

ZONING BOARD OF ADJUSTMENT

MINUTES

NOVEMBER 19, 2008

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, November 19, 2008 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; Jeana Hale-DeWitt; Sheila Duane; Alternate, Cynthia Briggs; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve. James Yeager, Code Compliance Officer, was in attendance.

PUBLIC HEARINGS

A public hearing was opened at 7:30 pm to consider an amendment to **CHAPTER A153.4.A** of the Zoning Board of Adjustment Procedures to change the meeting dates from the fourth Wednesday of the month to the third Wednesday of the month. Notice was published in the Conway Daily Sun. The public hearing was opened at 7:37 pm. Ms. Sherman asked for Board comment; there was none. Ms. Sherman asked for public comment; there was none. The public hearing was closed at 7:38 pm.

A public hearing was opened at 7:39 pm to consider a **SPECIAL EXCEPTION** requested by **ROUTE 112 REALTY, LLC** in regard to §147.14.1.2 of the Conway Zoning Ordinance to convert an ice cream shop to retail space at 175 Kancamagus Highway, Conway (PID 264-35). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, October 10, 2008. This was continued from October 22, 2008.

Mr. Irving stated that the applicant has withdrawn this application. **Mr. Colbath made a motion, seconded by Ms. Duane, to accept the withdrawal of the Special Exception requested by Route 112 Realty, LLC. Motion unanimously carried.**

A public hearing was opened at 7:40 pm to consider a **VARIANCE** requested by **RANDY AND THERESE DAVISON** in regard to §147.13.6.10 of the Conway Zoning Ordinance to allow a yard sale for more than six days at 96 East Main Street, Conway (PID 265-173). Notice was published in the Conway Daily Sun and certified notices were sent to abutters on Friday, October 10, 2008. This was continued from October 22, 2008.

Randy and Therese Davison appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Mr. Davison stated that this is an older neighborhood and each year on the fourth of July the neighborhood gathers at their property to hold a neighborhood yard sale to help supplement their income. Mr. Davison stated that the Town was concerned with the six day requirement, but they have eight neighbors that participate. Mr. Davison stated that they also have a home occupation for an antique and collectible shop.

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Ms. Davison stated rather than moving the yard sale 100 yards to the neighbor's property it would just make sense to keep it at our property. Mr. Davison stated that our property is well maintained and it is not a nuisance. Mr. Davison stated that the Town contacted the Police Department to see if they thought the yard sale was a hazard. Mr. Davison stated that the Police Department did inform them that the Town did contact them, which is good. Mr. Davison stated that it is a neat thing to do in the neighborhood.

Ms. Hale asked how many days does he hold the yard sale. Mr. Davison answered Friday, Saturday and Sunday and usually three or four weekends depending on the weather. Ms. Davison stated with the four immediate families they don't exceed six times four. Ms. Davison stated that they also don't count the days that it is set up in the yard and they are not open. Ms. Davison stated they set up the yard sale in the back yard a couple of days before opening. Ms. Duane asked if they have the yard sale material set up in their yard for approximately 6 weeks. Ms. Davison stated that it depends on the weather and they are looking to sell for more than six days.

Mr. Davison stated that he does not know when this section of the ordinance was adopted, but they have been there for 16 years. Mr. Chalmers asked if they had the yard sale for more than six days. Ms. Davison stated that they would like to sell for more than six days.

Mr. Yeager stated that because of the location, the congestion and little parking, the Town received a complaint a few years ago regarding pedestrians crossing the road and the lack of parking. Mr. Yeager stated that there is a significant safety issue. Mr. Yeager stated that his interpretation of the ordinance is that each property is allowed six days on their property. Mr. Yeager stated if the neighbors want to operate a yard sale it has to be on their own property and not on the Davison property. Mr. Yeager stated there are lot of yard sales in town that go beyond six days, but the town does not require a permit. Mr. Yeager stated that the Board needs to address what they can and cannot do.

Mr. Davison stated that he does not know how this ordinance came about, but our properties are neat and clean, and are heavily taxed. Mr. Davison stated that he is surprised that they had to go this route and he is not sure how many other people have had to go this route. Mr. Davison stated that he doesn't know if we are being singled out due to the location. Mr. Davison stated that this is a yard sale and the property today is well maintained. Ms. Briggs stated the six days came about as it was assumed that someone would have a yard sale for two weekends and then it would be gone; not to set up all summer long. Ms. Briggs stated that the idea was not to have continuous yard sales.

Ms. Davison stated that he just heard of the complaint from a couple of years ago and the concern for traffic safety. Ms. Davison stated that a complaint a couple of years ago is not an indicator that it is a public nuisance. Ms. Davison stated that there have not been any accidents. Ms. Davison stated that we have insurance on our home occupation. Mr. Chalmers asked if they had seen the letters from the Police Department. Mr. and Mrs. Davison answered in the negative. Mr. Chalmers stated that there are three sergeants in the police department that have concerns. Ms. Davison stated that she would like to see the ordinance equally enforced.

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Ms. Duane stated that the question is how they continue to sell items in their yard and have it done in a safe manner. Ms. Duane asked if they could create parking on another neighbor's yard. Mr. Chalmers stated the home occupation requires off-street parking. Mr. Irving stated that a home occupation also does not allow storage of materials outdoors. Mr. Irving stated that the applicant could have appealed for a variance to either allow their yard sale for more than six days or to allow for a more elaborate home occupation. Mr. Irving stated what is before the Board tonight is to allow more than six days.

Ms. Sherman asked for public comment; there was none. Mr. Davison stated that they would like to utilize their neighbor's six days. Mr. Irving stated that it would be difficult to monitor. Ms. Sherman asked for Board comment; there was none.

Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Duane, 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.** Ms. Sherman asked for Board comment; Mr. Colbath stated that the applicant already has a home business so they already have a reasonable use of the property. Ms. Sherman stated that the applicant is allowed six days already and the restriction is not unreasonable. **Motion defeated with Mr. Colbath, Mr. Chalmers and Ms. Sherman voting in the negative and Ms. Hale-DeWitt and Ms. Duane voting in the affirmative.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on this property.** Ms. Sherman asked for Board comment; Mr. Colbath stated that the ordinance restricts yard sales to six days and the same restriction applies to all properties. Mr. Chalmers stated that this restriction is applied to all properties not just this property. **Motion defeated with Ms. Hale-DeWitt, Mr. Colbath, Mr. Chalmers and Ms. Sherman voting in the negative and Ms. Duane voting in the affirmative.**

Ms. Sherman read item 1.c. **Mr. Colbath made a motion, seconded by Ms. Duane, that the variance would not injure the public or private property rights of others.** Ms. Sherman asked for Board comment; Mr. Colbath stated that the Town has received complaints. Mr. Chalmers stated that the Town has received documentation from the Conway Police Department that this is a concern. Ms. Sherman stated that there are public safety issues. **Motion unanimously defeated.**

Mr. Colbath made a motion, seconded by Ms. Duane, 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. Ms. Sherman asked for Board comment; there was none. **Motion defeated with Ms. Hale-DeWitt, Mr. Colbath, Mr. Chalmers and Ms. Sherman voting in the negative and Ms. Duane abstaining from voting.**

Ms. Sherman read item 2. **Mr. Colbath made a motion, seconded by Ms. Duane, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; there was none. **Motion unanimously carried.**

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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.** Ms. Sherman asked for Board comment; Ms. Hale-DeWitt stated that the ordinance clearly states no more than six days and this is what the ordinance is trying to prevent. **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 adversely affect the public interest.** Ms. Sherman asked for Board comment; Ms. Hale-DeWitt stated that the Town has received complaints. Mr. Chalmers stated to become part of the ordinance this had to have been an issue. Ms. Sherman stated that the public interest in this case is public safety. **Motion unanimously carried.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Duane, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; there was none. **Motion carried with Mr. Colbath, Ms. Duane, Mr. Chalmers and Ms. Sherman voting in the negative and Ms. Hale-DeWitt voting in the affirmative.**

Mr. Colbath made a motion, seconded by Ms. Duane, that, based on the forgoing findings of fact, the variance from §147.13.6.10 of the Town of Conway Zoning Ordinance to allow a yard sale for more than six days be granted. Motion unanimously defeated.

A public hearing was opened at 8:22 pm to consider a **VARIANCE** requested by **RAMONA M. L'HEUREUX** in regard to §147.13.1.5.1 of the Conway Zoning Ordinance to allow a 50-foot monopole for a wind turbine with a height of 58-feet at 198 Chapel Street, Conway (PID 216-84). Notice was published in the Conway Daily Sun and certified notices were sent to abutters on Thursday, November 7, 2008.

Ramona L'Heureux appeared before the Board. Ms. Sherman read the application and the applicable section of the ordinance. Ms. L'Heureux stated that she would like to request a variance for 57-feet instead of 58-feet. Ms. L'Heureux stated that there is a shorter pole that would meet the height restrictions, but she thought it was ugly so she is still requesting the variance for the additional two feet. Ms. L'Heureux stated that she does not believe the extra two feet would affect the view.

Chris Franchi of Green Alternative Energy stated that the system height is the tower height plus the blade. Ms. Duane asked if the Board required a balloon test for the first wind turbine application [File #07-34, PID 283-28]. Mr. Irving answered in the affirmative. Ms. Sherman stated that it was also 100-feet. Mr. Briggs stated that this is a little different then the first application as there was no one to see that wind turbine, but this is proposed at the foot of Cathedral Ledge.

Ms. L'Heureux stated that the variance is for two feet. Ms. Duane stated that the last application was not affecting their neighbors, but this is a denser neighborhood. Ms. Duane questioned whether or not this would diminish values for those with views of Cathedral Ledge. Ms. Sherman stated that it was not going to be visible. Ms. L'Heureux stated that it is probably only going to be visible to the abutters. Ms. Briggs stated that it would be visible looking down from Cathedral Ledge.

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Ms. Sherman asked for public comment; Gloria Hannon stated she would hope that Ms. L'Heureux might reconsider this as it is going on the back side of her home from which they would not be able to see it. Ms. Hannon stated that she has two sets of sliders and they would be able to see the wind turbine before they enter their home. Ms. Hannon stated that she hopes there would be some other less obtrusive way to go green. Ms. Hannon stated that a single wind turbine would require you to live to a ripe old age to regain your money.

Ms. Hannon stated that the view from Cathedral Ledge is pristine and would be a shame to see a wind turbine. Ms. Hannon stated that she feels as though this variance request is strategically timed so that it is during the week and most of the abutters had to come from Boston. Ms. Hannon stated the thought of seeing a wind turbine from the top of Cathedral Ledge just breaks her heart. Ms. Hannon stated disturbing this area is just a sin. Ms. Hannon stated that she is not against a wind turbine, but there is a time and place for everything and this is not the place.

Ms. Hannon stated that Ms. L'Heureux would not be bothered by the wind turbine as it is on the back of her property. Ms. Hannon stated that she did speak with an environmental attorney and believes she could file a nuisance suit, but she has a friendly relationship with Ms. L'Heureux and she doesn't want it destroyed; however, she still cannot let it go.

Mr. Irving stated any legal questions should be posed to your own attorney, but you do have the right to appeal to this Board and then if denied you would have the right to appeal to the courts. Mr. Colbath asked about the increased setback proposed by the State to take effect in 2009. Mr. Irving stated that it has no bearing at this time. Ms. Duane stated in regards to the first applicant to request a variance for a wind turbine, the Board spent a lot of time on the impact to the abutters and she would still like to see a balloon test. Ms. Duane stated that the first applicant also had 10-acres of land and Ms. L'Heureux only has a quarter of an acre lot.

Ms. Hale-DeWitt stated that we cannot stop her as all tonight is going to do is allow or disallow an additional two-feet in height. Ms. Hannon stated that she understands that and her hope is that Ms. L'Heureux would reconsider. Edward Gillis stated that he is against this and read a prepared statement [in the file]. John Gillis stated that his property has been a family home for about 30 years and he understands that it can be installed, but he would like to see it not installed. Mr. John Gillis stated that they are taxed for the ledge, the lots are small, and it doesn't seem it is going to fit with the neighborhood. Mr. John Gillis suggested going solar as this is not the right spot for a wind turbine.

Mr. Chalmers stated that there is no question that a 55-foot pole could go on this lot, two feet is two feet, but if this structure were to come down it is going to damage the property of one of the abutters. Ms. Duane stated that we asked this on the first application. Mr. Irving stated that it would meet the Town's setback requirements. Ms. L'Heureux stated that telephone poles are all over the place and could come down as well. Ms. Hannon stated so put it on the front of your lot. Ms. L'Heureux stated that it would not meet the setbacks in the front of the property. Mr. Franchi stated that the support system is over engineered.

Ms. Duane stated the neighborhood is really not in favor of the wind turbine all together and Ms. L'Heureux might want to reconsider. Ms. Duane stated that that is just her suggestion.

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Ms. Sherman read item 1.a. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.** Ms. Sherman asked for Board comment; Ms. Hale-DeWitt stated that there are no special conditions to this property. **Motion defeated with Ms. Hale-DeWitt, Ms. Duane, Mr. Chalmers and Ms. Sherman voting in the negative and Mr. Colbath voting in the affirmative.**

Ms. Sherman read item 1.b. **Mr. Colbath made a motion, seconded by Ms. Duane, that the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.** Ms. Sherman asked for Board comment; Ms. Hale-DeWitt stated that there are other options available. **Motion unanimously defeated.**

Mr. Colbath made a motion, seconded by Ms. Duane, 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. Ms. Sherman asked for Board comment; there was none. **Motion unanimously defeated.**

Ms. Sherman read item 2. **Ms. Duane made a motion, seconded by Ms. Hale-DeWitt, that there would not be a diminution in value of surrounding properties as a result of granting this variance.** Ms. Sherman asked for Board comment; Mr. Chalmers stated the abutters feel there would be a diminution in value of their properties. Mr. Colbath asked how much diminution could there be for two-feet. Mr. Chalmers stated that the abutters feel by granting this variance their property would be diminished. **Motion unanimously carried.**

Ms. Sherman read item 3. **Mr. Colbath made a motion, seconded by Ms. Duane, 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.** Ms. Sherman asked for Board comment; Mr. Colbath stated that the spirit of the ordinance is a 55-foot structure height and the additional two-feet are for aesthetics and that is not a practical reason to grant a variance. **Motion carried with Mr. Colbath voting in the negative and Ms. Hale-DeWitt, Ms. Duane, Mr. Chalmers and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 4. **Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that the granting of this variance will not be contrary the public interest.** Ms. Sherman asked for Board comment; Ms. Hale-DeWitt stated that we have heard from the public. Mr. Colbath stated that it would be contrary to the public interest. **Motion defeated with Ms. Hale-DeWitt, Mr. Colbath, Ms. Duane and Mr. Chalmers voting in the negative and Ms. Sherman voting in the affirmative.**

Ms. Sherman read item 5. **Mr. Colbath made a motion, seconded by Ms. Duane, that by granting this variance, substantial justice would be done.** Ms. Sherman asked for Board comment; Mr. Colbath stated that the public justice is greater here only in terms of the additional two feet; if the public does not want the wind turbine at all then they won't want the additional two feet. **Motion unanimously defeated.**

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Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, that, based on the forgoing findings of fact, the variance from §147.13.1.5.1 of the Town of Conway Zoning Ordinance to allow a 50-foot monopole for a wind turbine with a height of 57-feet be granted. Motion unanimously defeated.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Colbath made a motion, seconded by Ms. Hale-DeWitt, to approve the Minutes of October 22, 2008 as written. Motion unanimously carried.

OTHER BUSINESS

Application Fee: Mr. Irving stated that the current Zoning Board of Adjustment application fee of \$40 is well below what other towns are charging and would recommend increasing the fee. Mr. Colbath made a motion, seconded by Ms. Duane, to increase the Zoning Board of Adjustment fee to \$100. Motion unanimously carried.

Meeting adjourned at 9:30 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant