

ZONING BOARD OF ADJUSTMENT

MINUTES

OCTOBER 17, 2018

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, October 17, 2018 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; Andrew Chalmers; Steven Steiner; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider a **VARIANCE** requested by **LILLIAN KNOWLES** in regards to §190-30.B.(1)(a) and §190-30.B(2)(e) of the Conway Zoning Ordinance **to expand the two-dimensional footprint as necessary and allow the raising of the existing structure to obtain a first-floor elevation above the 100-year floodplain elevation** at 36 E Road, North Conway (PID 250-82). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 7, 2018 and Friday, October 5, 2018. This hearing was continued from September 19, 2018.

Mr. Irving stated that the applicant has withdrawn the application.

A public hearing was opened at 7:05 pm to consider a **VARIANCE** requested by **RIVER RUN COMPANY/KJK WIRELESS, LLC** in regards to §190-19.E.(1) of the Conway Zoning Ordinance **to permit a false chimney to enclose antennas with a proposed total height of 60’11” ~~73’7”~~ that exceeds the 30-foot maximum structure height** at 2760 White Mountain Highway, North Conway (PID 218-51). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 7, 2018.

Ken Kozyra, Principal of KJK Wireless, LLC, appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Kozyra stated we are proposing to replace an unused brick chimney with a cell structure, but will still look like a chimney. Mr. Kozyra stated the equipment would be in the basement. Mr. Kozyra reviewed the plans with the Board.

Mr. Colbath stated it is not visible from the street. Mr. Kozyra stated that is correct, but it can be seen from the back of the property. Mr. Kozyra reviewed a plan showing where it would be visible. Mr. Irving asked if that is based on the revised 60’ tower and not the 73’ tower. Mr. Kozyra stated the visibility was the same regardless.

Mr. Kozyra stated it was originally proposed at 73’7” from ground level from the front of the building. Mr. Irving stated it should be measured from the lowest point of grade. Mr. Kozyra stated he believes it was and it is now proposed to be 60’ 11”. Mr. Kozyra stated the top of the

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existing chimney is 51'3"; it will essentially be 9-½ feet above that. Mr. Chalmers stated it is proposed to be 12'8" over the existing chimney height. Mr. Kozyra stated 12'8" over the top of the existing roof line.

Mr. Bartolomeo stated on the west side of Route 16 the structure height is 30' 0". Mr. Irving stated that is correct; the ordinance was amended in 2013. Mr. Bartolomeo stated the applicant is seeking more than double what is allowed by the ordinance. Mr. Bartolomeo stated that the existing chimney is grandfathered. Ms. Sherman stated that the building is grandfathered. Mr. Irving stated that both are correct; the existing structure already exceeds the building height and is, therefore, legally existing nonconforming.

Mr. Kozyra stated there is no structure or tower proposed here; this will be putting antennas on the roof in a faux chimney. Mr. Bartolomeo stated because it is not a tower you don't have to rent space to other carriers. Mr. Irving stated if they were applying for a special exception for a wireless communication facility then they would be required to do that, but they are not seeking a special exception. Mr. Irving stated once the chimney is there we don't care what is in it. Mr. Irving stated this particular district does not provide for wireless communication facilities over 55-feet in height.

Mr. Bartolomeo asked if this would be an improvement in coverage. Mr. Kozyra answered in the affirmative, and stated that he would like to have Keith Vellante of C Squared Systems give an overview of his report. Mr. Vellante reviewed his RF Report dated October 4, 2018. Mr. Vellante stated there is a lot of usage in this area; there are a lot of people and dense traffic. Mr. Vellante stated they have to have enough signal strength to connect to the network, and this would absorb from the western facing facility on the top of Mt. Cranmore.

Mr. Steiner asked what is the capacity of the tower on Mt. Cranmore. Mr. Vellante stated it is more bandwidth and it will vary; the stronger signal you get from the site the better service you receive. Mr. Steiner asked how many local users are on that system. Mr. Kozyra stated we cannot release that information.

Mr. Chalmers asked how is it providing coverage, is it line of site. Mr. Vellante stated hills, topography and trees will degrade the signal, line of site is not as strict as you think. Mr. Vellante stated radio waves are similar to light and will move over objects to a degree. Mr. Chalmers asked if the tower on Mt. Cranmore would be upgraded. Mr. Vellante answered in the negative, and stated that would be the simplest and easiest solution if that would resolve the issue, but it will not.

Mr. Irving stated increasing the capacity of the Mt. Cranmore site would be the easiest solution if you could. Mr. Kozyra stated that is correct, but it is not possible. Mr. Kozyra stated we have put in everything that we can there. Mr. Chalmers asked if they could meet the same goal with a series of other antennas without going over the height restriction. Mr. Kozyra stated that would be cost prohibitive; each site is about ½ million dollars.

Ms. Sherman asked if this antenna would only benefit North Conway. Mr. Kozyra answered in the affirmative. Ms. Sherman stated it will not benefit any other areas in Town. Mr. Vellante

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stated it would be a benefit to other areas as there would not be as much demand. Ms. Sherman asked about the areas to the south. Mr. Kozyra stated the tower on Mt. Cranmore does not cover to the south.

Mr. Bartolomeo asked if this facility would require a generator. Mr. Kozyra answered in the negative and stated the battery technology is much better than it was originally. Mr. Bartolomeo asked would this facility have batteries. Mr. Kozyra answered in the affirmative, and stated they last up to eight hours. Mr. Steiner asked what happens if the power is out for more than eight hours. Mr. Kozyra stated if it is important enough we will bring in a temporary generator.

Mr. Steiner stated this helps the greater good; he thinks it is important to have great communication in the valley. Mr. Chalmers stated it is the conditions for granting the variance that we have to consider. Mr. Chalmers stated he would feel differently if this were an actual tower with other carriers, but this is just one carrier that covers a very small area. Mr. Steiner stated it helps the locals, it takes a load off the original cell service. Mr. Steiner stated he thinks it is one of those things that meets the greater good on all points.

Mr. Colbath stated the times are changing where the standard is wireless communication; he would presume if the tower on Mt. Cranmore went down the one in the chimney would still function. Mr. Kozyra answered in the affirmative. Mr. Colbath stated he thinks it is a fine line, and not having the cell width is a hardship. Mr. Chalmers stated financial burden is not a hardship. Mr. Colbath stated if you need reliable band width and you're in a dead spot or a tower is down, that is a hardship. Mr. Chalmers stated he would disagree, he is not seeing how the hardship test is being met. Mr. Bartolomeo stated they have to prove there is a hardship in the land. Mr. Bartolomeo asked what is the hardship here.

Mr. Kozyra stated the ordinance was amended so it only allows 30-foot structures on the west side of Route 16, that in itself creates a hardship for a wireless carrier. Mr. Kozyra stated the restriction creates the hardship for use, and we have a solution as we are not proposing to construct a tower, but retrofitting it in an existing structure. Mr. Kozyra stated the proposal is making a minor change where to the public it is not noticeable.

Mr. Bartolomeo stated the hardship has to be inherit in the land. Mr. Kozyra stated if we were to do a straight-out replacement it would not work as the signals would go directly into the building. Mr. Kozyra stated we would not be able to provide any relief in that area without the variance to go slightly higher.

Mr. Chalmers asked if they have exhausted all options. Mr. Kozyra answered in the affirmative, and stated there was not another structure that was tall enough to do this. Mr. Chalmers stated you have indicated that you have exhausted all options and there is no other place that would meet these coverage requirements, but the other side of the road allows more height. Mr. Colbath stated there was a court case quoted in the summary provided to the Board. Mr. Kozyra stated wireless carriers are treated differently in regards to hardship.

There was a brief discussion on how to measure the structure height.

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Mr. Chalmers stated there is a very distinct way that we have to look at hardship. Mr. Colbath referred to the court case referenced in the summary, Daniels vs. Town of Londonderry. Mr. Irving stated there are provisions in our ordinance that allows for wireless communication facilities in the vicinity of or near this property; however, they are not allowed in this district over 55-feet.

Mr. Chalmers stated that it is not applicable since we specifically cover them in our ordinance, we have not zoned against cell towers. Mr. Irving stated this is not an application for a cell tower, but an application for structure height. Mr. Kozyra stated he would recommend the Board consult with Town Counsel. Mr. Kozyra stated we are a wireless carrier and we are doing this to increase coverage.

Ms. Sherman asked how many other places have you approached. Mr. Kozyra stated we looked at three or four sites immediately adjacent to this building. Ms. Sherman asked adjacent to Eastern Slope Inn. Mr. Kozyra answered some adjacent and some down the road. Ms. Sherman asked if any of the sites were on the east side of the road. Mr., Kozyra stated he could not answer that as he did not do the search.

Mr. Bartolomeo stated he is prepared to vote on this application tonight. Mr. Steiner stated he is too. Mr. Chalmers stated he is as well. Mr. Colbath stated he could see it both ways, if denied the applicant is going to be asking for a rehearing. Mr. Irving stated if the Board would like the opinion of Town Counsel it will be at the applicant's expense. Ms. Sherman stated she would like more information on the alternate sites.

Mr. Irving stated the application before the Board is for a variance to take a legally existing non-conformity and make it more non-conforming. Mr. Chalmers stated if it is not a telecommunications tower then they are looking to extend an appendage on the building. Mr. Chalmers stated no one will know what is in the chimney, we need to take the telecommuting piece out of it. Mr. Chalmers stated they are applying for an extension of a chimney at this property.

Ms. Sherman asked for public comment; there was none.

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; Mr. Chalmers stated that the spirit of the ordinance is the literal definition of the ordinance; the spirit of the ordinance in this case is not observed. Mr. Bartolomeo stated this is a historical building and by building code a chimney only needs to be 30" above the roof. **Motion carried the Mr. Bartolomeo and Mr. Chalmers voting in the negative.**

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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; Mr. Bartolomeo stated the public benefit is a limited area; a congested area, but still limited. Mr. Chalmers stated substantial justice is to the public, that is the reason we have ordinances; it is not to benefit the owner. **Motion carried with Mr. Bartolomeo and Mr. Chalmers voting in the negative.**

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; Mr. Bartolomeo asked if there was any health hazard. Mr. Kozyra answered in the negative and stated it would be FCC compliant. Mr. Steiner stated we are talking a chimney at the back of the site. **Motion carried unanimously.**

Ms. Sherman read item 5.a.i. **Mr. Colbath made a motion, seconded by Mr. Steiner, 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; Mr. Chalmers asked how does the applicant feel this property is different from other properties in the area; what is the hardship. Mr. Chalmers stated based on the testimony how does the Board weigh this.

Mr. Steiner stated the location of the antennas means an increase in coverage area. Mr. Chalmers asked but how is this property different from the other surrounding properties. Mr. Kozyra stated that this property is unique based on its location within the coverage footprint and the area of capacity relief, and it is the tallest structure in this area. Mr. Chalmers stated then you are giving testimony that this is the tallest structure in that area. Mr. Kozyra stated he believes it is; and based on the location of the structure it meets the coverage needs as well as the height needed.

Mr. Steiner stated we had a substantial windstorm the other day and if we lose the tower on Mt. Cranmore this would still be available. Mr. Chalmers stated hardship is based on what distinguishes this property from the other properties in this area; what is the restriction that prevents this property from being used the way it is being used. Mr. Chalmers stated if this variance was not granted the use of this building will be used as a hotel whether or not there is a tower on it.

Mr. Chalmers stated our ordinance would have to restrict the use of that property, and he does not see how this application meets the hardship. Mr. Chalmers stated we are not restricting the use of that property. Mr. Chalmers stated there are certain requirements we have to follow. Mr. Bartolomeo stated he thinks the applicant has failed to demonstrate the unique conditions of this property to nearby properties. Ms. Sherman stated there is not enough information on the other properties that might satisfy their needs. **Motion defeated with Mr. Bartolomeo, Mr. Chalmers and Ms. Sherman voting in the negative.**

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; Mr. Chalmers stated it is not a reasonable use based on the fact that our ordinance restricts the height. Ms. Sherman stated it is not a reasonable use for this particular property. **Motion carried with Mr. Chalmers and Ms. Sherman voting in the negative.**

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. Mr. Colbath stated based on what it says, we didn't carry item 5.a.i. Motion defeated with Mr. Bartolomeo, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative.

Ms. Sherman read item 5.b. **Mr. Colbath made a motion, seconded by Mr. Steiner, that if the criteria in subparagraph a are not established, an unnecessary hardship will be deemed to exist, if, and only if, owing to 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.**

Ms. Sherman asked for Board comment; Mr. Chalmers stated there are no special conditions that distinguish this property from other properties in the area, and this property can be reasonably used without this variance. Ms. Sherman stated there might be other properties in the vicinity that could be used. **Motion defeated with Mr. Bartolomeo, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative.**

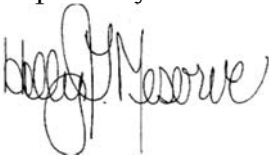
Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that, based on the forgoing findings of fact, the variance from §190-19.E.(1) of the Town of Conway Zoning Ordinance to permit a false chimney to enclose antennas with a proposed total height of 60'11" as depicted on the drawing received October 3, 2018 that exceeds the 30-foot maximum structure height be granted. Motion defeated with Mr. Bartolomeo, Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to approve the Minutes of September 19, 2018 as written. Motion carried with Mr. Chalmers abstaining from voting.

Meeting adjourned at 8:23 pm.

Respectfully Submitted,



Holly L. Meserve
Recording Secretary