

**ZONING BOARD OF ADJUSTMENT**

**MINUTES**

**JUNE 21, 2023**

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, June 21, 2023, at the Conway Town Office, 23 Main Street, in Conway, NH, beginning at 7:00 pm. Those present were: Chair, John Colbath; Vice Chair, Andrew Chalmers; Richard Pierce; Jac Cuddy; Alternate, Debra Haynes; Building Inspector/Code Enforcement Officer, Jeremy Gibbs; and Planning Assistant, Holly Whitelaw.

Mr. Colbath announced the minutes are being transcribed remotely, and asked participants to clearly identify themselves.

Mr. Colbath led the Pledge of Allegiance.

**PUBLIC HEARINGS**

A public hearing was opened at 7:00 pm to consider a **VARIANCE** requested by **RIVER RUN COMPANY, INC.** [FILE #23-21] in regards to §190-20.E.(2) of the Conway Zoning Ordinance to allow the construction of 10 residential buildings exceeding the height limitations at 94 & 130 River Road, North Conway (PID 215-9 & 11). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, May 5, 2023. This hearing was continued from April 19, 2023.

Mr. Colbath stated that the application was withdrawn.

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A public hearing was opened at 7:04 pm to consider a **SPECIAL EXCEPTION** requested by **DOMENIC AND KATRINA AIELLO-POPEO** [FILE #23-24] in regards to §190-13.B.(4)(b) of the Conway Zoning Ordinance to allow an accessory dwelling unit at 430 Eaton Road, Conway (PID 276-92). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, June 9, 2023.

**As the applicant was not present, Mr. Chalmers made a motion, seconded by Mr. Cuddy, to continue this public hearing to the end of the meeting. The motion carried unanimously.**

Mr. Colbath reopened the hearing at 8:35 pm to consider a **SPECIAL EXCEPTION** requested by **DOMENIC AND KATRINA AIELLO-POPEO** [FILE #23-24] in regards to §190-13.B.(4)(b) of the Conway Zoning Ordinance to allow an accessory dwelling unit at 430 Eaton Road, Conway (PID 276-92).

Domenic Aiello-Popeo appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Aiello-Popeo said he and his wife have owned the

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property for five years and are requesting this variance due to the arrival of their first child. Their house is small and there is no room for relatives to visit. They propose to build a two-car garage with a one bedroom, one bathroom ADU over it. They intend that this property will never be used as a short-term rental.

Mr. Colbath asked for Board comment. Mr. Colbath asked if they are on Town sewer and Mr. Aiello-Popeo said they are on private septic, but they are discussing expanding the leech field. Mr. Colbath asked about parking. Mr. Aiello-Popeo said there is sufficient parking, as there is a large driveway. Mr. Colbath asked regarding the architectural design of the garage. Mr. Aiello-Popeo said it is combination Craftsman/farmhouse style, in keeping with the appearance of the house. Mr. Colbath asked about the architectural design of the abutting properties. Mr. Aiello-Popeo said the abutting properties are a combination of designs.

Mr. Cuddy stated the application it is written to be more of a guest house than an ADU. Mr. Aiello-Popeo said in practice, this is how it will be used. Mr. Cuddy clarified that an ADU generally requires permanent residents.

Mr. Pierce asked if the garage exists. Mr. Aiello-Popeo said they will be building the garage and the residential unit.

Ms. Haynes asked if the garage will be attached to the house. Mr. Aiello-Popeo said it will be attached by a covered breezeway/walkway.

Mr. Colbath asked for public comment; there was none.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the accessory dwelling unit is no less than 300 square feet and no greater than 800 square feet.** Mr. Colbath asked for Board comment; there was none. Mr. Aiello-Popeo clarified the ADU will be 450 square feet. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the accessory dwelling unit is architecturally compatible with the neighborhood.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that sufficient parking is located on site.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that both the primary single-family dwelling and the accessory dwelling unit shall be used for long-term residency, and short-term transient occupancy of either dwelling unit is prohibited.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, that based on the forgoing findings of fact, the Special Exception pursuant to §190-13.B.(4)(b) of the Town of Conway Zoning**

**Ordinance for an accessory dwelling unit be granted.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

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A public hearing was opened at 7:06 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **ROBERT NELSON** [FILE #23-25] in regards to §190 – Permitted Use Table of the Conway Zoning Ordinance to appeal the Zoning Officer’s determination that a commercial firewood business is not a permitted use at 66 Emery Lane, Conway (PID 265-157.2). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, June 9, 2023.

Mr. Colbath read the application and the applicable section of the ordinance.

Robert Nelson of 66 Emery Lane and Sarah Saunders appeared before the Board. Mr. Nelson believes this small business on his property is allowable in the residential-agricultural district under the permitted use tables for forestry and accessory uses. He cited the definition of forestry and lumbering operations per the federal guidelines and stated the Town does not have a definition for processing of cordwood. He has been processing cordwood at his residence for five years and brought this appeal to the Board to ensure this is an allowable use and to request a permit, if necessary. He will comply with noise ordinances.

Mr. Colbath asked for Board comment.

Mr. Chalmers asked if the firewood is for personal use. Mr. Nelson explained it will be for personal use and for sale.

Ms. Haynes asked if the operation would run five days a week. Mr. Nelson said possibly in the fall, but only a couple of days a week in the summer. They cut per order; they will not be storing stacks of firewood.

Mr. Cuddy noted he has a forestry plan on his property and they have had work done to remove trees to maintain the healthy forest for a long time.

Mr. Colbath asked if Mr. Nelson owns other property on Emery Lane. Mr. Nelson said he owns commercial and residential property on the road. Mr. Colbath asked if he could move this operation to the commercial property. Mr. Nelson said he could move some of it, but he believes he has the right to process the cordwood in the agricultural zone on his residential property.

Mr. Cuddy said as a property owner, he has the right to cut trees on his property. Mr. Nelson clarified he is not cutting trees on his property, he is bringing in trees from other locations. He said one of the concerns is that this will be operated as a commercial business, with log trucks accessing the property regularly. However, he said it will be similar to a farm operation. Mr. Cuddy said this is a commercial enterprise. Mr. Nelson said there are other local businesses doing the same thing, i.e. farms and tree service companies.

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Ms. Saunders noted that keeping it on the residential property is less obtrusive to the abutters. Mr. Colbath asked if the apartment building Avesta is constructing is an abutter. Mr. Nelson said yes, but his commercial property also abuts the Avesta property. His intent is not to make money, but to subsidize his workers.

Mr. Colbath asked Mr. Gibbs why he felt requesting this waiver was appropriate. Mr. Gibbs explained if the wood is not coming from the property, it cannot be considered a forestry operation. He agreed that this is similar to a farm but under state statute, a certain percentage of products (35%) are supposed to come from the farm itself. He said if this is an allowed use in a residential agricultural district, it could occur in the middle of Birch Hill. Mr. Nelson said under the current permittable use tables, Birch Hill could indeed do this. He said the zoning use might need to be changed.

Mr. Cuddy asked if Mr. Nelson owns all of the property on Emery Lane. Mr. Nelson explained there is one house he does not own, but he has an agreement with the owner that he will purchase it. Mr. Cuddy asked if Emery Lane is a Town-owned road and Mr. Nelson said it is. However, Public Works Director Andrew Smith has asked if he would be interested in taking over the road.

Mr. Pierce asked Mr. Gibbs if there is a criteria that pushes this operation over the line. Mr. Gibbs clarified the wood not coming from the property is the main distinction. Mr. Pierce asked if the 35% figure is meaningful in this case. Mr. Gibbs said the percentage shows whether products being sold are coming from the property. Mr. Nelson clarified the application does not state he will be bringing wood in on trucks, although this is factual. They do process some firewood off this land every year but not as much as what could be brought in from lots that his company clears.

Mr. Cuddy asked what kind of trucks will be coming onto the property. Mr. Nelson said they will not be regular logging trucks. Mr. Cuddy expressed concern over logging trucks traveling a Town-owned road. Mr. Nelson said he has a commercial business on Emery Lane that trucks are permitted to access.

Mr. Colbath asked for public comment; there was none.

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, to approve the appeal from Administrative Decision. Motion carried unanimously.**

Mr. Colbath explained the 30-day appeal process, if anyone wants to appeal this decision.

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A public hearing was opened at 7:33 pm to consider a **VARIANCE** requested by **JONATHAN M. NORIS TRUST 2017** in regards to §190-27.G.(2) of the Conway Zoning Ordinance **to allow a 58-foot-long dock, 50-feet of which will extend over water** at 68 Little Kate Road, Center Conway (PID 281-3). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters Friday, June 9, 2023.

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Dan Lucchetti of HEB Engineers and Jonathan Noris appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Lucchetti explained that due to the topography of the lakebed and obstructions, the shoreline is rocky and shallow and prevents boats from docking safely. They cannot provide a boat slip that meets the DES regulations. This will be a seasonal dock. This is the location along the shoreline that will allow the shortest dock to be constructed.

Mr. Colbath asked for Board comment.

Mr. Chalmers asked if the dock will present a hazard to other boaters. Mr. Lucchetti said in an area with rocks and known shallow water, boats are probably staying away from this area. It is similar to a 30-foot dock placed in navigable waters, so presents the same hazards.

Mr. Pierce asked where the dock gets to a depth of three feet. Mr. Lucchetti said it starts 30 feet from the edge of water and the 20 feet for a legal boat slip would extend beyond that. They have a wetland permit pending with the DES for this length. The DES is fine with this proposal, as long as the Town concurs. Mr. Cuddy asked for written verification from the DES of this. Mr. Lucchetti clarified the DES's approval does not depend on the ZBA decision. It is to confirm whether the Town has comments on the wetland application, as the proposed dock does not meet Town regulations.

Mr. Cuddy asked if there are other docks beyond the Town regulations. Mr. Gibbs said if there are, they would be grandfathered or not permitted, or have been issued a variance. Mr. Lucchetti believes there are a number of docks on Conway Lake of this length.

Mr. Pierce noted everyone wants more dock space and breaking the rules could create a "feeding frenzy." Mr. Lucchetti clarified they were required to get a waiver from the DES regulations to allow this extended dock. Mr. Pierce noted this could be a navigation hazard, especially at night.

Mr. Cuddy asked if there are any docks close to this area. Mr. Lucchetti said there are two to the northwest of the property, in the cove, which is still navigable water. Mr. Cuddy suggested constructing a U-shaped dock that would meet the DES regulations. Mr. Noris said his understanding is the DES will only approve straight docks.

Ms. Haynes clarified where the three-foot depth line is on the map.

Mr. Gibbs explained the Town can only approve a 30-foot dock. This dock was previously approved at 40 feet. He does not have adequate information regarding what the DES is waiting for. Mr. Lucchetti explained they originally requested a 40-foot dock in 2020, but the shoreline does not allow boats to be safely docked at that depth. So, they are now asking for an additional ten feet.

Mr. Chalmers asked why the original shoreline study did not reveal this issue. Mr. Lucchetti said the original study was done in the winter and new information has come to light since then.

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Mr. Cuddy asked why no information on the communication with the DES as to why they would allow this has been included in the package. Mr. Chalmers added it would back up the applicant's argument.

Mr. Colbath asked for public comment.

Mark Guerrigue appeared as a representative of the Conway Lake Conservation Association. He noted the DES defers to local regulations. He shared a list of how the property is in violation of the Conway zoning ordinance and asked how this happened. He said HEB presented this plan without considering the local regulations and it was approved by mistake. He said local boat owners with approved docks learn to navigate the shallow water to dock their boats. He requested that the ZBA not approve this request and force the property owner to install a 30-foot dock.

Tom Deans said there are numerous violations on this property of the Conway zoning regulations that were approved by a Town officer with no hearing. He is appalled at what the Town has allowed to happen on this property and there is no need for a 50-foot dock.

Mr. Pierce asked for clarification as to why the Town allows a 30-foot dock. Mr. Gibbs noted the depth of the water is not mentioned in the Town regulations. He said the previous zoning officer approved the 40-foot dock in 2020. Mr. Chalmers said this appears to be in violation of the Town zoning ordinance. Mr. Gibbs said it looks this way now, but there is no information on how this decision was made. He said as it was an approved application, it would be allowed moving forward.

Mr. Colbath asked if there was documentation as to any objections to this approval. Mr. Gibbs said there has been conversations about it. Mr. Lucchetti said there have been updates to the plan that have been approved by the Town. Mr. Noris said a letter from David Pandora in September 2022 listed Mr. Gibbs' review of the HEB plan and mentioned a number of issues that needed to be addressed. He said these issues have been resolved.

Mr. Colbath refocused the discussion and clarified the ZBA's responsibilities.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment. Mr. Cuddy said based on the conversations of abutters, the situation does not prevent a 40-foot dock from being put in. Mr. Chalmers said the interest is greater in the public's favor to not have this dock that egregiously exceeds the 30-foot allowed dock length. Ms. Haynes said no, as she would like to stay within the Town regulations. Mr. Pierce said no for reasons stated. Mr. Colbath said no for reasons stated. **Motion defeated unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment. The Board members agreed it is not in the spirit of the ordinance. Mr. Colbath said the spirit of the ordinance is for shoreline protection and this variance does not contribute to shoreline protection. **Motion defeated unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that substantial justice is done.** Mr. Colbath asked for Board comment. Mr. Chalmers stated justice is greater to the public than to the applicant. **Motion defeated unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment. Mr. Chalmers said if the surrounding landowners are forced to comply with the ordinance, an applicant out of compliance will not help the surrounding property values. **Motion defeated unanimously.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, 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.** Mr. Colbath asked for Board comment. Mr. Chalmers noted abutting property owners say they can make do using their docks, so he does not see a hardship for this applicant. Mr. Pierce said he has an issue with the Town ordinance not defining depth. The Town ordinance is more restrictive than that of the DES, and usually the most restrictive ordinance applies. Mr. Colbath stated the land can be used with or without the presence of the dock. **Motion defeated unanimously.**

Mr. Colbath read item 5.a.ii. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the proposed use is a reasonable use.** Mr. Colbath asked for Board comment. Mr. Pierce said it was excessive. Ms. Haynes agreed. Mr. Colbath stated that 58 feet is excessive and an unreasonable use. **Motion defeated unanimously.**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, that based on i and ii above, literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.** Mr. Colbath asked for Board comment; there was none. **Motion defeated unanimously.**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, that item 5.b. is not necessary for this application. Motion carried unanimously.**

Ms. Whitelaw noted that 5.b. needs to be addressed, as it is applicable.

**Mr. Chalmers rescinded the motion that item 5.b. is not necessary for this application, seconded by Mr. Cuddy. All were agreeable.**

Mr. Colbath read item 5.b. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, 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.** Mr. Colbath asked for Board comment. Mr. Chalmers said without being granted the variance, the applicant can continue to utilize his home and existing dock, like the other property owners on the lake that are in compliance with the ordinance. **Motion defeated unanimously.**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, that based on the forgoing findings of fact, the variance from §190-27.G.(2) of the Town of Conway Zoning Ordinance to allow a 58-foot-long dock, 50 feet of which will extend over water be granted.** Mr. Colbath asked for Board comment; there was none. **Motion defeated unanimously.**

Mr. Colbath noted the applicant has 30 days to appeal the decision.

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A public hearing was opened at 8:21 pm to consider a **SPECIAL EXCEPTION** requested by **E.C. SHOP, LLC** in regards to §190-28.I.(4) of the Conway Zoning **to allow a wetland crossing for a driveway to access a building site** at 60 Service Road, Center Conway (PID 244-2). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters Friday, June 9, 2023.

Ron Briggs of Briggs Land Surveying and Roger Garland appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Briggs explained this is a 13+-acre parcel on Service Road that leads to the Town of Conway landfill. It is in the I-2 district. The property is divided by a large wetland. There is an equipment maintenance garage on the southern half of the property and the northern half is used for forest products storage and transfer. They propose to construct a driveway to access the rear of the northern lot from Service Road that crosses the wetlands. The DES is reviewing the wetlands application for this project. The driveway would separate this section into two lots.

Mr. Colbath asked for Board comment. Mr. Colbath asked how much of the property is usable. Mr. Briggs said there are three to four usable acres. Mr. Colbath asked why the DES has not made a determination. Mr. Briggs said the DES have done test pitting and the soil scientist is on vacation, although he stated he did not see an issue with the permit.

Mr. Pierce clarified that there is a section of the property that is inaccessible without crossing the wetlands and Mr. Briggs agreed. Mr. Pierce stated in his experience in residential use, you cannot deny a landowner access to their usable property.

Mr. Colbath asked for public comment; there was none.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the use is essential to the productive use of land not in the district.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that the use is so located and constructed as to minimize the detrimental impact upon the wetlands.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that there is no better feasible alternative, in keeping with State and Federal standards for the**



issuance of development permits in 404 jurisdictional wetlands. Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, that a site plan review approval shall be required prior to construction.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, that, based on the forgoing findings of fact, the Special Exception pursuant to §190-28.(I)(4) of the Town of Conway Zoning Ordinance to allow a wetland crossing for a driveway to access a building site be granted and the condition that the owner receive DES approval.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

#### **REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Chalmers made a motion, seconded by Mr. Cuddy, to approve the Minutes of May 17, 2023, as written. Motion carried unanimously.**

**Mr. Cuddy made a motion, seconded by Mr. Chalmers, to adjourn. Motion carried unanimously.**

Meeting adjourned at 8:45 pm.

Respectfully submitted,

Beth Hanggeli  
Recording Secretary