

ZONING BOARD OF ADJUSTMENT

MINUTES

JULY 16, 2014

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, July 16, 2014 at the Conway Town Office in Center Conway, NH, beginning at 7:03 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Luigi Bartolomeo; Alternate, Martha Tobin; Alternate, Steven Steiner; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve. Peter Malia, Town Attorney, was in attendance.

ALTERNATE MEMBER

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

PUBLIC HEARINGS

A public hearing was opened at 7:03 pm to consider a **SPECIAL EXCEPTION** requested by **DAVID STONE** in regards to §147.13.3.2.4.2 of the Conway Zoning Ordinance **to allow an accessory apartment above a garage to be constructed** at 167 River Street, Conway (PID 265-179). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, July 2, 2014.

David Stone appeared before the Board. Ms. Sherman asked if the house and garage are built. Mr. Stone answered the house is constructed. Mr. Bartolomeo asked if the apartment would be over the garage. Mr. Stone answered in the affirmative. Ms. Sherman asked if there are four parking spaces. Mr. Stone answered in the affirmative. Mr. Bartolomeo asked about architectural compatibility. Mr. Stone stated that the garage would match the house.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the apartment is accessory to an owner-occupied single family dwelling.** Ms. Sherman asked for Board comment; Ms. Sherman asked if Mr. Stone lives in the house. Mr. Stone answered in the affirmative. **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.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the apartment is architecturally compatible 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.**

Ms. Sherman asked for public comment; there was none. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.13.3.2.4.2 of the Town of Conway Zoning Ordinance to allow an accessory apartment above a garage to be constructed be granted. Motion unanimously carried.**

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Ms. Tobin, to approve the Minutes of June 18, 2014 as written. Motion unanimously carried.

PUBLIC HEARINGS CONTINUED

A public hearing was opened at 7:18 pm in accordance with the Court Order issued March 14, 2014 by Justice Stephen M. Houran to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **DEBORAH DUGGAN** in regards to §147.14 of the Conway Zoning Ordinance **to request that the ZBA find that the existing structures are legally existing non-conformities** at 361 Transvale Road, Conway (PID 251-51). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, June 6, 2014. This hearing was continued from June 18, 2014.

Deborah Duggan appeared before the Board. Ms. Sherman stated that this is a remand from the Court for the Board to specify what we considered grandfathered in the original hearing. Mr. Malia stated the original decision was to partially overturn the administrative decision; the administrative decision determined that nothing was grandfathered, but the Board found that a canopy was grandfathered. Mr. Malia stated that the property owner is seeking a determination that the full slab and canopy are grandfathered. Mr. Malia stated there was a shed on the property that the Board did not find to be grandfathered.

Mr. Malia submitted a package to the Board along with language from the Court decision that brought us back here tonight. Mr. Malia stated that the Board held a public hearing, the applicant submitted a Motion for Rehearing which they submitted a signed and sworn affidavit, the Board denied the Motion for Rehearing request and it went to Court. Mr. Malia stated Judge Horan sent it back to the Board asking that the Board take a closer look at one document and four photos.

Mr. Malia stated that the one document is the Stone affidavit, which Mr. Stone is present this evening and four photos. Mr. Malia stated that the two photos from the late 1970's show the slab and screened room that this Board determined to be grandfathered. Mr. Malia stated that the Judge wanted the Board to look at the Stone Affidavit and to take a closer look at the two late 1970's pictures as well as the 2004 and 2011 pictures.

Mr. Malia stated that the Town tax records from 1994 show that the size of the pavilion was 15' x 19' and in 2011 it shows that it was 18' x 23'; the portion the Board found grandfathered was 11' x 11.6'. Mr. Malia stated that Judge Horan sent it back to the Board to take another look at the photos and Mr. Stone's affidavit and perhaps speak to Mr. Stone.

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Deborah Duggan stated there is no difference and the Board did not consider the slab that it was bolted too. Ms. Duggan stated that the shed, the pavilion and the platform were recorded in the tax record. Ms. Duggan reviewed the tax assessor's photos with the Board and stated those pictures were back to 1975 and used for tax assessments in 1978. Ms. Duggan stated there were other affidavits from Thomas Sr and Natalie Duggan and Beverly Duggan. Ms. Duggan stated the question was where the pavilion was located and a group of trees you can see in each photo are a good marker.

Steven Steiner joined the Board at this time. Mr. Bartolomeo questioned if the Board found the shed to be grandfathered. Mr. Malia stated there was discussion about the shed, but it appears the Board was not convinced that it was in the same location. Mr. Bartolomeo asked if it was the same shed in the same spot as in the 1977 photo. Ms. Duggan stated that the photo was from the tax assessor's files and proven to be a lot earlier than 1977, believe to be 1975; that shed is in a different location from the photo, but has been in the current location, between the trees, since before 1979.

Ms. Tobin stated we started with an 11' x 11.6' concrete pad and now have an 18' x 23 concrete pad; how did we get there. Mr. Malia stated that he could not answer that. Mr. Bartolomeo stated there is a point that the record shows 11' x 11.6'. Mr. Malia stated that the 1994 the tax records show 15' x 19'. Mr. Irving was looking to see what the original tax card indicated, but Ms. Duggan stated that it indicates that it was not established.

Ms. Sherman stated there appears to have been two separate pouring's of cement. Mr. Bartolomeo asked when this observation was made. Mr. Irving stated he took a picture of it and it appeared that it was poured at different times since there was a seam between them. Ms. Duggan stated that this was addressed in an affidavit. Ms. Duggan stated that it was all there before 1979; when Mr. Irving went out he made the representation on his opinion. Ms. Duggan stated that it has 8-poles and a roof, the same 8-poles that were there and were mounted into the concrete so they would be secure.

Derek Durbin of Durbin Law Offices, Attorney for Deborah Duggan, joined the Board at this time. Mr. Irving stated there are two separate slabs as one wraps around the other in an L-shape. Mr. Malia stated that the question arose of how did we come up with the 11' x 11.6' and read the first paragraph of page 10 of the January 18, 2012 ZBA minutes. Ms. Tobin stated it seems that is where we got it from. Ms. Duggan stated it was on Mr. Irving's opinion.

Mr. Malia asked Robert Stone to raise his right hand and asked if he swore to tell the truth, the whole truth and nothing but the truth, so help him god. Mr. Stone answered in the affirmative.

Mr. Malia asked if he was Robert Stone and if he filled out the affidavit. Mr. Stone answered in the affirmative. Mr. Stone stated he has been visiting there since the middle-1960's; he lived across the street. Mr. Stone stated when he got out of the service in 1974 he remembers going over there to visit Tommy and Nat; and why it sticks out is because he is not a big fan of lightning and remembers the metal poles and he would never be there during a lightening storm. Mr. Stone stated he remembers bringing his son over there and I have my son's birth certificate; there has been a shed on the property since the 1960's, it really has not changed.

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Ms. Sherman asked Mr. Stone if he remembers how much cement was around the pavilion. Mr. Stone stated what is there is what he remembers. Ms. Sherman asked if it didn't extend beyond the pavilion. Mr. Stone stated what is there now is what he remembers as being there.

Mr. Malia showed Mr. Stone the photos on the tax card. Mr. Stone stated they are basically the same photo. Mr. Malia asked if it is the same size concrete pad and pavilion. Mr. Stone answered in the affirmative. Mr. Malia stated that Mr. Stone thinks it is the same size concrete pad and pavilion as the blurry pictures in the late 1970's.

Ms. Tobin stated that it just doesn't look the same to her. Mr. Bartolomeo stated if you look at the space at the top of the wall and the underside of the roof and compare to the lack of space in the old picture there is a vast discrepancy there. Ms. Tobin stated if you look at the overhang, one is shorter and one is longer. Mr. Chalmers stated it is longer in the newer picture and the canopy over the trailer. Ms. Duggan stated that it has been raised and adjusted for the new trailer, but it is the same size. Mr. Bartolomeo asked if the roof was raised. Ms. Duggan answered in the affirmative and stated for the new trailer. Mr. Bartolomeo asked if this is the first time we are hearing this. Ms. Duggan stated that she did not know.

Mr. Irving stated that he does not see a dimension on the tax card from 1978-1979. Mr. Malia asked if there was one on the 1994 tax card. Mr. Irving stated that the 1994 tax card indicates the date measured was 3-2-94 and was 15' x 19'; it also indicates a 7' x 15' travel trailer and a 19' x 23' concrete patio and various other items. Ms. Duggan stated that there are discrepancies with the tax assessor files for the properties in Transvale Acres.

Mr. Durbin asked if he would be able to speak and he apologizes for being late. Ms. Sherman stated that he would be able to. Ms. Sherman asked for other Board comments; Mr. Malia stated that the 1994 tax card shows a concrete slab of 19' x 23'. Mr. Irving stated that it shows a 19' x 15' rectangle with a note beside it that says 19' x 23' patio. Mr. Malia asked if the discrepancy could be the overhang. Mr. Irving stated that is a reasonable assumption. Mr. Malia stated they are suggesting that was the size back in the late 1970's that should be grandfathered. Ms. Duggan stated on the same card it has a 15' x 19' open porch; and there is a house on the same sheet that shows the 19' x 15' pavillion.

Mr. Bartolomeo stated it is his understanding that the tax records started out with an 11' x 11.6' square pad and then a later one showed an L-shaped additional pad poured around the original one. Ms. Duggan stated that was Mr. Irving's opinion when he went out there. Mr. Irving stated one of the pieces measured 11' x 11.6'. Ms. Duggan stated that it is not in any tax records. Mr. Bartolomeo stated you wouldn't pour an 11' x 11.6' pad and then pour around it; you would pour it all at the same time.

Mr. Durbin stated that the 11' x 11.6' pad was actually to square of the original piece and it was brought in by the neighbors before 1979; it was not poured as one piece, but taken from another lot, so there is the discrepancy between the two pieces. Mr. Durbin stated that we are dealing with lack of documents prior to the adoption of the floodplain ordinance. Mr. Durbin stated at the final hearing one of the arguments made by the Duggan's was that the tax records were not definitive evidence that this concrete slab was anything different than what it is now.

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Mr. Durbin stated that the pictures are blurry, small and taken at an angle. Mr. Durbin cautioned the Board that Mr. Irving is not an expert on determining the age of concrete; the Board is being asked to strip the applicant of significant property rights on an educated guess and that is not what the court looks at when making these appeals.

Mr. Durbin stated that Mr. Malia asked him in early conversations what my opinion was to why we are here, we are here to hear the evidence that the Court saw that did not support the Board's decision and that the Board did not take Mr. Stone's affidavit into consideration. Mr. Durbin stated what exists now is what existed prior to the adoption of the floodplain ordinance and Mr. Stone's recollection is from 1974. Mr. Durbin stated that a 7' x 8' shed and a well existed on the property as well. Mr. Durbin asked Mr. Stone if they existed on the property in 1974. Mr. Stone answered in the affirmative. Mr. Durbin stated that he was not sure if that question had come up with Mr. Stone tonight or not.

Mr. Irving stated he would like to make a clarification as to what is misinterpreted or misrepresented as to what he said. Mr. Irving stated the record has a photograph that he took when he visited the site; the only thing that he represented and had written on it was that the older portion of the concrete pad appeared to be the same size as what was represented on the 1978 tax card. Mr. Irving stated that he was not there in 1978 and the first time he visited the site was in 2011.

Mr. Irving stated that his purpose through this exercise was to determine if there was sufficient evidence to confirm grandfathering claim; he could not find that and that is why it is before the Board. Mr. Irving stated that the burden of proof is not on staff, but on whoever is claiming the grandfathering. Mr. Irving stated all the evidence presented to staff was not sufficient enough for us to say that all the buildings on site were grandfathered.

Mr. Malia stated that he does not believe any of the tax cards show 11' x 11.6' concrete pad; the applicant is saying that the 11' x 11.6' concrete pad was added to square off the patio, but done prior to the 1979 floodplain ordinance. Mr. Malia stated that the applicant is saying that it is grandfathered, which is supported by a letter from Thomas Sr and Natalie Duggan.

Ms. Tobin stated the Board received those affidavits after the original hearing, at the time of the request for rehearing. Ms. Tobin stated she thought the Board had to look at the rehearing request based on if the information was not available. Ms. Sherman stated that the Judge has asked the Board to review the Stone affidavit. Mr. Malia stated that the Judge wants the Board to take a second look at these documents, to consider them and see if you want to reconsider your finding or if this evidence changes your opinion and grandfathers more of the concrete. Ms. Sherman stated on the 1994 tax card there is an asterisk by a building that states no value out house to the left of the canopy, is that the same shed we are referring to. Mr. Durbin stated that it is the same shed that has been there. Mr. Bartolomeo asked if it is a part of the appeal. Mr. Durbin answered in the affirmative and stated as is the well. Mr. Bartolomeo stated that it moved from its original location. Mr. Durbin stated it was there before 1979 and it moved before 1979.

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Mr. Malia suggested that the Board go into non-public session under RSA 91-A:3 II (e) regarding pending litigation. Ms. Sherman asked if there were any other comments from the applicant or the audience; Ms. Duggan stated there is a difference between an affidavit and a certified statement, but they both still have weight. Ms. Sherman closed the public hearing at 8:15 pm. At 8:15 pm, **Ms. Tobin made a motion, seconded by Mr. Colbath, to go into non-public session under RSA 91-A:3 II (e) regarding pending litigation. The motion unanimously carried by roll call vote.** The Board returned to regular session at 8:43 pm.

Ms. Sherman stated that the public hearing has been closed and the Board is now in their discussion phase; the Board will not be taking any more comment or testimony. Mr. Steiner stated he is a Real Estate Agent and rely on the Tax Assessor's cards; he thinks the appeal should be granted. Ms. Sherman stated the question is what was there prior to the enactment of the floodplain ordinance and the claims of the owners and the notarized testimony by Mr. Stone is that the pavilion, the concrete, the shed and the well were all there prior to the enactment of the floodplain ordinance. Ms. Sherman stated there is not much of anything in the 1978 tax cards to determine what was or was not there.

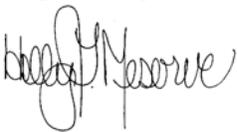
Mr. Colbath stated that Mr. Stone came forward with a sworn affidavit and he is certainly leaning towards, based on the testimony, granting the appeal. Mr. Colbath stated if we do grant the appeal, the Town should visit the site and document what is there. Mr. Colbath stated a lot of the records for Transvale Acres are inaccurate and things changed regularly there without any record. Mr. Bartolomeo stated that he has hearing compelling evidence tonight to be inclined to support the applicant's appeal.

Mr. Bartolomeo made a motion, seconded by Mr. Colbath, to grant the applicants appeal and make a finding of fact that the shed, the canopy, the well structure and the concrete pad as they exist today are grandfathered and as they are represented in the 2011 photo. Motion carried with Mr. Chalmers, Mr. Bartolomeo, Mr. Colbath and Ms. Sherman voting in the affirmative and Ms. Tobin voting in the negative.

Mr. Malia stated if there is an outhouse in the shed it is not grandfathered and is a separate issue.

Meeting adjourned at 8:55 pm.

Respectfully Submitted,



**Holly L. Meserve
Recording Secretary**