

ZONING BOARD OF ADJUSTMENT

MINUTES

APRIL 19, 2023

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, April 19, 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; Jonathan Hebert; Jac Cuddy; Planning Director, Jamel Torres; and Planning Assistant, Holly Whitelaw. Alternate Steven Steiner was in attendance. Code Enforcement Officer, Jeremy Gibbs, was in attendance.

ELECTION OF OFFICERS

Mr. Chalmers nominated, seconded by Mr. Hebert, Mr. Colbath as Chair. Motion carried with Mr. Colbath abstaining from voting.

Mr. Colbath nominated, seconded by Mr. Cuddy, Mr. Chalmers as Vice Chair. Motion carried with Mr. Chalmers abstaining from voting.

PUBLIC HEARINGS

A public hearing was opened at 7:03 pm to consider a **SPECIAL EXCEPTION** requested by **RWN REAL ESTATE HOLDINGS, LLC** [FILE #23-16] in regards to §190-13.B.(4)(b) of the Conway Zoning Ordinance **to allow an accessory dwelling unit** at 51 Emery Lane, Conway (PID 265-158). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 31, 2023.

Robert Nelson appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Nelson stated he is proposing a 24' x 24' building to be used as employee housing. Mr. Nelson stated it would not be used for short-term rentals.

Mr. Colbath asked for Board comment; Mr. Colbath stated two pictures of the proposed building was submitted and asked if he would be using one or the other. Mr. Nelson answered in the affirmative, and stated the footprint would stay the same. Mr. Chalmers asked about the parking on site. Mr. Nelson stated there is enough parking. Mr. Nelson stated the proposed house will sit at the back of the lot and there will be a walkway to the house. Mr. Colbath asked if both homes would be used for long-term rentals. Mr. Nelson answered in the affirmative, and stated they would be employee housing.

Mr. Colbath asked for public comment; Paul Tobacco of Evergreens on the Saco stated he feels this would have an impact on our values. Don Newton asked are we talking about two multi-family units on the lot. Mr. Colbath stated a single-family home exists and he is requesting an accessory dwelling unit. Michelle Tobacco asked if this would be a boarding house. Mr. Nelson answered in the negative.

Mr. Tobacco asked for an earth buffer. Mr. Nelson stated the current house is approximately 21-feet from the property line. Mr. Nelson stated he would be willing to put up a fence.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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. Hebert, 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. Hebert, 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. Hebert, 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 to allow an accessory dwelling unit be granted. Motion carried unanimously.

A public hearing was opened at 7:19 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **SETTLERS R1, INC.** [FILE #23-02] in regards to §190-20.F.(3) & §190-31 of the Conway Zoning Ordinance **to appeal the Zoning Officer’s determination that the existing “wings” mural on Building B1 is a sign** at 2 Common Court, North Conway (PID 235-99). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated the primary issue here is whether the murals at Settlers Green are in fact signs, and are governed by the ordinance. Mr. Lick stated the ordinances’ ideal goal is to regulate commercial speech, and the idea is for the ordinance to place reasonable restrictions on commercial speech. Mr. Lick stated it is our interpretation that these murals are not commercial speech; they were made for selfies, and this particular mural is not seen from a public roadway.

Mr. Lick stated the regulation is focused on business enterprise or commercial enterprise. Mr. Lick stated wall signs are supposed to be located on a common wall to the interior and exterior of the business identified by the sign. Mr. Lick stated the whole focus is, is this a commercial sign and is it advertising a commercial enterprise. Mr. Lick stated this does not advertise a business. Mr. Lick stated the ordinance identifies how big a sign can be by the square footage of the business.

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Mr. Lick stated when you read the ordinance as a whole it doesn't apply to this mural and it shouldn't apply to this mural; you can't define what size it should be because it doesn't advertise a business, it is not commercial and it is not visible from a public road. Mr. Lick stated those are the reasons why we articulate in the documents we have submitted and why this ultimately should not be deemed to be a sign, it should be a mural or a work of art, and therefore, the zoning administrator when he interpreted the ordinance as applied to this mural misinterpreted the ordinance and ultimately reached a conclusion that was wrong based upon the purpose and intent and the language of the ordinance.

Mr. Colbath asked for Board comment; Mr. Pierce asked Mr. Gibbs what made you make a distinction between a mural and a sign. Mr. Gibbs stated we don't have a definition in our ordinance for murals, so with no way to define the difference between a mural and a sign, he felt it met the definition of a sign. Mr. Lick stated he does not fault Mr. Gibbs for reaching the preliminary decision he reached. Mr. Lick stated if you look at the sign definition as a standalone without looking at the context he could see where he reached his conclusion.

Mr. Lick stated when he looks at it he understands what the definition is, but you have to look for what is the purpose of this ordinance to begin with, and you have to look outside of the definition to determine that; what was going on here and what were you defining. Mr. Pierce asked it is a pair of wings so what does the business do. Mr. Lick stated it is not advertising a business, it is a selfie location.

Mr. Pierce stated he recalls with the bakery it was something that was indicative of what was going on inside. Mr. Cuddy stated the wings show products on them. Mr. Lick stated it is very generic in nature. Mr. Lick stated they were trying to bring some interest, and not have a blank wall.

Mr. Barsamian stated we didn't hire a sign person to do the wings, we hired an artist. Mr. Barsamian stated this is happening everywhere; this is another expression of art. Mr. Barsamian stated they have been adding pieces of art all over the property, and we picked these locations as they weren't visible from the road. Mr. Barsamian stated we were caught up in the Leavitt's thing; it was asked at that meeting why isn't Settlers Green a sign and someone said it isn't a sign, but then all of a sudden we received a notice that it is viewed as a sign.

Mr. Hebert stated it is attached to Banana Republic, and asked what would be allowed for a sign there. Mr. Gibbs stated he would have to come see the Board for a second wall sign because they already have a wall sign there. Mr. Gibbs stated he does not know the square footage of Banana Republic, but the minimum wall sign allowed is 20 square feet. Mr. Hebert stated if it is internal and not visible from the road then it is not applicable, so if this is not visible from the road how did this get caught up that this now applies. Mr. Gibbs stated he disagrees that you can't see it from a road.

Mr. Gibbs stated what falls under the Town's control is a bit of a conundrum. Mr. Gibbs stated since 1995 Settlers Green has been treated as a mall, and with that the Town has enforced signage only along on the exterior of the building.

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Mr. Gibbs stated we do have responsibility to the wings, and he believes it is under the town's sign ordinance. Mr. Barsamian stated is it almost 1,200-feet from a public way. Mr. Hebert stated he could see that sign from the intersection where the reader board sign is. Mr. Barsamian stated that is a private way, it says from a public way.

Mr. Colbath asked if there are words in the lower corner. Mr. Barsamian stated it is an identifier of where you are, it says #settlersgreen. Mr. Colbath asked if they were ever cited for the sign. Mr. Barsamian answered in the negative, and stated we were cited after the Leavitt's hearing, but not before.

Mr. Gibbs stated there was no formal violation notice, but there is a note to file from the previous zoning officer and Dot Seybold about a conversation they had regarding these murals and that they would be considered signage under the Town's definition and would need to be permitted. Mr. Barsamian stated that conversation did happen, and we felt those murals were murals. Mr. Barsamian stated Mr. Gibbs spoke with Michael Mitchrone and it was clear that you didn't consider those signs, but had another problem at G building which was resolved. Mr. Barsamian stated we were not cited for these until after the Leavitt's case, and at the Leavitt's hearing we were told they were not signs.

Mr. Colbath asked who told them they were not signs. Mr. Barsamian stated it was his interpretation from the conversation Mr. Mitchrone had with Mr. Gibbs that these were not considered signs. Mr. Barsamian stated it was a meeting they had, there was not anything in writing.

Mr. Colbath stated our zoning ordinance is permissive and it needs to be identified to be allowed. Mr. Colbath stated there is nothing that permits murals. Mr. Barsamian stated he believes you need to go deeper and look at the purpose, is it advertising something, is it not advertising something. Mr. Barsamian stated their biggest complaint by tenants, and one of the reason why we lose tenants, is because our signage is very restrictive. Mr. Colbath stated the warrant article to change the definition of sign was turned down by the legislative body; what we have in place is what the legislative body has told us that we have to deal with.

Mr. Cuddy stated it is representing something that is sold there. Mr. Pierce stated during the Leavitt hearing one of the problems was it had cupcakes and donuts, and it was discussed that we wouldn't have a problem with it if they didn't have those items on there. Mr. Barsamian stated if the shoe wasn't on the wings the Board would have a different feeling about it.

Mr. Gibbs stated his decision was not based on the content of what was there, its whether or not it could be defined in the sign ordinance, and our ordinance says from a road corridor, and that is a road corridor that the public travels on and is not restricted to just OVP customers. Mr. Lick stated if that is the case there is no way anybody can see any of those tiny little purses or shoes from any roadway. Mr. Pierce stated that is what makes it a sign. Mr. Lick asked if it is a sign if you can't see it.

Mr. Lick stated he can see wings but couldn't tell in any way shape or form that it is advertising. Mr. Colbath stated it is not just that it can be seen from a road; it is a wall sign on the wall of a building. Mr. Colbath stated we don't define mural in our ordinance.

Mr. Gibbs read the sign definition. Mr. Lick stated it cannot be looked at in isolation, you have to look to the rest of the ordinance otherwise you ignore what was intended by the ordinance. Mr. Lick stated the very purpose is to place reasonable restrictions on commercial speech and prevent excessive or unnecessary signage along road corridors.

Mr. Chalmers asked if the letter read earlier involving Dot Seybold just go into the file or was it sent to Settlers Green. Mr. Gibbs stated it went into the file; he doesn't know if a copy was ever sent to Dot or not. Mr. Gibbs stated it is a reflection of the conversation Jim and Dot had on January 18, 2018. Mr. Lick stated the Zoning Board minutes from September states "Mr. Gibbs stated that murals at Settlers Green don't meet the Town's definition of signage." Mr. Lick stated and now we are somehow found responsible for not understanding that these murals would be indeed signage. Mr. Barsamian stated in 2018 we didn't have murals. Mr. Gibbs stated it was a conversation about putting them up. Mr. Gibbs read the memo that was in the file.

Mr. Gibbs stated in regard to the minutes from September meeting, he is relatively new and at that time the understanding he had was correct in that it was not signage. Mr. Gibbs stated the only conversation he had with Mr. Mitchrone at that point was discussing the wings mural, and as explained earlier he didn't realize it fell under our responsibility for signage. Mr. Gibbs stated it wasn't the streetside murals or the heritage mural at that point with his conversation with Mr. Mitchrone. Mr. Gibbs stated since then he discovered this note to file and has educated himself through the Leavitt's process on murals, our definitions and how enforcement proceeds from there.

Mr. Colbath asked for public comment; there was none. **Mr. Cuddy made a motion, seconded by Mr. Chalmers, to uphold the administrative decision. Motion carried unanimously.**

A public hearing was opened at 8:00 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **SETTLERS R1, INC.** [FILE #23-03] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing "wings" mural on Building B1 to remain** at 2 Common Court, North Conway (PID 235-99). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated the primary issue here is that Settlers had reason to believe that the mural was in fact a permissible use and up until September of last year the Town's Zoning Officer believed the same thing, that it was not regulated as a sign. Mr. Lick stated the dimensional regulation does not constitute under the standard a public or private nuisance nor does it diminish the value of the properties in the area. Mr. Lick stated the cost of correction outweighs any public benefit to be gained.

Mr. Lick stated it cost thousands of dollars for the mural, and the benefit to be gained by painting over those thousands of dollars for a plain wall has very limited, if any, public benefit. Mr. Colbath asked for Board comment; Mr. Colbath asked how long has it been in place. Mr. Lick stated he does not have an exact date, but thinks it is two years.

Mr. Cuddy asked if we are considering the logos or the pictures on the wings and the Settlers Green hashtag to be commercial if those are removed what part of it at this point in time, other than the size, would make it commercial. Mr. Gibbs stated where the Board upheld the decision that it is a wall sign, it exceeds the number of wall signs permitted by the ordinance.

Mr. Lick stated in this case commercial has nothing to do with it anymore, we are treating it as a sign and the question is can we have an equitable waiver given that it is in place, we thought it was permitted, it doesn't create a nuisance and the value of taking it down does not outweigh the harm to the public.

Mr. Gibbs stated when considering the appeal from administrative decision think it is hard to say that they didn't know that there was an ignorance of the ordinance where Dot was in charge of signage and had the conversation with Jim that this would be considered signage and still went forward with it. Mr. Lick stated Dot was not talking about this mural; this mural wasn't considered at the time, and, furthermore, testimony from the zoning officer just a couple months ago was that this was not treated as a sign. Mr. Lick stated he doesn't see how Settlers could be faulted for having the same opinion.

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

Mr. Hebert asked was there confusion on the Town's part when discussing with the applicant whether or not this was a sign or not. Mr. Gibbs answered in the affirmative and stated when he had the conversation with Michael Mitchrone on where we enforce inside Settlers Green and it was before he knew about the conversation with Dot.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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.**

Mr. Colbath asked for Board comment; Mr. Colbath stated they thought it was allowed; they didn't see it as a sign. Mr. Pierce stated that is the same way Leavitt's felt. Mr. Hebert stated the Town was confused as well on whether it was a sign or not a sign. Mr. Colbath stated that the Board has just found that it is a sign; this equitable waiver allows the applicant to say in all good faith we didn't create it as a sign we created it as a work of art. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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.

Mr. Colbath asked for Board comment; Mr. Hebert stated he thinks this is an error in ordinance interpretation, and not done intentionally to violate it. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Hebert., that item 3 is not applicable. Motion carried unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.**

Mr. Colbath asked for Board comment; Mr. Pierce stated we have already found that the dimensional is a violation. Mr. Chalmers stated this mural has been up for two years with no complaints, he doesn't see where it would constitute a nuisance. Mr. Pierce stated if no one has complained he is hard pressed to call it a nuisance. **Motion carried unanimously.**

Mr. Colbath read item 5. **Mr. Chalmers made a motion, seconded by Mr. Cuddy, 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.** Mr. Colbath asked for Board comment; Mr. Hebert stated he doesn't see how the investment made of removing that one sign outweighs the public benefit gained. Mr. Pierce stated the cost of correction is pretty cheap.

Mr. Lick stated covering it up is just the cost of some paint, however, you have to consider not just the value of the paint, but the value of what you are painting over. Mr. Hebert stated he doesn't agree with the applicant on the severity that it far outweighs the inequitable required violation to correct it. Mr. Pierce stated there is no cost of correction. Mr. Colbath stated the correction does not outweigh the benefit to the public. **Motion defeated unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Hebert, that, based on the forgoing findings of fact, the equitable waiver from §190-20.F.(3) of the Town of Conway Zoning Ordinance to allow the existing “wings” mural on Building B1 to remain be granted. Motion defeated unanimously.

A public hearing was opened at 8:43 pm to consider a **VARIANCE** requested by **SETTLERS R1, INC.** [FILE #23-04] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing “wings” sign on Building B1 to remain** at 2 Common Court, North Conway (PID 235-99). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

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Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated in respect to the first criteria, it is not advertising a business commercial in nature and it is not visible from a public roadway. Mr. Lick stated ultimately the ordinance was designed to protect obtrusive, excessive signage along a road corridor, and, in his view, this is barely visible.

Mr. Lick stated with respect to #2, the spirit of the ordinance is to ensure you don't have cluttered roadways and signage that is unattractive, and this sign is barely visible from any roadway; it really is more in line with a mural than a sign. Mr. Lick stated substantial justice would be done as there was a lack of concern by the Town for two years, and is liked by the public and not deemed to be a nuisance. Mr. Lick stated it is aesthetically pleasing and is more along the line of art.

Mr. Lick stated there has been no testimony that the values of surrounding properties would be diminished, if anything it is aesthetically pleasing; it simply breaks things up a bit and brings people to the area. Mr. Lick stated it has the opposite effect and increases property value and that is why Settlers advertises it as public pieces of art.

Mr. Lick stated with respect to item #5, in this case the special condition of the property is it is located in a location that is not visible from a public road or visible at all from a road corridor. Mr. Lick stated if you include private roads owned by Settlers even in that case it is located in such a way that it is not intrusive and not in anyway located on an outwardly facing wall such as along Route 16. Mr. Lick stated this is a reasonable use that the public enjoys.

Mr. Colbath asked for Board comment; Mr. Hebert asked what is the unnecessary hardship. Mr. Lick stated you look at this this particular building in this particular location and it would in fact be an unnecessary hardship to waste \$10,000 putting this onto the property and simply wiping it out. Mr. Lick stated in this case if there is any public benefit to be deemed whatsoever with respect to this mural given the purpose of the ordinance.

Mr. Chalmers asked if the hardship test is monetary based. Mr. Lick stated it depends; we have this unique situation where we already have an existing based on a prior uncertainty as to what it was or what it wasn't and now you're facing a situation where we spent \$10,000 for bettering, but nevertheless we are going to say you can't have it. Mr. Lick stated he doesn't see how that follows the spirit of the ordinance, so it is a unique situation. Mr. Lick stated the other special condition of this particular parcel is that it is not visible from a public road.

Mr. Lick stated there is no way to see anything that represents commercial in nature from a roadway on this mural. Mr. Gibbs stated the ordinance says this is to regulate commercial speech, you cannot ignore that. Mr. Cuddy stated it is commercial in nature because it is showing product. Mr. Lick stated even if you consider that commercial speech, you have to look at where is the commercial speech visible from. Mr. Lick stated the only place you would know that it is potentially commercial speech is not from any roadway corridor or parking lot, you would have to be standing next to it to even contemplate commercial speech.

Mr. Chalmers stated he could support this if we get rid of the commercial aspect of it. Mr. Barsamian stated if the Board makes the determination that it is okay as long as you remove the pocketbooks and the hashtag we would consider that. Mr. Gibbs stated a determination can't be made based on the content of the sign. Mr. Chalmers stated our ordinance regulates commercial speech. Mr. Chalmers stated if we remove the commercial aspect of it then it is no longer a sign. Mr. Gibbs stated it states commercial or non-commercial.

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

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; Mr. Pierce stated he thinks it violates the sign ordinance. Mr. Colbath stated the public interest is to have the sign ordinance enforceable. **Motion defeated unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; Mr. Pierce stated it is contrary to that. Mr. Colbath stated the spirit of the ordinance is to not allow. **Motion defeated unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that substantial justice is done.** Mr. Colbath asked for Board comment; Mr. Colbath stated the justice lies greater with the public than the applicant. **Motion defeated with Mr. Pierce, Mr. Hebert, Mr. Chalmers and Mr. Colbath voting in the negative and Mr. Cuddy voting in the affirmative.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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 stated this is internal to Settlers Green, and that is what distinguishes it from other properties. Mr. Hebert asked how is Market Basket, Lowe's and Home Depot different from this lot. Mr. Chalmers stated this is internal to Settlers Green, Lowe's is not; you can't see this from just driving by, you would actually have to go into that property to see it. Mr. Chalmers stated this is different from other properties in the area as you cannot see it from Route 16 or the North-South Road. Mr. Colbath stated he doesn't see the hardship inherit in the land. **Motion defeated unanimously.**

Mr. Colbath read item 5.a.ii. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the proposed use is a reasonable use.** Mr. Colbath asked for Board comment; Mr. Colbath stated a reasonable use is an oversized sign. Mr. Chalmers stated if they remove the commercial aspect of it then it is no longer a sign. Mr. Colbath stated it would be a sign even if you started adjusting or regulating the content. Mr. Hebert stated we have to come up with a definition that makes it an advertisement to some degree.

Mr. Chalmers stated if you remove the commercial aspect of the sign, is it still a sign. Mr. Colbath stated by definition of our ordinance it is still an oversized sign on the side of a commercial building. **Motion defeated with Mr. Pierce, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the negative and Mr. Hebert voting in the affirmative.**

Mr. Colbath made a motion, seconded by Mr. Hebert, 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. Colbath read item 5.b. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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; there was none. **Motion defeated unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Hebert, that, based on the forgoing findings of fact, the variance from §190-20.F.(3) of the Town of Conway Zoning Ordinance to allow the existing “wings” sign on Building B1 to remain be granted. Motion defeated unanimously. Mr. Colbath reviewed the appeal process.

OTHER BUSINESS

Gary Shackford [File #23-17] – Motion for Rehearing (PID 260-9): Gary Shackford was in attendance. This is a request in regards to §190-30.A.(2) of the Conway Zoning Ordinance to quantify the number of RVs allowed on site for repairs to be up to twenty (20) in addition to the previously approved twenty-five (25) RVs allowed in storage at 100 Burbank Road, Center Conway.

Mr. Colbath stepped down as he was not present for this hearing. Mr. Chalmers became Chair. Mr. Chalmers asked for Board comment; Mr. Hebert stated in regard to technical error #2 did the Town send notification. Ms. Whitelaw stated a notice of decision was sent first class mail. Mr. Hebert stated in regard to technical error #3 he did not see someone who was not acting in good faith.

Mr. Hebert stated in regard to technical error #1 to come in after a determination has been made and say that he shouldn't have to comply with anything is a challenge that should be made early on in the process. Mr. Chalmers stated that property has been before us multiple times, and he doesn't think this is new information that makes it a technical error for the Board.

The Board agreed that new information #4 is not a technical error or new information. The Board agreed that new information #5 doesn't have anything to do with the case. The Board agreed that new information/technical error #6 has nothing to do with the Board's finding.

Mr. Hebert made a motion, seconded by Mr. Cuddy, to grant a rehearing to Gary Shackford. Motion defeated unanimously. The appeal process was explained.

A public hearing was opened at 10:06 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **SETTLERS R2, INC.** [FILE #23-05] in regards to §190-20.F.(3) & §190-31 of the Conway Zoning Ordinance **to appeal the Zoning Officer’s determination that the existing “Conway Heritage” mural on Unit I is a sign** at 39 Settlers Green Drive, North Conway (PID 235-89.004). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Mr. Colbath rejoined the Board as Chair at this time. Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated this is a replica of a mural that used to be at Storyland. Mr. Lick asked if a sign is not of a commercial nature is it in fact a sign. Mr. Lick stated this is the same argument as before, this is not commercial speech, and it is not advertising any business. Mr. Gibbs stated it is the same thing, he doesn’t have the authority to distinguish between a sign and mural; he had to treat them as signage, whether commercial or noncommercial.

Mr. Colbath asked for Board comment; Mr. Hebert asked how does this sign advertise. Mr. Gibbs stated it is communicating to the public. Mr. Chalmers asked what is it communicating. Mr. Cuddy stated it is an educational piece. Mr. Pierce stated he would not call that a sign, we would call that art. Mr. Colbath stated that art is not defined in our ordinance. Mr. Cuddy stated bottom line common sense has to play a role; it is a heritage sign and it is educational. Mr. Colbath stated if it is not a sign please show him in the ordinance. Mr. Lick stated it is the same as painting a building. Mr. Hebert stated there is nothing written on it.

Mr. Colbath stated we don’t have an art definition. Mr. Cuddy stated it is paint on a wall. Mr. Chalmer stated if you read the section of the ordinance as a whole paragraph what is this communicating. Mr. Cuddy stated it communicates education, history. Mr. Colbath asked what are we telling our zoning officer. Mr. Hebert stated it is nothing other than an image.

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

Mr. Chalmers made a motion, seconded by Mr. Hebert, to uphold the administrative decision. Motion defeated with Mr. Cuddy, Mr. Chalmers, Mr. Hebert and Mr. Pierce voting in the negative and Mr. Colbath voting in the affirmative.

A public hearing was opened at 10:19 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **SETTLERS R2, INC.** [FILE #23-06] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing “Conway Heritage” mural on Unit I to remain** at 39 Settlers Green Drive, North Conway (PID 235-89.004). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Adopted: May 17, 2023 – As Written
CONWAY ZONING BOARD OF ADJUSTMENT – APRIL 19, 2023

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Lick withdrew the application.

A public hearing was opened at 10:20 pm to consider a **VARIANCE** requested by **SETTLERS R2, INC.** [FILE #23-07] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing “Conway Heritage” sign on Unit I to remain** at 39 Settlers Green Drive, North Conway (PID 235-89.004). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian appeared before the Board. Mr. Lick withdrew the application.

A public hearing was opened at 10:21 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **1675 WMH, LLC** [FILE #23-08] in regards to §190-20.F.(3) & §190-31 of the Conway Zoning Ordinance **to appeal the Zoning Officer’s determination that the existing “Welcome to North Conway” mural on Building M is a sign** at 1699 White Mountain Highway, North Conway (PID 235-85). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated this has similar arguments to the previous application. Mr. Lick stated our interpretation of the ordinance is to put reasonable restrictions on commercial speech, it focusses on commercial tenants and it has to be on the same wall that has the same business that it advertises. Mr. Lick stated the size is governed by the floor space that is being advertised by the sign.

Mr. Lick stated this is not commercial speech and it is not advertising a business on which the wall it is to. Mr. Colbath asked if it is on the back of a business. Mr. Barsamian stated it is a mechanical room.

Mr. Hebert stated he agrees with the enforcement officer; Welcome to North Conway communicates something. Mr. Cuddy stated it has skiers on it and other things. Mr. Colbath stated it can be seen northbound on Route 16.

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

Mr. Hebert made a motion, seconded by Mr. Chalmers, to uphold the administrative decision. Motion carried with Mr. Pierce, Mr. Hebert, Mr. Chalmers and Mr. Colbath voting in the affirmative and Mr. Cuddy voting in the negative.

A public hearing was opened at 10:31 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **1675 WMH, LLC** [FILE #23-09] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing “Welcome to North Conway” mural on Building M to remain** at 1699 White Mountain Highway, North Conway (PID 235-85). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated the arguments in the first equitable waiver hearing are the same for this hearing.

Mr. Colbath asked for Board comment; Mr. Colbath asked how old is this. Mr. Barsamian answered two years. Mr. Colbath asked for public comment; there was none.

Mr. Colbath read item 1. **Mr. Hebert 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.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Hebert made a motion, seconded by Mr. Chalmers, 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.** 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. Hebert, that item 3 is not applicable.** **Motion carried unanimously.**

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

Mr. Colbath read item 5. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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.** Mr. Colbath asked for Board comment; Mr. Hebert stated he doesn't think it meets the burden. **Motion defeated with Mr. Hebert, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the negative and Mr. Pierce voting in the affirmative.**

Mr. Chalmers made a motion, seconded by Mr. Hebert, that, based on the forgoing findings of fact, the equitable waiver from §190-20.F.(3) of the Town of Conway Zoning Ordinance to allow the existing “Welcome to North Conway” mural on Building M to remain be granted. Motion carried with Mr. Pierce, Mr. Chalmers and Mr. Cuddy voting in the affirmative and Mr. Hebert and Mr. Colbath voting in the negative.

A public hearing was opened at 10:40 pm to consider a **VARIANCE** requested by **1675 WMH, LLC** [FILE #23-10] in regards to §190-20.F.(3) of the Conway Zoning Ordinance **to allow the existing “Welcome to North Conway” sign on Building M to remain** at 1699 White Mountain Highway, North Conway (PID 235-85). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Lick withdrew the application.

A public hearing was opened at 10:41 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **REBECCA MULKERN** [FILE #23-13] in regards to §23-4, §23-13, §23-15 & §23-16 of the Conway Building Construction Code, §190-5, §190-20 & §190 – Permitted Use Table of the Conway Zoning Ordinance and §110-2 & §110-2.A., B., & E. of the Conway Site Plan Review Regulations **to appeal the Building Inspector’s issuance of a building permit to Conway Poker Room & Casino, LLC** at 234 White Mountain Highway, Conway (PID 265-147). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, March 3, 2023. This hearing was continued from March 15, 2023.

Mr. Torres stated the applicant has requested a continuance until May 17, 2023. **Mr. Hebert made a motion, seconded by Mr. Cuddy, to continue the appeal from administrative decision requested by Rebecca Mulkern until May 17, 2023 at 7:05 pm. Motion carried unanimously.**

A public hearing was opened at 10:42 pm on Wednesday, April 19, 2023 at the Conway Town Office, 23 Main Street, Conway, NH to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **E.C. SHOP, LLC** [FILE #23-18] in regards to §190-23.D. of the Conway Zoning Ordinance **to allow an existing office structure to remain within the 30-foot setback** at 60 Service Road, Center Conway (PID 244-2). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, March 31, 2023.

Mr. Torres stated the applicant has requested a continuance until May 17, 2023. **Mr. Hebert made a motion, seconded by Mr. Cuddy, to continue the Equitable Waiver of Dimensional Requirement requested by E.C. Shop, LLC until May 17, 2023 at 7:00 pm. Motion carried unanimously.**

A public hearing was opened at 10:43 pm on Wednesday, April 19, 2023 at the Conway Town Office, 23 Main Street, Conway, NH to consider a **VARIANCE** requested by **THE RESIDENCES AT SACO RIVER, LLC** [FILE #23-19] in regards to §190-20.E.(1) & (2) of the Conway Zoning Ordinance **to allow the construction of 228 (of the 243 proposed) residential dwelling units in three-story buildings to exceed the height limitations** at 1552 White Mountain Highway, North Conway (PID 246-23). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, March 31, 2023.

Mark Lucy of Horizons Engineering, Derek Lick of Sulloway & Hollis and Rob Barsamian of OVP Management appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. Mr. Lick stated the applicant is proposing 243 residential units, it was previously approved for a density variance. Mr. Lick stated they are before the Board now not because they have changed the project in anyway, but the town voted to change the height ordinance at Town Meeting which makes these buildings above the height that is allowed.

Mr. Lick stated the current building height as proposed last fall and is currently proposed is a building height of 39-feet where now 35-feet is allowed and a structure height of 47-feet, 8-inches where now 45-feet is allowed. Mr. Lick stated the buildings are now 2-feet, 8-inches higher than what is now allowed and the building height is 4-feet higher than what is now allowed. Mr. Lick stated they were previously allowed and now they are not.

Mr. Lick stated it is their understanding the purpose of the change in the ordinance by dropping everything by 10-feet was to protect the view shed. Mr. Lick stated this area, the highway commercial corridor, was allowed higher than everyone else in Town probably because the buildings exist. Mr. Lick stated this particular lot sits much further below grade to the roadway then the lot in front of it.

Mr. Lick stated there is a long dog leg road that gets you to the site, and there is a significant drop in the roadway. Mr. Lick stated there is a 15-foot drop from where the cars would be passing on the roadway on Route 16/White Mountain Highway as compared to where the ground level is of the buildings being constructed. Mr. Lick stated there is a height restriction for a reason but unlike other properties where the buildings would be level with the roadway, you are already starting from a point that is 15-feet below the roadway. Mr. Lick stated you are not gaining the viewshed protection here because you are already 15-feet below the roadway.

Mr. Lick stated there is one small sliver of area if you look down the driveway you will see the buildings, but if looking at from other directions you will see only the tippy top of the rooftops and will not be impacting the viewsheds in any way.

Mr. Lucy reviewed the plans. Mr. Lucy stated we have been working on these plans for months, months before the petition article was submitted.

Mr. Colbath asked for Board comment; Mr. Hebert asked if there is anything inherent in the land that prohibits them from building to meet the ordinance that has just passed. Mr. Lick answered density and stated the only way to get the density that this Board approved by a variance is to go up and not out.

Mr. Hebert stated the lot could be developed just not to the amount you would like to. Mr. Lick stated if we don't have the density we would not be able to do this project, which is the same reason the variance was granted the first time around. Mr. Hebert stated if you look at why you can't make it with what is inherent in the land he has never seen an applicant say we can meet it but we want to go beyond the ordinance because we want to get more from it.

Mr. Lick stated you have to couple together the rationale of the last variance which was you are allowing this density because it is the only way the project works because of the unique nature of the lot being far back and with all the roadway and utility improvements there is no way the project can go forward without the density.

Mr. Barsamian stated we came to the Board a few times and we finally developed a number that we needed to make the project work. Mr. Barsamian stated we showed the elevation and we showed the height, that was not an issue; the only way they got to the number was with the idea that the building we were showing and that is what was approved. Mr. Barsamian stated we thought we had a strong argument for height because we have already showed the Board the height.

Mr. Colbath asked if it can go further in the ground. Mr. Lucy stated that it is physically possible. Mr. Barsamian stated this site happens to be lower, and the theory is because we are lower already this site is very different. Mr. Lucy stated it is physically possible to put the units in the ground, but then none of them would be ADA accessible; every unit on the ground floor is ADA accessible.

Mr. Colbath asked for public comment; Jim McQueen stated you have to grade quite a bit of that, couldn't you grade a few feet off of that. Mr. Lucy stated it will still be the same height.

Mr. Lick read his letter regarding criteria [in file]. Mr. Hebert asked can a variance be granted if they can meet the ordinance. Mr. Colbath answered in the affirmative and stated the legislative body created this new hardship where this property already had a variance.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; there was none. **Motion carried with Mr. Hebert, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the affirmative and Mr. Pierce voting in the negative.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; there was none. **Motion carried with Mr. Hebert, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the affirmative and Mr. Pierce voting in the negative.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that substantial justice is done.** Mr. Colbath asked for Board comment; there was none. **Motion carried with Mr. Hebert, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the affirmative and Mr. Pierce voting in the negative.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Hebert, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Hebert, 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 stated the fact that they are below the grade of the main road makes it different from other surrounding properties. **Motion carried unanimously.**

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

Mr. Chalmers made a motion, seconded by Mr. Hebert, 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 carried unanimously.**

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

Mr. Chalmers made a motion, seconded by Mr. Hebert, that, based on the forgoing findings of fact, the variance from §190-20.E.(1) & (2) of the Town of Conway Zoning Ordinance to allow the construction of 228 (of the 243 proposed) residential dwelling units in three-story buildings to exceed the height limitations based on the materials submitted be granted. **Motion carried with Mr. Hebert, Mr. Chalmers, Mr. Cuddy and Mr. Colbath voting in the affirmative and Mr. Pierce voting in the negative.**

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Chalmers made a motion, seconded by Mr. Hebert, to approve the Minutes of March 15, 2023 as written. **Motion carried unanimously.**

Meeting adjourned at 11:47 pm.

Respectfully Submitted,

Holly L. Whitelaw
Planning Assistant