

## ZONING BOARD OF ADJUSTMENT

### MINUTES

AUGUST 18, 2021

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, August 18, 2021 at the Conway Town Office, 23 Main Street, in Conway, NH, beginning at 7:00 pm. Those present were: Vice Chair, Andrew Chalmers; Luigi Bartolomeo; Richard Pierce; Steven Steiner; Building Inspector, David Pandora; Town Engineer, Paul DegliAngeli; and Planning Assistant, Holly Whitelaw. Alternates, Phyllis Sherman, Jonathan Hebert and Jac Cuddy were in attendance.

#### APPOINTMENT OF ALTERNATE MEMBER

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

#### PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **JASON AND TRACY LEAVITT** [FILE #21-30] in regards to §190-13.G. and §190 – Permitted Use Table of the Conway Zoning Ordinance **to appeal the administrative decision that an auto-body repair shop is not a home occupation or an accessory non-residential use** at 408 Henderson Road, Center Conway (PID 283-19). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, August 6, 2021.

Shawn Bergeron of Bergeron Technical Services appeared before the Board. Jason and Tracy Leavitt were in attendance. Mr. Chalmers read the application and the applicable section of the ordinance.

Mr. Bergeron stated a zoning permit was submitted asking that their single-family home be allowed a home occupation for auto-body repair. Mr. Bergeron stated the submission of that application was based upon Tradesman/Craftsman workshop under home occupations. Mr. Bergeron stated the permit was denied; and the reason for denial was that automotive repair or service are not allowed in the residential agricultural district and there were complaints about commercial traffic.

Mr. Bergeron stated under the permitted use table automotive painting, automotive repair and automotive service as stand-alone occupancies, not as part of a home occupation, are not permitted in the district. Mr. Bergeron stated they don't question that; they didn't ask for a stand-alone occupancy. Mr. Bergeron stated they asked for this to be accessory to a dwelling unit as a home occupation.

Mr. Bergeron stated §190-13.G. provides the nine criteria that would need to be met to be granted a home occupation. Mr. Bergeron stated in the denial of the permit those nine criteria were not addressed; we don't know where we failed the nine-part test.

**Adopted: September 15, 2021 – As Written**  
**CONWAY ZONING BOARD OF ADJUSTMENT – AUGUST 18, 2021**

Mr. Bergeron stated because the Town did not adequately consider what was being asked of them, we don't have much to present tonight as he does not know where they failed the nine-part test. Mr. Bergeron stated based on that information he asks the Board to either overturn the decision of the Code Enforcement Officer or, more appropriately, remand the application back to the Code Enforcement Officer directing him to make a decision based upon what was requested, that being a home occupation, and address items 1 through 9 under §190-13.G.

Mr. Chalmers asked for Board comment; Mr. Bartolomeo stated maybe he didn't go through the nine points because it failed the home occupation definition right out of the box. Mr. Bergeron stated if that is indeed the case, it was not explained to us.

Mr. Bartolomeo stated there was a similar case, and he knows we are not a precedent setting Board, where a gentleman in Redstone wanted to set up that same type of occupation; he believes Mr. Bergeron might have attended that meeting. Mr. Bartolomeo stated we had a room full of abutters, like tonight, and they were solid in their unity to oppose the request.

Mr. Bartolomeo stated the list might have been different back then, but the careful reading of the list indicates what they are trying to encourage as home occupations are quiet clerical/office type, small craft manufacturing, bakeries, hair salons. Mr. Bartolomeo stated it is a whole different genre of impacted noise than a car repair shop. Mr. Bartolomeo stated the Board that night ruled against the applicant because it didn't meet the definition of the types of uses that were described as acceptable for a home occupation.

Mr. Bergeron stated the town hasn't explained to us that we can't meet the noise criteria. Mr. Bergeron stated the table of permitted uses did not exist in the 1990's; a tradesman/craftsman's workroom is allowed which indicates that it is permitted as long as the nine criteria for home occupations can be met. Mr. Bergeron stated we have to be told which one of those we failed before we know that we failed.

Mr. DegliAngeli stated he thinks he understands that due to a procedural technicality they are asking for a reconsideration. Mr. DegliAngeli asked Mr. Bergeron, separate from this applicant, is it his opinion that autobody repair is a permitted use in the residential agricultural district. Mr. Bergeron answered in the affirmative and stated as a home occupation if the nine criteria can be met, but not as a stand-alone use.

Mr. DegliAngeli stated in 1995, and maybe this is what Mr. Bartolomeo was referring to, when Mr. Bergeron was in the position that Mr. Pandora has now, he denied the same type of business because it was not a permitted use. Mr. DegliAngeli asked why is his position different now. Mr. Bergeron stated in 1995 the table of permitted uses didn't exist; the way the decision had to be made wasn't as clearly spelled out.

Mr. DegliAngeli read the notice of decision for Tim Donovan. Mr. DegliAngeli stated it was not permitted as a home occupation, not as a stand-alone; in 1995 it was not allowed as a home occupation. Mr. DegliAngeli stated with or without the table, it is not a home occupation. Mr. DegliAngeli stated this is a permissive ordinance where we list what is allowed, if it is not listed, it is not allowed. Mr. DegliAngeli stated in our zoning it is explicitly not allowed.

**Adopted: September 15, 2021 – As Written**

**CONWAY ZONING BOARD OF ADJUSTMENT – AUGUST 18, 2021**

Mr. DegliAngeli stated he doesn't understand Mr. Bergeron's point; if it is that we technically didn't answer the nine criteria, it seemed obvious to us that it was not a home occupation. Mr. DegliAngeli stated we did not permit it back when it was first applied for at the time Jim Yeager was here in April 2020. Mr. DegliAngeli stated Mr. Yeager issued a denial because it is not a permitted use in the residential agricultural district as a home occupation; that decision was not appealed.

Mr. DegliAngeli stated when they came back it was discussed if we needed to act as the clock had run out, but rather than stand on procedure as we want to give citizens the right to be heard, Mr. Pandora issued his decision. Mr. DegliAngeli stated he cannot get on Board with Mr. Bergeron's argument.

Mr. Bergeron stated it is a permissive ordinance; however, between 1995 and 2021 a lot of things have changed. Mr. Bergeron stated in the opening paragraph of §190-13 it states "...land uses permitted in this district are represented in the permitted use table included in the attachment of this chapter...". Mr. Bergeron stated that wording and the permitted use table did not exist in 1995; that in itself makes quite a difference.

Mr. Bergeron stated a tradesman/craftsman workroom is listed as a permissible home occupation and it goes along even with the Town's definition of tradesman. Mr. Bergeron read the definition of tradesman, and asked are we saying that auto repair is not a skilled trade. Mr. Bergeron stated things have changed; this is not the same time or the same ordinance. Mr. Bergeron stated the application previously submitted and denied in 2019 was denied basically for the same reason, but the application has changed. Mr. Bergeron stated the square footages, the size, the dynamics of the proposed use are different.

Mr. Bergeron stated a letter dated July 3, 2019 from Mr. Pandora suggests that a home occupation is a way to do this. Mr. Bergeron stated he believes this is a different situation from 1995, and this application deserves the right to be considered as a home occupation as it was applied for; if it passes all nine criteria then it has to be granted. Mr. Bergeron stated the application has not been addressed accurately or appropriately based on what was applied for.

Mr. DegliAngeli stated Mr. Bergeron is interpreting tradesman as autobody repair, and by adding that table he is defining autobody repair as tradesman. Mr. DegliAngeli stated if that is the case, then where the table indicates that automotive repair is not allowed the table would have been revised to indicated that it was allowed as a home occupation. Mr. Bartolomeo stated he has read the letter dated July 3, 2019 and he doesn't see where it suggests going as a home occupation.

Mr. Bartolomeo referred to the definition of home occupation and stated home occupations are for low-impact, quiet, non-disturbing occupations. Mr. Bergeron stated it states "not limited to", he is not limited to; they need to meet the criteria specifically listed in the ordinance. Mr. Bergeron stated if they meet those criteria, a tradesman can have a workroom. Mr. Bergeron stated if the Board upholds this decision, then the land owner is not getting the opportunity to comply with the ordinance. Mr. Bartolomeo stated if you don't meet the definition of a home occupation right of the bat, why bother with the nine criteria.

**Adopted: September 15, 2021 – As Written**

**CONWAY ZONING BOARD OF ADJUSTMENT – AUGUST 18, 2021**

Mr. Chalmers asked in the July 3, 2019 letter from the Town where the nine criteria are listed, is Mr. Bergeron suggesting that that is not a proper review of that application. Mr. Bergeron stated that application was different due to the overall size; it was greater than the 1,500 square feet that is allowed. Mr. Chalmers asked if it was for an autobody repair facility. Mr. Bergeron answered in the affirmative. Mr. Chalmers asked if it has gone from an autobody repair shop to a craft shop. Mr. Bergeron answered in the negative and stated the application is for a single-family home with a home occupation of an autobody repair facility.

Mr. Bergeron stated the nature of the application is not different, but the details of the application are different as the owner has made modifications so it can meet the criteria. Mr. Bergeron asked Mr. Leavitt if he had a conversation with Mr. Pandora regarding having an autobody repair facility there. Mr. Leavitt stated he met with Mr. Pandora and he told him that a commercial business is not allowed in the residential agricultural district; however, we did go over the nine criteria and he indicated that if we could meet all of those the home occupation permit would pass. Mr. Leavitt stated Mr. Pandora indicated that the one that could possibly fail was the noise and dust criteria.

Mr. Bergeron asked Mr. Pandora if he has been to the property since it was constructed. Mr. Pandora stated he has not seen the finished product in the garage, but he has seen the building.

Mr. DegliAngeli stated in the July 3, 2019 letter Mr. Pandora did address the nine criteria and the table was included that indicates that automotive painting, automotive repair and automotive service are not allowed. Mr. DegliAngeli stated the argument is coming down to ignore this and accept as a home occupation under the updated trades. Mr. DegliAngeli stated staff feels we have done the right thing; we debated whether or not to reissue again in 2021 since we did in 2019, but in the interest of giving citizens as much due process as we could we are here.

Mr. Bergeron stated the 2021 application is a different application. Mr. Bergeron stated if we were simply applying for an autobody painting, automotive repair or automotive service without a single-family home and it was denied there would be no question. Mr. Bergeron stated this legitimately can be considered as a tradesman occupation and, therefore, should be allowed to pass or fail the nine criteria. Mr. Bergeron stated in the letter of July 3<sup>rd</sup> Mr. Pandora did list the nine criteria, but he didn't indicate what parts failed. Mr. Bergeron stated they would like the opportunity, and the applicant is due that opportunity.

Mr. Chalmers asked the fact that there is a separate automotive category versus a tradesman category is something that the Board should consider. Mr. Bergeron stated the separate category is for a stand-alone occupancy not being considered as a home occupation; they are separate and distinct.

Mr. Steiner asked Mr. Leavitt how many employees he has. Mr. Leavitt answered it is just him. Mr. Steiner asked how many cars he works on in a day. Mr. Leavitt answered one or two. Mr. Steiner asked what is the commercial traffic. Mr. Bergeron stated commercial traffic was indicated as part of the denial, but under §190-13.G commercial traffic is not mentioned so how it becomes part of the test. Mr. Leavitt stated the parts vehicles that deliver are smaller than a UPS truck.

**Adopted: September 15, 2021 – As Written  
CONWAY ZONING BOARD OF ADJUSTMENT – AUGUST 18, 2021**

Mr. Bartolomeo stated in the letter from Mr. Pandora dated June 30, 2021 it indicates that we have received two additional complaints of auto part trucks delivering to this address; it was an issue and two people complained. Mr. Chalmers stated the letter also states that it is not approved for commercial use and must cease at once. Mr. Bartolomeo asked what is the state of the building and what is being done inside that building right now. Mr. Bergeron stated it is presently being used as a single-family home with an autobody repair facility in the lower level.

Mr. Chalmers asked if it is continuing even with several attempts from the town to cease. Mr. Bergeron answered in the affirmative and stated it is continuing right now. Mr. Pierce asked if the Board overturns the decision does that give them approval. Mr. Chalmers answered in the negative. Mr. Chalmers stated the same verbiage is in a letter dated April 16, 2021. Mr. Bartolomeo stated after being told not to do it he is still doing it anyway. Mr. Bergeron stated apparently yes.

Mr. Chalmers asked if there were modifications to the building. Mr. Bergeron answered in the affirmative and stated to bring it into compliance. Mr. Chalmers asked if the Town has permitted that work. Mr. Bergeron stated that work has not been done at this time and will need to be permitted. Mr. Chalmers asked if the square footage that is currently shown is representative to what is there. Mr. Bergeron answered in the negative.

Mr. Chalmers asked for public comment; Bill Marvel stated a change-of-use permit to operate a home occupation is required before startup of operation and apparently that has not been issued. Mr. Marvel stated the operation has been going on for at least 2½ years according to the advertisement on Yelp. Mr. Marvel stated at least three of the criteria are violated. Mr. Marvel stated in regard to exterior storage of vehicles, equipment, and materials, there are, at this moment, a couple of vehicles in the parking lot and disassembled out in the back, and there are autobody parts behind the building.

Mr. Marvel stated in regard to noise, vibration, smoke, dust, electrical disturbance, odors, heat, glare or other nuisance or threat to the health of the abutters, he walks a loop that goes around there every day and on July 28<sup>th</sup> as he was coming down the hill about 1,000 feet away from this business, he heard a humming noise; it was the exhaust fan from what appears to be the paint room. Mr. Marvel stated when he turned the corner of Henderson Road it was putrid; when he passed by the exhaust fan he was nauseated by the smell.

Mr. Marvel stated as for the noise, there is noise there any time he goes down. Mr. Marvel stated that a home occupation shall not be offensive to the character of the neighborhood or decrease surrounding property values and this does both of those. Mr. Marvel stated he thinks Mr. Bergeron is hanging his hat on a technicality and thinks Mr. Pandora probably refused this, for a friend of his, because he realized that it probably could not meet the criteria; and it doesn't.

Virginia Greenway stated she is the closest neighbor and became neighbors just this past year; she spends most of her time in Vermont. Ms. Greenway stated she didn't know they had this whole situation going on; she received a letter and went over to speak with Mr. Leavitt last night. Ms. Greenway stated he showed her the paint room and the ventilation.

**Adopted: September 15, 2021 – As Written**  
**CONWAY ZONING BOARD OF ADJUSTMENT – AUGUST 18, 2021**

Ms. Greenway stated being the closest neighbor she hasn't smelled anything and can't say the noise when she is here is any louder than the really obnoxiously loud vehicles that speed up and down that road. Ms. Greenway stated she has more of a problem with people racing. Ms. Greenway stated she has not smelled anything.

John Cryan of 1244 Davis Hill Road stated it looks to him that we are trying to squeeze a commercial building into a residential neighborhood. Mr. Cryan stated he thinks the right decision was made to start with.

Dave Greenslit stated if a business is not allowed in a residential district as a standalone what difference does it make if somebody lives over that business; if it doesn't belong in a residential neighborhood then it doesn't belong in a residential neighborhood.

Rodney King asked how did it manage to stay in business for 2-1/2 years when it is not a permitted use, and when he was told not to run his business and still ran it. Mr. King stated he believes the Town did a good job, and would be a little more receptive if he followed the law and waited to get approval. Mr. King stated he is operating a business where there is no commercial property whatsoever. Mr. King stated trucks go up and down that road carrying vehicles that are stove up. Mr. King stated its sort of convenient that we tuck them in our trailer and bring them back and forth where people don't see it.

Mr. Bergeron stated we are not denying that there is a functioning operation there now and asked Mr. Leavitt how long he has been doing this out of this location. Mr. Leavitt stated he started working out of here this past December; before that he was located at 1650 East Main Street next to Frye's Store in Center Conway. Mr. Bergeron stated it has been 8 months, not 2½ years. Mr. Bergeron stated if we get the opportunity to be heard under the nine-part criteria it doesn't say we can't have traffic. Mr. Chalmers closed public comment.

Mr. DegliAngeli stated if the process was that it comes back to staff our response letter would probably sound a lot like what Mr. Marvel had to say, so knowing how it will play out it will be back here. Mr. Bergeron stated if collectively we conclude that we legitimately cannot pass the nine-part test we probably would not appeal it, but we would like the opportunity to specifically address any concern items the Town of Conway has.

Mr. Steiner stated they are allowed due process. Mr. Bartolomeo stated if it is not allowed as a standalone commercial business, why would it be allowed as a home occupation which is generally far more restrictive than a commercial zone. Mr. Bartolomeo stated if we are willing to ignore the table where automotive painting, automotive repair and automotive services is listed and pretend this is a skilled trade under some other category then they may have a prayer.

Mr. Bartolomeo stated responding to something Mr. King stated we have an applicant that deliberately defied Mr. Pandora's two letters about ceasing until the right permitting is obtained, that is sort of thumbing his nose at the zoning ordinance and then asking the Board to deal generously with you; that is hard to swallow.

**Mr. Bartolomeo made a motion, seconded by Ms. Sherman, to uphold the administrative decision to deny the application. Motion carried with Ms. Sherman, Mr. Pierce, Mr. Bartolomeo and Mr. Chalmers voting in the affirmative and Mr. Steiner voting in the negative.**

Mr. Chalmers reviewed the appeal process.

**REVIEW AND ACCEPTION OF MINUTES**

**Mr. Bartolomeo made a motion, seconded by Mr. Steiner, to approve the Minutes of July 21, 2021 as written. Motion carried unanimously.**

Meeting adjourned at 7:55 p.m.

Respectfully Submitted,

Holly L. Whitelaw  
Planning Assistant