn't believe the Town records are accurate. Mr. Holmes stated that we are saying we cannot grandfather these structures because our records don't show it, so it is up to the property owner to show us.

Mr. Duggan stated that his brother owned the lot next to him, and he is one of the oldest owner's in there. Mr. Duggan stated that he has been there since Shaw owned it. Ms. Sherman asked if the slab and the pavilion were added in 1976. Ms. LaMontagne answered in the affirmative. Mr. Bartolomeo stated there is no other documentation. Mr. Malia asked if he remembered any of the details of pouring of the slab. Mr. Duggan stated that his brothers helped him and his sister's husband. Donald Morse stated that he camped there.

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Susan Blaney stated that she knows that some of the pictures in the Town files are not accurate, not on purpose, but they are wrong. Ms. Blaney stated that his property went up at the same time as the others down by the river.

**Mr. Hysten made a motion, seconded by Mr. Bartolomeo, to uphold the Administrative Decision. Motion unanimously carried.**

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A public hearing was opened at 9:45 pm to consider a **VARIANCE** requested by **CLAUDE AND DOROTHY BOISVERT** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation District** at 14 & 18 B Road, Conway (PID 251-47). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, June 8, 2012.

Tony Marcotte and Claude Boisvert appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Marcotte stated there has been a request for a structure to be removed from the existing travel trailer and to remove other multiple structures. Mr. Marcotte stated the he was told there are two structures on the lot with one of them being above the flood level. Mr. Boisvert asked that the Board vote individually on the structures.

Mr. Marcotte stated that the flood level is 459.90-feet in this area. Mr. Marcotte stated that the property records show there was a structure on the property before 1979, shows an addition onto the travel trailer and then on to the house between 1978 and 1980. Mr. Marcotte stated there was some addition to the first house. Mr. Marcotte stated that they feel it appropriate to keep the existing house as it and modify the second house to be one foot above the base flood elevation. Mr. Marcotte stated that the properties electrical service is above the floodplain level. Mr. Marcotte stated in the last storm the first home did not have water but the lower home did.

Mr. Marcotte stated that the variance would not be contrary to the public interest. Mr. Marcotte stated that the first floor of the first house is above the floodplain level and the second house can be raised so there is not a risk. Mr. Marcotte stated that the first home complies with FEMA and the second home can easily be brought into compliance.

Mr. Marcotte stated granting the variance is in the spirit of the ordinance as it is not taking up any additional flood storage as the first home is above the flood plain and water can pass below. Mr. Chalmers asked if he has applied for a Letter of Map Amendment (LOMA). Mr. Marcotte stated one has been applied for, but he thinks the variance is the most appropriate. Mr. Marcotte stated that there is no effect to the floodplain; he thinks this is different then the average house.

Mr. Irving stated that it is represented to be in the Floodway; but the terrain changes in this area and there is a property across the street that is not even in the floodplain. Mr. Irving stated that we have no record of these structures being permitted and they have evolved over time. Mr. Irving stated that they are not asking for grandfathering, but seeking a variance to keep the

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structures as they are. Mr. Irving stated that this Board cannot permit them to raise the building. Ms. Tobin read the restrictions of the warranty deed. Mr. Irving stated that they are private deed restrictions which would be a civil issue and not a Town issue.

Mr. Marcotte stated that they are in a catch-22 in regard to the LOMA. Mr. Marcotte stated that FEMA will not process the application if the town won't sign the LOMA application. Mr. Irving stated we have not experienced that, people have been requesting LOMA's in this area. Mr. Marcotte stated that they hired Thaddeus Thorne and received letter from them that Town had to sign off. Mr. Irving stated that we have had other properties with issues, but was still able to obtain a LOMA. Mr. Marcotte read a letter from Thaddeus Thorne Surveys.

Mr. Marcotte stated that he spoke with Thaddeus Thorne Surveys and suggested granting the variance with a condition that a LOMA is obtained. Mr. Irving stated that looking at the flood elevations almost all of the structures are in the floodplain and possibly the floodway. Mr. Irving stated that we have a record that indicates that there was an 8 x 34 trailer. Mr. Irving stated the drawing in the package by Thaddeus Thorne Survey show the actual flood elevations; almost all of the structures are in the floodplain and possibly the floodway. Mr. Irving stated that there may be issues obtaining a LOMA or any approvals for any structure in the floodway; that is why they have to seek the variance. Mr. Irving stated that we don't have any record of it being built with a permit prior to the regulations of the floodplain.

Ms. Sherman asked do you know when the second trailer was added. Mr. Marcotte answered in the negative and stated that it showed up on the Assessing records in 1981. Ms. Sherman asked when it was enclosed. Mr. Boisvert stated that he did it a little at a time after he purchased in 1992. Mr. Marcotte stated that he was not changing the footprint and you can still see the hitch from the trailer; he improved what was there.

Mr. Irving asked if the second building was there when he purchased it. Mr. Boisvert answered in the affirmative. Mr. Marcotte stated that the Board should address the two structures separately. Mr. Marcotte stated the Board should allow the existing home with the first floor above the flood elevation to remain; it is 31 years later. Mr. Marcotte stated that he believes a LOMA would be granted for the first home. Mr. Marcotte stated that this would not have any effect on the Town's FEMA status.

Mr. Marcotte stated granting the variance would not diminish the value of surrounding properties. Mr. Marcotte stated they could raise the second home and there is no danger of the house floating away since the flood level is less than one foot. Mr. Marcotte stated granting the variance does not affect the Town's ability to participate in the FEMA program.

Mr. Marcotte stated that this property is on the very edge of the floodplain and the first floor of the first home is above the floodplain and water can pass under it. Mr. Marcotte stated that this is different from a majority of the homes in the area and the first home does not have an effect on the floodplain. Mr. Marcotte stated that the larger home, with it being above the floodplain, is no risk to other people or other properties and it can quickly be remedied for the lower home as well.

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Mr. Marcotte stated that this is a reasonable use of the property; the upper home can be used as it is without taxing the town and without risking life or limb. Mr. Marcotte stated that it is out of the floodplain so there is no reason to enter the property as it is already protected.

Mr. Marcotte stated that the flood waters can pass below the upper home and part of it is out of the floodplain. Mr. Marcotte stated that to be out of the floodplain they would have to use the corner of their lot which would affect the abutting properties. Mr. Marcotte stated removing the home would not benefit anyone. Mr. Marcotte stated that the variance allows reasonable use of the property as it has been used for 32 years.

Mr. Marcotte stated in regard to the threes criterias for the floodway; the water passes below the higher home and the lower home can be raised; this is a very unique site and there would not be a threat to public safety. Mr. Marcotte stated in regard to FEMA guidelines for granting the variance, the variance is for floodplain management, this proposed property is good sound floodplain management because these homes can defend that it is unique.

Mr. Marcotte stated that the variance is not necessary for the upper home as it has been there since 1978. Mr. Bartolomeo stated if you were to remove the framed structure, everything else seems to be non-conforming in the floodway. Mr. Holmes stated what we have grandfathered is a wood deck and a trailer; they were there in 1977 and 1981, but the little bump out was not picked up until 1994. Mr. Marcotte, stated Mr. Boisvert did see the building inspector and because he was staying within the existing footprint, he didn't feel he was doing anything wrong.

Ms. Sherman read item 1. **Ms. Tobin made a motion, seconded by Mr. Hylan, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that it would jeopardize the Town's participation in the FEMA program. **Motion unanimously defeated.**

Ms. Sherman read item 2. **Mr. Hylan made a motion, seconded by Ms. Tobin, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated structures in the floodway are forbidden. **Motion unanimously defeated.**

Ms. Sherman read item 3. **Ms. Tobin made a motion, seconded by Mr. Hylan, that substantial justice is done.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that the public interest out ways the applicant's interest. **Motion unanimously defeated.**

Ms. Sherman read item 4. **Mr. Hylan made a motion, seconded by Ms. Tobin, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated if the Town loses its FEMA status there is great potential we could lose its protection. **Motion unanimously defeated.**

Ms. Sherman read item 5.a.i. **Ms. Tobin made a motion, seconded by Mr. Hylan, 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

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for Board comment; Mr. Bartolomeo stated that the property is similar to many others in the area and can still be used for camping. **Motion unanimously defeated.**

Ms. Sherman read item 5.a. ii. **Mr. Hylen made a motion, seconded by Ms. Tobin, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated structures in the floodway are not a reasonable use. **Motion unanimously defeated**

**Mr. Hylen made a motion, seconded by Ms. Tobin, 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. Hylen made a motion, seconded by Ms. Tobin, 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. Bartolomeo stated that the lot can still be reasonably used. **Motion unanimously defeated.**

Ms. Sherman read item 6. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the variance will not result in increased flood heights, additional threats to public safety, or extraordinary public expense.** Ms. Sherman asked for Board comment; Mr. Hylen stated that the applicant did not demonstrate that this would not be the case. **Motion unanimously defeated.**

Ms. Sherman read item 7. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the requested variance is for activity within the designated regulatory floodway, no increase in flood levels during the base flood discharge will result.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated there are two structures in the floodway. Mr. Hylen stated that the applicant has not shown that this would be true. **Motion unanimously defeated.**

Ms. Sherman read item 8. **Ms. Tobin made a motion, seconded by Mr. Hylen, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that the property can still be used. **Motion unanimously defeated.**

**Mr. Chalmers made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the variance from §147.13.14 of the Town of Conway Zoning Ordinance to allow existing structures to remain in the Floodplain Conservation District be granted. Motion unanimously defeated.**

**REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Hylan made a motion, seconded by Mr. Chalmers, to approve the Minutes of May 16, 2012 as written. Motion carried with Ms. Tobin abstaining from voting.**

Meeting adjourned at 10:36 pm.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Holly L. Meserve". The signature is written in a cursive style with a large initial "H" and "M".

Holly L. Meserve  
Recording Secretary