

ZONING BOARD OF ADJUSTMENT

MINUTES

JANUARY 15, 2014

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, January 14, 2014 at the Conway Town Office in Center Conway, NH, beginning at 7:30 pm. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Luigi Bartolomeo; Alternate, Martha Tobin; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBER

Ms. Sherman appointed Ms. Tobin as a voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **SPECIAL EXCEPTION** requested by **BARNES DEVELOPMENT, LLC** in regards to §147.14.1.2 of the Conway Zoning Ordinance **to change a non-conforming use, a racquet club, lounge/restaurant and fitness center, to another non-conforming use, a hotel**, at 110 Barnes Road, North Conway (PID 235-82). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, January 3, 2014.

Mark Lucy of White Mountain Survey and Engineering and Roger Williams, Construction Manager, appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Lucy stated in a letter dated June 13, 2007, the landowner noted his intent to remove the existing fitness club for safety purposes, but did not relinquish his rights to the allowed use. Mr. Lucy stated that he believes they have met all seven of the criteria's of the special exception and a letter dated December 26, 2013 addresses those criteria's. Mr. Bartolomeo asked what is on the site now. Mr. Lucy stated at the advice of Mr. Irving the landowner put in writing his intention to not relinquish the non-conforming use associated with the property.

Mr. Bartolomeo asked if there is a foundation in the ground. Mr. Williams answered in the negative. Mr. Irving stated there are two factors which determine abandonment. Mr. Irving read the following from a publication written by Bernard Waugh Jr entitled *Grandfathered – The Law of Nonconforming Uses and Vested Rights (2009 ed)*, “Abandonment depends upon the concurrence of two factors: (1) an intention to abandon or relinquish the use, and (2) some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the use”. Mr. Irving stated that the owner made it clear that they were not intending to abandon.

Ms. Sherman asked for Board comments; Ms. Tobin stated that she is delighted that someone is doing something with that property should it be approved. Mr. Lucy stated that the proposed non-conforming use would be a hotel not to exceed 116 rooms. Mr. Chalmers asked if the number of rooms would have a lesser impact on trip generation, less traffic than the fitness/lounge did. Mr. Lucy stated a 116 room hotel will not exceed the average daily traffic of a week day or a Sunday.

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Mr. Bartolomeo asked for Mr. Lucy to read through the criteria's; Mr. Lucy read a letter from James Rines dated December 26, 2013. Mr. Lucy stated in regard to the lot being the same size, when the State of New Hampshire purchased the right-of-way for the North-South Road, the east end of the lot was blocked off so the present size and shape is smaller than the original lot that the non-conforming use was on.

Mr. Colbath asked if there would be any food and beverage at the hotel. Mr. Lucy stated there are ancillary uses that are associated with a hotel such as dining, fitness room, and swimming pool and referred to and read the ITE Land Use page 541 that was submitted with the application. Mr. Irving asked in the trip generation Mr. Lucy indicated weekdays would have a potential for 104 rooms, would 104 rooms have an equivalent impact to the previous existing non-conforming use. Mr. Lucy answered during the week day.

Mr. Irving stated that the applicant is asking for 116 rooms, are they planning on not using some of those rooms on a weekday. Mr. Lucy referred to and read section 147.14.1.2.2.3, traffic, of James Rines letter dated December 26, 2013 and stated from his position the answer is always no until you ask. Mr. Lucy stated the applicant is looking for permission for a hotel with 104 to 116 rooms and to not exceed 116 rooms. Mr. Irving stated more than 104 rooms will exceed the traffic that the applicant estimated was created by the former non-conforming use. Mr. Lucy stated that it correct. Mr. Irving stated if the Board was to grant the applicant 116 rooms, then it might be greater than the estimated. Mr. Lucy agreed.

Mr. Bartolomeo asked why push it to 116 rooms if the rooms are going to be there seven days a week. Mr. Lucy referred to §147.1.2.2.3 of Mr. Rines letter dated December 26, 2013 and read "Given that the surrounding commercial uses likely generate more traffic on Sundays rather than weekdays, this Special Exception requests a hotel building, as defined by ITE, not exceeding 116 rooms". Mr. Lucy stated that this has to do with traffic generators that surround this property. Mr. Chalmers stated that it is not specific to this property, but to the properties surrounding it. Mr. Lucy agreed. Mr. Chalmers asked if there was a water park planned. Mr. Williams answered in the negative.

Ms. Sherman asked for public comment; John Sokul of Hinkley Allen and representing the North Conway Grand Hotel indicated that Doug Cohen, a principal of the North Conway Grand Hotel was in attendance. Mr. Sokul asked what the square footage of the new hotel is. Mr. Lucy answered that it is undetermined at this time. Mr. Sokul asked the square footage of the building that preexisted on the site. Mr. Lucy answered 25,822 square feet. Mr. Sokul asked if the hotel would be less than or equal to 25,822 square feet. Mr. Lucy stated that is not determined at this time. Mr. Sokul stated if it is more you would need different relief, would you agree with that. Mr. Lucy stated that he is not an attorney and does not have an answer.

Mr. Sokul stated that he does not believe that §147.14.1.2 of the Conway Zoning Ordinance applies to this application because there is not a present non-conforming use on the property that the applicant is proposing to change. Mr. Sokul stated he does not believe that the 2007 letter included in the applicant's package amounts to a statement of intent to resume that prior use and not abandon that prior use. Mr. Sokul stated even if that 2007 letter was an expression of that intent what has happened over time reveals a different intent. Mr. Sokul stated writing that letter

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alone cannot confer on this property some special grandfathering status when the facts indicate something else. Mr. Sokul read definition of a “nonconforming use” from the Conway Zoning Ordinance.

Mr. Sokul stated that the section the applicant is applying under is a lawful non-conforming use may be changed to a different non-conforming use if granted a special exception. Mr. Sokul read the definition of “abandonment” from the Conway Zoning Ordinance. Mr. Sokul stated that Conway has a special type of Zoning Ordinance which is really intent based and a lot of towns because of subjectivity have moved away from intent based ordinances. Mr. Sokul stated under New Hampshire law the purpose of zoning is the reduction and elimination of non-conforming uses.

Mr. Sokul stated it is a well-established policy in zoning law to carefully limit the enlargement and extension of non-conforming uses and ultimately to reduce them to conformity as completely and rapidly as possible. Mr. Sokul stated that the spirit of zoning is to restrict rather than increase non-conforming uses and to eliminate such uses as speedily as possible. Mr. Sokul stated that the burden of proof is on the applicant that they did not abandon of use and NH law is in favor of reducing or eliminating non-conforming uses.

Mr. Sokul stated that he agrees that in June 2007 the applicant wrote a letter to Mr. Irving to demolish the building and he believes the demolition was completed sometime in 2008, but nowhere in that letter does the applicant state that they will resume a fitness center. Mr. Sokul stated nowhere in that letter does the applicant state that they want to resume the use on that property as a health club; no time, no manner or when. Mr. Sokul stated the letter refers to they would like to tear down the building and preserve the status of the property as grandfathered status.

Mr. Sokul stated if the Board allows the interpretation, that letter by itself will control whether that property or use is discontinued or abandoned, who wouldn't write a letter like that. Mr. Sokul stated what if the applicant comes back in 10-, 20- or 40-years from now; where is the end of it. Mr. Sokul stated he would admit that there is no good formula in Conway, but six or seven years with absolutely no activity at the property to resume the property as a health club is the type of failure to act that is referenced in the Conway Zoning Ordinance that clearly indicates intent to abandon that use.

Mr. Sokul stated he is not saying that the building wasn't torn down for a legitimate reason, but after some period of time it becomes abandoned. Mr. Sokul stated that he believes that enough time has gone by with nothing happening there at all to resume that use as a health club that there is an abandonment of that use. Mr. Sokul stated the demolition of the building was entirely voluntary at the applicant's discretion; the applicant has saved taxes over the years for writing a very self-serving letter that they would like to save their grandfathered status. Mr. Sokul stated that he just doesn't think it works.

Mr. Sokul stated he thinks if the Board agrees that this does work it would set bad precedence and policy; the letter didn't even say that they would resume the use. Mr. Sokul stated no one

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would be in here within a year with plans with what they want to do; six or seven years later with no activity on the property we have gone beyond what is reasonable.

Mr. Sokul stated there is nothing in the letter stating they would continue the health club use, just that the owner did not want to lose his grandfathered status; that is not enough. Mr. Sokul stated that it just doesn't make sense that you can tear down a building voluntarily, take no action to try to resume the use and say that you haven't abandoned it.

Mr. Sokul asked the Board to take a vote if they are in the right forum and under the right statute for the proposed use. Mr. Sokul stated that the prior use is gone, there is not even a foundation; six or seven years have gone by with nothing being done to resume the health club use. Mr. Sokul stated at some point the fact that the use was never resumed and no action was made to resume the use speaks louder than the letter; the letter doesn't even state that they will resume it as all, therefore, under the terms of the Conway Zoning Ordinance the Board must find that the prior use was abandoned and that this section doesn't apply.

Mr. Bartolomeo asked where is he getting that the proposed use has to be equal to or less than the square footage of the former building. Mr. Sokul answered the section of the ordinance that deals with expansion of a non-conforming use, §147.14.1.1. Mr. Bartolomeo stated that it is not likely to get 116 rooms into 25,000 square feet. Mr. Sokul stated that he thinks not. Mr. Bartolomeo asked Mr. Cohen as a hotel owner if that seems possible. Mr. Cohen stated once you accommodate public areas, hallways, stairwells, elevators, pools and other amenities, 116 rooms would likely need approximately 60,000 – 70,000 square feet, 50,000 square feet minimum.

Derek Lick of Sulloway & Hollis stated that he is representing the applicant and is present this evening as they were anticipating there might be some objection. Mr. Lick stated that Conway does have an intent based ordinance. Mr. Lick stated that the purpose of the 2007 letter was to express our intent that we did not abandon the use. Mr. Lick stated that the letter was sent only after consultation with the Town. Mr. Lick stated that his client did not abandon the use and did exactly what was requested of them by the Town and should not now be punished. Mr. Lick stated that in regards to an expansion, this is changing one non-conforming use to another non-conforming use regardless of the size of the building.

Mr. Lick stated that the point of the ordinance of changing one non-conforming use to another non-conforming use is to address impact and the issue is does the use change in such a way that it would more negatively affect the area; our position is that regardless of the building size it would not. Mr. Lick stated that the Board is considering if the change of use is appropriate.

Mr. Lick stated that you as a Board are to listen to public comment, but the Board needs to take a step back and see who the objection is coming from. Mr. Lick stated that the North Conway Grand Hotel, a competitor, will not be affected in anyway; and it is our position that the North Conway Grand Hotel has no standing. Mr. Lick stated the North Conway Grand Hotel is in litigation with his client now and hopes the Board will overlook the side show and look at the application. Mr. Lick stated that this is a perfect fit for the area. Mr. Bartolomeo stated that this Board is well aware of standing, but at a public hearing we can take public comment. Mr. Lick stated that he understands there are no abutters here objecting.

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Mr. Sokul submitted a copy of Town Tax Map 235 to show the Board the location of the North Conway Grand Hotel to the subject parcel. Mr. Sokul stated that the North Conway Grand is not an abutter, but they are one property away and close to the development site. Mr. Sokul stated as far as standing goes we have it. Mr. Sokul stated to say that the use is being changed to from a use that doesn't exist anymore can be a lot bigger than the use that doesn't exist anymore when the use that was there would require a special process to expand, it doesn't make sense that you can change a use that couldn't be expanded if it still existed.

Mr. Sokul stated as far as the impacts they will be reviewed during site plan review, but the Board needs to make findings that the proposed use shall have the same or lesser impact on the neighborhood. Mr. Sokul stated in regard to public health, safety and welfare this is the same owner that mismanaged the health club to the point of requiring police visits; there is not enough information to compare what was there and what is being proposed.

Mr. Sokul stated in regard to property values of adjacent properties he is representing a hotel and the proposed hotel will be a competitor to his client's and he does not have any information tonight to show that the proposed hotel will have an impact on his client's property values, but the applicant has not provided any information that it doesn't and they have the burden of proof.

Mr. Sokul stated in regard to traffic all they have done is thrown out an average ITE trip number based on some room number that they are not even willing to commit to here tonight. Mr. Sokul stated that we don't have the traffic on the former use; plus where is the traffic coming from, what streets are they using, are they the same streets as the health club. Mr. Sokul stated it would seem that the health club use would have different traffic patterns then a hotel which might have people coming from out of town to stay. Mr. Sokul stated that the traffic numbers might be the same, but peak and traffic patterns might be vastly different.

Mr. Sokul stated in regard to nuisance, they don't even know the number of rooms they are going to have. Mr. Sokul stated in regard to noise how you can determine noise when they haven't said anything about the actual use. Mr. Sokul stated that the same can be said about lighting; don't know what the lighting was at the health club. Mr. Sokul stated that the question is not whether the proposed use complies with the site plan review regulations, but will the proposed use have less nighttime lighting than the former use. Mr. Sokul stated that he does not believe the applicant has provided sufficient information for the Board to grant the special exception.

Mr. Colbath asked how this property has been taxed. Mr. Irving answered it is coded as a 390 which is commercially develop land. Ms. Tobin asked if they are allowed to use the entire property. Mr. Irving stated that he is not aware of any restrictions other than the normal zoning restrictions. Mr. Bartolomeo asked if the new use would be restricted to the former building. Mr. Irving stated the Board is only reviewing the use, this is not a non-conforming building; this Board has never looked at if the building is increasing when looking at changing a non-conforming use.

Mr. Lick stated in regards to the traffic generator, they looked at what previously existed and backed into the number of rooms in order to compare apples to apples, but the uses are different

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uses. Mr. Sokul stated in regard to expansion of the use, reading the language from the use section, size of the lot is less and the building is more, there are specific requirements with one being that the expansion will not render the lot more non-conforming.

Mr. Bartolomeo stated understand the owner wrote a letter, but the question was raised on how long does this go on. Mr. Bartolomeo stated that he thinks the questions are good, but he believes what was written satisfies non-abandonment. Mr. Cohen stated in regard to impact on property values, his property value will go down if another hotel is constructed, but not if a health club was constructed. The public hearing was closed at 8:35 pm.

Ms. Sherman read item 1. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, that the proposed use is confined to the same lot to which the original nonconforming use would be confined.** 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. Chalmers, that the proposed use has the same or lesser impact on the neighborhood relative to public health, safety and/or welfare.** 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. Chalmers, that the proposed use has the same or lesser impact on the neighborhood relative to impact on property values of adjacent properties.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use has the same or lesser impact on the neighborhood relative to traffic.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use has the same or lesser impact on the neighborhood relative to nuisance to neighbors.** Ms. Sherman asked for Board comment; Ms. Sherman stated there have been no abutters who have come forward expressing objection. **Motion unanimously carried.**

Ms. Sherman read item 6. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use has the same or lesser impact on the neighborhood relative to noise.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Ms. Sherman read item 7. **Mr. Colbath made a motion, seconded by Ms. Tobin, that the proposed use has the same or lesser impact on the neighborhood relative to nighttime lighting.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

Mr. Colbath made a motion, seconded by Mr. Chalmers, that, based on the forgoing findings of fact, the Special Exception pursuant to §147.14.1.2 of the Town of Conway Zoning Ordinance to change a non-conforming use, a racquet club, lounge/restaurant and fitness center, to another non-conforming use, a hotel, be granted. Motion unanimously carried.

MOTION FOR REHEARING

A public meeting was opened 8:42 pm to consider a **MOTION FOR REHEARING** requested by **FRED SOMERS** in regard to § 147.13.1.4 of the Conway Zoning Ordinance **to allow a garage to remain within the side setback** at 30 Bow Lane, North Conway (PID 216-41).

The Board determined that there was neither a technical error nor new information available that was not available at the time of the first hearing. **Mr. Colbath made a motion, seconded by Mr. Bartolomeo, to grant the rehearing for Fred Somers as requested. Motion unanimously defeated.**

FIRST READING OF THE ZONING BOARD OF ADJUSTMENT BYLAWS REGARDING STARTING TIME

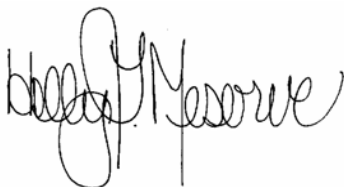
Mr. Irving read the attached amendment to the bylaws. The Board agreed to hold the second reading of the Bylaws regarding starting time February 19, 2014.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Ms. Tobin, to approve the Minutes of December 11, 2013 as written. Motion unanimously carried.

Meeting adjourned at 8:46 pm.

Respectfully Submitted,



Holly L. Meserve
Recording Secretary

Chapter A153

Zoning Board of Adjustment Procedures

1. AUTHORITY

These rules of procedure are adopted under the authority of New Hampshire Revised Statutes Annotated, 1983, Chapter 676: 1, and the zoning ordinance of the Town of Conway.

2. OFFICERS

- a. A chairman shall be elected annually by a majority vote of the Board at the first scheduled meeting after the Annual Town Meeting. The chairman shall preside over all meetings and hearings, appoint such committees as directed by the board and shall affix his/her signature in the name of the board.
- b. A vice-chairman shall be elected annually by a majority vote of the Board at the first scheduled meeting after the Annual Town Meeting. The vice-chairman shall preside in the absence of the chairman and shall have the full powers of the chairman on matters that come before the board during the absence of the chairman.
- c. All officers shall serve for one (1) year and shall be eligible for reappointment.

3. MEMBERS AND ALTERNATES

- a. Members must reside in the community and they are expected to attend each meeting of the Board to exercise their duties and responsibilities. Any member unable to attend a meeting shall notify the chairman as soon as possible. Members shall participate in the decision making process and vote to approve or disapprove all motions under consideration.
- b. Up to five (5) alternate members shall be appointed, as provided for by the local legislative body, and should attend all meetings to familiarize themselves with the workings of the board to stand ready to serve whenever a regular member of the board is unable to fulfill his/her responsibilities. Alternates may ask questions during public hearings however they are not permitted to otherwise participate in discussions, deliberations, motions, seconds or votes unless they are appointed to replace an absent Board Member.

4. MEETINGS

- a. Regular meetings shall be held as necessary at the Conway Town Offices in Center Conway at 7:00 pm ~~7:30 pm~~, on the third Wednesday of each month. Other meetings may be held and/or locations may be used on call of the chairman provided public notice and notice to each member is given at least twenty-four (24) hours excluding Sundays and legal holidays prior to such meetings.
- b. Town staff shall provide technical assistance as well as maintain a record of all meetings, transactions and decisions of the Board.
- c. Quorum. A quorum for all meetings of the Board shall be three members, including alternates sitting in place of members. In the event that less than 5 members are present, the applicant shall be offered the choice of having the appeal heard with the present members or to have the hearing continued until five (5) members can be present to hear the appeal.

RSA 674:33,111 provides that "...the concurring vote of three (3) members of the Board shall be necessary to reverse any action of an administrative official or to