

APPROVED

**TOWN OF LINCOLN, NH
PLANNING BOARD MEETING**

Wednesday, June 23, 2021 – 6:00 PM

Planning Board Public Meeting

Lincoln Town Hall, 148 Main Street, Lincoln NH

This meeting will be a hybrid meeting – available to attend in person and available via the Zoom Meeting Platform to allow for town wide participation. The public is encouraged to participate remotely using ZOOM by going to:

Join Zoom Meeting

<https://us02web.zoom.us/j/82404994003?pwd=TDRHdVpxcUNJc1RHTVZmekFvU0hFQT09>

Meeting ID: 824 0499 4003

Passcode: 222818 Or dial by your location 1-929-205-6099 US (New York)

(See also town website www.lincolnnh.org for the same link, meeting ID and passcode.)

I. CALL TO ORDER by the Chairman of Planning Board Jim Spanos

Present: Paul Beaudin, O.J. Robinson, Stephen Noseworthy, Alternate Mark Ehrman
(attending remotely via Zoom)

Excused: Vice Chairman Joe Chenard

Staff Present: Planner Carole Bont, Fire Chief/Code Enforcement Officer/Health
Officer/Zoom Host and Moderator Ronald Beard

Town Consultants Present: Attorney Peter Malia, Town Engineer Ray Korber
(attending remotely via Zoom)

Guests: Selectman Jack Daly,

II. CONSIDERATION of meeting minutes from:

- May 12, 2021

MOTION TO ACCEPT by member Beaudin

2nd O.J. Robinson

Three “yes” and one “abstention”

Motion Carries

- May 26, 2021

MOTION TO ACCEPT with changes Chairman Spanos

2nd Paul Beaudin

All in favor

Motion Carries

III. CONTINUING AND OTHER BUSINESS (Staff and Planning Board

Member/Alternates).

None

IV. NEW BUSINESS

A. Water & Sewer Capacity in the Town of Lincoln – Town Engineer Ray Korber

B. Impact Fees and Exaction Fees – Attorney Peter Malia & Town Engineer Ray Korber

Presentation

Planner Bont introduced Engineer Ray Korber and Attorney Peter Malia as they were invited by the Planning Board to help them understand how impact fees and or exaction fees work and how they could help find some of the infrastructure improvements necessitated by developments. She gave the Planning Board some background information starting from back in 2004.

In 2004 the Town of Lincoln adopted the Impact Fee Ordinance that is part of the Land Use Plan Ordinance (zoning ordinance). In 2008 the Planning Board came up with an estimated water impact fees that we refer to as “betterment impact fees” or “bedroom impact fees” that the Town charges \$500.00 per bedroom. According to John Hettinger, who used to be on the Planning Board, there is a spreadsheet that was created in 2008 to determine the future facility and dollar requirements based on what were determined at the time to be the numbers representative of the number of units built out by each of the respective developers at that time. No sewer estimates were done at that time.

From about December of 2007 to June of 2009 the housing market experienced a slump. In 2013 Mr. Hettinger said the impact fees should be updated especially based on the proposed additions to the following developments: InnSeasons Resort at South Mountain, Forest Ridge Resort, South Peak Resort, Village Center Hotel (assumed to be part of the Loon Village), and RiverWalk Resort at Loon Mountain.

Currently, Lincoln has Water and Sewer Tap Fees which are really one-time connection fees as well as Bedroom Impact Fees based on the number of bedrooms. The Bedroom Impact Fee is \$500.00 per bedroom. Applicants are given a form to fill out indicating the number of bedrooms that will be created in the building. Then the applicants pay both those fees once, upfront, when they apply for a Land Use Authorization Permit prior to constructing the bedroom or adding the fixtures that use water and sewer services.

Town Attorney Peter Malia will discuss how these impact fee and exaction fees work and how they differ and talk about how these are a carryover from prior decisions made by the planning board. Attorney Peter Malia earlier had forwarded an article was given to all titled “Demystifying Impact Fees” by Christine Fillmore who worked for the New Hampshire Municipal Association.

The Town Engineer, Ray Korber will provide an update regarding the status of our water and sewer infrastructure. A memorandum with the update was given to members, written by Town Engineer Korber dated May 24, 2021.

Right To Know Law RSA 91-A:3

Town Attorney Malia will address earlier question by the board for members who attending meeting remotely.

Right to Know Law 91-A:2, Subsection 3: A public body may allow remote participation if in-person attendance is not reasonably practical. Several other requirements apply; each part of the

meeting must be audible otherwise discernible to the public at the location of the meeting. Any member participating remotely must identify the person's present in the location from which the member is participating and all votes must be by roll call.

Impact Fees

Presentation by Attorney Peter Malia

Impact Fees Ordinance Statute – RSA 674:21, V.

Town Attorney Malia expressed the Impact Fees Ordinance is a lengthy statute and read through only the highlights.

Impact Fee is an assessment imposed upon development including subdivision, building construction, or other land use change, in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities owned or operated by the municipality.

The Planning Board can consider which capital facilities owned or operated by the municipality should be assessed an impact fee. The list is as follows:

- Water Treatment and Distribution Facilities;
- Wastewater and Disposal Facilities;
- Sanitary Sewers;
- Storm Water, Drainage and Flood Control Facilities;
- Municipal Road Systems and Rights of Way;
- Municipal Office Facilities;
- Public School Facilities;
- The municipalities' share of capital facilities of a cooperative school district;
- Public Safety Facilities;
- Solid waste collection, Transfer, Recycling, Processing and Disposal Facilities;
- Public Library; and
- Public Recreational Facilities not including public open space.

The amount of any impact fee shall be a proportional share of Municipal Capital Improvement costs (CIP) which is reasonably related to the capital needs created by the development.

The Planning Board must determine what needs are actually created by the development. The statute says that upgrading of existing facilities and infrastructure the need for which is not created by new development shall not be paid for by impact fees. In short, if upgrades are needed for any of those categories of capital facilities that were previously mentioned above and those upgrades are not at all necessitated by the new development you cannot impose an impact fee on that new development.

Any impact fees shall be accounted for separately, shall be segregated from the municipalities' general fund, may be spent upon order of the municipal governing body and shall be used solely for the CIP for which it was collected.

All impact fees imposed shall be assessed at the time of Planning Board approval of a subdivision plot or site plan. The impact fee shall be intended to reflect the effect of development upon municipal facilities at the time of the issuance of the building permit.

The fees shall be collected at the time of a certificate of occupancy. If no certificate of occupancy is issued, impact fees shall be collected when the development is ready for its intended use.

Finally, impact fees cannot be held indefinitely, they have to be refunded with any accrued interest within the amount of time established by the planning board. Town Attorney Malia believes the Lincoln Impact Fee Ordinance is for a period of six (6) years. Monies accrued through collection of Impact Fees have to be expended within a period of six (6) years.

Exactions Versus Impact Fees:

Aside from the Impact Fee Ordinance, the Planning Board can also require from the developer an exaction for the cost of offsite improvement needs to be necessary for the occupancy of any portion of the development.

An offsite exaction fee means an improvement that is necessitated by a development which is located outside the boundaries of the property that is subject to the planning board's review. This is more limited; an offsite exaction is limited to highway, drainage, or sewer and water upgrades pertinent to the development. It is a one-time assessment against the developer any offsite improvement that is necessitated by the development. It does not go into a fund and is not held for a period of six (6) years. For example: a one-time "we need to fix this road which provides access to this hotel, etc.". This is different from the impact fee.

Impact Fees

Within sixty (60) days of the end of the fiscal year any municipality having adopted an impact fee ordinance shall prepare a report listing all expenditures of impact fee revenue for the prior fiscal year, identifying the Capital Improvement Plan (CIP) for which the fees were assessed and stating the dates upon which the fees were assessed and collected.

The Town of Lincoln passed a warrant article in 2004 at the annual Town Meeting to adopt an Impact Fee Ordinance which is a two (2) page Impact Fee Ordinance which is part of the Land Use Plan Ordinance. (See Article VI, Section G.)

Town Attorney Malia, Town Engineer Korber and Planner Bont have been working together and received from the Town Finance Director Johnna Hart, the Town's Annual Report listing all Impact Fees being held by the Town. Attorney Malia believes all of the impact fees that are being held by the Town are for the Bedroom Impact Fee to cover the water treatment cell.

For each development the Planning Board should consider that the long list of items that the Impact Fee Ordinance allows the Planning Board to assess an impact fee. Currently, the only use of an impact fee is for the water treatment cell. The Town could be using the impact fee for much broader category of capital needs on the CIP. Attorney Malia feels that the Planning Board makes the bedroom impact fee a condition of every approval that is going to be assessed this bedroom tax for the water treatment cell and should also consider whether the Town wants to assess any other impact fees for other things.

Planning Board Questions:

Can Impact Fees be Assessed Retroactively?

Member Beaudin asked can impact fees be assessed for currently approved projects?

Town Attorney Malia's response was "No. All impact fees shall be assessed at the time of Planning Board approval of a subdivision plot or site plan".

Can Impact Fee Ordinance Be Improved?

Member Beaudin expressed concern that the Impact Fee Ordinance is missing a level of specificity to have any type of standard or methodology as how to charge for an Impact Fee.

Town Attorney Malia agreed and has checked with Planner Bont to find out if she is aware if any prior Planning Board had created any regulations along those lines. The answer is "no". Town Attorney Malia will gather some examples from some other municipalities for the Planning Board to look at. Historically, the Impact Fee Ordinance has only been used for the water treatment cell. The Planning Board should consider Impact Fees for other capital expenditures on its Capital Improvement Plan (CIP) as well.

Vesting

Member Beaudin brings up a question regarding what is considered a "current project".

Town Attorney Malia explained that it is an issue of vesting. When the Planning Board approves a project and imposes conditions and then the developer meets the conditions and begins construction the developer is vested. (A separate statute deals with "substantial completion" within a five (5) year period). Once the developer is vested it is not feasible for a Planning Board to impose any additional fees or costs upon a project. The developer would have the legal right to finish a project without the imposition of further fees or costs. If the developer is not yet vested then the developer could expose himself to re-application and additional Planning Board review for impact fees.

Member Beaudin inquired about how long does it take a project to become vested. Should the Planning Board be able to write that into the Town's Land Use Plan Ordinance.

Town Attorney Malia explained that the statute could be referenced and a definition for vesting could be added to the Land Use Plan Ordinance. He believes the applicable state statute is NH RSA 674 39 Five Year Exemption.

NH RSA 674 39 Five Year Exemption

Every subdivision and site plan approved by the planning board and properly recorded in the registry shall be exempt from all subsequent changes for a period of five (5) years after the approval and also is active and a substantial development occurs within two (2) years then they become fully vested.

Substantial Completion. Town Attorney Malia explained that “active and substantial development” and “substantial completion of improvements” is determined on a case-by-case, development-by development basis.

Make Impact Fees a Condition of Approval

The Planning Board discussed the parameters for fees citing some current and previous projects. Town Attorney Malia explained that as long as there is justification for a particular impact fee there should not be a problem. Also, once an impact fee is designated for a particular purpose under the CIP the monies collected cannot be moved around and used for anything else and holding those monies have a six (6) year time limit.

Current Status of Impact Fees

Planner Bont explained that currently bedroom impact fees being collected for the water treatment cell are based on the number of bedrooms being constructed. Currently, water and sewer tap fees being collected are based on points and are not part of the Bedroom Impact Fees or an “exaction fee”, but fall under a separate ordinance.

Member Beaudin asked for clarification regarding the water and sewer tap fees. If the Water and Sewer Tap Fees are not expended within six (6) years of being collected, does the money paid need to be returned? Town Attorney Malia explained that the water and sewer tap fees are not impact fees and are covered under a separate ordinance.

Town Attorney Malia concluded that this was a useful exercise because it has forced Mr. Korber, Planner Bont, himself and the Planning Board to take a closer look at this statute and this ordinance from 2004. For many years the two different kinds of fees have been on autopilot and it is a good time to clean up the process. When developers are before the Planning Board and the conditions for approval are being created there is no real discussion about the bedroom fee and that the fee is an impact fee which will go into a specific town account and that they will be paying water and sewer tap assessments. Part of the planning board process should be to evaluate whether the development will impact to a significant degree any of these town facilities and as a result should the planning board impose an impact fee on the developer in these areas.

Connection Fees Versus Impact Fees

Member Beaudin asked about what is written on the one-page Water & Sewer Tap Fee form as it is titled “Water and Sewer Tap Assessment Form with Impact Fees”. The one-page form has two different types of fees on it: (1) Water & Sewer Tap Fees; and (2) Bedroom Impact Fees. The board clarified that the “Impact Fee” referred to on the form is the “Bedroom Impact Fee” or bedroom tax.

Town Engineer Ray Korber offered to help with the discussion with the following information:

The total water tap fees and sewer tap fees are “connection fees”. It is the cost of the development to make a connection to the system. These fees are figured in two (2) ways:

1. Cost of the actual connection
2. Impact fee is the number of bedrooms

Selectmen’s Representative Robinson commented that the Board of Selectmen sets the fees for water and sewer tap connections and wonders if the Planning Board should be setting these rates instead. Town Attorney Malia agreed that it makes sense for the Planning Board to review the cost of the water treatment cell.

Water Treatment Cell

Town Engineer Korber discussed the cost of the water treatment cell. He explained that the Water Impact Fees letter dated December 19, 2008 assessing the impact fee is based on the number of bedrooms. In 2008 it was contemplated that the impact fee was for the installation of the third cell. He is not sure that the impact fee can be used for the installation of the fourth cell.

Planner Bont mentioned that when people submit applications for permits to build houses, the number of bedrooms in each house has significantly increased over the years. Currently almost no one has been seeking a Land Use Authorization Permit for a home with three (3) bedrooms or less; they are seeking permits for homes with significantly more than three (3) bedrooms.

Town Attorney Malia asked Town Engineer Korber about the water treatment cells. When was the most recent cell built and when is the next cell going to be built?

Town Engineer Korber responded that the most recent water treatment cell was completed in 2015-2016. Cell number four (4) is based on a 2016 water system assessment projection that has projected the fourth (4) cell would need to be installed in 2024. This projection is based on the historical water use trends. Town Engineer Korber said the Town needs to keep current by updating its water and sewer capacity studies to stay on top of where the Town’s water and sewer capacity is at on a regular basis.

Recommendations

Town Engineer Korber made the following recommendations:

1. Do an annual assessment on what the water and sewer usage has historically been; and
2. When a new development comes forward, through the peer review process, have the developer do a capacity assessment based on what they are, tell us what they think will be the capacity of the system and what they project their project's demand on the system will be.

Town Engineer Korber believes this analysis will help with future planning for the CIP for the water and wastewater infrastructure.

What is the Timeline for Sewer Connection Permits?

Member Beaudin asked about the timeline for sewer permits and what happens if the developer fails to hook up to the sewer system in a timely way. The State will not allow the developer to hook up.

Town Engineer Korber agreed that the State would not allow a developer to hook up if the permit has expired.

Member Beaudin read what Robert Daniels from the New Hampshire DES said in 2018:

“Instead of the sewer connections for a permit issued years ago have not been constructed the permit would no longer be valid. An applicant would need to be resubmitted pursuant to EMVW 2703 and would need to demonstrate compliance with all current requirements.”

Town Engineer Korber agreed that the developer would need to resubmit a sewer connection permit application to NH Department of Environmental Services (DES). The Town DPW Director would have to sign off on that sewer connection permit application assuming that there is sufficient capacity for the developer to hook on.

Member Beaudin said that he understood that after the first three (3) years the sewer connection permit issued by NH DES goes to two (2) year extensions. Town Engineer Korber agreed and stated that the DES will issue a permit and will let the permit go for the length of the extension, depending on the type of permit, and after that extension expires a new permit application is required. DES will grant the new sewer connection permit as long as there is sufficient capacity.

What About Vested Projects that Have Sewer Connection Permits but Stall?

This discussion then led to a discussion regarding what happens with vested developments when a certain capacity was determined at the start of the project, but then the developer may or may not make it to full completion (i.e., when a project stalls).

Town Engineer Korber explained that the water and sewer capacity sits there for those vested developments. Meanwhile, new developments coming in are reviewed on a first come, first serve basis. Town Engineer Korber recommends in the future that the Planning Board set some termination dates to the developments that have been approved by letting them know that there may be some capacity issues. For example, other communities state that if the developer has not pulled a building permit within two (2) years of the Planning Board approval then the developer's approval is void.

Selectmen's Representative Robinson discussed some developments that are vested and remain partially or wholly unbuilt. This led Town Engineer Korber to recommend that the Planning Board consider defining "Substantial Completion" for each project as it is approved.

Define "Substantial Completion"

What is "substantial completion" from the municipality's point of view. Is "substantial completion" when the infrastructure is built to a level that it is being used, (i.e., water and waste water systems are in so that new houses can hook up, the road network is in, etc.)? This level of investment would indicate that a good chance of the build out happening over time. This would justify the municipality setting aside some level of facility capacity to accommodate those future builds.

Can You Extinguish Vested Development Rights?

Town Attorney Malia discussed how there are a number of vested developments that have unbuilt but approved development rights and are occupying space in municipal facilities, but there is no indication of completion in the near future. Extinguishing these vested development rights is difficult to do because once vested the developer get a certain amount of power and control over the completion of the project.

RSA 676:4-a Revocation of Recorded Approval

- Ask the developers to find out if they want to maintain their unbuilt but vested development rights. If they are not planning to complete the development, they may voluntarily relinquish the development rights.
- The Planning Board could have the developer set the date for substantial completion and if it goes past the date set the revocation process could begin.

Review of Town Impact Fees Ordinance

Town Attorney Malia had some guidelines to use to review the Town's Impact Fee Ordinance. Town Attorney Malia feels the Impact Fee Ordinance itself is fine, it is broad and references RSA 674-21. The Town's Impact Fee Ordinance has the same definition of impact fees that he read earlier from the state statute with the list of different capital improvements eligible for inclusion in the CIP. Article VI, Section G is OK.

Compilation of Checklist to be Used by Planning Board

Selectmen's Representative Robinson asked if there were any type of check list the Planning Board could use to assess what and how the development projects impact the entire community.

Town Attorney Malia said he and Planner Bont can work on putting together a one-page check list for the planning board to use for subdivisions and site plan reviews to help focus on these different areas in relation to the project under discussion.

Town Engineer Korber said he will send the State of N.H. list to the Planning Board.

Current Fees

Fees are set for connections but the 2004 rates are currently being used.

How to Dovetail Impact Fees with Capital Improvement Plan (CIP)

Member Robinson and Member Beaudin started to discuss how to use the Impact Fees to fund the capital reserve funds and add to the capital improvement accounts.

To help clarify, Town Attorney Malia re-read the Statute:

If a municipality wants to adopt an impact fee ordinance it must have enacted a Capital Improvement Plan (CIP). Once the Town has a CIP and an impact fee ordinance then when a new project is before the Planning Board you can try to determine what kind of stress or additional cost that a new project will cause to the construction or improvement of your capital facilities and impose an appropriate impact fee upon that project. That impact fee is to be accounted for separately, segregated from the municipality's general fund and used solely for the capital improvements for which it was collected.

Report from Town Engineer Korber regarding Current Waste Water and Water Capacity

Town Engineer Korber gave a bottom-line assessment of the water and waste water capacity.

A. Waste Water Treatment Capacity

There is sufficient waste water capacity to accommodate current demand plus the demand that is expected from a full buildout for vested developments at the waste water treatment plant and the interceptors that are leading into the waste water plant.

However, there are probably areas within the collection system that will have to be upgraded. For example, that is the case for the Fairfield Inn. We determined that there is a segment of the collection system that will have to be upgraded between the Fairfield

Inn and the waste water treatment plant before the Fairfield Inn can make a sewer connection. This was determined after the engineers for Kamlesh Patel d/b/a Fairfield Inn did a capacity analysis for the Fairfield Inn development using the Westin & Sampson Water Model.

B. Water for Drinking for Commercial and Household Use and Water for Fire Flow Capacity

In regards to water, there have been several studies over the last several years:

- **Water treatment plant** capacity is at 1.75 million gallons per day (1.75mgd) and there should be adequate capacity according to a report issued in 2016 until about 2024, assuming the current use rate continues on the current trend. At that point the Town will consider bringing on board a 4th water treatment unit would bring the capacity of the water treatment plant, system-wide, to 2.2 million gallons per day (2.2mgd) which includes the treatment plant and the Cold Spring Wells.
- **Water storage (Fire protection issue)** reports by Weston and Sampson, on the three water storage units show:
 - Pollard Road tank has sufficient capacity to meet peak demands and fire flow requirements and a deficiency in meeting the emergency storage requirements. The emergency storage supply is low on the priority list. Usually on the water storage tanks you would want to make sure you have enough equalization and enough capacity for the fire flow requirements.
 - Loon Village tank has sufficient capacity to meet peak demands and a deficiency in meeting the fire flow requirements.
 - Indian Head tank has sufficient capacity to meet peak demands and a deficiency in meeting the fire flow requirements.

Summary: The deficiency in meeting the fire flow requirements is one that is relative to levels of service and benchmarks that are established for those types of facilities and it does not mean there is not fire protection; our system basically does not meet the standard.

Weston & Sampson, Inc., Reports

Town Engineer Korber said the engineering firm, Weston and Sampson, Inc., did a series of reports for the Town:

- Tank Siting Assessment Study; and
- Identified locations for:
 - A water storage tank in the Loon Village pressure zone; and
 - A water storage tank in the Indian Head Resort pressure zone.

Weston & Sampson Inc., Recommendations

Town Engineer Korber explained the Weston & Sampson Inc., recommendations. In order of priority:

- Remove the Crooked Mt. Rd. from the main pressure zone which will free up some additional capacity in the Pollard Rd. tank and main pressure zone.
- Install a pressure reducing valve between the Loon Village and the main pressure zone. This will allow Loon Village to be able to augment a fire demand in the main pressure zone.
- Construct tank in the Loon Village.
- Construct tank in the Indian Head Resort.

Town Engineer Korber said, in summary, the waste water system is in good shape and on the water side there are specific issues that are recommended to be addressed.

Planning Board Questions

Cost Estimate

Member Beaudin asked if there was a way to get an estimate for the cost to complete the projects that are being recommended to allow for an assessment of potential impact fees?

Town Engineer Korber replied that “they [KVPartners, LLC] can certainly help you with that”.

Town Engineer Ray Korber left the meeting.

Who Has Jurisdiction Over a Request for a Variance to Build an Addition on Top of the Non-Conforming Portion of a Pre-existing Building Located in the Setback Area?

Members of the Planning Board brought up a case currently under appeal from the Planner. The Planner did not give the appellants a Land Use Permit without a variance from the ZBA because the appellants intend to put an addition on top of the nonconforming portion of their home, thereby increasing the amount of the encroachment into the twenty-five-foot setback area.

Town Attorney Malia said he feels the Appellants in the case referenced either need to go to the ZBA or to the Board of Selectmen to request relief from the zoning ordinance (i.e., Land Use Plan Ordinance) and that the issue is not a Planning Board issue.

Selectmen’s Representative Robinson told the Planning Board that the Land Use Plan Ordinance (LUPO) appears to direct the appellant to the Board of Selectmen instead of the Zoning Board of Adjustment for a variance. Selectmen’s Representative Robinson asked Town Attorney Malia, if this would be something the Planning Board should look at changing in the Land Use Plan Ordinance or did he think going to the Board of Selectmen was a legitimate process even though it does not follow what the State of New Hampshire says is typical.

Member Beaudin replied that he thought the RSA said it “may” go to the Board of Selectmen.

Town Attorney Malia clarified that he does not think that the fact that Lincoln's Land Use Plan Ordinance (LUPO) has a provision which allows the Board of Selectmen to make this decision, is a violation of state law. After having a discussion with another lawyer from Waterville Valley, which also delegates this decision-making authority or similar decision-making authority to the Board of Selectmen, he suspects there may be other town that do that also.

Selectman Daly commented that the owners at 196 Black Mountain Road want to put a bedroom over their garage. They are represented by Attorney Chris Boldt. The existing house is non-conforming as it lies now because a portion of the garage is located in the front setback.

Town Attorney Malia agreed the garage encroaches into the twenty-five-foot (25') setback area by six feet (6'). The new proposed space would be above the garage and would be in the same plane as the existing non-conforming space but not encroaching further into the setback.

Lincoln's Town Use Plan Ordinance Article III Applicability and Non-Conforming Uses, Section C. Non-Conforming Uses, Paragraph 3 says "A non-conforming use may not be expanded except upon a finding by the Board of Selectmen or their designee, that

- a. The expansion reflects the nature and purpose of the existing non-conforming use so as not to constitute a different use.
- b. The expansion will not have a different or detrimental impact on the neighborhood in which the use is located.

Town Attorney Malia and Planner Bont discussed this issue. They wondered if this request for a variance-like relief should be a matter for the ZBA and whether the homeowners should request a variance from the ZBA.

Town Attorney Malia's Opinion:

Town Attorney Malia feels that Article III, C,3 applies. If the appellants meet the criteria the appellants should go to the Board of Selectmen to request this upward expansion because the addition does not go further into the setback.

Would the Planning Board want to consider changing their Land Use Plan Ordinance (LUPO)?

Planner Bont's Opinion:

Planner Bont explained that she disagrees with Town Attorney Malia because she sees a difference between a nonconforming "use" and a nonconforming "dimension". She does not see this proposed expansion of living quarters as a change in "use" or an expansion of "use". The existing "use" is residential. The proposed "use" is residential. Residential "use" in the General Use (GU) District is a permitted "use". There is no change of "use" here. What she does see is a change in the size of the dimensional encroachment. The amount of space within the setback area will almost double. That is a dimensional change that should go before the ZBA for approval.

Planner Bont explained that a "use" differs from a dimensional requirement which are two distinct aspects of a building. For instance, a "use" would be:

1. A “Residential Use”; or
2. A “Public Use”; or
3. A “Business Use”; or
4. An “Industrial Use”.

Within each of those categories are multiple subcategories of “uses”.

A good example of an expansion of a nonconforming “use” would be adding an indoor coffee shop to a pre-existing nonconforming retail store in a residential district. Would the addition of such an expansion [of “use”] reflects the nature and purpose of the existing non-conforming use so as not to constitute a different use and (b) the expansion will not have a different or detrimental impact on the neighborhood in which the use is located? The Board of Selectmen could make that call.

Planner Bont informed the Planning Board that she consulted with the Planner from the Town of Hanover who agrees with her.

Planning Board Discussion

Selectmen’s Representative Robinson does not want to advocate for a change in the Land Use Plan Ordinance (LUPO) but was just wondering why the issue was for the Board of Selectmen and not for the ZBA.

Member Beaudin asked if the Board of Selectmen could assign the ZBA as its designee and send the request to the ZBA.

Town Attorney Malia replied that the ZBA only has the jurisdiction to hear:

1. A variance appeal;
2. An appeal of administrative decision;
3. A request for a special exception; or
4. An equitable waiver of dimensional requirements.

The Board of Selectmen cannot give the ZBA additional jurisdiction as they are only to hear the four (4) areas listed above.

Appeal of Board of Selectmen Decision

Fire Chief Beard asks if the Board of Selectmen denies a similar request does the applicant have the ability of go to the ZBA for a variance on the decision by BOS.

Town Attorney Malia answered that anytime a decision is made by any municipal official, or in this case Board, which involves the interpretation of a zoning ordinance provision then the property owner can file an appeal to the ZBA as an appeal of an administrative decision. He feels that appellants’ Attorney Chris Bolt would not file a variance request with the ZBA but rather an appeal of the Board of Selectmen’s decision as an administrative decision or to Grafton County Superior court of maybe both.

Selectman Daly asked about being an elected official in both the Board of Selectmen and the ZBA would he need to recuse himself if the issue went from the BOS and then to the ZBA. He would recuse himself from the ZBA hearing.

What Next?

Planner Bont asked for clarification. Where should she direct people when they are planning to expand the amount of the encroachment within the setbacks if they stay within the nonconforming foot print. Should they start with the Board of Selectmen and then appeal to the ZBA?

Town Attorney Malia said to refer back to Article III, C, 3 and suggests going to the Board of Selectmen. The Board of Selectmen can determine if the project will have a different or detrimental impact on the neighborhood. If they deny it, then the appeal would go to the ZBA.

Loon Bridge

There is lots of material to go through as one of the deeds for the land swap has not been recorded. That needs to be sorted out and then the whole package of information needs to go to the tax mappers as the current tax maps do not accurately reflect the agreement, the transfer of property, and the survey for beach lot. Mr. Malia explains that a series of attorneys worked on this as it was a very complicated series of transactions. Mr. Hastings worked on this and is not currently available, but Town Attorney Malia has his paralegal going through the file to figure out why the deed was not recorded.

V. ADJOURNMENT

"To adjourn the meeting"

Motion: Member Robinson

Second: Member Beaudin

All in favor.

Respectfully submitted,

Judy Sherriff
Recording Secretary

Date Approved: 9/2/2021


James Spanos, Chairman

