

ZONING BOARD OF ADJUSTMENT

MINUTES

MAY 15, 2013

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, May 15, 2013 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; Luigi Bartolomeo; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

NOMINATION OF OFFICERS

Mr. Colbath made a motion, seconded by Mr. Chalmers, to nominate Ms. Sherman as Chair. Motion unanimously carried.

Ms. Sherman made a motion, seconded by Mr. Chalmers, to nominate Mr. Colbath as Vice Chair. Motion unanimously carried.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **HANCOCK WHITE MOUNTAIN LLC** in regard to §147.13.7.6.14.2 of the Conway Zoning Ordinance **to allow the sign incentive to apply to this property** at 2451 White Mountain Highway, North Conway (PID 219-228). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013. This hearing was continued from March 20, 2013 and April 17, 2013.

Chris Meier of Cooper Cargill Chant and Shawn Bergeron of Bergeron Technical Services appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance.

Mr. Meier stated that this was a two part application; an Appeal from Administrative Decision (AAD) and a Variance request. Mr. Meier stated that the AAD was heard on a prior occasion and the variance request was continued. Mr. Meier stated that the applicant filed a motion for rehearing on the AAD, which the Board has not acted on yet. Mr. Meier stated that his client is in no hurry for the variance to be heard and asked for the variance to be continued until there is a decision on the motion for rehearing on the AAD.

Mr. Colbath made a motion, seconded by Mr. Chalmers, to continue the variance requested by Hancock White Mountain LLC until June 19, 2013 at 7:30 pm. Motion unanimously carried.

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A public hearing was opened at 7:40 pm to consider a **VARIANCE** requested by **ANGELL FAMILY TRUST OF 2011** in regard to §147.13.1.2.3 of the Conway Zoning Ordinance to **allow the lot to become more non-conforming** at 226 Beechnut Drive, North Conway (PID 232-15). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 8, 2013. This hearing was continued from March 20, 2013 and April 17, 2013. Mr. Irving stated that the applicant has withdrawn the application.

A public hearing was opened at 7:41 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **THOMAS AND DEBORAH WHITE** in regard to §147.13.14; §147.14.2.1.1; and §147.14.2.2.5 of the Conway Zoning Ordinance to **preserve the existing structures** at 30 Moat Brook Drive, Conway (PID 251-131). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, May 3, 2013.

Thomas White appeared before the Board. Peter Malia, Town Counsel, was in attendance. Ms. Sherman read the application and the applicable section of the ordinance. Mr. White stated that he purchased the property in 2010. Mr. White stated there was nothing attached to the deed informing them of any violations and then after Hurricane Irene they received several notices from the Town. Mr. White stated that it looks like there was an addition in 2000 which the Town knew about, but did nothing about it, so we are applying for an equitable waiver to try to fix it up and keep it the way it is.

Mr. Irving stated that the Town received new information from Thorne Surveys today in regard to this property. Mr. Irving stated that he had asked several questions and one was when the expansion took place. Mr. Irving stated that the Board may be considering an expansion of the two- and three-dimensional envelope as well as potential wetland buffer and setback violations.

Mr. White stated that it looks like the footprint is the same as it was in 2000. Mr. Malia stated that the property is located in the Floodplain, but not the floodway. Mr. Malia stated the expansions were done prior to Mr. White owning the property. Mr. White stated they were done about ten and a half years prior to him purchasing the property.

Mr. Irving stated in this particular case there was a grandfathered structure and it was expanded upward. Mr. Colbath asked what happened in 2007 when the Town discovered it. Mr. Irving stated it was sent to the Building Inspector. Mr. Colbath stated to the best of your knowledge nothing was done. Mr. Irving stated that is correct.

Mr. Malia stated that he spoke with the applicant's attorney and was told they would have more information to present to the Board tonight. Mr. Irving stated they provided the plan from Thorne Surveys showing the wetlands, but not the property line setbacks. Mr. Malia stated that the owner has offered to design and install a new septic, but wanted to wait to see if the Town would allow the house to remain. Mr. Malia stated that we are in court with this property, but have asked for a stay to allow the applicant time to go before this Board.

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Mr. Irving stated he questioned when the additions were constructed because the wetlands district was adopted in 1999 and if they were constructed prior to that they would have been done legally and been grandfathered from that ordinance. Mr. Bartolomeo asked about the permit issued. Mr. Irving stated that the permit was issued after the ordinance was amended. Mr. Irving stated there never was a permit to expand the footprint, so it appears that the Board may be considering an equitable waiver for the three-dimensional envelope and expanding into the wetland setback and buffer.

Mr. Colbath stated when ready for finding of fact have to look at whether this was noticed by other former owners. Mr. White stated that he bought this in a private sale, and then the previous owner owned property next to them. Mr. White stated after Hurricane Irene the previous owner tore the house down next to them and moved to the mid-west. Mr. Irving stated relative to the building permit issued in 1999, he is assuming there was no expansion, but the question is was that stuff there when the permit was issued or not.

Mr. Chalmers stated that it seems the expansion occurred after that according to the tax cards. Mr. White stated before they changed the pitch of the roof there was a sleeping loft. Mr. Bartolomeo stated that it gained more head height. Mr. White agreed and stated that is what he was told by the neighbors.

Mr. Bartolomeo stated that this was not done by the current owner and he cannot provide testimony because it was changed before he owned it. Mr. Malia stated that the equitable waiver has a four part test and if they cannot prove the first 2 there is a fall back. Mr. Malia stated without the 10 year rule it would be difficult to meet; so the 10-year would be a benefit in this case. Ms. Sherman stated she would assume that nothing had been done to either the two- or three-dimensional envelope since 2000. Ms. Sherman stated that the assessing records picked up 47 square feet and 112 square feet in 2000 although there were no permits on file. Ms. Sherman stated that it has been there as it exists today since 2000. Mr. Malia stated that sounds correct.

Ms. Sherman asked for public comment; there was none.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.**

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Ms. Sherman asked for Board comment; Mr. Hylan asked for clarification. Mr. Malia stated that the applicant has to prove to the Board that the owner was not ignorant to the law, that the outcome was not failure to inquire, or a misrepresentation, but that it was caused by a good faith error in measurement or an ordinance misinterpretation by a town official.

Mr. Hylan stated someone from the Town could have messed it up. Ms. Sherman stated without input from the former owner, which is unavailable, we don't know if he meant to misrepresent. Mr. Chalmers stated that the previous owner realized he needed a permit for the reroof. Mr. Bartolomeo stated that the second floor was there and used as a sleeping area and may not have realized he was expanding the structure as the floor was already there. Mr. Bartolomeo stated that they were just trying to get more head height. Mr. Chalmers asked about the footprint. Mr. Bartolomeo stated that the 10 year will help him.

Mr. Hylan stated if the previous owner was smart enough to get a permit for a new roof the he should have been smart enough to get a permit for a porch. Mr. Bartolomeo agreed. Ms. Sherman stated that it could have been done prior to 2000. Mr. Hylan stated it could have been constructed between 1994 and 2000, which may have already been there when they applied.

Motion unanimously carried.

Ms. Sherman read item 3. It was determined that item 3 was not necessary.

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Hylan, that the physical or dimensional violation does not constitute a public or private nuisance, nor diminishes the value of other property in the area, nor interferes with or adversely affects any present or permissible future uses of any such property.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Hylan, that, based on the forgoing findings of fact, the equitable waiver from §147.13.14; §147.14.2.1.1; and §147.14.2.2.5 of the Town of Conway Zoning Ordinance to preserve the existing structures be granted. Motion unanimously carried.

MOTION FOR REHEARING

A public meeting was opened 8:35 pm to consider a **MOTION FOR REHEARING** requested by **HANCOCK WHITE MOUNTAIN LLC** in regard to § 147.13.7.6.14.2 of the Conway Zoning Ordinance **to request that the ZBA find that the sign incentive applies to this property** at 2451 White Mountain Highway, North Conway (PID 219-228).

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Mr. Bartolomeo stated that he voted against it because he thought Mr. Bergeron was in error by adding up all of the street frontages, but the definition argument had merit. Mr. Colbath stated there are two reasons the Board can grant a rehearing; providing new information that was not available at the first hearing or a procedural error. Mr. Colbath stated that he does not see where it was suggested that there were either. Mr. Chalmers stated that he would concur with Mr. Colbath.

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to grant the rehearing for Hancock White Mountain as requested. Mr. Hylen stated that they did not provide proof of a technical error or present any new facts that were not available at the time of the previous hearing. **Motion unanimously defeated.**

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Bartolomeo made a motion, seconded by Mr. Chalmers, to approve the Minutes of April 17, 2013 as written. Motion carried with Mr. Colbath and Mr. Hylen abstaining from voting.

Meeting adjourned at 8:40 pm.

Respectfully Submitted,



Holly L. Meserve
Recording Secretary