

ZONING BOARD OF ADJUSTMENT

MINUTES

SEPTEMBER 19, 2012

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, September 19, 2012 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, Luigi Bartolomeo; Planning Director, Thomas Irving; and Recording Secretary, Karen Hallowell.

APPOINTMENT OF ALTERNATE MEMBER

Ms. Sherman appointed Mr. Bartolomeo as a voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **TARBERRY COMPANY/RIVER RUN COMPANY** in regard to §147.13.7.4 of the Conway Zoning Ordinance **to allow the construction of a 57 square foot addition within the side setback** at 2686 White Mountain Highway (aka 16 Norcross Circle), North Conway (PID 218-43). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, July 6, 2012.

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 of the property with the Board. Mr. Berry advised they would like to expand the space by 57 square feet and square off the building.

Mr. Berry presented a letter from the North Conway Fire Department stating it would not cause an unsafe situation for the Woodbury property next door. Mr. Berry next advised the Board that there is also a letter from the abutter in their packets that supports the project. Mr. Chalmers questioned if the addition will go out further than the existing building. Mr. Berry responded in the negative.

Mr. Berry stated that the building expansion would not be contrary to public interest as it is not going further into the setback and the building is within the Village Commercial District. Mr. Berry stated that the proposed expansion would be along the existing sideline setback and the present structure was erected when the zoning restriction was a five-foot side setback. Mr. Berry stated that the village area of North Conway has many structures encroaching in the side setback creating the charming character of the village.

Mr. Berry stated substantial justice is done as the variance will allow the property owners to make a more viable space and continue with the successful character of the village. Mr. Berry stated that values of surrounding properties are not diminished as the building will not be encroaching any further into the setback and the abutter has endorsed this minor addition.

Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012

Mr. Berry stated that literal enforcement of the provision would result in an unnecessary hardship. Mr. Berry stated the property is unique; it has a residential property to the north, which is very different than most of the commercial properties in the village, and the parcel provides the protection of a 10-foot setback, plus there is 30 feet between our property and the abutting property.

Mr. Berry stated when the zoning changed from 5 feet to 10 feet to create a better separation in the commercial district there was no consideration given to the high density in the villages of Conway and North Conway where all buildings had been built 5 feet apart. Mr. Berry stated the villages were created before zoning. Mr. Berry stated that the section of the building they are looking to expand would not make the structure more non-conforming in that the expansion would be along the same setback as the structure that was originally built.

With regard to the point that enforcement of the provisions of the ordinance would result in an unnecessary hardship, Mr. Berry stated that the change in zoning in the villages created an unnecessary hardship considering a densely populated village and available space to create a ten foot setback on each parcel which would actually be 20 feet between buildings and they have about 40 feet. Mr. Berry stated that the Norcross building is the largest building with about 2,800 square feet and fits nicely with the charm of the village.

There was brief discussion with the Board regarding setbacks. Ms. Sherman asked for public comments; there were none. Ms. Sherman next asked for any further Board comments or questions; there were 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; there were no comments. **Motion unanimously carried.**

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 were no comments. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that substantial justice is done.** Ms. Sherman asked for Board comment; there were no comments. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there were no comments. **Motion unanimously carried.**

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; there were no comments. **Motion unanimously carried.**

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

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 were no comments. **Motion unanimously carried.**

Mr. Colbath 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 were no comments. **Motion unanimously carried.**

Ms. Sherman read item 5.b. **Mr. Colbath moved, seconded by Mr. Chalmers that we don't need to consider 5.b because 5.a was satisfied.** **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Hysten, that based on the forgoing findings of fact, the variance from §147.13.7.4 of the Town of Conway Zoning Ordinance to allow a 57 square foot addition within the side setback be granted. **Motion unanimously carried.**

A public hearing was opened at 7:48 pm to consider a **VARIANCE** requested by **MOUNT WASHINGTON OBSERVATORY** in regard to §147.14.3 of the Conway Zoning Ordinance to **increase the message area of the previously approved freestanding sign** 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 Friday, September 7, 2012.

Scot Henley, President of the Mount Washington Valley Observatory, and Ed Bergeron of HEB Engineers appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Chalmers recused himself from this matter. Ms. Sherman asked the applicants if they are okay with proceeding with this public hearing with only four Zoning Board of Adjustment members participating. Mr. Henley and Mr. Bergeron both agreed to have the matter heard tonight with four Board members.

Mr. Bergeron distributed photographs of the proposed sign to the Board for review. Mr. Bergeron advised that they are asking to make the existing Citizens Bank sign a less non conforming sign. Mr. Bergeron stated that they would like to remove the current sign and replace it with a combination sign for both the Citizens Bank and the Mount Washington Valley Observatory. Mr. Bergeron stated that the sign would not be internally lit; they will light the sign externally.

Mr. Henley next stated he feels the spirit of the ordinance is met, the surrounding properties are not diminished, and they feel the new sign will fit in better with the look and feel of the village. Mr. Bergeron stated with regard to items 2 and 3 and, as one of the originators of the sign ordinance, one thing was not to have blaring lights. Mr. Bergeron stated that they were great supporters of non-internally lit signs.

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

Mr. Bergeron next stated that, also, if they had to meet the setback requirement, they would be in the bushes in front of the bank and so this would be a hardship.

Mr. Henley stated that the existing sign is 40 square feet and they would like to preserve this. There was discussion by the Board on the size of the sign. Mr. Colbath asked if the banner would remain. Mr. Henley answered in the affirmative. Mr. Irving advised banners have to be over existing signs. Mr. Henley stated he believes we are talking about the wall mounted signs and this is fixed on the front of the building. Mr. Irving stated you are permitted wall signs for each business.

There was next a discussion of the size of the sign and when it was originally placed. Mr. Irving advised that the sign has been the size it is for as long as he knows. Ms. Sherman asked for questions or comments from the public; there were none. Ms. Sherman asked for any additional Board comments; there were none.

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 were no comments. **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 were no comments. **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 were no comments; **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; there were no comments. **Motion unanimously carried.**

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 were no comments. **Motion unanimously carried.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; there were no comments. **Motion unanimously carried.**

Mr. Colbath 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 were no comments. **Motion unanimously carried.**

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

Ms. Sherman read item 5.b. **Mr. Colbath moved, seconded by Mr. Hylen that we don't need to consider 5.b because 5.a was satisfied. Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Hylen, that based on the forgoing findings of fact, the variance from §147.14.3 of the Town of Conway Zoning Ordinance to increase the message area of the previously approved freestanding sign be granted. Motion unanimously carried.

A public hearing was opened at 8:10 pm to consider a **VARIANCE** requested by **EDWARD AND MADELINE BRADY** in regard to §147.14.4.2 of the Conway Zoning Ordinance **to reduce the size of a currently non-conforming lot** on Beechnut Drive, North Conway (PID 232-120). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 7, 2012.

Ron Briggs of Briggs Land Surveying and Edward and Madeline Brady appeared before the Board. Also present was Attorney Bill Albrecht representing the Sotheby's. Mr. Chalmers rejoined the Board at this time. Ms. Sherman read the application and the applicable section of the ordinance.

Mr. Briggs stated they are looking for approval for a reduced lot size. Mr. Briggs stated that he feels the spirit of the ordinance is observed. Mr. Briggs stated that this lot is in Birch Hill on a privately owned water system and a one acre lot for a private water system is required. Mr. Briggs stated as for public health and welfare they would meet the lot requirement if it were a public water system.

Mr. Briggs stated as to the issue of justice, the situation is that the Brady's had owned lots 119 and 120, which they received a building permit for lot 119. Mr. Briggs stated that they thought the improvements were on lot 119 and within the setbacks; however, it was through no fault of their own that this issue arose. Mr. Briggs stated when they conveyed the lot to the Sotheby's it was with the thought that it was in conformance; however, the building is across the property line.

Mr. Bartolomeo asked about the addition. Mr. Irving advised the permit plan was not the same as what was constructed. Mr. Irving stated it was constructed in a different orientation than the plan submitted. Mr. Briggs explained how this may have occurred. Mr. Irving reviewed that the Town of Conway does not authorize residential building inspections and so long as the voters don't allow them, you will find the same situations occurring with other properties. Mr. Briggs reviewed the need to move the boundary line to bring this lot into conformance.

There was next further review of the property. It was pointed out that the shed was put on the property after the house was built. Mr. Irving asked Mr. Briggs to identify a black dot on the

Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012

plan. Mr. Briggs advised that it is a hemlock tree; when they did the plans there were certain things his client wanted to keep such as this tree. There was further review of the plans.

Mr. Chalmers asked Mr. Briggs what will happen if this variance isn't granted. Mr. Briggs advised they would have to take this matter to the attorneys and he does not know what direction they would take. Mr. Bartolomeo stated that he could live with the small part that clips the boundary; however he can't live with the larger portion that extends over.

There was next further discussion of the parcel, the placement of the house, water system, etc. Mr. Chalmers questioned if there was a survey of the property when it changed hands. Mr. Briggs responded in the negative. Mr. Irving next presented a plan from 2002 with the proposed addition for the Board to review.

Mr. Bartolomeo next referred back to the proposed adjusted line. Mr. Bartolomeo stated that if they didn't want the tree it could be smaller and less non-conforming than what they asking for. Mr. Bartolomeo questioned if the buyer is willing to support this proposed plan. Mr. Bartolomeo stated that this is hard for him to accept. Mr. Briggs stated he feels they would reluctantly accept it; they are looking for a way to resolve this between both of them. Mr. Bartolomeo stated he feels the line is more than is needed and he is not sure if he would accept the application as is.

Mr. Colbath questioned if the buyer and seller are agreeable to this, does this then rectify the problem. Mr. Briggs responded in the affirmative.

Mr. Chalmers stated he feels the same as Mr. Bartolomeo and questioned if changing the proposed plan is something that both sides would agree to. Mr. Briggs stated that both sides have said that if this is what it came to this would be acceptable to them. Mr. Colbath questioned if Mr. Bartolomeo felt that the proposal was overkill. Mr. Bartolomeo responded in the affirmative. There was further discussion regarding the proposal.

Ms. Sherman asked for public comments; Attorney Bill Albrecht of Albrecht and Weegar advised that both parties are not present and he feels this matter should be continued so discussions could be held with both parties and so he could speak to his client. Mr. Albrecht stated he thinks that both parties want to work together and he doesn't want to see this Board do all this work and then his client doesn't agree. Mr. Albrecht next stated he would like to get an idea of what this Board would like to see so that he can take this back to his client.

There was further discussion regarding the lot, the water system, the abutters, etc. Mr. Irving stated that right now this is a legally existing non conforming lot. Mr. Briggs stated that the ZBA deals with rules, etc., but on the justice side it is the Board's job to balance the rights of the landowner with the public well being. Mr. Briggs stated in this case the only two lots affected by this variance are 119 and 120 and this has no affect on the other abutters. Mr. Briggs stated that the abutters won't even know of any change to the lots.

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

Mr. Briggs further added they are looking for a resolution to the problem and if both parties are happy and it is not detrimental to either party he feels this is the direct effect on whether to grant the variance or not. Mr. Bartolomeo stated this is why the buyers should have done due diligence and known what they bought. Mr. Briggs stated there is no bad faith; the people who filed this application are the ones affected. Mr. Bartolomeo asked when they bought the other lot. Valerie Shea advised they bought the lot in 2002 and they bought it as a viable buildable lot.

Ms. Sherman questioned if the Board wants to act on this matter or hold it to a future meeting. There was discussion on holding on the matter. Mr. Briggs asked if the Board could give him direction to take back to the clients for discussion. Mr. Irving reviewed that some Board members indicated either an even land swap or to reduce the amount of land swap to what is necessary to make the structures on 232-119 conform to the setbacks. Mr. Bartolomeo stated he feels it should be an even swap. Mr. Briggs advised he brought this up and they felt that they had given up enough already.

Mr. Irving asked if it was the pleasure of this Board to continue the matter. The Board agreed. Mr. Irving questioned how much time did Mr. Briggs and Mr. Albrecht need to speak to their clients. Both Mr. Briggs and Mr. Albrecht agreed to 30 days. Mr. Bartolomeo questioned if this would be a reapplication or do they have to withdraw the application. Mr. Irving stated he feels they don't need to withdraw at this time and that the matter can be continued. The Board briefly discussed and agreed to just continue the matter for now.

Mr. Irving advised that any new information would have to be to the Board at least seven days prior to the next meeting as the Board and public will need time to review same. **Mr. Bartolomeo moved, seconded by Mr. Colbath, to continue this public hearing and application to October 17, 2012 at 7:30 p.m. The motion unanimously carried.**

A public hearing was opened at 9:20 pm to consider a **VARIANCE** requested by **EDWARD AND MADELINE BRADY** in regard to §147.13.1.2.3 of the Conway Zoning Ordinance to **reduce the size of a currently non-conforming lot** on Beechnut Drive, North Conway (PID 232-120). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 7, 2012.

Surveyor, Ron Briggs, and Edward and Madeline Brady appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. **Mr. Bartolomeo moved, seconded by Mr. Hylen, to continue this public hearing and application to October 17, 2012 at 7:30 p.m. Motion unanimously carried.**

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

A public hearing was opened at 9:23 pm to consider a **VARIANCE** requested by **MARY GIBBENS** in regard to §147.14.2.2 of the Conway Zoning Ordinance **to increase the three-dimensional envelope by adding dormers to a house within the Floodplain Conservation Overlay District** at 74 Bay Road, Conway (PID 251-139). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 7, 2012.

Mary Gibbens did not appear for this public hearing. Mr. Irving questioned if the Board wanted to continue the matter or consider the variance request tonight. The Board agreed to proceed with the application. Ms. Sherman read the application and the applicable section of the ordinance.

The Board reviewed information in the application. Mr. Irving pointed out this is in the floodplain not the floodway and FEMA requirements apply. Mr. Bartolomeo questioned if the proposed dormers are on the roof and high enough to be out of the high water mark. Mr. Irving answered in the negative and stated that the three-dimensional envelope of a building cannot be expanded.

Mr. Irving next stated that there is one thing he wanted to correct in the application in that there is a statement that someone told them they could change the footprint. Mr. Irving stated that this person has received notice of a violation and they tried for a Letter of Map Amendment (LOMA), but failed. Mr. Irving stated that the town did not allow them to do this.

Mr. Bartolomeo asked if they could put in skylights. Mr. Irving responded in the affirmative. Ms. Sherman questioned where the property is located. The Board reviewed a map of Transvale and identified the property location. Ms. Sherman asked for public comments; there were none.

Ms. Sherman read item 1. **Mr. Colbath 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 the variance would be contrary to the public interest and could jeopardize the Town's participation in the FEMA program. **Motion unanimously defeated.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Hylan, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that the spirit of the ordinance is not observed and the request is directly opposite to the spirit of the restriction. **Motion unanimously defeated.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Hylan, that substantial justice is done.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that substantial justice is not done and the benefit gained by the applicant is greater than the benefit gained by the public. Mr. Bartolomeo stated that the public would suffer if the Town is suspended from the National Flood Insurance Program. **Motion unanimously defeated.**

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylen, that the values of surrounding properties are not diminished.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated the values of surrounding properties are diminished and others in the area could lose FEMA/NFIP protection. **Motion unanimously defeated.**

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; Mr. Chalmers stated this property is not distinct from other properties in the area. **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; Mr. Chalmers stated expanding buildings in a floodplain is not a reasonable use. **Motion unanimously defeated.**

Mr. Colbath 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 were no comments. **Motion unanimously defeated.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Hylen, that if the criteria is 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 that the property can still be used as it had been in the previous years. **Motion unanimously defeated.**

Ms. Sherman read item 6. **Mr. Colbath 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. Colbath stated the applicant did not demonstrate that flood heights would not increase, that there would be no threat to public safety, or that there would not be an extraordinary public expense. Mr. Chalmers added the applicant has not presented any of this information. **Motion unanimously defeated.**

Ms. Sherman read item 8. **Mr. Colbath 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. Chalmers stated that granting the variance would not afford any relief from flood hazards. **Motion unanimously defeated.**

**Adopted: ADOPTED: October 17, 2012 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – SEPTEMBER 19, 2012**

Mr. Chalmers made a motion, seconded by Mr. Colbath, that based on the forgoing findings of fact, the variance from §147.14.2.2 of the Town of Conway Zoning Ordinance to increase the three-dimensional envelope by adding dormers to a house within the Floodplain Conservation Overlay District be granted. Motion unanimously defeated.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to approve the Minutes of July 18, 2012 as written. The motion carried with Mr. Hylen abstaining.

Mr. Colbath made a motion, seconded by Mr. Hylen, to approve the Minutes of August 15, 2012 as written. The motion carried with Mr. Colbath abstaining.

Mr. Irving reminded the Board the next ZBA meeting on October 17, 2012 will start at 7:00 p.m. instead of 7:30 p.m.

At 9:35 p.m., **Mr. Colbath moved, seconded by Mr. Chalmers to adjourn the meeting. Motion unanimously carried.**

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Karen J. Hallowell", with a long horizontal flourish extending to the right.

Karen J. Hallowell
Recording Secretary