

ZONING BOARD OF ADJUSTMENT

MINUTES

SEPTEMBER 20, 2023

A meeting of the Conway Zoning Board of Adjustment was held on Wednesday, September 20, 2023, at the Conway Town Office, 23 Main Street, in Conway, NH, beginning at 7:00 pm. Those present were: Chair, John Colbath; Vice Chair, Andrew Chalmers; Jonathan Hebert; Alternate, Steven Steiner; Town Planner, Ryan O’Connor; Zoning Officer, Nick DeVito; and Planning Assistant, Holly Whitelaw. Deputy Town Manager, Paul DegliAngeli, was in attendance.

Mr. Colbath led the Pledge of Allegiance.

Mr. Colbath explained how alternates are used on the Board. Alternates are appointed randomly and in a fair manner to provide experience serving on the Board.

APPOINTMENT OF ALTERNATE MEMBER

Mr. Colbath appointed Mr. Steiner as a voting member.

PUBLIC HEARINGS

A public hearing was opened at 7:00 pm to consider a **VARIANCE** requested by **MOUNTAIN TOP MUSIC CENTER** [FILE #23-30] in regards to §190, Permitted Use Table of the Conway Zoning Ordinance **to allow a ground-mounted solar energy system within the Floodplain Conservation Overlay District** at 36 Main Street, Conway (PID 265-45). Notice was published in the Conway Daily Sun and certified notices were mailed on Friday, July 7, 2023. This hearing was continued from July 19, 2023, and August 16, 2023.

This application has been withdrawn.

A public hearing was opened at 7:05 pm to consider an **APPEAL FROM ADMINISTRATIVE DECISION** requested by **CONWAY POKER ROOM & CASINO, LLC** [FILE #23-40] in regards to §190, Permitted Use Table and §190-31, Definition of Commercial Amusement Facility of the Conway Zoning Ordinance **to appeal the administrative decision that a zoning permit for a restaurant/sports pub with indoor commercial amusements does not cover use as a casino/gambling facility** at 234 White Mountain Highway, Conway (PID 265-147). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, August 4, 2023. This hearing was continued from August 16, 2023.

Mr. Colbath explained that public comments have been closed for this public hearing and will not be reopened. This hearing was continued as there were legal concerns and some of the Board members wanted legal questions answered.

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Mr. Colbath explained that only four members of the Board were present. An affirmative vote of three Board members is necessary to carry the decision. He gave the applicant the option of continuing to October or moving forward. If the applicant is not satisfied with the decision, this cannot be used as a reason to appeal the decision. The applicant agreed to move forward.

Shawn Bergeron of Bergeron Technical Services asked for a point of order to be considered. He noted under RSA 673:14 that Mr. Colbath is a member of the Selectboard and that he should not be allowed to hear this matter, as it is a decision that was made by the Selectboard and he represents 20% of that decision. Mr. Colbath consulted counsel and Town Planner O'Connor, who agreed it was not a decision made by the Selectmen. It was made by an individual filling in as the Town Planner. Although staff members technically report to the Selectmen, it was not a Selectmen's decision. It was a Planning decision.

Town Counsel Jason Dennis explained that the interim Planner was acting as the agent, so there was not a Selectboard meeting where a vote occurred. Mr. Colbath did not substantively participate in this decision.

Mr. Bergeron reiterated his concern.

Mr. Dennis said Mr. Bergeron is correct in referencing the juror standard.

Mr. Colbath said he was comfortable not recusing himself and that nothing related to this decision hearing came before the Board of Selectmen.

Mr. Bergeron reiterated his concern.

Mr. Chalmers made a motion, seconded by Mr. Steiner, that the Board be polled as to whether Mr. Colbath should recuse himself. Mr. Colbath asked for Board comment; there was none. **Motion was defeated 3-0-1, with Mr. Colbath abstaining.**

John Cronin of Cronin Bisson & Zalinsky and Dick Anagnost appeared before the Board. Stefan Huba was in attendance. Mr. Cronin stated that the applicant is prepared to go forward with a short Board and knows that this cannot be raised as an issue in any request for reconsideration of appeal.

Mr. Colbath read the application and the applicable section of the ordinance.

Mr. Cronin noted in their submittal, they included requests for finding. He said there has been discussion regarding the title of his operation. It is a small building and a small use, consistent with other charitable gaming facilities throughout the state. He said the legislature has stated charitable gaming is good for New Hampshire, as the revenues go to charities in part and to fund the school system.

He reviewed the history of the building and stated that historically, there has been no requirement for a zoning permit or a site plan review for the change of tenants when there has been no addition or improvement to the building. He said the application clearly depicts what this use is for. He addressed the question of whether the first permit was allowed to lapse, saying the zoning

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ordinance didn't change before the second permit was applied for. These applications were reviewed by Town staff and determined it was an allowed use. He stated they applied for a zoning permit as a bar and restaurant. He acknowledged there is concern in the community regarding the morality of this use.

Mr. Paul DegliAngeli asked for a point of order. He said the issue is a challenge of the staff's decision. He explained the zoning permit applied for was for a restaurant and indoor amusement. He noted the information being presented is a repeat from the last meeting and is not germane to the issue before the Board.

Mr. Dennis said from a legal perspective, this Board is not empowered to make a decision based on the equitable principle, as this is a municipal estoppel argument.

Mr. Cronin respectfully disagreed, saying if the Board determines an administrative official made a mistake, they can reverse the decision. He continued addressing the morality issue, saying the community already has this type of use, such as fraternal clubs.

Mr. DegliAngeli asked for a point of order, noting that this is not the question before the Board. The applicant appealed an administrative decision of the zoning permit. The decision is whether the Town's ordinance, which clearly addresses indoor amusement, covers the intended use. Staff said it does not. The applicant could have withdrawn and reapplied for a restaurant and charitable gaming permit, but they did not. The issue is whether staff was in error that indoor amusement does not cover the intended use.

Mr. Cronin said if this is not relevant, someone should have spoken up during the first part of the hearing, when the morality issues were debated in great detail. He asked the Board to direct him as to what they wanted to hear and he would respond.

Mr. Colbath asked for a compromise. He said he did not want to revisit what had already been said, so any new or pertinent information would be welcome.

Mr. Cronin noted charitable gaming is allowed under indoor amusement in many communities, without an additional permit. He noted charitable gaming does not have a home rule option, so it cannot be voted out. The legislature permits this activity. He said the law and permitting should not change based on who reviews the file, especially when the ordinance has not changed. He reiterated that this use was permitted by two individuals on the Town staff. He read the Town's definition of commercial amusement facility and stated the proposed use fits within this definition. He referred to an ad hoc committee studying the ordinances and said this committee has proposed to add an exception for charitable gaming, as this definition allows it.

He stated the applicant believes what is being proposed is allowed by the ordinance and the Board has the right to weigh in on the estoppel. He said based on the evidence that was presented before, the Board's review of the submitted materials, and the Town ordinance, the Board should overturn the decision made by the third administrative official and find that the first two administrative officials were correct in their analysis.

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Mr. Colbath invited comment from members of the Board.

Mr. Hebert asked who A.W. Rose Realty is. Mr. Anagnost replied it is one of his companies and was a partial owner in the original partnership that purchased the shopping mall. Art Rose is a portion of A.W. Rose Construction, who is the contractor on the site. Mr. Hebert asked if A.W. Realty sold to Conway Poker Room and Casino. Mr. Anagnost said Art Rose, his construction partner, sold his interest to him. Mr. Hebert asked who John Anzulous (ph) was and Mr. Anagnost said Mr. Anzulous (ph) was partners with A.W. Rose and sold his interest to him as well. Mr. Hebert noted Mr. Anagnost has been involved as an owner through all three zoning permits.

Mr. O'Connor said the commercial amusement definition was created in the mid '90s prior to charitable gaming to address arcades. An ad hoc committee was created by the Planning Board to study the definitions and the ordinance. It has come to the Town's attention that charitable gaming may need to be addressed in the ordinance. There is confusion as to how it is defined. They want to be very clear for future applicants where charitable gaming is permitted, what definition it fits under, and that it is not a commercial amusement. The Town does not feel that charitable gaming fits within the commercial amusement definition.

He said the charitable organizations that operate in the Town are bona fide charitable organizations that are holding events purely for a charitable purpose and would be seen as a special event permit. They are not commercial establishments similar to a charitable gaming facility operating in this manner.

Mr. Colbath asked Mr. O'Connor to explain the charitable gaming application. Mr. O'Connor said it would be used if a charitable organization wanted to hold a special event that might have games of chance as part of it.

Mr. Hebert asked if a local organization could host a charitable gaming event. Mr. O'Connor said it would have to be a bona fide 501(c)(3) charitable organization. Mr. Herbert clarified that the position of the Town is that if this is a charitable gaming facility, this is where the line is drawn, because it is not a permitted use under zoning and it does not fall under amusements by definition. Mr. O'Connor said the RSA sees these as separate uses. Mr. Hebert asked Mr. Dennis for clarification of the issue before the Board.

Mr. Dennis said the Board has to decide if there is a difference between an organization having a Monte Carlo night to raise money versus a facility with a dedicated gaming floor. Charitable gaming is legal in New Hampshire, but there is not a local option. The question becomes, is a charitable gaming facility, as has been applied for, currently permitted under the zoning ordinance – in particular, charitable amusement.

Mr. Colbath clarified the number of requests for finding. Mr. Dennis said something needs to be on the record indicating the basis for the Board's ultimate decision. Mr. Colbath clarified that issues relating to the municipal estoppel did not need to be addressed by the Board, but would be addressed at a higher court level. Mr. Dennis said this was his opinion; however, Mr. Cronin disagreed.

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Mr. Colbath asked Mr. Cronin if he expected the Board to address all 67 findings in the appeal from administration decision and Mr. Cronin said yes. However, it was determined that there were only 51 findings.

Mr. Cronin said all charities that would participate are licensed by the state. He showed a picture of a pull tab machine at the Conway American Legion Hall and noted these are available throughout the year, not during a special event. He asked how these are approved and what zoning permit they have to operate more than on special occasions. Mr. O'Connor responded that this is based on the license that the state requires for charitable gaming facility, which is different than a bona fide charitable organization operating these types of games.

Mr. Colbath said some of these organizations are for members only, so he is unfamiliar with what occurs in these facilities, as he is not a member. The applicant, Mr. Huba, said he was notified that there are charitable gaming pull-tab machines at two locations in Conway that run on an annual basis. He visited one of the facilities as a member of the public, was signed in as a guest of a member, and participated in the charitable gaming. He said they are issued an annual license that runs throughout the year.

Mr. O'Connor reminded the Board they are considering this use in this proposed facility, and not uses in other locations that the Town might be unfamiliar with.

The Board reviewed the requests for findings.

Mr. Chalmers made a motion, seconded by Mr. Hebert, that the applicant is the owner of the property. Mr. Colbath asked for Board comment; there was none. **Motion carried 4-0-0.**

Mr. Chalmers made a motion, seconded by Mr. Hebert, that at the time of purchase, 12/12/22, the Property was approved as a commercial, retail strip center. Mr. Colbath asked for Board comment. Mr. Hebert said he does not know when the purchase and sales agreement on this took place. Per the Town record, it became Conway Poker Room & Casino, LLC, on 12/12/22. **Motion carried 4-0-0.**

Mr. Chalmers made a motion, seconded by Mr. Hebert, that the strip center was approved prior to March 26, 2021. Mr. Colbath asked for Board comment. Mr. O'Connor said it was constructed in 1982. **Motion carried 4-0-0.**

Mr. Hebert made a motion, seconded by Mr. Chalmers, that nothing was presented through the hearing to substantiate number 4, so it is not applicable. Mr. Colbath asked for Board comment; there was none. **Motion carried 4-0-0.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that the applicant submitted an application for a building permit in 2021. Mr. Colbath asked for Board comment. The Board noted Mr. Anagnost testified that he was part of the permitting process as a partial or full owner. **Motion carried 4-0-0.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that the then building official undertook a zoning review upon receipt of the application. Mr. Colbath asked for Board comment. Mr. Hebert said he has no information on how this was decided. Mr. Colbath agreed the people allegedly involved are no longer employed by the Town. Mr. Chalmers said he had no way of knowing if a zoning review occurred. **Motion failed 1-3-0.**

Mr. Dennis said the applicant would not require a motion be made for each item. Rather, the Board could poll yes or no, and then make a motion at the end to adopt the findings that were done through the poll.

Mr. Cronin said it was not necessary to make a motion on every finding. He agreed the Board could deliberate and tally the results. At the end, a motion could be made to make the finding.

6. **The then building official undertook a zoning review upon receipt of the application.** N/A
7. **The applicant paid an application fee.** YES
8. **Conway accepted the payment of the application fee.** YES
9. **The application identified the use as a restaurant and bar with charitable gaming.** Mr. Hebert noted the first permit was for a sports bar with charitable gaming; it did not mention a restaurant. This correction was made. YES
10. **Conway issued the building permit on March 26, 2021.** YES
11. **Conway confirmed in a written e-mail "charitable gaming" is a permitted use.** YES
12. **The applicant met with the Board of Selectmen on at least two occasions to discuss the proposed use of the property, including the charitable gaming opportunities.** The Board had no knowledge of this. N/A
13. **The applicant requested the Board of Selectman consider placing opportunities for Keno and Sports Book on the warrant for the consideration at the annual meeting.** The Board had no knowledge of this. N/A
14. **Keno and Sports Betting were placed on the 2022 Town Warrant.** YES
15. **The votes did not support Keno and Sports Betting.** YES
16. **Keno and Sports Betting are permitted by local option.** YES
17. **Charitable gaming is permitted by state law and there is no local option.** YES
18. **The applicant proceeded to commence construction upon receipt of the building permit.**
YES

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19. **It was reasonable for the applicant to rely on a properly issued building permit.** The Board agreed whether “it was reasonable” is subjective. YES
20. **Hundreds of thousands of dollars were expended in construction between the issuance of the building permit and the present day.** Mr. Colbath noted it was testified that well above \$500,000 was spent. YES
21. **Work was suspended during the construction.** YES
22. **The applicant desired to resume construction.** YES
23. **The then building official advised that the original permit lapsed and a new permit was required.** Mr. Hebert said he did not know who did what, as no testimony on this was presented. YES
24. **The then building official advised that the new permit was routine and not an issue.** The Board agreed there is no evidence that this conversation took place. N/A
25. **The applicant filed a second application for a building permit which specifies the proposed use as "Sports Pub with Charitable Gaming."** YES
26. **The applicant paid an application fee.** YES
27. **Conway accepted the application fee.** YES
28. **The then building official reviewed the application and issued the permit on January 9, 2023, which specifies that the permit authorized renovation to a sports pub with gaming.** YES
29. **Construction work resumed.** YES
30. **Thereafter, Conway revoked or otherwise rescinded the building permit.** YES
31. **Construction was stopped.** YES
32. **Planning Board Member Hounsell circulated a letter claiming the proposed use required a zoning permit or planning board review.** The applicant attached a copy of this letter to his documentation. YES
33. **The applicant agreed to attend a Planning Board meeting to discuss the developments with a reservation of rights.** Mr. Colbath said he does not believe the ZBA has the capacity to rule on reservation of rights. N/A
34. **The Planning Board conducted a meeting on April 13, 2023.** YES

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35. **The applicant attended the meeting and, in the spirit of co-operation, agreed to file an application for a zoning permit with a reservation of rights.** Mr. Colbath said he does not believe the ZBA has the capacity to rule on reservation of rights. N/A
36. **During the meeting, Member Hounsell identified the use as a casino rather than a restaurant and bar offering charitable gaming.** The Board does not know what Mr. Hounsell testified to. N/A
37. **"Casino" gaming without limits (MGM, Foxwoods) is not a type of gaming permitted in New Hampshire.** YES
38. **In New Hampshire, only charitable gaming is permitted subject to a licensure and regulatory oversight by the NH Lottery Commission.** The Board agreed this is not applicable to this hearing. YES
39. **Member Hounsell expressed concern that Conway did not get a portion of the revenue generated by charitable gaming.** N/A
40. **The applicant filed the application for a zoning permit on or near May 26, 2023.** YES
41. **On May 31, 2023, Planning Director Jamal Torres left the employ of Conway.** YES
42. **The applicant requested that the Board of Selectman review the application rather than delegate authority to a third party.** N/A
43. **The Board of Selectman delegated the authority to review the zoning permit application to Paul DegliAngeli, the acting Planning Officer.** YES
44. **Deputy Town Manager DegliAngeli, acting as Agent of the Board of Selectman, denied the zoning permit by letter of June 13, 2013.** Mr. Hebert said he approved the restaurant and sports bar component, but added a clarification that it did not fall under commercial amusement. NO
45. **Deputy Town Manager DegliAngeli determined the proposed use was not allowed anywhere in Conway.** Mr. Hebert said this was not stated in the zoning denial. The Board did not recall hearing this in the testimony. NO
46. **The decision contradicted two prior decisions of the building official.** The Board agreed the third application was different than the first two. NO
47. **The applicant filed an administrative appeal on or near July 10, 2023.** YES
48. **The Conway Planning Board discussed zoning amendments to prohibit the proposed use at a meeting on July 13, 2023.** N/A

49. **Planning Board members met or otherwise communicated prior to the meeting about preventing the proposed use.** Mr. Steiner said a Town citizen approached him and stated that there was a secret meeting. Mr. O'Connor said the Planning Board did form the ad hoc committee to review the definitions, but this was a public meeting. The Board agreed no information came to the Board about this. N/A

50. **In his editorial "Call to the Masses," Mr. Hounsell concedes that the New Hampshire legislature permits charitable gaming in the state of New Hampshire.** Most of the Board members agreed they did not read the editorial. N/A

51. **Unlike Keno and other games, towns do not have authority via "local option" to prohibit charitable gaming.** YES

Mr. Colbath asked for a point of order as to whether a motion to enter into the minutes the results of the discussion was appropriate.

Mr. Chalmers made a motion, seconded by Mr. Steiner, that the request for findings that the Board reviewed be approved as part of the meeting minutes. Mr. Colbath asked for Board comment; there was none. **Motion carried 4-0-0.**

Mr. Colbath asked for Board comment.

Mr. Hebert said he has been in the industry a long time, growing up in the hospitality and food and beverage industry. He has also been in charitable groups and on their Boards of Directors. He has been involved in business management of a hotel and met with experts on how to promote businesses. He is drawing on his personal knowledge during the course of this discussion.

Mr. Chalmers asked the Board to entertain a motion, seconded by Mr. Steiner, to uphold the administrative decision in relation to this application of June 13, 2023. Mr. Colbath asked for Board comment; there was none. **Motion passed, with Mr. Steiner voting in the negative.**

Mr. Colbath noted the Board upheld the administrative decision. The applicant has the right, within 30 days, to ask for a re-hearing. The re-hearing is based on if there has been a technical error made or there is other information available that wasn't available at the time of the first two hearings.

A public hearing was opened at 8:33 pm to consider a **VARIANCE** requested by **VICKI MCDONALD AND RONALD COLLINS** [FILE #23-41] in regards to §190-13.J.(3) of the Conway Zoning Ordinance **to allow multiple travel trailers to be used as residential dwelling units** at 234 Transvale Road, North Conway (PID 251-120). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 8, 2023.

Vicki McDonald appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance.

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Ms. McDonald read a letter [in file] she sent to Town counsel.

Mr. Colbath explained that only four members of the Board were present. An affirmative vote of three Board members is necessary to carry the decision. He gave the applicant the option of continuing to October or moving forward. If the applicant is not satisfied with the decision, this cannot be used as a reason to appeal the decision. The applicant decided to move forward.

Ms. McDonald said she and Ronald Collins are applying for use of space for storage and residential units. They now have one trailer on each lot, so they are in compliance. She shared information regarding the property abutters. She stated there are no rear setbacks, which is a hardship. She said they require roommates as they are on or at the poverty level. She said they have sold and moved trailers to be in compliance.

Mr. Colbath noted there are specific criteria for a variance based on the applicant's lot and use. He said sharing information on the abutters confused the issue. Ms. McDonald said she was advised to focus on her hardship. Mr. Colbath clarified that the hardship is inherent in the land, not financial personal hardship.

Ms. McDonald said her hardship is that their trailer is small and it has been housing three people for 15 years. In regard to hardship of the land, she said there is not much there to make the bills. Mr. Colbath clarified the definition of hardship in relation to the land.

Mr. Hebert asked if it would be helpful if the applicant meet with someone to help her with the application. She said it would not be, as she believes the Town of Conway is more interested in taking her land than helping her continue to live in the flood plain. Mr. Hebert clarified no one was trying to take her land. He said she needed to present evidence to support her request.

Ms. McDonald asked how she is creating a health issue by living in her camper, when others in town are living in their campers and creating no issues.

Mr. Colbath asked to hear from the Town regarding this issue. Mr. O'Connor offered to sit down with the applicant and review the application so that she understands the criteria. He said Zoning Officer Nicholas DeVito visited the property and found seven trailers and two sheds. He is unaware of which trailers were moved and what the current condition of the property is. If there is only one trailer per lot, the variance would not be needed.

Mr. DeVito has identified other violations in the area that he is pursuing. There are several zoning concerns to address with this property. There are health regulations that need to be followed with the campground, no permitted structures are permitted, and no residential use of more than 180 days is permitted. The overall campsite is an existing non-conforming use as a commercial campground in the residential agricultural zone and in the flood plain.

Mr. Colbath asked if the campground was eligible to be grandfathered. Ms. McDonald said they have been there for 20 years. Mr. O'Connor said the flood plain overlay district was established in 1979. So, the uses would need to be prior to that date to be grandfathered. The majority of the campground is in the flood plain.

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Mr. DeVito reviewed the situation. The Town was notified of a potential violation in July. He found seven trailers and two sheds on the property. Ms. McDonald was served with a cease and desist letter. She said she uses these trailers to supplement her rent and living situation. In the RA zone, only one camper is allowed per lot as an accessory use, not to be lived in. The campground is in the flood way, so is inherently dangerous to the public. Ms. McDonald felt this was the best course of action, to keep these campers on her property to supplement her rent. He said there are eight open cases currently, with more to be opened in the next few weeks. Ms. McDonald would like to have those campers to supplement her living situation.

Mr. Hebert noted she is in compliance now, with only one camper on each lot, and asked if she still wanted to request a variance to have more campers on the lot. She said she did not. Mr. Colbath explained she could withdraw the application and she agreed. He informed her the Town will continue to observe the property to ensure it is in compliance. If the property is not in compliance, she will be cited again.

Mr. Chalmers suggested continuing the request pending the zoning officer's review of the property, in case a variance is still needed. If she has to reapply, it will involve an additional cost. Ms. McDonald agreed.

Mr. Hebert made a motion, seconded by Mr. Chalmers, to continue the public hearing to October 18th at 7:00 p.m. Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

A public hearing was opened at 9:05 pm to consider a **VARIANCE** requested by **MCDONALD'S CORPORATION/MCDONALD'S USA, LLC** [FILE #23-42] in regards to §190-20.F.(10)(a) of the Conway Zoning Ordinance **to allow a second 10 square foot digital pre-browse board within the secondary drive-thru lane** at 1750 White Mountain Highway, North Conway (PID 235-11). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 8, 2023.

Mr. Colbath explained that only four members of the Board were present. An affirmative vote of three Board members is necessary to carry the decision. He gave the applicant the option of continuing to October or moving forward. If the applicant is not satisfied with the decision, this cannot be used as a reason to appeal the decision. The applicant decided to move forward with the request.

Mr. Colbath read the application and the applicable section of the ordinance.

Jim Cranston of Bohler Engineering appeared before the Board representing McDonald's. He explained they are requesting a variance as part of the remodel and site improvements that have been approved by the Planning Board. He presented a brief overview and history of the project.

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Final site plan approval was given in August 2023; however, sign permits were denied for both the digital pre-browse and the digital menu board. Variances were sought for the existing boards in 2019; this application is similar. They are proposing installing the same signs that are onsite today.

He reviewed the proposed plan. Changes have been made to the plan per Staff recommendations. The signs will not be visible from the street or abutting properties.

Mr. Cranston reviewed the criteria:

1. The variance will not be contrary to the public interest. The additional drive-thru lane will address stacking concerns onto the public highway. Providing these additional features will address safety concerns.
2. The spirit of the ordinance is observed. The ordinance does not specifically address menu boards, but it does address signs attracting attention. These signs are not visible from the public right-of-way or abutters, so the ordinance is observed. There are no detrimental impacts to neighboring properties.
3. Substantial justice is done due to the non-offensive nature of and location of the signs.
4. The value of surrounding properties is not negatively impacted, as they are improving the site access and eliminating queueing into the street, which will improve safety. The signs not being visible from abutting properties also contributes to the value.
5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Without these variances, the drive-thru would be slower and stacking could extend further into the street. So, this would provide a more efficient drive-thru, reduce wait times, and improve safety and traffic circulation.

Mr. Hebert asked what was unique about this property that would distinguish it from other properties in the area that would qualify it for the variance. Mr. Cranston said this property is a commodity and people want to be there. The Board noted the business is the commodity, not the property.

Mr. O'Connor noted that this is a unique layout and the stacking is a safety concern. So, allowing the second travel lane, for which these boards are required, was an important part of the site plan review.

Mr. Cranston referenced the prior variance, which said the majority of the business is drive-thru. The menu boards provide a more efficient operation and a better customer experience. He said zoning does not specifically address menu boards. It is reasonable to improve the efficiency of the site for the public.

Mr. Colbath asked if there is an alternative, if the variances are not granted. Mr. Cranston said there would only be a single drive-thru lane using the existing boards, which would result in a slower process. Another option is to not seek the pre-browse sign and only use the second menu board.

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Mr. Colbath asked for Town input. Mr. O'Connor said the ordinance is gray on menu boards for drive-thrus. The variance would be consistent with what is currently on the property.

Mr. Colbath asked for Board comment. Mr. Hebert clarified the ability to only have three signs instead of four. Mr. Cranston said the better project is to have four signs, which allows customers to make a decision faster. Removing the pre-browse sign will slow down the process and increase the queueing.

Mr. Colbath asked for public comment; there was none.

Mr. Colbath asked the staff if digital signs for safety have been addressed yet. Mr. O'Connor said this specific issue has not been addressed. Mr. Colbath supports a safety hardship for this project, especially where the proposed signs will not face the highway or the frontage. Mr. O'Connor said the signs would be allowed without a variance, if they were not internally lit.

Mr. Colbath closed the public hearing.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that substantial justice is done.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Mr. Colbath asked for Board comment; Mr. Hebert did not believe there was any testimony that made the hardship inherent in the land that wasn't reasonable. **Motion carried, with Mr. Hebert voting in the negative.**

Mr. Colbath read item 5.a.ii. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the proposed use is a reasonable use.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that based on i and ii above literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Mr.

Colbath asked for Board comment; there was none. **Motion carried, with Mr. Hebert voting in the negative.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 5.b. is not necessary for this application. Motion carried unanimously.

Mr. Chalmers made a motion, seconded by Mr. Steiner, that, based on the forgoing findings of fact, the variance from §190-20.F(10)(a) of the Town of Conway Zoning Ordinance to allow a second 10 square foot digital pre-browse board within the secondary drive-thru lane be granted. Motion carried unanimously.

A public hearing was opened at 9:35 pm to consider a **VARIANCE** requested by **MCDONALD’S CORPORATION/MCDONALD’S USA, LLC** [FILE #23-43] in regards to §190-20.F.(10)(a) of the Conway Zoning Ordinance **to allow a second 20 square foot digital menu board within the secondary drive-thru lane** at 1750 White Mountain Highway, North Conway (PID 235-11). Notice was published in the Conway Daily Sun and certified notices were mailed to abutters on Friday, September 8, 2023.

Jim Cranston of Bohler Engineering appeared before the Board. Mr. Colbath read the application and the applicable section of the ordinance. The discussion of the request was combined with the prior request.

Mr. Colbath read item 1. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the variance will not be contrary to the public interest.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 2. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the spirit of the ordinance is observed.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 3. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that substantial justice is done.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 4. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the values of surrounding properties are not diminished.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Colbath read item 5.a.i. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.** Mr. Colbath asked for Board comment; there was none. **Motion carried, with Mr. Hebert voting in the negative.**

Mr. Colbath read item 5.a.ii. **Mr. Chalmers made a motion, seconded by Mr. Steiner, that the proposed use is a reasonable use.** Mr. Colbath asked for Board comment; there was none. **Motion carried unanimously.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that based on i and ii above, literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Mr. Colbath asked for Board comment; there was none. **Motion carried, with Mr. Hebert voting in the negative.**

Mr. Chalmers made a motion, seconded by Mr. Steiner, that item 5.b. is not necessary for this application. Motion carried unanimously.

Mr. Chalmers made a motion, seconded by Mr. Steiner, that based on the forgoing findings of fact, the variance from §190-20.F(10)(a) of the Town of Conway Zoning Ordinance to allow a second 20 square foot digital menu board within the secondary drive-thru lane be granted. Motion carried unanimously.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Hebert made a motion, seconded by Mr. Chalmers, to approve the Minutes of August 16, 2023, as written. Motion carried unanimously.

Mr. Hebert thanked the staff for helping with his earlier questions. He expressed his appreciation for their helping community members when they need it.

Mr. Hebert made a motion, seconded by Mr. Chalmers, to adjourn. Motion carried unanimously.

Meeting adjourned at 9:40 pm.

Respectfully submitted,

Beth Hanggeli
Recording Secretary