

**CONWAY ZONING BOARD  
OF ADJUSTMENT**

**MINUTES**

**JANUARY 26, 2005**

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, January 26, 2005 beginning at 7:30 p.m. Those present were: Chair, Phyllis Sherman; Vice Chair, John Colbath; Andrew Chalmers; Jeana Hale; Planning Director, Thomas Irving; and Recording Secretary, Holly Meserve.

A public hearing was opened at 7:32 p.m. to consider a **VARIANCE** requested by **CMF DEVELOPMENT, LLC** in regard to Article 147.13.19.13 of the Conway Zoning Ordinance to permit the construction of Building 5, Units A-J at the Village of North Conway on Village Way, North Conway (PID 235-51.033 thru 51.042). Notice was published in the Conway Daily Sun and certified notices were mailed on Wednesday, January 19, 2005.

Randy Cooper of Cooper, Deans & Cargill representing the applicant and Peter Malia of Hastings Law Firm representing the Conway Board of Selectmen appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. Sherman stated there are 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 until a five member Board is present. Mr. Cooper agreed to proceed with four members.

Mr. Cooper stated that the underlining issue for the variance is the more than 25% lot coverage in the Special Highway Corridor District. Mr. Cooper stated this development received Site Plan Approval on May 2, 1983 and, to date, 32 of the approved 42 units have been constructed. Mr. Cooper stated that the original developer, Twin Oaks, would have had the right to construct these 10 units had they continued to pay taxes for the vested rights. Mr. Cooper stated if Twin Oaks owned it today and had continued to pay taxes, it would have been a vested subdivision and they would be able to construct the remaining units.

Mr. Cooper stated Twin Oaks failed to pay taxes and the town took ownership of the building rights. Mr. Cooper stated that the Town auctioned the building rights off. Mr. Cooper stated at the time of the auction the applicant signed a purchase and sales agreement with the condition that the development rights would be subject to all current codes.

Mr. Cooper stated he wrote to the Town in regard to the condition and that in fact under RSA 674:39 this would be a vested subdivision. Mr. Cooper stated that applicant paid a substantial amount of money to the Town for these rights. Mr. Cooper stated the

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applicant applied for a building permit for those 10-units and the building permit was denied, as it needed Town Planner or Site Plan approval.

Mr. Cooper stated the applicant appealed the decision to ZBA, but prior to the hearing, the applicant and the Town agreed that the deed language is not in the jurisdiction of the Zoning Board of Adjustment. Mr. Cooper stated the applicant could go to court to see if that language applies, but the applicant is attempting to seek municipal approvals. Mr. Cooper stated there are no problems with meeting the Site Plan regulations, however, the only major hurdle is the 25% lot coverage imposed by the Special Highway Corridor District.

Mr. Cooper stated the location of building 5 is within the Special Highway Corridor District, but if you go through the calculations, of the 152,734 square feet within the SHCD, 38,975 square feet is already covered by impervious surfaces. Mr. Cooper stated if the SHCD applies and a variance cannot be granted to construct building 5 then this is a pig and a poke.

Mr. Cooper stated that this is an area variance. Mr. Cooper read item 1.a. of the requirements to for an area variance. Mr. Cooper stated that this is the only possible location for building 5 or two separate buildings. Mr. Cooper stated that this is the only location as the remaining land is used for buildings and the applicant doesn't have the right to go on common land.

Mr. Cooper read item 1.b. of the requirements to grant an area variance. Mr. Cooper stated that this is the only location and there is no other alternative. Mr. Cooper stated it is either build it here or not building it at all and that is not a reasonable solution.

Mr. Cooper read item 2 of the requirements to grant an area variance. Mr. Cooper stated the immediate neighbor consists of other residents of the North Conway Village, the Rock Development, which there is a petitioned article to convert it from residential land to commercial land and another residential development, which would be screened by buildings 1, 2 & 3. Mr. Cooper stated there is sufficient evidence that there would be no diminution of surrounding property values and it would be keeping with the neighborhood.

Mr. Cooper read item 3 of the requirements to grant an area variance. Mr. Cooper stated the specific intent is to limit lot coverage to the bypass. Mr. Cooper stated that this is a unique situation, but except for the contractual condition within the deed this right existed prior to the adoption of the SHCD.

Mr. Cooper read item 4 of the requirements to grant an area variance. Mr. Cooper stated the public did not intend to benefit from a pig and a poke. Mr. Cooper stated if the Board of Selectmen wanted to protect the public interest they would not have sold the rights.

Mr. Cooper read item 5 of the requirements to grant an area variance. Mr. Cooper stated Twin Oaks would not need to be here today as it is a vested subdivision. Mr. Cooper

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stated with the granting of the variance the applicant would be able to construct building 5 and the applicant would proceed to Site Plan Review.

Ms. Sherman asked if the Board had any questions; there was none. Peter Malia stated he is here at the request of the Board of Selectmen and to request that this Board deny the variance request. Mr. Malia stated that the history of this property is not relevant tonight, as this Board needs to focus only on the five-part test to grant an area variance. Mr. Malia stated that the hardship factor has changed, but as far as the BOS is concerned, hardship is not a factor. Mr. Malia stated one of the requirements of a variance is if the proposed project is consistent with the spirit and intent of the ordinance and the BOS would suggest that the applicant couldn't meet this requirement.

Mr. Malia stated the Board should review §147.13.19, which is the purpose of the SHCD and that which the BOS is concerned with. Mr. Malia stated whether or not the BOS had the right to attach the restriction, which we may end up in court to resolve, is not a concern of this Board as this Board should just apply the five part test.

Earl Sires, Conway Town Manager, stated that Mr. Cooper has referenced to this as a pig and a poke and the Town being unfair. Mr. Sires stated that these property rights were sold at a tax sale with specific language in the advertisements that this was a buyer beware and made no guarantee to buildability. Mr. Sires stated that the Town sells land that is wet and obvious not buildable lots, but it could be a benefit to a neighbor, so the Town had no expectations of the value of these rights. Mr. Sires stated that the BOS did what they were obligated to do for the Town by State law.

Ms. Sherman asked for public comment; there was none. Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property. Motion unanimously defeated.**

Ms. Sherman read item 1. b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the benefit sought by the applicant couldn't be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. Motion defeated with Ms. Sherman and Ms. Hale voting in the affirmative and Mr. Chalmers and Mr. Colbath voting in the negative.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Motion defeated with Ms. Hale voting in the affirmative and Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Motion unanimously defeated.**

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Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance. Motion unanimously defeated.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the granting of this variance will not be contrary the public interest. Motion unanimously defeated.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done. Motion unanimously defeated.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the forgoing findings of fact, the variance from §147.13.19.13 of the Town of Conway Zoning Ordinance be granted. Motion unanimously defeated.**

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A public hearing was opened at 8:04 p.m. to consider a **VARIANCE** requested by **RED JACKET MOUNTAIN VIEW LLC** in regard to Article 147.13.8.6.8.1 of the Conway Zoning Ordinance to allow two freestanding signs to be lit from below at 2251 White Mountain Highway, North Conway (PID 230-51). Notice was published in the Conway Daily Sun and certified notices were mailed on Wednesday, January 19, 2005.

David Abraham 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 until a five member Board is present. Mr. Abraham agreed to proceed with four members.

Mr. Abraham stated the signs replaced were in place for 30 years, and when designed and installed basically made a mistake. Mr. Abraham stated the type of sign installed would not have been chosen if they had known the signs would have had to be lit from above. Mr. Abraham stated that they feel the lighting does not conflict with the ordinance nor does it impede traffic on Route 16. Mr. Abraham stated they would have to add additional poles and conduit, which would detract from the aesthetics.

Ms. Sherman asked how were the original signs lit. Mr. Abraham answered internal fluorescent tubes. Mr. Colbath asked if the new signs were smaller. Mr. Abraham answered in the affirmative and stated by about 15-20%. Mr. Abraham stated the new signs are wood carved.

Ms. Sherman stated the change from under lighting to overhead lighting was to eliminate light pollution. Mr. Irving answered in the affirmative and stated it was so light would not be emitting into the air. Mr. Irving stated in this situation the Board must take into consideration the spirit and intent of the ordinance, plus this is a fairly new ordinance.

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Mr. Irving stated there is a reasonable alternative, which is down lighting that is in accordance with the regulation.

Mr. Abraham stated that the intent of the ordinance is to also improve signage and not have a lot of wash over. Mr. Abraham stated that this is not a brilliant light and only lit substantially enough so guests and other passerby's are going to see the signs. Mr. Abraham stated to overhead light the signs would have to be on a separate pole with conduit and also be a heavy enough structure to hold the lights. Mr. Chalmers asked if they have looked into overhead. Mr. Abraham answered in the affirmative and stated none of the options are pleasing.

Jan Filip stated that he is in favor of this application as the signs that were replaced were internally lit. Mr. Filip stated when the Staples property redeveloped, that sign was allowed to stay the same. Mr. Filip stated that the Red Jacket has improved their signs and they could have left them internally lit. Mr. Filip stated the eyes have more of a tendency to pick up down lighting and be more of a distraction than a light facing up.

Craig Boyer of the Fox Ridge Resort asked when was down lighting adopted. Mr. Irving answered last Town meeting. Mr. Filip stated down lighting is more of a hazard than up lighting. Mr. Broyer stated when they redesigned the sign at Fox Ridge a few years ago they were granted certain aspects because it was a grand fathered sign. Mr. Broyer stated he was under the impression if the sign became more conforming and the owner was willing to improve the sign, the Town would give some latitude. Ms. Sherman stated the applicant could have maintained the grand fathered status for size and internally lit.

Mr. Irving stated that the sign permit indicated down lighting. Mr. Abraham stated that when designing the new signs, there was a lot of discussion amongst themselves regarding down lighting versus up lighting, however, they did not realize it was a factor to the Town and thought it was only an internal discussion. Mr. Abraham stated that he thought they had done an improvement.

Mr. Chalmers stated the sign is a huge improvement over what was there, just the Board is in a tough spot, as the voters approved down lighting for signs and there wasn't a gray area in the application. Mr. Chalmers stated the application was clear, unfortunately, the applicant did not do what the application said would be done.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the zoning restriction as applied interferes with a landowner's reasonable use of the property, considering the unique setting of the property in its environment. Motion unanimously defeated.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on this property. Motion unanimously defeated.**

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Ms. Sherman read item 1.c. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the variance would not injure the public or private property rights of others. Motion unanimously defeated.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a, b, and c above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Motion unanimously defeated.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Motion defeated with Mr. Chalmers, Ms. Hale and Ms. Sherman voting in the negative and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance. Motion unanimously defeated.**

Ms. Sherman read item 4. **Ms. Hale made a motion, seconded by Mr. Colbath, that the granting of this variance will not adversely affect the public interest. Motion unanimously defeated.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done. Motion unanimously defeated.**

**Mr. Colbath made a motion, seconded by Ms. Hale, that based on the forgoing findings of fact, the variance from §147.13.8.6.8.1 of the Town of Conway Zoning Ordinance be granted. Motion unanimously defeated.** Ms. Sherman reviewed the motion for rehearing.

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A public hearing was opened at 8:26 p.m. to consider a **VARIANCE** requested by **OLYMPIA EQUITY INVESTORS X, LLC** (regarding property owned by Frank & Gilda Januzzi/ Priority Development Inc./CMC Realty Trust) in regard to Article 147.13.8.5 of the Conway Zoning Ordinance to allow a 4-story hotel to exceed the structure and building height at 1772 and 1788 White Mountain Highway, North Conway (PID 230-12, 13 & 14). Notice was published in the Conway Daily Sun and certified notices were mailed on Wednesday, January 19, 2005.

Jeff Kevan of T.F. Moran 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 until a five member Board is present. Mr. Kevan agreed to proceed with four members.

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Mr. Kevan reviewed architectural elevations. Mr. Kevan stated that the site naturally drops off and from Route 16 to the railroad there is a 10-foot change. Mr. Kevan stated in order to save some of the older trees the building was pushed to the back of the lot. Mr. Kevan stated in addition to saving the older trees, they will be planting landscaping per the ordinance, which results in an additional 200 trees.

Mr. Kevan stated there is a depression at the back of the lot, which results in a 7-foot elevation change from the front of the building to the back of the building. Mr. Kevan stated that the ordinance requires the building height to be measured from the existing or lowest grade. Mr. Kevan stated that the structure height is 60.5-feet and the building height is 52.92-feet. Mr. Kevan stated that the grade in front of the building complies with the ordinance if measuring from the natural grade at the front of the building.

Mr. Kevan stated that the building sits 10-feet lower than the street making the second floor level with the street. Mr. Kevan stated with the orientation of the building, pushing the building to the back of the lot and by taking advantage of the changing grade, it would make the building look lower. Mr. Kevan stated the building sits down from the railroad and it would look higher up if brought forward on the lot. Mr. Kevan stated that he has discussed the layout with the Fire Chief and it is acceptable to him. Mr. Kevan stated that the applicant wanted to maintain the peak roof that meets the criteria of the Town.

Mr. Kevan stated in regard to hardship there is a special condition on this property where there is a 7-foot elevation change from the front of the property to the back of the property. Mr. Kevan stated the applicant is trying to work with the natural terrain of the property.

Mr. Kevan stated in regard to the benefit sought by the applicant, in order to construct a 100-room hotel, they would not be able to comply with the peak roof requirement. Mr. Kevan stated what the applicant is proposing sits lower on the site, which preserves the view shed and some of the older trees on the site.

Mr. Kevan stated in regard to diminution in value of surrounding properties, the applicant is developing the property with an allowed use. Mr. Kevan stated that the applicant is maintaining the character of the community by using a peaked roof. Mr. Kevan stated that the proposed would increase this property and that of surrounding properties. Mr. Kevan stated the applicant is trying to maintain the trees and the view shed by placing the building at the rear of the site.

Mr. Kevan stated in regard to public interest, the proposal meets the character of the town and preserves the view shed. Mr. Kevan stated in regard to substantial justice being done, the site is being developed in a reasonable manner with an allowed use, which complies with all other regulations.

Mr. Colbath asked if the measurements are from the lowest part of the property. Mr. Kevan answered in the affirmative. Mr. Kevan stated if measured from the front of the

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building, it would be in compliance. Mr. Chalmers asked if the roof pitch could be changed to make up the five feet. Mr. Kevan answered in the negative and stated it would end up being a flat roof, which is not compliant with the Town site plan review regulations. Ms. Sherman stated the Board did receive a letter from an abutter, the Conway Scenic Railroad, and there is a representative of the railroad in the audience. Mr. Colbath asked if there is anything written from Fire Chief. Mr. Kevan answered in the negative.

Ms. Sherman asked for public comment in favor of this application; there was none. Ms. Sherman asked for public comment against this application; Russ Seybold of the Conway Scenic Railroad stated there is a letter from his attorney stating several things they object to. Mr. Seybold stated they try to maintain a 10-foot buffer from the right-of-way. Mr. Seybold stated the building is about as far back on the property as it possibly can be and if the variance is granted the height of the building will be seen by the people on the train and not from Route 16. Mr. Seybold stated there will end up being a wall that we will need to try to buffer. Mr. Seybold stated the pool building is on the right-of-way line and they are trying to maintain the right-of-way.

Mr. Kevan stated that the property line goes within the railroad right-of-way and they have respected the right-of-way by proposing a transition in grading and planting a buffer along the property line but within railroad right-of-way, which would be all green or natural to provide a buffer. Mr. Kevan stated if it comes away from the railroad the building would come up in height and the further away from the back of the property the taller the building looks from Route 16.

Mr. Seybold stated when construction is taking place in other areas we find trees disappear and then they can only plant new trees. Mr. Seybold stated that this has been a problem in the past; however, he is not saying that it is going to be a problem here. Mr. Seybold asked if there would be an impact on the existing vegetation. Mr. Kevan stated he doesn't think there is a lot of existing trees back there.

Steve Hartman stated he is opposed to the variance as it opens the door for everyone else. Mr. Hartman stated that the views from Main Street are being obstructed every day and part of the draw to the valley is the views. Mr. Hartman stated that he don't see where this is helping views or tourism. Mr. Kevan stated that the height has been mitigated with it being dropped down to follow the natural grade.

Ms. Sherman asked in order to construct a 100-room hotel and meet all the requirements what would need to be done. Mr. Kevan stated that they would not be able to construct a 100-room hotel. Ms. Sherman asked what are the restrictions of the right-of-way. Mr. Seybold stated the applicant would not be able to enter onto the right-of-way and there is a legal issue of whether they can come onto the right-of-way as they are proposing now. Mr. Irving stated the building in question is not in the right-of-way.

Jan Filip of the Golden Gables Inn stated that he constructed a 2-story hotel with 28-rooms and it is a big building. Mr. Filip stated that the proposed building is not going to



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hidden by the height of land and it will stick out. Mr. Kevan stated the difference is if the land elevation was consistent across the back of the site they wouldn't be here. Ms. Sherman stated the pool building will meet the requirement and the rest of the building has to be measured from that point. Mr. Kevan agreed.

Mr. Chalmers asked if there is a way to meet the code. Mr. Kevan answered in the negative. Mr. Chalmers stated the first floor could be 8-feet instead of the proposed 12-feet. Jim Brady stated typically hotels have the lobby and laundry on the first floor, which usually has a larger height for mechanicals for the guest rooms above. Mr. Brady stated the first floor is more for public areas, which requires a higher floor height. Mr. Brady stated that the second, third and fourth floors usually only have guest rooms. Mr. Brady stated that this is a fairly good size lot and the development is being driven by a height standpoint by a depression in the land. Mr. Brady stated that the lowest building is in the lowest depression.

Mr. Irving asked if the pool building were a detached structure, would the remainder of the building meet the regulation. Mr. Kevan stated that the variance would still be necessary, but for a few feet difference. Mr. Hartman asked if the applicant has considered a 3-story building instead of a 4-story building. Mr. Brady answered in the affirmative, but it would not be feasible. Mr. Hartman asked if there has been a feasibility study done. Mr. Brady answered in the affirmative.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property. Motion defeated with Mr. Chalmers and Ms. Sherman voting in the negative and Ms. Hale and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 1. b. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the benefit sought by the applicant couldn't be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance. Motion defeated with Mr. Chalmers, Ms. Hale and Ms. Sherman voting in the negative and Mr. Colbath voting in the affirmative.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the findings of a and b above, denial of the variance would result in unnecessary hardship to the property owner seeking it. Motion defeated with Mr. Chalmers, Ms. Hale and Ms. Sherman voting in the negative and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that there would not be a diminution in value of surrounding properties as a result of granting this variance. Motion unanimously defeated.**

Ms. Sherman read item 3. **Mr. Chalmers made a motion, seconded by Mr. Colbath, that the use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit and intent of the ordinance. Motion defeated**

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**with Mr. Chalmers, Mr. Colbath and Ms. Sherman voting in the negative and Ms. Hale voting in the affirmative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that the granting of this variance will not be contrary the public interest. Motion unanimously defeated.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Mr. Chalmers, that by granting this variance, substantial justice would be done. Motion unanimously defeated.**

**Mr. Colbath made a motion, seconded by Mr. Chalmers, that based on the forgoing findings of fact, the variance from §147.13.19.13 of the Town of Conway Zoning Ordinance be granted. Motion unanimously defeated.**

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A public hearing was opened at 9:19 p.m. to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **LUTHERAN CHURCH OF THE NATIVITY** in regard to Article 147.15.3 of the Conway Zoning Ordinance to establish a homeless shelter with a maximum capacity of 10 persons as an accessory use to the Church and Rectory at 15 Grove Street, North Conway (PID 218-138). Notice was published in the Conway Daily Sun and certified notices were mailed on Wednesday, January 19, 2005.

Mr. Irving explained that this application has been withdrawn as the Conway Board of Selectmen rescinded the staff decision. Mr. Irving stated that the Board of Selectmen found that the Religious Land Use and Institutionalized Persons Act of 2002 (“RLUIPA”), 42 U.S.C., §2000 cc (2004) et. Seq. preempted local land use regulation relative to the proposed shelter.

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A public hearing was opened at 9:19 p.m. to consider a **VARIANCE** requested by **LUTHERAN CHURCH OF THE NATIVITY** in regard to Article 147.16 of the Conway Zoning Ordinance to establish a homeless shelter with a maximum capacity of 10 persons as an accessory use to the Church basement, where the Zoning Ordinance does not list “homeless shelters” in the table of permitted uses at 15 Grove Street, North Conway (PID 218-138). Notice was published in the Conway Daily Sun and certified notices were mailed on Wednesday, January 19, 2005.

Mr. Irving stated that this application has been withdrawn.

**REVIEW AND ACCEPTANCE OF MINUTES**

**Mr. Colbath made a motion, seconded by Ms. Hale, to approve the Minutes of December 15, 2004 as written. Motion unanimously carried.**

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Meeting adjourned at 9:21 p.m.

Respectfully Submitted,

Holly L. Meserve  
Recording Secretary