

**CONWAY ZONING BOARD
OF ADJUSTMENT**

MINUTES

NOVEMBER 15, 2006

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, November 15, 2006 at the Conway Town Office in Center Conway, NH. Those present were: Acting Chair, John Colbath; Luigi Bartolomeo; Jeana Hale; Alternate, Hud Kellogg; Alternate, Sheila Duane; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

APPOINTMENT OF ALTERNATE MEMBER

Mr. Colbath appointed Ms. Duane and Mr. Kellogg as voting members for the evening.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Bartolomeo made a motion, seconded by Ms. Hale, to approve the Minutes of September 27, 2006 as written. Motion unanimously carried.

Ms. Hale made a motion, seconded by Ms. Duane, to approve the Minutes of October 25, 2006 as written. Motion unanimously carried.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider a **VARIANCE** requested by **VIRGINIA HOLLIS** in regard to §147.13.15.5 of the Conway Zoning Ordinance to allow the construction of a year round home within the Shoreline Protection Overlay District setbacks at 458 Mudgett Road, Center Conway (PID 267-5). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, October 18, 2006. This application was continued from October 25, 2006. **Mr. Irving stated that the applicant has withdrawn the application.**

A public hearing was opened at 7:45 pm on Wednesday, November 15, 2006 at the Conway Town Office in Center Conway, NH to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **THOMAS AND DIANNE KNAPP** in regard to §147.13.1.7.2 & 3 of the Conway Zoning Ordinance to appeal the violation notice regarding storage and display outside the permitted home occupation area at 19 Fireside Drive, Conway (PID 261-38). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, November 8, 2006.

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Thomas and Dianne Knapp and Jim Shannon, Attorney for the owner, appeared before the Board. James Yeager, Code Enforcement Officer, and Peter Malia, Town Attorney, were in attendance. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Shannon stated that the Knapp's bought this land in the 1970's and then sold the land to a brother who constructed the house and then they purchased the property a few years later from the brother and started the fencing and insulation business. Mr. Shannon stated that these types of activities have been conducted on this property since that time frame. Mr. Shannon stated periodically throughout the 1990's until 2001 the town would come to him with complaints from the neighbors in regard to his business. Mr. Shannon stated every time that happened the applicant would try to address the neighbor's concerns as well as operate his business.

Mr. Shannon stated in 2001 he sat with the owners and determined what they had was a grandfathered, nonconforming use. Mr. Shannon stated that the owners submitted materials to the Code Enforcement Officer at the time, Sandy Stowell, and in 2001 the owners received letters from Ms. Stowell, Earl Sires, Town Manager and a letter was sent to the neighbor, Sue Power from Mr. Malia, that stated in light of the material presented by the Knapp's, it was in fact a grandfathered use of the property. Mr. Shannon stated since that point and up to the past few months there has been no knowledge of any complaints in regard to his business.

Mr. Shannon stated in addition to this business and after the enactment of the Zoning Ordinance, the Knapp's went into an automobile wholesale business with another friend. Mr. Shannon stated that a home occupation was granted in the early 1990's and was in addition to the fencing and insulation business. Mr. Bartolomeo stated that the application states that it was for office space only. Mr. Shannon stated that there was a concern with several vehicles for sale. Mr. Bartolomeo stated that when the Knapp's applied for a new home occupation, which only one is allowed, did it negate the old one. Mr. Shannon stated that the Knapp's did not have a home occupation, as it was a grandfathered business.

Mr. Bartolomeo asked if the applicant could have a grandfathered, nonconforming business as well as a home occupation. Mr. Shannon stated that he has not researched that question, but clearly the file shows that that is what occurred. Mr. Shannon stated that clearly he has been doing the first activity and in 1991 he applied for a home occupation for the office only. Mr. Shannon stated that Mr. Knapp's friend passed away a few years after starting the automobile wholesale business and now he has been selling vehicles to family members or friends only. Mr. Shannon stated that this summer there were vehicles on the property that were for sale, but one was Mrs. Knapp's old vehicle and one was T & K's [which is the fencing and insulation business]. Mr. Shannon stated that there have not been automobiles on his property for sale under the wholesale business for years. Mr. Bartolomeo asked if the applicant still had the home office for the wholesale business. Mr. Shannon answered in the affirmative.

Mr. Shannon stated that once this matter was brought forward and there was a request for grandfathered status, which was signed off by Sandy Stowell and the Town Manager, it was entitled to finality and is binding. Mr. Shannon stated that the decision in regard to grandfathering was not appealed nor overturned and so that determination put an end to these

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matters for some time until this past summer. Mr. Shannon stated that the file is complete and shows that there was a home occupation permit as well as the owner trying to clean up his property per the request of the Town. Mr. Shannon stated every time there was a complaint Mr. Knapp tried to be a good neighbor. Mr. Shannon stated that the applicants just want to operate their business.

Mr. Shannon stated at one time there was a carved sign for the fencing and insulation business, but the Town made them remove the sign in 1995, as it did not comply with the ordinance. Mr. Shannon stated that the applicant brought the sign into conformance by erecting a 1' x 3' sign. Mr. Shannon stated subsequent to that Ms. Stowell wrote a letter to that Knapp's that stated that the sign was too close to the highway, so he moved the sign back into conformance. Mr. Shannon stated that Mr. Knapp was asked to enclose his property to shield his yard from his neighbor and he complied. Mr. Shannon stated that he tried to conceal his activity as well as make it a profitable business. Mr. Shannon stated in 2001, he doesn't believe there were any issues regarding signage. Mr. Shannon stated there were two episodes in regard to the signs in the 1990's and in the pictures are the fencing products being displayed.

Mr. Shannon stated in this go around the Code Enforcement Officer is stating that the fencing is signage, but in the pictures from the 1990's the fencing was always there. Mr. Shannon stated as long as the applicant has been operating his business he has had fencing displayed. Mr. Shannon stated that those products have always been there and there have never been any issues with the fencing being signage. Mr. Shannon stated that he does not agree that the fencing is signage, but it would be grandfathered as well.

Mr. Kellogg asked if there was a violation of town regulations and the Town failed to enforce the violation, due to the lack of enforcement by the Town, the business should be grandfathered. Mr. Shannon stated that it is not in a time frame for estoppels, but if the Zoning Officer did not deal with signage then it would be different. Mr. Bartolomeo asked if this is a grandfathered nonconforming business, then everything should be considered grandfathered. Mr. Bartolomeo stated he read somewhere in the file that there was an agreement for winter signs and summer signs. Ms. Hale stated that it was on the time frame submitted by Claudine Safar, Attorney for Sue Power.

Mr. Shannon stated at the time that was submitted he is not sure if they were entitled to a home occupation for that type of business. Mr. Bartolomeo stated that a contractor is allowed to operate an office, just not have equipment. Mr. Shannon stated in 1997 it was suggested that the Knapp's apply for a home occupation. Ms. Duane asked what is being considered grandfathered. Mr. Shannon answered the fencing and insulation business. Ms. Duane asked what is the display of goods. Mr. Irving stated that a display area would not be allowed under a home occupation. Mr. Bartolomeo stated that the grandfathered business is the fencing and insulation business and the automobile wholesale office is the home occupation. Ms. Duane asked if it could be expanded. Mr. Irving stated that there are regulations in regard to expanding a grandfathered use.

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Mr. Shannon stated that he has always had a display of fences since he started the business. Mr. Shannon stated that the power company has cut some of the trees, as well as by the owner himself. Ms. Duane stated if the applicant was trying to conceal the neighbor then it would be one contiguous fence, but what is there appears to be a display area. Mr. Shannon stated there is one type of stockade fence as well as the display area. Mr. Bartolomeo stated that it is ludicrous to think that you can change the signage and be considered grandfathered. Mr. Shannon stated that it is not ludicrous; if there was a weather beaten fence then he should be allowed to replace it. Mr. Kellogg stated that the lack of enforcement by the Town does not agate the town's ability to enforce it. Mr. Kellogg stated that the applicant has had several visits by the Code Enforcement Officers and the Town has been dealing with this issue for a while.

Mr. Shannon stated if the Zoning Officer's had never dealt with signs he could understand the current violation, but they never addressed signage at this site in the past 15-20 years, except for the 1' x 3' sign that was requested to be moved. Mr. Shannon stated that the fencing is not signage. Mr. Shannon stated to the extent that the Town did not enforce it there is estoppel. Mr. Kellogg stated that the applicant has put out several fires, but they haven't dealt with the violations. Mr. Shannon stated the applicant has made repeated efforts to work with the Town and operate the grandfathered use. Mr. Shannon stated that the applicant reduced the sign and moved it back at the Town's request.

Mr. Yeager stated that home occupations are restricted to a 1' x 3' sign. Mr. Kellogg asked if the office for the automobile wholesale business was still being operated from this location. Mr. Shannon stated that the office is still there, but there are no vehicles for sale. Mr. Kellogg asked if the automobile wholesale business is current with the State. Mr. Knapp answered in the affirmative.

Mr. Bartolomeo asked if the current home occupation is now the fencing and insulation business and not the automobile wholesale business. Mr. Knapp stated that fencing and insulation business is grandfathered and the automobile wholesale business is the current home occupation. Mr. Knapp stated in 2001 he received a letter from Mr. Malia stating that they had provided enough information to determine that the fencing and insulation business was grandfathered. Mr. Bartolomeo asked why the applicant applied for a home occupation in 1997. Mr. Knapp stated before they could find the information to confirm they were a grandfathered business, they were asked by the Town to file for a home occupation and move the automobile wholesale business, which they did.

Mr. Shannon stated that the notice of violation and the letters from Mr. Yeager are clearly saying that the home occupation is the fencing product, but he is ignoring the letters from Ms. Stowell, Mr. Sires and Mr. Malia that the fencing and insulation business is grandfathered. Mr. Shannon stated that the question is what is grandfathered and what is not grandfathered, but in 2001 the Town determined that the fencing and insulation business was a grandfathered commercial activity. Mr. Shannon stated as of 2001 anything to do with fencing or insulation was grandfathered. Mr. Kellogg stated that the applicant testified that the automobile warehouse business moved off-site, but now the office is back at this location. Mr. Knapp

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stated that the business was moved before the 2001 ruling, but after the 2001 ruling, they brought the Fireside Auto mailing address and office only back to the Fireside Drive location.

Mr. Malia stated that he does not believe the 2001 opinion is inconsistent with the violation notices. Mr. Malia stated he was asked by the Town in 2001 if this was a non-conforming use and he determined that it seemed to be a non-conforming use and in business prior to 1980, but what came this year was a concern from the neighbor that this was an illegal expansion issue. Mr. Malia stated that Mr. Yeager and he reviewed the file and looked at it with an eye that was fair to both sides. Mr. Malia stated that the town enacted zoning in 1980, Fireside Auto was established in 1991, a home occupation for the fencing and insulation business was granted in 1997, that business was considered grandfathered in 2001 and two violation notices were issued in 2006.

Mr. Malia stated if there was not a home occupation permit issued in 1997, then the laws regarding the expansion of a non-conforming use would control, but in 1997 the applicant applied for and was granted a home occupation permit for the fencing and insulation business. Mr. Malia stated by the applicant applying for and receiving the home occupation for the fencing and insulation business, they submitted themselves to the home occupation regulations, which is the basis of the first violation.

Mr. Malia stated that there is a letter from Dave Powers that specifically references the section of the ordinance that must be complied with and in 1997 when the applicant applied for and received the home occupation permit, they submitted themselves to the home occupation regulations. Mr. Bartolomeo asked when the applicant applied for and received the home occupation for the fencing and insulation business, did they initially abandon the grandfathered status. Mr. Malia answered in the affirmative. Mr. Yeager stated in 1997 the applicant agreed to move the automobile business. Mr. Malia stated that the second violation notice is for signs, which the fences are considered signs by the ordinance.

Ms. Hale stated in 1997 the Town issued a home occupation permit, but in 2001 the Town considered them grandfathered, which is it. Mr. Malia stated by the applicant subjecting himself to the home occupation permit, it restricts him to the regulations of a home occupation. Mr. Knapp stated that the Town told him that he needed a home occupation permit because he was not able to validate the grandfathered use, but in 2001 he was able to produce information that had the Town determine that it was a grandfathered use.

Mr. Bartolomeo asked when it was determined in 2001 that the business was grandfathered did Mr. Knapp try to withdraw the 1997 home occupation permit. Mr. Knapp stated that he thought the ruling by the Town Attorney and the Town Manger would have superseded everything prior to that determination. Mr. Yeager stated that the use may have met the requirements for grandfathering, but the expansion over the years has not been approved. Mr. Knapp stated what is there now is what was there in 1980. Mr. Shannon stated that the notice of violation does not state that it was for an expansion of a non-conforming use. Mr. Shannon stated what is before the Board this evening is the perpetuation of confusion of what happened before and after 2001.

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Mr. Bartolomeo asked what are the regulations for the expansion of a non-conforming use. Mr. Irving read §147.14 of the Conway Zoning Ordinance in regards to non-conformity. Mr. Bartolomeo asked if the expansion has to do with the fences on the outside. Mr. Yeager stated with signing the 1997 home occupation permit he agreed to abide by the home occupation provisions. Mr. Malia stated that the first Appeal from Administrative Decision is for the violation of the home occupation ordinance and the second violation is for the sign ordinance. Mr. Bartolomeo stated that the Board should make a finding of fact of whether this is a grandfathered business or a home occupation. Mr. Malia agreed. Mr. Irving stated if the Board rules that this is not a home occupation, but is a grandfathered use of the site, the Board would need to determine what is the non-conforming use and to what degree it is grandfathered.

Ms. Duane stated that the burden of proof in regard to the non-conformity is on the applicant. Mr. Irving stated that the ordinance states that the applicant has to prove that it is on the original lot of record. Mr. Malia stated if the Board overturns the decision regarding the home occupation, it wouldn't necessarily be the end. Mr. Malia stated that the Town would have to review the file again and determine if there has been an expansion of a non-conforming use without the proper permits, but that is not the violation before the Board tonight. Ms. Duane asked Mr. Malia where was the home occupation permit when he reviewed the information in 2001. Mr. Malia stated that the home occupation permit was not given to him.

Mr. Colbath asked for public comment; Claudine Safar of Melendy and Lee stated that Mr. Irving read the ordinance in regard to a lawful nonconforming use, but in order to remain a lawful the business would have to conform, which it does not. Ms. Safar stated that the applicant lost his grandfathered status and he has expanded his business. Ms. Safar submitted photos from 1999 to the Board. Ms. Safar stated that the trees were cut by NHDOT with the cooperation of Mr. Knapp in order to better see his business. Mr. Safar stated that at one point he may have been grandfathered, but that status was lost.

Ms. Safar stated that this is not the end for Mr. Knapp, when passing title to this property there was a deed restriction that restricted this property to residential use only. Ms. Safar stated that this site is not permitted to have commercial endeavors in the first place. Ms. Safar stated that the disappearance of the deed restriction occurred when the property changed hands from both Knapp's to one Knapp individually. Mr. Safar stated that Harold Whitaker created this subdivision and the deed restriction has always been a part of the deeds. Mr. Irving asked if that restriction was there before the business started. Mr. Knapp stated the business was started in 1977. Mr. Irving asked when was the deed recorded. Mr. Safar answered 1973. Mr. Irving stated that this brings up the question of whether this is a lawful non-conforming use, however, it would be a civil issue.

Mr. Colbath asked for any other public comment; there was none. Mr. Shannon stated that this comes up every so often as the abutter wants him out of business. Mr. Shannon stated that he doesn't see anything other than fencing products in the pictures. Mr. Shannon stated that it was PSNH, not NHDOT that cut the trees and it was not up to Mr. Knapp; he had no say in what was to be cut. Mr. Shannon stated that Ms. Safar has no proof that Fireside Auto

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owned any of the vehicles on the site. Mr. Shannon stated in one picture one car belonged to their son, one was Mrs. Knapp's sisters and the other was Mrs. Knapp's.

Mr. Bartolomeo stated that there was a deed restriction. Mr. Shannon stated that Harold Whitaker was their neighbor for years. Mr. Bartolomeo stated that generally this Board does not enforce deed restrictions. Mr. Shannon stated that there was a decision by the Code Enforcement Officer in 2001. Ms. Duane stated the Town Attorney was not given all the information when he made his opinion in 2001. Ms. Duane stated that she has a hard time with the 2001 ruling when the Town Attorney was not given all the information. Ms. Hale stated she doesn't see how that is Mr. Knapp's problem. Ms. Hale stated that Mr. Knapp also received a letter from the Town Manager, Earl Sires, also stating that it was grandfathered.

Mr. Kellogg asked Mr. Malia with the review of the entire file and the testimony this evening what would have been his decision. Mr. Malia stated in 2001 the situation was different and having gone through the file with Mr. Yeager, if it was not for the 1997 permit, the expansion of a non-conforming use would have applied, but in 1997 the applicant subjected themselves to the home occupation regulations and they are currently not in compliance with that ordinance.

Ms. Duane asked if there a way to have them coexist. Mr. Bartolomeo stated there has been too much history. **Mr. Bartolomeo made a motion, seconded by Ms. Hale, to the finding of fact that the fencing and insulation business is a lawful grandfathered, non-conforming use based on the testimony.** Mr. Irving asked about the automobile wholesale business. Mr. Bartolomeo stated that that business is a non-issue. Mr. Shannon stated that they are not arguing that the automobile wholesale business is grandfathered. **Motion was defeated with Mr. Kellogg voting in the negative, Mr. Bartolomeo voting in the negative and stating that he agrees with Mr. Malia's interpretation and the applicant made no effort to withdraw the 1997 home occupation permit, Ms. Hale voted in the affirmative, Ms. Duane voted in the negative and Mr. Colbath voting in the affirmative.**

Mr. Bartolomeo made a motion, seconded by Ms. Hale, to uphold the Administrative Decision in regard to §147.13.1.7.2 & 3 of the Conway Zoning Ordinance regarding storage and display outside the permitted home occupation area. Motion carried with Ms. Duane voting in the affirmative, Ms. Hale voting in the negative, Mr. Bartolomeo voting in the affirmative, Mr. Kellogg voting in the affirmative and Mr. Colbath voting in the affirmative.

Mr. Colbath reviewed the appeal process.

A public hearing was opened at 9:20 pm on Wednesday, November 15, 2006 at the Conway Town Office in Center Conway, NH to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **THOMAS AND DIANNE KNAPP** in regard to §147.13.1.6.10 of the Conway Zoning Ordinance to appeal the violation notice regarding the fencing display as not permitted signage at 19 Fireside Drive, Conway (PID 261-38). Notice was published in

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the Conway Daily Sun and certified notices were mailed to abutters on Wednesday, November 8, 2006.

Thomas and Dianne Knapp and Jim Shannon, Attorney for the owner, appeared before the Board. James Yeager, Code Enforcement Officer, and Peter Malia, Town Attorney, were in attendance. Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Shannon stated that the testimonies for both applications were intermingled. Mr. Shannon stated that the Town never dealt with the signage and the principal evidence that they have is that it has been there well in excess of recent past and part of the grandfathered use. Mr. Malia stated it would rest largely on the photographs that have been submitted. Mr. Colbath asked public comment; there was none.

Mr. Bartolomeo made a motion, seconded by Ms. Duane, for a finding of fact that the display of fences and other materials fall under the Town definition of the a sign under §147.88. Motion unanimously carried.

Ms. Hale made a motion, seconded by Mr. Bartolomeo, to uphold Administrative Decision in regard to §147.13.1.6.10 of the Conway Zoning Ordinance regarding the fencing display is not permitted signage. Motion unanimously carried.

Mr. Colbath reviewed the appeal process.

OTHER BUSINESS

Barry and Ellanore Hill/US Cellular (PID 291-9/File #06-52) – Motion for Rehearing requested by Richard and Sara Mayo (File #06-61): Ms. Duane made a motion, seconded by Mr. Bartolomeo, that the Motion for Rehearing pursuant to §147.13.1 of the Conway Zoning Ordinance be denied as there was neither a technical error nor any new evidence provided. Motion carried with Ms. Hale and Mr. Kellogg abstaining from voting.

Meeting adjourned at 9:45 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant