

ZONING BOARD OF ADJUSTMENT

MINUTES

OCTOBER 17, 2012

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, October 17, 2012 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Dana Hylan; Alternate, Luigi Bartolomeo; Alternate, Martha Tobin; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBER

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

MWV HOUSING COALITION – *HOUSING MATTERS* RESOURCE BOOKLET PRESENTATION

Theresa Kennett could not attend this evening, but booklets were distributed to the Board.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider a **SPECIAL EXCEPTION** requested by **ROBERT HEWITT** in regard to §147.13.1.2.4.2 of the Conway Zoning Ordinance **to allow an accessory apartment** at 1040 West Side Road, North Conway (PID 250-101). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 3, 2012.

Robert Hewitt appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Hewitt stated that it is an owner-occupied single family house; it is 650 square feet; it is above an existing garage; it has an entrance off Heather Hill Road and there is sufficient parking for both units. Mr. Colbath asked if the existing house will be reduced from four bedrooms to two bedrooms and two bedrooms in the apartment. Mr. Hewitt answered in the affirmative.

M.s Sherman public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the apartment is accessory to an owner-occupied single family dwelling.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the apartment is no less than 300 square feet and no greater than 800 square feet.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the apartment is architecturally compatibility with the neighborhood.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Tobin, that sufficient parking is located on site.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.1.2.4.2 of the Town of Conway Zoning Ordinance to allow an accessory apartment be granted. Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

A public hearing was opened at 7:14 pm to consider a **VARIANCE** requested by **MARTIN AND ANN JONES** in regard to §147.13.14 of the Conway Zoning Ordinance **to allow existing structures to remain in the Floodplain Conservation Overlay District** at 109 Brookview Road, Conway (PID 250-190). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Tuesday, May 1, 2012. This hearing was continued from May 16, 2012 and July 18, 2012.

Martin Jones appeared before the Board. Mr. Irving stated that the applicant is actively pursuing a Letter of Map Amendment (LOMA) and FEMA has still not issued it even though there are indications from the surveyor that it meets the requirements. **Mr. Colbath made a motion, seconded by Ms. Tobin, to continue the public hearing for Martin and Ann Jones until April 17, 2012 at 7:30 pm. Motion unanimously carried.**

OTHER BUSINESS

Ms. Tobin made a motion, seconded by Mr. Bartolomeo, to take the agenda out of order. Motion unanimously carried.

Jeffery and Michelle Knowles (PID 251-61) to consider a Motion for Rehearing at 128 E Road, Conway (File #12-64): Mr. Colbath stated that he does not remember any affidavits at the first meeting. Mr. Irving stated there were three affidavits submitted at the first meeting; Jane Duggan, Leo McCarthy and Susan Wilson-Blaney.

Mr. Colbath stated that they are not claiming a procedural error and there is no new information. Mr. Bartolomeo stated that the motion is built on the Town’s lack of enforcement, or estoppel, which is not this Board’s purview. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to grant the Motion for Rehearing requested by Jeffery and Michelle Knowles. Motion unanimously defeated.**

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2013 ZBA Meeting Dates and Deadlines: Mr. Colbath made a motion, seconded by Mr. Hylen, to accept the ZBA Meeting Dates and Deadlines for 2013. Motion unanimously carried.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to approve the Minutes of September 19, 2012 as written. Motion carried with Ms. Tobin abstaining from voting.

PUBLIC HEARINGS CONTINUED

A public hearing was opened at 7:30 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.

Attorney Bill Albrecht appeared before the Board. Edward Brady and James Sotheby were in attendance. Mr. Albrecht stated that he is representing both the Brady's and the Sotheby's. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Albrecht stated an amended lot line adjustment has been submitted to the Board and both parties are in agreement to the change. Mr. Albrecht stated that the plan is restricted to just the area that is needed to make the structure conforming.

Mr. Albrecht read a statement to the Board dated 10/17/12 [copy attached].

Mr. Bartolomeo stated a variance would not be necessary if there was another way to resolve the issue. Mr. Albrecht stated the Supreme Court has ruled even if there are other viable alternatives, the burden of the party it is to meet the five criteria's of a variance. Mr. Bartolomeo stated that this Board has interpreted it to be if there are no other alternatives. Mr. Albrecht stated in the case of Harborside, the Supreme Court stated that applicant does not have to prove that there is no other alternative to be granted a variance. Mr. Albrecht stated that the initial request in this case was overly aggressive.

Mr. Bartolomeo stated the equal land swap seems to be reasonable and they wouldn't be here tonight if there was a land swap. Mr. Bartolomeo asked if the buyers were given a warranty deed free of defects on this property. Mr. Sotheby agreed.

Ms. Sherman asked for public comment; James Sotheby stated that this is a corner lot. Mr. Sotheby stated the driveway is on Randall Farm Road and the area along Beechnut Drive has a view of the Moats and is where the propane tank is accessed. Mr. Sotheby stated if there is an equal land swap they would lose the view; they will not agree to an equal area exchange.

Mr. Bartolomeo stated it appears they are coming to the Board to get bailed out; sorry for the trouble, but glad they have title insurance.

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Valerie Shae, Realtor, stated that they did not request an equal land swap as she has been told that the Town does not like jagged property lines and would not accept this. Ms. Shae stated there was an amended septic design done that was not on file with the Town. Ms. Shae asked if the Town reviews the files before issuing building permits because they should have come across the septic issues. Mr. Albrecht submitted a copy of Public Utilities Commission order #25,309 dated December 29, 2011 to the Board.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated that it puts the Board in a position to correct a bundle of errors by others. **Motion carried with Mr. Bartolomeo and Ms. Tobin voting in the negative.**

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; Mr. Bartolomeo stated making a lot more non-conforming is not in the spirit of the ordinance. **Motion defeated with Mr. Hylen, Mr. Bartolomeo, Ms. Tobin and Ms. Sherman voting in the negative.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Tobin, that substantial justice is done.** Ms. Sherman asked for Board comment; Mr. Hylen asked for a clarification on this question. Mr. Hylen asked if this is public versus the applicant and who gains more. Mr. Irving stated that it is partly of the benefits being gained, but have to balance the harm to the applicant by not granting the variance versus the harm to the Town by granting the variance. Mr. Irving stated no one should gain more than one is hurt.

Mr. Colbath stated there has been no input from the abutters; there is not an outcry that represents the public. Mr. Bartolomeo stated they are coming to the Board to solve the problems of others when there is a legitimate solution. **Motion carried with Mr. Bartolomeo and Ms. Tobin voting in the negative.**

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

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Ms. Tobin, 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. Bartolomeo stated there is a problem that needs to be resolved and a variance is not the only way to resolve it. Mr. Bartolomeo stated that he thinks this is the misuse of a public hearing; you cannot make a non-conforming lot more non-conforming. **Motion defeated with Mr. Hylen, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use is a reasonable use.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated unnecessarily making one lot more non-conforming is not responsible. **Motion carried with Mr. Bartolomeo voting in the negative.**

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Mr. Colbath 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 defeated with Mr. Hysten, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Ms. Tobin, 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. Hysten stated there are no special conditions of this property. Mr. Bartolomeo stated that the variance is not necessary as there is another alternative. **Motion defeated with Mr. Hysten, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Mr. Colbath made a motion, seconded by Ms. Tobin that, based on the forgoing findings of fact, the variance from §147.14.4.2 of the Town of Conway Zoning Ordinance to reduce the size of a currently non-conforming lot be granted. Motion defeated with Mr. Hysten, Mr. Bartolomeo and Ms. Tobin voting in the negative.

A public hearing was opened at 8:13 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. This hearing was continued from September 19, 2012.

Attorney Bill Albrecht appeared before the Board. Edward Brady and James Sotheby were in attendance. Mr. Albrecht stated that he is representing both the Brady's and the Sotheby's. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Albrecht stated that the arguments have already been made in the previous application; there are no further arguments. Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated he does not think it is in the public's interest to solve errs by other professionals; there is another alternative. **Motion carried with Mr. Hysten, Mr. Colbath and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; Mr. Hysten stated that this is against the spirit of the ordinance. **Motion defeated with Mr. Hysten, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

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

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

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Ms. Tobin, 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 are no special conditions relating to any other properties in the area. **Motion defeated with Mr. Hylen, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Ms. Sherman read item 5.a. ii. **Mr. Colbath made a motion, seconded by Ms. Tobin, 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. 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 defeated with Mr. Hylen, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Ms. Sherman read item 5.b. **Mr. Colbath 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. Hylen stated there are no special conditions and this property can be reasonably used. **Motion defeated with Mr. Hylen, Mr. Bartolomeo and Ms. Tobin voting in the negative.**

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the variance from §147.13.1.2.3 of the Town of Conway Zoning Ordinance to reduce the size of a currently non-conforming lot be granted. Motion defeated with Mr. Hylen, Mr. Bartolomeo and Ms. Tobin voting in the negative.

Ms. Sherman reviewed the appeal process.

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A public hearing was opened at 8:23 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** on 114 E Road, Conway (PID 251-63). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 5, 2012.

Eugene Duggan and Pamela Lamontagne appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Irving stated that the applicant was granted a motion for rehearing. Ms. Lamontagne stated that they are requesting that the structures on the property be considered grandfathered. Ms. Lamontagne stated at the first hearing we supplied a photo, but we were advised after the meeting that sworn affidavits would be considered as evidence; those have been submitted.

Ms. Sherman asked if the shed was rebuilt. Ms. Lamontagne answered in the affirmative and stated in 1976. Ms. Lamontagne read a statement [in the file]. Ms. Sherman asked for Board comment; Mr. Irving asked if they lost the shed during the most recent flood. Ms. Lamontagne answered in the affirmative and stated there is a tank in the ground. Mr. Irving asked if there was an outhouse. Ms. Lamontagne answered in the affirmative. Mr. Irving asked when it was constructed. Mr. Lamontagne stated 1972; it was existing when the lot was purchased.

Mr. Irving asked if there is a well. Ms. Lamontagne answered in the affirmative and stated that it is a driven point. Mr. Duggan stated that it is not used for drinking, just for the bathroom. Ms. Sherman asked for public comment; there was none.

Mr. Colbath made a motion, seconded by Ms. Tobin, to overturn the Administrative Decision and grant the appeal from administrative decision and to find that the pavilion, slab and shed are grandfathered. Motion carried with Mr. Hysten voting in the negative.

Mr. Irving stated that the applicant should contact the Building Inspector to obtain a building permit for any repairs and to address the septic system.

A public hearing was opened at 8:43 pm to consider a **VARIANCE** requested by **ALICE ALLEN REALTY TRUST/MOUNT WASHINGTON VALLEY HABITAT FOR HUMANITY** in regard to §147.13.8.2.1 of the Conway Zoning Ordinance to get relief from the density requirement to allow four dwelling units at 42 North Road, Conway (PID 277-283).

Clark Boydston and Attorney John Fichera appeared before the Board. Attorney Ken Cargill was in attendance. Mr. Bartolomeo stepped down at this time. Ms. Sherman stated there were only four members available. Ms. Sherman asked if the applicant would like to proceed with four members or continue the hearing until five members were present. Mr. Boydston agreed to proceed with four members. Ms. Sherman read the application and the applicable section of the ordinance.

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Mr. Irving stated this property was before this Board by a previous developer. Mr. Irving stated that this site was granted a special exception that allowed a density bump up as long as two of the units stayed in the rental market. Mr. Irving stated unfortunately that project failed. Mr. Irving stated that the new applicant is seeking a variance to allow four units where three would be allowed.

Mr. Colbath asked if the first developer is still involved. Ken Cargill answered in the negative and stated that the Trust funded the development and was motivated by supporting the community and its housing needs. Mr. Cargill stated that the first project was poorly managed and failed, so the Trust foreclosed. Mr. Cargill stated that the Trust remains motivated to do something for the community as this site is not commercially viable. Mr. Cargill stated that Habitat for Humanity will be able to handle this project.

Ms. Sherman asked if the applicant is asking for an additional unit over what the density would normally allow. Mr. Boydston answered in the affirmative and stated based on the financing, we heavily subsidize the homeowner, build the house and sell it at cost. Mr. Boydston stated that Financial Housing Authority gives a down payment and holds the first mortgage on the property until they payback the down payment; then Habitat for Humanity holds a second mortgage on the property and have first refusal so the homeowner cannot flip the home. Mr. Boydston stated that this is strictly workforce housing. Mr. Colbath asked if they would be apartments. Mr. Boyd stated that they would be condominiums and be home owner occupied.

Mr. Cargill stated there is currently a foundation, framing and a roof; they will try to salvage that box. Mr. Cargill stated they advertise these units as sold to occupants, there is a fairly rigorous application process, the complete financing process is through Habitat for Humanity, they cannot resell them and the owners are prescreened. Ms. Sherman asked for public comment; Doug Moorehouse stated that the exterior materials will be changed from the previous development as they were proposing high end materials. Mr. Moorehouse stated that it will be similar to the other buildings in the area.

Bill Jones of Remax Presidential stated that he has a much higher comfort level with Habitat for Humanity then he did with the previous developer; he is excited about this project.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Ms. Tobin, 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 Ms. Tobin, 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 Ms. Tobin, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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

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

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

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Hylen, that item 5.b is not applicable.** **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Ms. Tobin that, based on the forgoing findings of fact, the variance from §147.13.8.2.1 of the Town of Conway Zoning Ordinance to get relief from the density requirements to allow four dwelling units be granted. **Motion unanimously carried.**

Meeting adjourned at 9:10 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, looped initial "H".

Holly L. Meserve
Recording Secretary

ZBA HEARING ON 10/17/2012

At the time the previous hearing in September was recessed, Mr. Briggs on behalf of the applicants, the Brady's, had made his presentation in support of the variance requested to allow for a boundary line adjustment

As the board will recall the proposed boundary line adjustment requested in the original application measured 1897.5 square feet.

As pointed out in the written submission filed by Mr. Briggs with the board dated 10/5/12, along with an amended boundary line adjustment proposal, during the original hearing it became apparent from the comments of two members of the board that they did not favor the lot line adjustment as originally proposed, because it requested an adjustment encompassing to large an area to remedy the immediate problem, namely: the encroachment of the Sutherby's house not only within the setback requirement but over the parties' property line.

Input at that time from those members of the board voicing their initial opposition was that they would favorably consider an amended lot line adjustment which was limited to only that minimal area necessary to assure that the Sutherby's residential structure would be on their property and within the required set back of 15'.

The board inquired of Mr. Briggs at the original hearing if the Sutherby's would be in agreement with a lot line adjustment which covered only that reduced area.

At that time the hearing was recessed at my suggestion so that Mr. Briggs could prepare a new proposed lot line adjustment for the Brady's and the Sutherby's to review..

The amended lot line adjustment has been submitted to the board, by Mr. Briggs and as the board can see it reduces the proposed area from 1897.5 square feet to 975.3 square feet, the minimum area required to assure a distance of 15' off the residential structure.

It has been reviewed by the Sutherby's and they support it, as do the applicants, the Brady's.

To review, the parties involved, Edward and Madeline Brady owned two adjoining lots in the Birch Hill Development and sold one of the lots to James and Linda Sutherby, in June of 2012. The lot sold to the Sutherby's includes a residential structure, the remaining lot retained by the Brady's is unimproved.

As I understand it, after the transfer occurred, Mr. Briggs was retained by the Brady's on an unrelated matter and he learned that when an addition to the residential structure had been completed in 2002 it actually encroached onto the lot retained by the Brady's after the transfer, which was unknown to both, the Bradys and the Sutherby's at the time of the transfer. In arguing that substantial justice would be done in his written application for the variance Mr. Briggs represented that he had reviewed the building permit application and septic system design application on file with the town and his review indicated that the Brady's had done due diligence and sincerely believed that they were within the required setback requirements when the addition was completed, which resulted in the present issue. In a recent case, *Harborside Associates LP v. Parade Residence Hotel LLC*, at 162 NH 508 (2011), our Supreme Court in reviewing RSA 674:33 as amended in 2010, said about the substantial justice factor that "perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice", and it is important to assess, whether the proposed request is consistent with the area's present use. Here the proposed boundary line adjustment will minimally decrease the size of the Brady's lot, in order to allow only that the Sutherby's entire residential structure will be on their property and within the required setback. Therefore the request is not overly aggressive. The variance requested is one of area, not use; therefore, it has no effect on, and is consistent with the area's present use. For reasons to be discussed momentarily, it poses no threat to other properties in the area, it will not harm abutters in the area, and the general public will assume no appreciable gain if the variance is denied. All factors the Supreme Court in *Harborside* said should be considered in weighing whether it would do substantial justice to approve the requested variance. **[copy of case if requested by board]**

The variance in this case is necessary because pursuant to Conway's zoning ordinance, Article 147. section 13 part 1.2.3, all lots in the residential agricultural zone, which includes the Birch Hill development, not serviced by a municipal water system shall have at least 1 acre for each residential unit that may be located there, and pursuant to Article 147 section 14 part 4.2 no action shall be permitted to change the boundary line of a non-conforming lot unless it brings the lot closer to conformance with the zoning ordinance, and it makes no aspect of the lot and or structures thereon more non conforming.

Since the Brady's lot currently measures 26,106.2 square feet, less than one acre, the lot line adjustment requested in the original request reducing their lot by 1897.5 square feet, or the amended proposal measuring 975.3 square feet would both result in their lot being more non conforming in violation of the zoning ordinance.

At the time of the original hearing, Mr. Briggs in addressing the board supplemented the Brady's written application where it outlined their arguments in meeting the statutory requirements to justify an area variance pursuant to RSA 674:33 (I)(b). I have already reviewed the petitioner's position that substantial justice would be done by granting a variance to allow for the boundary line adjustment requested.

In determining whether a variance will be contrary to the public interest and whether the spirit of the ordinance is observed by the variance, again the Supreme Court provided recent guidance in the Harborside case. The court found that the requirements were related, and, in assessing both factors one should determine if the variance requested would violate the zoning ordinance's basic objectives by examining whether granting the variance would alter the essential character of the neighborhood and/or whether granting the variance would threaten the public health and safety.

Again, given that the request is a request for a variance in area, not use, if granted, the boundary adjustment will not alter the essential character of the neighborhood.

Both of the lots as they exist now, and as they will exist if the variance request is granted, and the boundary line adjustment is allowed, will be in excess of ½ acre. As Mr. Irving pointed out at the hearing in September, pursuant to Article 147.13 section 1.2.2 of the zoning ordinance, if these lots were serviced by a municipal water system, we would not be here because the proposed lot line adjustment would not violate the ordinance, since the minimum lot size in the residential agricultural zone, for a lot with one residential unit is ½ acre, if serviced by a municipal water supply.

Birch Hill's water supply is maintained and serviced by a public water utility, Pennichuck East Utility, which is regulated by the PUC. And, in researching the issue, I actually located an administrative hearing order dated 12.29.11 by the PUC in an unrelated case which had come before them dealing with the Birch Hill Development and its water supply, **copy for the board members**. In its order in that case, the PUC found in part, that at the time Pennichuck's sister company, Pittsfield Aqueduct Company was serving Birch Hill, PAC installed an interconnection with the North Conway Water Precinct, a municipal water system, to obtain a new ground water supply source for Birch Hill. The order says in part, "that in a staff letter filed at the PUC on 12/9/11, staff noted that the water supply agreement has a term of 20 years, and is further extended by the agreement of both parties. thus assuring an adequate water supply for that development."

So, while Birch Hill's water supply is technically serviced by a regulated public water utility, as opposed to a municipal entity, the fact remains that the water provided is from a municipal water supply, the North Conway Water Precinct, and it is expected that the business relationship between Pennichuck and the Precinct will remain in place for an extended period of time.

Therefore, allowing a variance to provide for the minimal boundary line adjustment requested to resolve the encroachment and setback issues, will not threaten the public health and safety. Consequently, the requested variance is not contrary to the public interest and is within the spirit of the ordinance.

Again, the requested variance to allow for a minimal boundary line adjustment being one of area and not use, it would only affect the lots involved; therefore, it would have no effect on, or in any way diminish the values of surrounding properties. And, no abutters have appeared to voice an objection to same at the original hearing or at this time. Another factor to be considered in weighing the appropriateness of the variance request

As argued by Mr. Briggs in his written submission: literal enforcement of the ordinance would result in unnecessary hardship, since owing to the specific conditions of this property, that distinguish it from other properties in the area, namely: the encroachment of the Sutherby's residential structure over the set back, and onto the Brady property, a minimal lot line adjustment, not overly aggressive in nature, as a mutually agreed upon, and reasonable remedy to that issue, requires a variance from the aforementioned provisions of the town's zoning ordinance to enable a reasonable use of the Brady's lot.

For those reasons, the Brady's and Sutherby's submit that the amended boundary line adjustment and the variance it requires is justified.

In Mr. Briggs written submission of 10/5/2012, with the amended boundary line adjustment, he had suggested that Board members visit the site before this hearing to view for themselves why the alternate solution recommended by board members at the initial hearing, namely: a so called land swap or equal area exchange was unacceptable to the Sutherbys, as he emphasized in his written submission, based on issues of privacy, screening and access to their gas storage tank which is serviced from Beechnut Drive, the Sutherby's opposition to same is reasonable.

Further, our Supreme Court emphasized in the Harborside case – it is not necessary to obtain a variance, for the applicant to prove that the benefit they seek cannot be achieved by some method other than the variance, even if it would be reasonably feasible for the applicant to pursue that alternative.