

## ZONING BOARD OF ADJUSTMENT

### MINUTES

JULY 20, 2016

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, July 20, 2016 at the Conway Town Office in Center Conway, NH, beginning at 7:00 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Luigi Bartolomeo; Alternate, Steven Steiner; and Recording Secretary, Holly Meserve.

#### APPOINTMENT OF ALTERNATE MEMBER

Ms. Sherman appointed Mr. Steiner as a voting member.

#### PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider an **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** requested by **LYMAN DONOHOE, LLC** in regards to §147.13.16.4 of the Conway Zoning Ordinance **to allow a gravel driveway within the Wetland and Watershed Protection Overlay District buffer** at 456 East Conway Road, Center Conway (PID 253-6.2). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, July 8, 2016.

Josh McAllister of HEB Engineers appeared before the board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated there were only four members present and the applicant is entitled to a five-member Board. Ms. Sherman asked if the applicant would like to proceed with four members or continue the public hearing. Mr. McAllister stated he would proceed with four members.

Mr. McAllister stated after the fact, after construction and when HEB was brought on to do additional work we found a violation with respect to the Wetland and Watershed Protection Overlay District (WWPOD) buffer. Mr. McAllister stated at the time of the development we delineated wetlands and surveyed the wetlands with an eye toward staying out of the wetland buffer. Mr. McAllister stated we did find a wetland pocket, but the site is several acres and we were only developing a portion, so we delineated around the areas we were working.

Mr. McAllister stated the affected area appeared to be associated with road side drainage; we delineated to the rear where there is a brook and worked to avoid it; we took very special care to stay out of the district. Mr. McAllister stated the Lyman's asked us to look at feasibility for future development and to delineate the wetlands; there is a contiguous wetland area that is greater than three acres that puts the area we thought was road side drainage within the WWPOD.

Mr. McAllister stated because of the physical grade on the ground and the culvert we thought this area was not contiguous, however, hydraulically of the soils underground there is a connection between the wetlands which puts it in the WWOPD.

**Adopted: August 17, 2016 – As Written**

**CONWAY ZONING BOARD OF ADJUSTMENT – JULY 20, 2016**

Mr. McAllister stated HEB made an assumption, we thought it was ground water and was not within the district. Mr. McAllister stated at this point in time they do not have a project in mind; we are trying to correct an error. Mr. McAllister stated the only reason this came up is because we delineated a wetland and felt an obligation to the owner and the town; the project has been constructed.

Mr. McAllister stated there is gravel within the buffer for a portion of the driveway; we have looked to see if the trucks could facilitate the site without the gravel, but they cannot. Mr. McAllister stated the gravel pitches into the development and not into the wetland; this area of wetland is already being crossed by a gravel road, that has been there as long as probably the Kennett's have owned it, that accesses the gravel pit.

Mr. McAllister stated they are before the Board for an after the fact equitable waiver in respect to the buffer; based on the information we had at the time it was the assumption that it was not part of a wetland and that assumption was incorrect. Mr. McAllister stated this is a good faith error, a good faith mistake in assumption.

Mr. Colbath asked when was the original project constructed. Mr. McAllister answered this Spring. Mr. Colbath asked when it was constructed was there a wetlands permit. Mr. McAllister stated that the project does not affect any wetlands. Mr. Colbath asked if a Town driveway permit was obtained. Mr. McAllister stated a NHDOT driveway permit was obtained. Mr. Colbath asked if there is an alternate location for the driveway. Mr. McAllister stated now that it is constructed don't believe there is; the full swing is required for the tractor trailer truck movements they have on site.

Mr. McAllister stated they made the second delineation on June 20, 2016 and they applied to the Board immediately. Ms. Sherman stated this is strictly in the buffer and not the wetland. Mr. McAllister stated the gravel is not impacting any wetlands. Mr. Steiner asked if the reason for the buffer is in case there is a leak. Mr. McAllister stated the buffer is required by the Town, as the State of New Hampshire does not have a buffer requirement; the requirement is particular to Conway and the buffer is to protect the wetland.

Mr. Bartolomeo asked if the only encroachment within the buffer is gravel. Mr. McAllister answered in the affirmative. Ms. Sherman asked if it is pitched away from the buffer. Mr. McAllister stated it drains toward the back of the site and then there is ditch that brings it into swale. Mr. Colbath asked does it impact the use of the rest of the land. Mr. McAllister answered in the affirmative and stated inside of the train tracks at least. Ms. Sherman stated this is strictly the buffer and not the wetland. Mr. McAllister stated there is no impact to the wetland. Ms. Sherman stated essentially it is a loss of vegetation. Mr. McAllister agreed.

Ms. Sherman asked for public comment; Fran Rancourt, who owns 39 & 51 Whitelaw Drive, stated we have never had any problems with that area until this happened. Ms. Rancourt stated we have Mason brook behind our house, there were trucks going in late at night and placing fill and the water line on the brook has diminished.

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**CONWAY ZONING BOARD OF ADJUSTMENT – JULY 20, 2016**

Ms. Rancourt stated they hired an engineer, Matt Brook, to review the plans and to look at how filling that area has effected that waterway. Ms. Rancourt stated when you're talking about wetlands and just vegetation, she has lived there since 1986 and during dry seasons and there has been a diminish. Ms. Rancourt stated they have been filling it in not realizing the impact it has had to the houses in that area. Ms. Rancourt stated fixing it through a buffer is disturbing to her.

Ms. Rancourt stated they also paved the driveway. Ms. Rancourt stated now learning that the study was not done correctly in the first place is troublesome. Ms. Sherman stated the driveway pavement is out of the buffer. Mr. McAllister stated the driveway pavement is located at the front of the lot and was required by the Town and the NHDOT.

Mr. McAllister stated there is approximately 850 to 900 square feet of gravel within the buffer; all other improvements are outside of the buffer area and permitted. Mr. McAllister stated that the State of New Hampshire does not have a buffer requirement and would not have been an issue for them. Mr. Bartolomeo stated he doesn't see how gravel in a buffer effects what she has observed, not that he is doubting her either.

Mr. McAllister stated there is surface water that exists on the ground and a buffer is required to protect that surface water and the shoreline from road sedimentation. Mr. McAllister stated if the area was left as a grassy area it would have drained into a culvert away from Mason Brook; what is happening now since this area is gravel instead of a wooded area pitched to the road, is the gravel is increasing the runoff and is moving in the direction of Mason Brook.

Mr. McAllister stated it is now pitched to go into an infiltration trench and then makes its way to Mason Brook. Mr. Bartolomeo stated the addition of material would increase water flow not decrease it. Mr. McAllister stated when rain hit the area in the buffer before it would go directly into the ground, now it hits the gravel and goes into an infiltration trench.

Ms. Rancourt stated Mason Brook flows into the Saco River; whatever they have done has caused an impact. Ms. Sherman asked if she is sure this is the only reason for impact. Ms. Rancourt stated it is the only thing she has seen. Ms. Sherman asked besides the weather. Ms. Rancourt stated she has been here during dry seasons; it is kind of deceptive to have trucks going in at night and explains they were filling it more.

Ms. Sherman stated this is about wetlands and buffers, not waterways. Ms. Rancourt stated it is a small brook. Mr. McAllister stated the surface water from this is not connected to Mason Brook. Mr. Colbath stated this is addressing the buffer and not the watershed to Mason Brook; appreciate what you're saying that it may be connected, but Mr. McAllister doesn't think it is. Mr. Colbath stated it would require an extensive study.

Ms. Rancourt stated since this was half hazardly done in the beginning and if corrected it needs to be corrected correctly. Ms. Rancourt stated Matt Brook has told her it could have an impact. Mr. Colbath stated other than this disclosure of being found the project was under the Planning Board, and was reviewed by the Town and the State. Mr. Colbath stated it appears to have been built with the necessary permits.

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**CONWAY ZONING BOARD OF ADJUSTMENT – JULY 20, 2016**

Ms. Rancourt stated the way it is having an impact is concerning; there has been a change and she is unhappy with that. Mr. Colbath stated he appreciates what she is saying, but don't see a direct correlation. Ms. Rancourt asked if it gets worse what is the remedy. Mr. Steiner stated it would be to contact a lawyer, but he believes it is due to lack of rain. Ms. Rancourt stated they have been through dry seasons before and it has never been dry as it is now; there has been an impact and she will follow it through as it is important to her.

Mr. Steiner stated he is in real estate and he is hearing that a lot of wells are having issues. Mr. Bartolomeo asked if her concern is that the point well will dry up. Ms. Rancourt stated the point well did dry up and she put in an artesian well; however, most of the families on that road have point wells. Ms. Rancourt stated her well is 500-feet down and was put in about 20 years ago.

Mr. McAllister stated they thought it was a pocket wetland, but it connects to a larger wetland. Mr. Colbath stated within our rules and regulations that govern there are provisions for restitution; we can make them shut it all down or say that the impact is minimal enough, that it was a legitimate error made but not a harmful error. Ms. Rancourt stated we are paying a price for that; she understands impacts of errors and the part that concerns her is trying to save the life of the brook.

Ms. Rancourt asked why wasn't it done correctly. Ms. Sherman stated it was not known. Ms. Rancourt stated they will watch the brook and will come back. Ms. Rancourt stated we buy our propane from Jesse Lyman, we know the Lyman's personally and felt they would do the right thing so we decided not to come to the first meeting.

Mr. Colbath stated she could also speak with Town Planner, Tom Irving, or Town Manager, Earl Sires and address her concerns with them. Mr. Colbath stated she could also speak with the Board of Selectmen and we will do what is just for all citizens.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. It was determined that item 3 was not applicable with the granting of items 1 and 2 above.

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Steiner, that 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.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

**Mr. Colbath made a motion, seconded by Ms. Steiner, that, based on the forgoing findings of fact, the equitable waiver from §147.13.16.4 of the Town of Conway Zoning Ordinance to allow a gravel driveway within the Wetland and Watershed Protection Overlay District buffer be granted. Motion unanimously carried.**

Mr. Colbath reviewed the process to request a Motion for Rehearing.

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A public hearing was opened at 7:45 pm to consider a **VARIANCE** requested by **1657 NORTH CONWAY LLC/FRIENDLY'S ICE CREAM LLC** in regards to §147.13.6.13.1 of the Conway Zoning Ordinance to allow an interactive menu-board with speakers, drive-up window and associated uses within 600-feet of a residential property at 1657 White Mountain Highway, North Conway (PID 235-87). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, July 8, 2016.

Gordon Leady of VHB and David Panella of Friendly's Restaurants appeared before the Board. Ms. Sherman read the application and the applicable sections of the ordinance. Ms. Sherman stated there were only four members present and the applicant is entitled to a five-member Board. Ms. Sherman asked if the applicant would like to proceed with four members or continue the public hearing. Mr. Leady stated he would proceed with four-members.

Mr. Leady reviewed the site plan. Mr. Leady stated the closest residential property is across the street. Mr. Leady stated HME is the manufacture of the speaker system, and the decibel level is, at 1-foot, 60 decibels. Mr. Leady stated when you double the distance you lose decibels; so when you get 16-feet it goes down to 36 decibels which is equivalent to a conversation in a home.

Mr. Leady stated once you get further away and get to the property line it is essentially indistinguishable to the other noise in the area. Mr. Leady stated as we go from the source of the sound to the residential area, you're on the other side of the road with several buildings in between and becomes inaudible.

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**CONWAY ZONING BOARD OF ADJUSTMENT – JULY 20, 2016**

Mr. Colbath asked the hours of operation for the drive-through. Mr. Panella stated it is the same as the restaurant hours, which he believes in this location is 7am to 10 pm. Mr. Leady stated 6am to 11pm would be the worst case scenario. Mr. Colbath asked if they would be losing parking spaces. Mr. Leady answered in the affirmative and stated they have submitted an application to the Planning Board to construct additional parking.

Mr. Bartolomeo asked if both curb cuts exist. Mr. Leady answered in the affirmative and stated they would be changing the traffic circulation pattern so the southern driveway would be entrance only and the northern driveway would be exit only. Mr. Colbath asked if this will have any impact on abutting properties. Mr. Leady answered in the negative.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Steiner, that the variance will not be contrary to the public interest.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Steiner, that the spirit of the ordinance is observed.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Steiner, that substantial justice is done.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.a.ii. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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. Steiner, 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; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Steiner, that item 5.b is not necessary.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

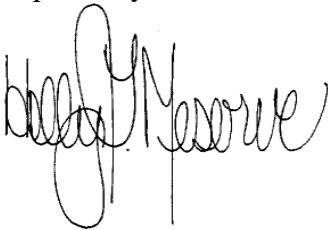
Mr. Colbath made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the variance from §147.13.6.13.1 of the Town of Conway Zoning Ordinance to allow an interactive menu-board with speakers, drive-up window and associated uses within 600-feet of a residential property be granted. Motion unanimously carried.

**REVIEW AND ACCEPTANCE OF MINUTES**

Mr. Colbath made a motion, seconded by Mr. Steiner to approve the Minutes of June 15, 2016 as written. Motion unanimously carried.

Meeting adjourned at 8:20 pm.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Holly L. Meserve". The signature is written in a cursive style with a large initial "H" and "M".

Holly L. Meserve  
Recording Secretary