

ZONING BOARD OF ADJUSTMENT

MINUTES

March 15, 2017

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, March 15, 2017 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm.

Present: Chair, Phyllis Sherman; Andrew Chalmers; Luigi Bartolomeo; Dana Hylen; Alternate, Steven Steiner, Alternate; Planning Director, Thomas Irving; and Recording Secretary, Theresa Ann Gallagher

Also Attending: Town Attorney, Peter Malia; Building Inspector, David Pandora; Attorney Derek Durbin, and Deborah Duggan and Thomas Duggan, Sr.

PUBLIC HEARING

A public hearing was opened at 7:00 pm to consider an APPEAL FROM ADMINISTRATIVE DECISION requested by DEBORAH DUGGAN in regards to §147.13.14.6.1 of the Conway Zoning Ordinance to request that the ZBA find that the existing outhouse is a legally existing non-conforming use at 361 Transvale Road, North Conway (PID 251-51). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters.

The Town of Conway issued a Notice of Violation to Deborah Duggan received by her on January 30, 2017 regarding Zoning 147.13.14.6.1 which does not allow a new septic system in the floodplain, and Unlawful Act – Section 3F (4) which states that the only toilet facilities permitted are those integral to a Camping Unit or attached to an approved NH DES septic system. The ZBA determined that a legally existing shed on the property is grandfathered, but not the septic from the structure.

ALTERNATE MEMBER Ms. Sherman appointed Mr. Steiner as a voting member of the Board at this meeting.

Ms. Sherman announced that the Board will review documents received regarding the notice of violation to the Duggan's.

Attorney Peter Malia clarified that the issue is about the bathroom in the shed not being grandfathered. In the past, the ZBA determined that the shed was grandfathered, but they didn't discuss the bathroom in the shed being grandfathered. At this meeting Deborah Duggan's has to prove that the bathroom is grandfathered as well.

Mr. Bartolomeo announced that he was at the meeting when the determination was made and came to the exact same conclusion, that the bathroom was not grandfathered. In the minutes of July 16, 2014, the ZBA approved the structure and the concrete pad as being grandfathered. There was no discussion about the use of the structure being grandfathered. Mr. Pandora stated

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he does not know what is currently used as a septic system on the property, but it is not State approved and is not a legal septic system.

Mr. Steiner asked when the shed was built; it was built prior to 1980, and the septic laws in NH changed in 1967. For the septic system to be legally grandfathered it would have to be in place before 1967.

Attorney Derek Durbin appeared before the Board on behalf of Deborah Duggan. He stated that this particular structure/use on the property has been discussed and called different things by different people; go back to the original appeal the Duggan's made in 2012, it was referred to as an outhouse, a shed or a bathroom. In 2011 a flood swept through Transvale acres and wiped out a lot of structures and properties. In 2011 a notice of violation was issued to Mrs. Duggan determining that the majority of structures on the properties, including the shed, were not grandfathered. It did not distinguish between structures and uses. That was appealed in January of 2012; it was denied and the case went back to the ZBA. The hearing that took place in July of 2014 overturned that violation determining that the structures on the property were grandfathered. In the decision at the meeting there was no distinction between uses and structures. It leads to a complicated discussion; people can use the components on their property for different things. Mrs. Duggan's shed is used about 14 weeks out of the year. In the minutes of July 16, 2014, the last statement that Mr. Malia made, after the vote on the motion, was about the outhouse being a separate issue and it is not grandfathered; that is a non-binding statement. There was no motion for reconsideration or follow up at the time. Attorney Durbin referred to page five in the minutes of July 16, 2014 where it is recorded that Ms. Sherman asked about the 1994 tax card, where there is an asterisk by a building that states no value out house to the left of the canopy, is that is the same shed that we are referring to. Mr. Durbin states that it is the same shed." Attorney Durbin also pointed out on Exhibit D, Mrs. Duggan stated "by the summer of 1978 the bathroom had been moved to its current location." The bathroom was passed down through the family since the early 1970's. An Affidavit has been submitted by Mr. Stone stating under oath that the shed existed since the early 1970's. This should be sufficient evidence to prove that the shed was used as a bathroom before 1979.

Mr. Bartolomeo asked about the application that came to the ZBA after the briefing, is it asking about the grandfathering of the structure or is the applicant specifically asking that the use be included in that issue. Attorney Durbin said they would have to go back to the original application. Mr. Irving has that application and it stated "to permit the following: property purchased in 1975 grandfather status of slab with open pavilion and shed, prior to flood ordinance as enforceable, amended date 9/7/1979." That was in 2012. Attorney Durbin said it's a non-supportable issue between uses of structures on a seasonal use property. That's not going to distinguish between sub-uses of a property. Mr. Bartolomeo commented that this is a fuzzy overlay, and that's what this Board deals with. Attorney Durbin said neither the Board nor the applicant ever distinguished between structure and uses before in previous discussions. Mr. Bartolomeo said they only deal with what is written on the application.

Mr. Steiner asked about a house being on the property; Attorney Durbin said there was never a primary residence on the property. Ms. Sherman clarified that the canopy was over a travel trailer which was on the slab. The housing is the trailer. Attorney Durbin stated that the Town is

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precluded from taking the action they did on January 30th due to the fact that it had the opportunity to distinguish previously between uses and structure, and to issue a notice of violation previously; that was never done. The applicant feels that the Town is taking two bites to the apple; it found a back-door way to present a notice of violation after unsuccessfully attempting to enforce first violation of non-conforming structures. There is an equity and fairness issue here. He suggested that the Board approve the application based on the more recent affidavit.

Mr. Chalmers asked about proof of having the septic system in place since 1979. Mr. Pandora explained that in Transvale acres there was only one bath house that had an approved septic system. Deborah Duggan explained that she included in a letter to the ZBA that the structure included a flush toilet; the ZBA put it under non-conforming uses, Zoning Code 147.14. During the hearing process, the Judge noticed that it included a bathroom. She thought it was all taken care of back at that time.

Attorney Durbin submitted a copy of Deborah Duggan's submission to the Board on February 13, 2012. In it she stated "Photos from the assessors file that were unattached appear earlier than 1977. On January 28th 2012, we received an April-1973 camera dated photo of the shed on the lot (flush toilet-see warranty deed/covenants)..."

Attorney Durbin also noted that on January 18, 2012 minutes page 10 of 16, in the 3rd paragraph from the bottom, "Mr. Steiner asked if the outhouse and the shed were the same, and Mrs. Duggan answered in the affirmative."

Mr. Steiner asked if it is an outhouse or a toilet with running water going to it. Attorney Durbin explained that the applicant does not refer to it as an outhouse; it's a structure with a shower, a toilet and a sink in it. It's also used for storage of personal belongings. It's not an outhouse like everyone would think, and it's not attached to a house.

Attorney Malia mentioned that Mrs. Duggan incorrectly suggested that Judge Horan's position on March 14, 2014 indicated that they had a grandfathered outhouse. It doesn't say that at all; he read that again today; he suggests that Mrs. Duggan consider submitting an affidavit with some pictures to fully prove all the evidence. Judge Horan's position does not stand for the proposition that the bathroom/outhouse/shed is grandfathered.

Attorney Malia said he disagrees with Attorney Durbin's suggestion that the Duggan's have been treated unfairly by the Town by the fact that it was remanded to the ZBA. The ZBA treated the Duggan's very fairly and took a fresh look at the evidence, and agreed more of the concrete pad have been grandfathered. It's not as if Dave Pandora is seeking a second bite at the apple; after that decision that was made a couple of years ago, Dave Pandora knew that if there was a bathroom in the shed, it wasn't being used because there was no power connected to the property. The only reason this issue has come forward now is because Mrs. Duggan is asking Mr. Pandora to restore power to the property. He has declined to do so because the Town's position in Transvale acres all along has been that you don't get power back until your property is in full compliance. The bathroom in there was not approved by the ZBA.

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Attorney Malia said there are two ways for the Duggan's to win this case tonight; one is to prove to the ZBA that it already grandfathered the bathroom in 2014; The Board may want to make a motion to decide whether or not they already grandfathered the bathroom in 2014. If the Board agrees that they haven't then it's incumbent upon the Duggan's to convince the Board tonight that the bathroom is grandfathered because it's been there before the Town prohibited septic systems in this particular zone. It should have been grandfathered along with the shed and it wasn't due to an oversight.

Mr. Hylen stated that he was present at the original hearing and the applicant came before the ZBA because all of the residents at Transvale acres did to ask if the structures on the lot be grandfathered. The ZBA determined that they were not grandfathered. They appealed and the ZBA denied the appeal. A use would have never been considered back then. Mrs. Duggan mentioned that the appeal was addressing both at that time. The Judge did not make a decision on grandfathering or not. She stated that all the information was included from the first letter that she sent to the Board. Mr. Hylen clarified that when the original applicant came in, they were deciding on the structure being grandfathered.

Ms. Sherman said at that time the ZBA determined a structure, and did not consider the use as being grandfathered. She suggested that the Board follow Attorney Malia's suggestion and make a motion that they all agree that the Board based their original decision on structure, and then review the situation for grandfathering the use.

Mr. Bartolomeo asked the applicant what the toilet empties into now. She said it is a septic system; Mr. Thomas Duggan said his father built it. Mr. Bartolomeo asked if it was approved by the State and Mr. Duggan said it was not. Mr. Bartolomeo confirmed that the Duggan's are asking the ZBA to grandfather something that was put in improperly without a design or State approval.

Mr. Hylen made a motion to say that the original decision was based on structure, and not on uses. Seconded by Mr. Chalmers. Ms. Sherman asked if there was any discussion from the Board. Ms. Sherman took a vote and the motion passed (4-0-1). Mr. Steiner abstained.

Mrs. Duggan asked to speak; she said there were no new laws that defined the difference between structure and use until the late 1980s. She received a flood plain ordinance that was dated 1979. There was no distinction at that time. It has been part of the issue since the beginning. Ms. Sherman said she has to prove to the ZBA that the bathroom was there prior to 1979. Attorney Durbin remarked that he already submitted the documentation needed. Exhibit E from Mr. Stone is proof. The original application was an appeal to the Administrative Decision regarding Article 147.14 which very generally states "specifies its rights to which nonconforming uses, structures signs and lots are entitled". It didn't identify a particular subdivision.

Mr. Bartolomeo mentioned that the State required septic systems designs in 1967. In 1979 the Town started to write laws for the septic system design. Mr. Pandora stated that before 1979 the owners could replace a septic system; anything after 1980 allows the maintenance of an existing septic system, but you could not put in a new septic system. Therefore, the applicant would have

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to go through the State of NH and get a new upgraded design, and they would also have to install it. Attorney Durbin agreed. Mr. Pandora also clarified that a new ruling by the State went into effect last year; it states that if there is a system that is not approved the applicant can wait for it to fail, and then the applicant will have to install the new approved septic system.

Attorney Malia said the next step for the applicant is to prove that the septic system has been there before 1979, which is when the Town created the flood plain ordinance.

Ms. Sherman asked who determines failure of the septic system. It would be Mr. Pandora. But in this case the applicant would have to go the State, who will make the decision. The State may approve 90 days to install a new system, or they may approve four years.

Mr. Steiner said he doesn't have enough information to make a decision and would prefer having Mr. Mark McConkey inspect what is there. Mr. Irving asked the applicants if the original system they had was replaced, and they said no, it was not.

Attorney Durbin suggested the ZBA make a decision tonight; they had enough time to inspect what is there, and he has submitted the burden of proof. Mr. Hysten stated that the ZBA should consider the use prior to 1979. He asked that the Board be less technical. Mr. Bartolomeo said he agrees.

Ms. Sherman asked for a motion; Mr. Bartolomeo made a motion that the Board has found fact based on the submission of the applicant that the preponderance of the evidence support a position that the use of the shed as a bathroom facility is grandfathered. Seconded by Mr. Andrew Chalmers. Ms. Sherman asked for any discussion. Ms. Sherman asked for a vote. Passed unanimously. (5-0)

Ms. Sherman asked for another motion to grant the appeal. Mr. Bartolomeo made the motion to grant the appeal to overturn the administration decision and find that the existing bathroom facility is a legally existing nonconforming use. Seconded by Mr. Andrew Chalmers. Ms. Sherman asked for any discussion. Ms. Sherman asked for a vote. Passed unanimously. (5-0)

Mr. Irving suggested that the next step for the applicant is to pursue a septic system approved by the State.

REVIEW AND ACCEPTANCE OF MINUTES Mr. Hysten made a motion, seconded by Mr. Bartolomeo, to approve the Minutes of January 18, 2017 as written. Mr. Chalmers abstained, as he was not present. Motion carried. (4-0-1)

Mr. Hysten made a motion to adjourn at 8:01 PM; seconded by Mr. Bartolomeo. Passed unanimously.

Respectfully Submitted,

Theresa Ann Gallagher, Recording Secretary