

ZONING BOARD OF ADJUSTMENT

MINUTES

NOVEMBER 19, 2014

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, November 19, 2014 at the Conway Town Office in Center Conway, NH, beginning at 7:06 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Luigi Bartolomeo; Alternate, Martha Tobin; Alternate, Steven Steiner; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBERS

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

PUBLIC HEARINGS

A public hearing was opened at 7:06 pm to consider a **VARIANCE** requested by **ADVENTURE AND ENTERTAINMENT PROPERTIES LLC** in regards to §147.16 of the Conway Zoning Ordinance **to construct an ADA accessible pool, associated concrete pad, concrete pavilion, ADA accessible bathroom, ADA accessible multi-purpose building, and associated concrete walkways within the Floodplain Conservation Overlay District** at 1550 White Mountain Highway, North Conway (PID 246-22). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 5, 2014. This hearing was continued from September 17, 2014 and October 15, 2014.

Josh McAllister of HEB Engineers appeared before the Board. Keith Wolters and Kevin Zins, owners, and Todd Sullivan of SFC Engineering Partnership were in attendance. Mr. McAllister read through his justification. Mr. McAllister stated everything is proposed in the Floodplain and not the Floodway. Mr. McAllister stated the water will be able to rise within the buildings and then flow out of the buildings. Mr. McAllister stated the multi-purpose building is for camp sales; guest check-in and the pool mechanicals.

Mr. McAllister stated that the pool is currently not ADA accessible; a lift could be added, but generally does not meet the needs as it can only be used by one person at a time. Mr. McAllister stated that the new pool will start at a zero depth and gradually taper down. Mr. McAllister stated that the original pool will be removed. Mr. Wolters stated this hearing was continued as there were some questions regarding the requirements for Federal level versus Town level; we were asked to seek some comments behind the logic. Mr. Wolters stated that they submitted a letter from Mr. Sullivan that addresses the ADA requirements.

Mr. McAllister stated the other bathrooms on the site are not ADA compliant nor can they be made ADA compliant. Mr. Colbath stated that the Board was asking which is mandated, a Town ordinance or Federal ADA requirements; which trumps the other. Mr. Sullivan stated that ADA would take precedence over Town codes. Mr. Sullivan stated that the town can make more

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stringent, but cannot take them away. Mr. Sullivan stated that ADA requires that all pools be compliant by June 2015. Mr. Sullivan stated that it is not as simple as installing a lift; the route to the pool and to the bathrooms have to be ADA accessible. Mr. Sullivan stated there are currently no bathrooms located near the pool. Mr. Sullivan stated that NH Department of Health requires an ADA bathroom be within 200 feet of a pool; it also requires it to have separate bathrooms for each gender. Mr. Sullivan stated that the closest bathroom is at the store, it's unisex and not ADA compliant and cannot be made accessible.

Mr. Bartolomeo stated if this is required of your campground it is required of all campgrounds. Mr. Wolters stated that he would speculate that would be the case. Mr. Bartolomeo stated that we have not heard from any of the other campgrounds. Mr. Wolters stated that we are trying to be proactive; cannot say what other campgrounds are doing or not doing.

Mr. Sullivan stated that this requirement is applicable to campgrounds with pools. Mr. Sullivan stated with the approval of the additional camp sites, they are required to be ADA compliant. Mr. Wolters stated we were also not aware of the domino effect this would have on us; it was brought to our attention after the fact. Mr. Wolters stated they are here because we need to address the problem. Mr. Bartolomeo stated if the Board had been aware of it, you might not have been granted the additional camp sites. Mr. Bartolomeo stated that the stricter ordinance applies; and the ordinance that says no is stricter rather than if they allow you to build then you have to meet the requirements.

Mr. Irving stated in regard to the question as far as superseding or whether or not something is preempted by another regulation, there are some situations where Federal law preempts, but he does not see that in this case. Mr. McAllister stated in accordance with the regulations they applied for and received a Special Exception to allow the additional camp sites; we then went to Planning Board and were granted a not applicable by that Board which states that a site plan review is not necessary. Mr. McAllister asked doesn't that make them allowed and thus requiring them to meet the strict regulation. Ms. Sherman stated that a special exception is a permitted use and we are discussing something that is not permitted.

Mr. McAllister stated there needs to be ADA bathrooms somewhere on the site; since the sites were granted under a special exception and there were renovations to the site ADA compliant bathrooms would be required. Mr. McAllister stated since the renovation was approved and permitted by both Boards, it would be an allowed use. Mr. Irving stated when you went to the Planning Board and sought a not applicable we did not get to the point where you indicate on the plans that the proposed site is ADA compliant.

Mr. Irving stated if the Planning Board had been dealing with the installation of these bathrooms then a site plan would have likely been required. Mr. Irving stated you sought a not applicable for access and utilities. Mr. Irving stated that you might find that you have to go back to the Planning Board to do anything other than what you have already done. Mr. McAllister stated adding bathrooms would require coming here before going to the Planning Board. Mr. Irving agreed. Mr. McAllister stated are we not here to talk about the bathrooms.

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Mr. Bartolomeo stated in order to be compliant, you have to remodel. Mr. Sullivan stated the existing buildings are not within the travel distance of the pool. Mr. Sullivan stated that the existing pool is required to be made accessible by installing a lift, plus a travel aisle. Mr. Wolters stated the pool accessibility has nothing to do with anything else. Mr. Sullivan stated it is enforced by the Justice Department. Mr. McAllister stated that the current pool was reviewed and approved by the ZBA. Ms. Sherman stated in retrospect. Mr. McAllister stated maybe in retrospect, but approved. Mr. McAllister stated the logic is if the pool was reviewed and approved and installed with necessary permits, it is now a permitted pool permitted by this Board, and now required to be updated to meet ADA requirements which requires ADA bathrooms.

Mr. Bartolomeo stated had the application to this Board had the bathrooms and all the improvements came in all at once, it might not have been granted. Mr. McAllister stated that he doesn't disagree, but on the basis that the pool is permitted it now requires ADA bathrooms with travel aisles. Mr. Steiner asked if the ADA requirements changed after the existing pool was installed. Mr. Sullivan answered in the affirmative. Mr. Steiner asked if there is a certain percentage that can be renovated before certain codes are required to be met. Mr. Sullivan stated under the existing code if the renovations are not more than 50%, but for any new work, or affecting any common function, you would have to upgrade the accessible route which also incorporates bathroom facilities.

Mr. Wolters stated we are learning that touching one thing started a domino effect. Mr. Wolters stated they are not grandfathered and it has to be brought into compliance. Mr. Wolters stated they gave three years and the previous owner did not make the necessary upgrades. Mr. Wolters stated, ultimately, we are trying to provide a need to the people that need it most. Mr. Wolters stated that the law is telling us that we have to provide these services. Mr. Wolters stated at the end of the day we need to do something and we are hopeful that we can find a way to come to a common ground that is a betterment to the people we serve.

Mr. Steiner stated his issue is that we have told other people in the floodplain, specifically Transvale Acres, they cannot build. Mr. Steiner stated help him get to the place where he can look at someone that we have denied and explain why we granted this. Mr. Irving stated there is a fundamental difference between residential and non-residential development; FEMA has a threshold of what they will and will not permit and commercial facilities have an entirely different set of requirements, as long as you build to certain criteria's.

Mr. Colbath stated he thinks what is presented is overkill; if it had a minimum impact he would be more likely to be in favor. Mr. Colbath stated he does think there is a compromise somewhere. Mr. Wolters stated we were trying to accomplish a few things; the new sites we are installing and the pool have to be so many feet from the bathrooms to be compliant, so if we don't relocate the pool we would have to construct two bathrooms., which we did not want to do.

Mr. Wolters stated he does not think it can be any smaller than what they have proposed. Mr. Wolters stated they were trying to create a platform of navigable area. Mr. Wolters stated it is not advantageous for us to build larger buildings when we can build smaller. Mr. Wolters stated that they are removing the existing pool and the existing pump house. Mr. Wolters stated that

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they could leave the pool where it is, but they would still need to install an apron creating an area to make it accessible and they would still have to build a bath house. Mr. Wolters stated we tried to put ourselves in your shoes. Mr. Wolters stated we are open to if there is a better way; we want to work with the Board.

Mr. Colbath stated if the existing pool was brought into compliance what would be the impact. Mr. McAllister stated he would assume they would still have to add a platform around the existing pool. Mr. Colbath asked when did it flood last; and would have the proposed bathrooms been flooded. Mr. Wolters answered in 2013 and they would not have been flooded. Ms. Sherman stated the office building gets wet. Mr. Wolters stated the office is below the field where the bathrooms are proposed. Mr. McAllister stated that the field is mounded.

Ms. Sherman asked what the 100-year flood level is. Mr. McAllister answered 462.5-feet. Mr. Bartolomeo stated there does seem to be missteps in the past that have compounded the issue. Mr. Bartolomeo stated that the pool was permitted after the fact and skirting of the Planning Board. Mr. Irving stated in 2001 a variance was granted to permit the pool; in 2002 he made an administrative decision that the pool required a site plan review; and on April 11, 2002 the Planning Board overturned the requirement for site plan review.

Mr. Irving stated there was no review that would have determined if the pool was ADA compliant. Mr. Colbath stated that the ZBA approved the pool prior to it being constructed. Mr. McAllister stated that we did not skirt the Planning Board; the owner requested that the Board find the proposed development to be insignificant to the rest of the development. Mr. McAllister stated that the proposal before the Board tonight is required to meet ADA requirements and will be required to have a Planning Board review. Mr. Wolters stated that they fully intend to go before the Planning Board if this proposal is granted by this Board. Mr. Wolters stated that they understand the steps to be taken and there has been no skirting.

Mr. Colbath asked if this proposal would require Planning Board review. Mr. Irving stated for what I think they are requesting, yes; however, the Planning Board has the discretion to grant a not applicable finding that the proposed development relative to the rest of the development is insignificant. Mr. McAllister stated that he would not request a not applicable.

Mr. Irving asked if they looked at the possibility of re-grading the site. Mr. McAllister answered in the negative and stated it would be a couple of feet. Ms. Sherman stated the proposed pool looks to be about three times the size of the existing pool. Mr. Wolters stated that it comes down to serviceability; pools have to be designed for the numbers. Ms. Sherman asked if the existing pool is compliant with the number of campsites. Mr. Wolters stated that it is undersized; Federal guidelines are usually not grandfathered. Mr. Colbath asked how much bigger the proposed pool to the existing pool is. Mr. McAllister stated it is about double in size.

Mr. Irving asked Mr. Sullivan if there was a difference between guidelines and regulations as the ADA indicates guidelines. Mr. Sullivan stated that it is more semantics; regulations are the upfront part, and the guidelines are in the background. Mr. Irving asked if they are required to satisfy the guidelines as though they are a regulation. Mr. Sullivan answered in the affirmative.

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Mr. McAllister stated that the documentation indicates “revised requirements”. Mr. Irving stated they are required guidelines. Mr. Sullivan agreed.

Ms. Sherman asked if you didn’t have a pool at all would ADA bathrooms be required. Mr. Sullivan answered for the new campsites, yes; any renovation is required to be ADA accessible. Ms. Sherman stated if you took some of your campsites along the river and put more gravel to make campsites down there. Mr. Sullivan stated adding new sites would have to have the same amenities. Mr. McAllister stated new sites have been constructed on this site. Mr. Irving stated the construction took you out of you compliance.

Mr. Irving asked if the construction of those 25 sites require compliance with ADA. Mr. Sullivan answered in the affirmative. Mr. Irving stated so when they were constructed they had to have additional bathrooms. Mr. Sullivan stated accessible bathrooms should have been constructed when the new sites were constructed. Mr. Irving stated so you’re claiming that the Town would have been in error in issuing a building permit and the Planning Board would have been in error in granting the site plan exemption and the Town was in error of issuing a certificate of occupancy, if we issued one.

Mr. Irving stated that he was not aware that these 25-sites required ADA bathrooms. Mr. Irving asked if Mr. McAllister knew they were required. Mr. McAllister stated they would have asked for them if we knew we needed them. Mr. Irving asked if the requirement for the additional bathrooms was in place last spring. Mr. Sullivan stated that was a renovation to the facility which would have required ADA bathrooms.

Mr. Irving stated when you were laying out this site no one thought about bathrooms. Mr. McAllister stated we were not aware of the requirement to construct bathrooms, but knew the challenges to construct in the floodplain. Mr. Wolters stated they could remove the river pavilion, which is in the floodway. Mr. McAllister stated the river pavilion is approximately 1,800 square feet. Mr. Wolters stated it is used for entertainment. Mr. Colbath asked it contains bathroom facilities. Mr. Wolters answered in the negative.

Ms. Sherman asked for public comment; there was none. 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; Ms. Tobin stated the rule is no building in that area and we could come up with something that would meet ADA without doing what is proposed. Ms. Sherman stated there can be compromises that she would rather see than what is proposed. **Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; Ms. Tobin stated that it would be the same reason from item 1. Mr. Bartolomeo stated that the ordinance is not observed as they are asking to build where we don’t allow things to be built. **Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.**

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Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that substantial justice is done.** Ms. Sherman asked for Board comment; Mr. Bartolomeo stated not to slight the small numbers of handicapped persons as a percentage of the general population, but denying this application serves the greater number with the greater good. **Motion carried with Mr. Bartolomeo voting in the negative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, 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 Mr. Bartolomeo, 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; Ms. Tobin stated the rule is no buildings and there are different things that could be done. Mr. Bartolomeo stated there is nothing unique about this property that is different from other properties in this area. **Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.**

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

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, 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; Ms. Tobin stated they can use the property as it is right now. **Motion unanimously defeated.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, 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; Ms. Tobin stated they are able to use the property. **Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 6. **Mr. Colbath made motion, seconded by Ms. Tobin, 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; there was none. **Motion unanimously carried.**

Ms. Sherman read item 7. **Ms. Tobin made a motion, seconded by Mr. Colbath, that item 7 is not applicable to this application.** **Motion unanimously carried.**

Ms. Sherman read item 8. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the variance is necessary, considering the flood hazard, to afford relief.** Ms. Sherman asked for Board comment; Ms. Tobin stated she does not see the relief. **Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.**

Mr. Colbath made a motion, seconded by Ms. Tobin, that, based on the forgoing findings of fact, the variance from §147.16 of the Town of Conway Zoning Ordinance to construct an ADA accessible pool, associated concrete pad, concrete pavilion, ADA accessible bathroom, ADA accessible multi-purpose building, and associated concrete walkways within the Floodplain Conservation Overlay District be granted. Motion defeated with Ms. Tobin, Mr. Bartolomeo and Ms. Sherman voting in the negative and Mr. Steiner and Mr. Colbath voting in the affirmative.

A public hearing was opened at 8:45 pm to consider a **SPECIAL EXCEPTION** requested by **WILLIAM DENNIS** in regards to §147.13.4.2.4.2 of the Conway Zoning Ordinance **to allow an accessory apartment over a garage** at 120 Oak Street, North Conway (PID 215-104). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, November 7, 2014.

Nolan Moody appeared before the Board. Mr. Bartolomeo stepped down at this time. Ms. Sherman stated that the applicant is entitled to a five-member Board and only four-members were present. Ms. Sherman asked if the applicant would like to proceed with four-members or continue the hearing until there is a five-member Board. Mr. Nolan agreed to proceed with four-members.

Ms. Sherman asked if it was owner occupied. Mr. Moody answered in the affirmative. Ms. Sherman asked if the building would be architecturally compatible with the neighborhood. Mr. Nolan answered in the affirmative. Ms. Tobin stated that the owner's address is in Florida. Mr. Nolan stated that he does not rent the house; he goes to Florida in the winter. Mr. Colbath asked the square footage of the apartment. Mr. Nolan answered 775 square feet. There was no public in attendance.

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.**

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.**

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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 §147.13.3.2.4.2 of the Town of Conway Zoning Ordinance to allow an accessory apartment over a garage be granted. Motion unanimously carried.

2015 ZBA Dates and Submittal Deadlines: Ms. Tobin made a motion, seconded by Mr. Steiner to approve the 2015 ZBA Dates and Submittal Deadlines. Motion unanimously carried.

Meeting adjourned at 9:00 pm.

Respectfully Submitted,



**Holly L. Meserve
Recording Secretary**