

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
WEDNESDAY – OCTOBER 18, 2017 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chair Jonathan Ham, Vice Chair Don Landry, Board of Selectman Representative Jayne Ludwig, Alternate Jack Daly, Paul J. Beaudin II, Raymond D'Amante

Members Excused: Alternate Jack Daly, Jim Martin, Myles Moran

Members Absent:

Staff Present: Town Manager/Planner Burbank, Fire Chief Ron Beard

Staff Excused: Planning and Zoning Administrator Carole Bont

Guests:

- **Kevin McNamara** – real estate agent of RE/MAX in the Mountains, 264 Main Street, Suite 2, PO Box 175, Lincoln, NH 03251-0175, owner of 264 Main Street #2 (Map 117, Lot 120000-01-00015), and co-owner with Karen McNamara of 264 Main Street #3 (Map 117, Lot 120000-01-00003). Representing Appellant Dipak Patel dba Hampton Inn
- **Gardner Kellogg** – surveyor and owner of Kellogg Surveying and Mapping, 254 Manns Hill Road, Littleton, NH 03561, Appellant and authorized agent for Dipak Patel dba Hampton Inn.
- **Raymond Correale** – Property Owner/Appellant 35 Goodbout Rd., M107 L026

I. CALL TO ORDER by the Chairman of Zoning Board of Adjustment; announcement of excused absences, if any, and seating of alternates(s), if necessary.

II. CONSIDERATION of regular meeting minutes from:

1. Public Meeting September 20, 2017

Motion to approve minutes as distributed

Motion: Jack Daly Second: Don Landry All in favor: 4-0

Mr. D'Amante abstained due to being absent for the 9/20/17 meeting due to a conflict.

CONSIDERATION of nonpublic meeting minutes from:

2. Nonpublic Meeting September 20, 2017

Motion to approve nonpublic minutes as distributed

Motion: Jack Daly Second: Don Landry All in favor: 4-0

Mr. D'Amante abstained due to being absent for the 9/20/17 meeting due to a conflict.

III. NEW BUSINESS

A. 6:00 PM. Lincoln Zoning Board of Adjustment (ZBA) Request for a Variance per RSA 676:5,II(b)

1. **Case #:** **2017 ZBA Var 2017-04 M 107 L026 Raymond Correale**
2. **Location:** 35 Goodbout Rd.
(Tax Map 107, Lot 026)
General Residential (GR) District

3. Appellant & Property Owner:

Raymond Correale
16 Ingleside Ave.
Winthrop, MA 02152

Appellant & Property Owner requests a **VARIANCE** to construct a porch within the front setback area.

Appellant proposes to extend his five-foot (5') wide-porch along the entire length of manufactured home at 35 Goodbout Road (Map 107, Lot 026) in the General Residential (GR) District. Appellant proposes to locate a small portion of the porch within the fifteen-foot (15') front setback area. His 1971 house predates the 1986 adoption of the zoning ordinance (LUPO). A small corner of the front of the house is in the front setback area. A corner of the proposed porch in front of the house would also be within the front setback area. The proposed porch needs variance as specified in LUPO, to encroach an additional five feet (5') into front setback area.

The lot is located in the General Residential (GR) District. The front setback in the General Residential (GR) District is fifteen feet (15'). The proposed porch needs a **variance** as specified in the Land Use Plan Ordinance, Article VI District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) to encroach into the fifteen-foot (15') front setback area.

ACTION: Upon a finding by the ZBA that the application meets the submission requirements the ZBA may vote to accept the application for a variance as administratively complete.

ACTION: The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting.

ACTION: The Zoning Board will vote to approve, approve with conditions or disapprove the application. Should a decision not be reached at the public hearing, this application will stay on the ZBA agenda until such time as it is either approved or disapproved.

Presentation:

Carole Bont explained Mr. Correale's proposal. Bont and Town Manager/Planner Burbank explained how wide the Town's right of way for Goodbout Road is and the large size of the grassy buffer area between the roadway surface and the boundary line of Correale's property. Bont stated she spoke with Public Works Director Nate Hadaway regarding snow removal; Mr. Hadaway reported there would be no problem.

ZBA Questions:

Mr. Beaudin asked about the portion of the lot whose ownership is in question as shown on the survey. Mr. Correale explained that although both he and the previous owners paid taxes on the small triangle of land in the southeast corner of the lot, when Sabourn & Tower surveyed his property they discovered that some previous owner had not transferred a small southeast corner of the lot to the previous owners of the lot and, thus the previous owners did not transfer that corner of the lot to him when they were deeded him the rest of the property. According to Note 7 on the survey, one small corner of the lot was a separate parcel left over when in 1971 owners Anthony & Antionetta Adriole conveyed the majority of the property to the State of NH by deed for the interstate. (See Grafton County Registry of Deeds, Book 1055, Page 560 from 1967, and Book

1135, Page 48 from 1971.) Due to the small size of the triangle and its location, it was probably an oversight. Mr. Correale will have to find 1971 owners of the lot and/or their heirs to try to get a deed for that corner or he will have to go to Grafton County Superior Court to quiet title. Discussion regarding the setback and two abutting lots.

Mr. Beaudin said the request of variance is to expand nonconforming use and he was not sure if, according to the ordinance, they could grant a variance to expand a nonconforming structure.

Attorney Peter Malia explained that the house itself is a nonconforming structure and Mr. Correale is not seeking to expand the house; he is seeking to expand the porch which is conforming. The existing porch is conforming and the Appellant is looking to expand the porch going into the front setback area. Attorney Malia said he thought the ZBA members could look at the house separately from the porch as being conforming.

Mr. Daly asked Mr. Correale if he would consider constructing a forty-five-foot (45') porch so it would remain conforming. Mr. Correale confirmed the porch has already been constructed. Mr. Correale told the ZBA he was told by his Realtors that a permit was not required so he is looking for a variance after-the-fact.

Mr. Landry said he went to look at the house and he noted that the house looks larger than what was shown in the information shared with the Zoning Board of Adjustment. Mr. Correale confirmed that he added to the back of the house without a Land Use Permit.

Mr. Burbank noted the homeowner's two realtors told Mr. Correale that no building permits were required in Lincoln; hence the construction that has already occurred. The Town was notified. Code Compliance Officer Ron Beard was notified and went to inspect the porch. Code Compliance Officer Beard asked Mr. Correale to come in to get a Land Use Permit. Bont said that when reviewing the application, she became aware that Mr. Correale needed a variance to build the porch in the front setback area.

Mr. D'Amante asked Mr. Correale further questions about his parcel. Mr. D'Amante said that it appeared that the portion being conveyed for the garage also does not conform to the setbacks. Mr. Correale responded he was not looking for a problem with the deed. Discussion ensued on the deeds and why Mr. Correale had his property surveyed.

Mr. D'Amante steered the discussion back to the variance for the porch. The ability to get a variance generally requires something to be tied back to the land. In looking at this lot, D'Amante suggested there is physical hardship which would justify granting a variance.

- This parcel is unique due to its shape and the extra-wide right-of-way which actually appears to be part of Correale's front lawn off Goodbout Rd.
- No one would be prejudiced by granting the variance because nothing can be built across the street anyway due to the location of the I-93 Interstate highway.
- There is no neighbor in the back who would be impacted.
- This is a unique and isolated request.
- The variance is also away from the abutters with homes or buildings.

Mr. D'Amante and Mr. Beaudin advised Mr. Correale to straighten his problem with the small triangle as soon as possible. Mr. Correale said that Stephen Tower of Sabourn & Tower is helping him with this issue. The garage was there when Correale bought the property. He has not made any changes to the garage; he has just re-sided and re-roofed the garage.

Mr. D'Amante explained the New Hampshire is a "race-notice" state. If five people have a deed to the same piece of property and one of them races to the Registry of Deeds and records his deed first, he wins. Bont explained that Mr. Correale's deed did not include the description for the small triangle of land in the southeast corner. Correale thought it did, but when he hired Sabourn & Tower to survey his lot, that is when he learned that the triangle was not included. The two realtors who brokered the sale to Correale told him that his land went to the tree. Correale did not believe them and that is why he had the land surveyed.

Town Attorney Peter Malia read Note 7 on the survey:

"Anthony and Antonetta Andriole purchased a lot from Alex and Lena Bouchard in 1967, said deed being recorded at G.C.R.D. Book 1055, Page 560. The gray shaded area illustrated hereon is the residual portion of said lot, after the conveyance of the majority of the property to the State of New Hampshire in 1971 by deed recorded at G. C. R. D. Book 1135, Page 48. No deed was found transferring title out of Anthony and Antonetta Andriole for said gray shaded area."

Mr. Correale said that Anthony and Antonetta Andriole were previous owners of the property within his chain of title. Mr. Daly suggested Mr. Correale find out who owns that land so somebody he has not noticed forces him to move his garage.

Mr. D'Amante returned the conversation back to the main point of the application – the variance for the porch. To get a variance the request for the variance has to be tied into the uniqueness of the land – something different about the property.

- This parcel is somewhat unique in a couple of ways due to its shape and the extra-wide right-of-way which actually appears to be part of Correale's front lawn off Goodbout Rd, suggesting physical hardship that would justify a variance.
- No one would be prejudiced by granting the variance because nothing can be built across the street anyway due to the location of the I-93 Interstate highway.
- There is no neighbor along Goodbout Road who would be negatively impacted.
- This is a unique and isolated request.
- The variance is also away from the abutters with homes or buildings.
- There are physical features of the site that would justify granting a variance.

Mr. Daly suggested Mr. Correale contact the former owners of the parcel who appear to be the owners of the land under the existing garage. Mr. Correale said he tried googling the name and Facebook. Mr. Correale was recommended to follow up with Sabourn & Tower.

Mr. D'Amante suggested that Mr. Correale chat with the Realtors. Mr. Beaudin suggested that Bont give the two realtors in question information regarding Lincoln's building process to avoid having this situation happen in the future. Mr. Beaudin suggested sending a copy of Lincoln's Land Use Plan Ordinance and Site Plan Review regulations. Attorney Peter Malia suggested the ZBA vote to have Bont send the realtors some kind of message about requiring a Land Use Permit, at least that this Appellant was here and there was confusion over ownership of that part of the lot, not accusing that realtor of misrepresenting anything necessarily, but just notifying them that the Appellant was here and there was confusion over ownership of the shaded area that he thought he had purchased.

Motion to open the floor for public comments.

Motion: Paul Beaudin Second: Jack Daly All in favor: 5-0 (Unanimous vote)

Chairman Ham opened the floor for public comments.

No public comment.

Motion to close the floor for public comments.

Motion: Paul Beaudin Second: Jack Daly All in favor: 5-0 (Unanimous vote)

1. **Motion that granting the variance would not be contrary to the public interest because:**

It will not alter the essential character of his neighborhood; nor will it threaten the health, safety or general welfare of the public.

Motion: Jack Daly Second: Ray D'Amante All in favor: 5-0 (Unanimous vote)

2. **Motion that granting the variance would or - observe the spirit of the ordinance because:**

The project will not create any problems beyond that envisioned in the zoning ordinance. This will not impact anyone's home on Goodbout Road as the project is at the front of the house. This will not negatively impact the road.

Motion: Jack Daly Second: Don Landry All in favor: 5-0 (Unanimous vote)

3. **Motion that granting the variance would do substantial justice because:**

The benefit to me it would allow three means of safety egress in case of fire at the front of the house.

Motion: Jack Daly Second: Don Landry All in favor: 5-0 (Unanimous vote)

4. **Motion that if the variance were granted, the values of the surrounding properties would not be diminished because:**

The view of sunsets and sunshine will NOT be blocked for any of the neighbors.

Mr. D'Amante suggested adding a few items to this:

- This is a minimum variance request.
- This is in an isolated part of the overall site.
- From the viewpoint of the permitted improvement, it is an extension of a conforming and permitted improvement with substantial setbacks from the road, which makes the visual impact minimal.

Motion: Jack Daly Second: Don Landry All in favor: 5-0 (Unanimous vote)

5. **Unnecessary Hardship**

- a. **Motion that owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:**

~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 because:

- The property is an oddly-shaped lot which causes one corner of the house to stick out into the setback area.

- The house predates zoning and the work being done to Goodbout Rd.
- No fair and substantial relationship exists between the restrictions in the setback area as applied to the porch.

Mr. D'Amante suggested adding a few special physical features that are unique to this site that justify the variance and create the hardship:

- The general area of the lot is unique. There are a few physical features of this lot that have impact negatively relative to extending the deck.
- The substantial area in front of the house, that is actually public right-of-way, is a bit of a deceiving feature. It appears to be lawn that belongs to him, but at the same time it is not his property.
- The setback and the nature of its visual impact is much less than it would be if the edge of the road was right on the setback line.

Mr. Beaudin feels the hardship is not anything other than the fact Mr. Correale had already built the porch. In his opinion, the only real hardship was that Mr. Correale purchased the lot and was told he could build anything on it without a permit. In his opinion, there was plenty of room on this lot to move his trailer and meet the setback requirements.

Mr. D'Amante answered it is possible to move the trailer. Under normal circumstance financial impact does not justify hardship, however, in this case telling someone they have to move their house to put in a corner of a deck outside of the setback area, given the layout and everything else would be the hardship. The hardship has to be a physical feature of the site, not being given incorrect information from a Realtor. He continued it would not be beneficial to the welfare of the Town to tell Mr. Correale he had to move his house.

Mr. Landry suggested that the ZBA add as a reason:

- Improving the means of fire safety egress from the bedrooms as being an important factor to consider.

~The proposed use is a reasonable one because:

- A front porch is a reasonable use on a home.

Mr. D'Amante added, to this:

- A front porch does not negatively impact neighbors or Goodbout Road.
- It is benign in terms of its impact and does substantial justice to allow it to be uniformly developed consistent with what you would expect a deck to look like.

Mr. Daly added to this:

- Improving the means of fire safety egress from the bedrooms would ameliorate a dangerous situation.

Motion that there is not a fair and substantial relationship that exists between the general public purposes of the ordinance provision and the specific application of that provision to the property for the reasons cited above:

Motion: Jack Daly

Second: Don Landry

All in favor: 5-0 (Unanimous vote)

Motion that the proposed use is a reasonable one for the reasons cited above:

Motion: Jack Daly **Second:** Ray D'Amante **All in favor:** 5-0 (Unanimous vote)

Motion to approve the request for a variance because the appeal meets the five-part test for a variance.

Motion: Jack Daly **Second:** Don Landry **All in favor:** 5-0 (Unanimous vote)

Variance is granted to Mr. Correale.

Motion to send two realtors a message about the confusion about ownership of a portion of Correale's lot after consulting with Attorney Peter Malia.

Motion: Paul Beaudin **Second:** Jack Daly **All in favor:** 5-0 (Unanimous vote)

Citing his judge friend, Daly said, "Ignorance is not innocence." Beaudin said, "It is easier to ask forgiveness than to ask permission."

**B. Lincoln Zoning Board of Adjustment (ZBA) Request for a Variance
per RSA 676:5,II(b).**

Case #: **2017 ZBA Var 2017-05 M112 L002 & L003 Patel & Del Regno**

Location: 2 adjacent vacant lots on Main Street
 (Map 112, Lot 002+Lot 003)
 Village Center (VC) District

Appellant & Authorized Agent for Buyer:

Gardner Kellogg
Kellogg Surveying & Mapping, Inc.
254 Manns Hill Road
Littleton, NH 03561

Buyer: Dipak Patel d/b/a Hampton Inn
 1567 White Mountain Highway
 North Conway, NH 03860

Property Owner:

Victor Del Regno, Trustee
Toreign III Realty Trust
6718 Fox Hollow Drive
West Palm Beach, FL 33412

Appellant & Property Owner requests a **Variance** to construct a four-story hotel that is fifty feet (50') to the primary eaves where 35' is permitted under the Zoning Ordinance.

Appellant proposes to build a four-story hotel on two (2) adjacent vacant lots on Main Street (Map 112, Lot 002+Lot 003) in the Village Center (VC) District that is fifty feet (50') to the primary eaves. The lot is located in the Village Center (VC) District. In the Village Center (VC) District the maximum structure height shall be thirty-five feet (35') measured from the primary eaves on

the uphill side of the structure. There shall be no more than four (4) floors used as living space above or below ground level as measured through any vertical plan of the building. The proposed building height needs a **variance** as specified in the Land Use Plan Ordinance, Article VI District and District Regulations, Section B District Regulations, Paragraph 7 (Height Requirements), Subparagraph B to build another fifteen feet (15') above the maximum height of thirty-five feet (35') measured from the primary eaves on the uphill side of the structure.

ACTION: Upon a finding by the ZBA that the application meets the submission requirements the ZBA may vote to accept the application for a variance as administratively complete.

ACTION: The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting.

ACTION: The Zoning Board will vote to approve, approve with conditions or disapprove the application. Should a decision not be reached at the public hearing, this application will stay on the ZBA agenda until such time as it is either approved or disapproved.

Presentation:

Surveyor, Mr. Gardner Kellogg, and Realtor, Mr. Kevin McNamara, presented the plan for the proposed Hampton Inn to the Zoning Board of Adjustment. Mr. Gardner included a drawing of the front of the building face on and offered larger plans which were easier to see. A different design is being considered, but the height variance is still being sought.

The roof is forty-one and four tenths feet (41.4') with parapets bringing the overall height to fifty feet (50'). The parapet will be used to block the view of the HVAC system.

Questions from the ZBA Members:

Discussion about what and where the primary eave is. Mr. Beaudin asked Mr. Kellogg to show him on the plans where he considered the primary eave to be as it was not made clear to him. Is the primary eave the same as the top of the roof line? Or is the primary eave the same as the top of the parapet? The back of the building is facing Rite-Aid. The front of the building is facing the bank. Mr. Burbank asked about drainage off a flat roof.

Mr. Beaudin asked Bont how many buildings were in Lincoln that were forty-one feet (41') high or higher. He listed as examples, RiverWalk, Mountain Club at Loon, InnSeasons at South Mountain Resort. Ms. Bont explained that RiverWalk received a height variance from the ZBA. RiverWalk's variance was granted prior to the terms of the currently serving ZBA members per Ms. Bont. RiverWalk's variance was based, in part, on a pre-existing building that was in excess of the current height limit. A portion of Riverwalk hits thirty-five feet (35') to the primary eave on the uphill side. InnSeasons South Mountain Resort is thirty-five feet (35') high at the front with the back being at about fifty feet (50') high. In both cases they extended the primary eave to meet the height restriction, but the majority of the building is well over thirty-five feet (35') high. Discussion about how these tall buildings relate to aesthetics and how they fit within the context of the rest of the downtown on Main Street/NH Route 112. Discussion about the pole heights at the Alpine Adventures Center on the northside of Main Street. Discussion about whether the height should include the parapet.

Mr. McNamara said this property is being built with a flat roof. If the flat roof is forty-one feet (41') high, there are already perhaps up to twenty-five (25) places in Town with a primary eave and a gable roof which stand at another twenty feet (20') higher at the primary eave. This is visually obstructive to the people in town and block their view of the mountains. Mr. Beaudin commented if the Appellant is willing to remove the parapet he would like to know if they are looking for a height of forty-one feet (41') high or fifty feet (50') high. Mr. Kellogg said this is a "Hampton Inn Design". They are not going to "cut that thing [the

parapet] off” just for the sake of making the building fit the height requirement. The parapet is not the “primary eave”. They are asking for fifty feet (50’) high to the primary eave.

Mr. D’Amante said any buildings that were built prior to the adoption of zoning in 1986 really are not relevant to this case as they were legally built. When RiverWalk came in the reason they were granted a variance is because they were replacing papermill buildings that included a big cement tower which had to be torn down. The ZBA granted the height variance because RiverWalk was going to be consistent with the pre-existing height of that cement tower.

Mr. D’Amante said that in another town where he was working on getting a variance, the Town counts the parapet as part of the height. Mr. D’Amante continued with a question of how much of a variance is needed, and more importantly where is the hardship. Mr. D’Amante said it appears that the ZBA is looking at a plan that just does not work and is unnecessarily crowded. This is a relatively large, flat, rectangular piece of land. He is not seeing where there is a hardship that justifies granting a variance. He saw in the Planning Board minutes that the applicant wanted to make more money. Wanting to make more money is not a hardship.

Mr. McNamara said that the hardship is, that in this day and age in order to build a four-story commercial building in a zoning district like the Village Center (VC) District, which is zoned for four (4) stories of living space you need more space. It is hard to get a four (4) story commercial style building up with a thirty-five foot (35’) primary eave. Just the construction requirements require that each story be much higher. There are twenty inches (20”) of space between floors now for housing the air circulation system, plumbing and electrical systems between floors. If the Village Center (VC) District is “offering” a four (4) story commercial building then you should be able to take something that is engineered for four stories and build it. In his opinion, the standard of thirty-five feet (35’) to the primary eave for a four (4) story commercial building is outmoded and unworkable.

Mr. Beaudin said that when the Planning Board created the thirty-five feet (35’) to the primary eave height restriction the Town did not own a ladder truck like we have today. The Town’s ability to address fire safety issues that arise from having a taller building that cannot be reached by fire apparatus was something the Town needed to keep in mind. Fire Chief Beard commented that the ability to use the ladder truck for tall buildings depends on whether there is proper access around the building to use the ladder truck.

Mr. Beaudin said that some of the things that the Appellant did for RiverWalk went a long way toward supporting the Appellant’s case that resulted in the ZBA granting approval for the height variance like:

- Installing an adequate sprinkler system;
- Using metal studs; and
- Using fewer flammable building materials.

Mr. Beaudin said he is not seeing that kind of safety information for this hearing. The building is going to have eighty-eight (88) rooms. Is the building all wood construction? Is the building sprinkled? Is the building going to be constructed of fire resistant materials?

Gardner Kellogg said that because the proposed building is a hotel, the first floor of the hotel has large open rooms with very high ceilings – eleven-foot (11’) ceilings with ten-foot (10’) ceilings on each floor above that.

Mr. Beaudin said that the height of the building does not concern him so much because he knows the Fire Department has a ladder truck with a ladder tall enough to reach the top floor. However, he is not able to see what they are offering about the safety aspects of the building. Mr. Beaudin said he was not sure if the information they had about the proposed Hampton Inn would enable him to make a decision about granting a variance for the height.

Town Attorney Malia felt it was important for the ZBA to remember some of the concerns the ZBA was talking about are within the jurisdiction of the Planning Board under Site Plan Review – issues like parking and sprinkling. The Appellant is asking for permission to exceed the thirty-five feet (35’) height restriction.

The ZBA needs to apply the five (5) part variance test like they did with the first application. If the ZBA finds the Appellant meets the five (5) criteria and grant the variance they should be specific. If the ZBA grants a fifty-foot (50') height variance, do they mean the primary eaves should not exceed fifty feet (50')? Or does the ZBA mean that nothing on the building can exceed forty-two feet (42'), forty-five feet (45') or fifty feet (50') or whatever the number is. Does the ZBA believe that the thirty-five feet (35') height restriction is outdated? If the ZBA denies the Appellant a variance, one option available to the Appellant is to submit a petition for a warrant article to Town Meeting to amend the zoning ordinance to increase the thirty-five feet (35') height restriction.

Mr. Beaudin asked Town Attorney Malia if the ZBA could set a height restriction at this hearing or is the ZBA bound by the exact request of the Appellant for a maximum height of fifty-foot (50') to the primary eaves on the uphill side. Town Attorney Malia said they could issue whatever they want. For example, they are asking for a fifteen-foot (15') variance from thirty-five feet (35') to fifty feet (50'). The ZBA could decide that an eight-foot (8') variance is okay, but a fifteen-foot (15') variance is too much. If the Zoning Board tells the Appellant they can only go a certain height the Planning Board will have to live with that. The ZBA could make it clear that the variance would be to the top of the parapet or bottom of the primary eave on the uphill side. If the ZBA says the variance goes to the bottom of the primary eave, then at the Site Plan Review hearing the Planning Board could decide whether to allow a parapet above that to hide the mechanicals on the roof.

Chair Ham asked if there could be living space above the primary eave. There was general agreement that for a number of properties in Town that is the case.

Ms. Bont told the ZBA they could make a suggestion that the Planning Board look at the height restriction and see if the Planning Board believes that thirty-five feet (35') to the primary eave on the uphill side is a rational height limit. The Planning Board could also consider whether its description of height is even workable any longer. Mr. Beaudin asked Attorney Malia if it was appropriate for the ZBA to ask the Planning Board to look at whether height restrictions should be increased. Ms. Bont said this was good timing as proposed changes to the zoning ordinances will be coming up with hearings being held in November/December in time for March Town Meeting.

Mr. Daly asked McNamara if the current Appellant owned the lot next to this one to which Mr. McNamara answered, "He will." Dipak Patel is purchasing two (2) adjacent vacant lots on Main Street (Map 112, Lot 002+Lot 003). Mr. Daly continued that when he read the Planning Board minutes about the conceptual hearing, he learned that another business might be going on that end. Now, according to these plans, an end wall will be facing NH Route 112/Main Street; seeing an end wall up against the sidewalk facing Main Street in his opinion "is going to look like crap". Mr. Daly said he would prefer to see something more aesthetically pleasing. McNamara said he thought the building as it was proposed to be sited would block less of the view of the mountains. Coming into town from I-93 drivers would see the back of the building, with signage. Coming back the other way towards the interstate drivers would see the front of the building with signage.

The ZBA is concerned about the parking and that would be a matter for the Planning Board to consider. Discussion about parking and the current regulations regarding individual parking spot sizes. The parking sizes were ten feet by twenty feet (10'X20'). Now the parking spaces have been reduced to nine feet by nineteen feet (9'X19'). The plan as submitted includes ninety (90) parking spaces, although the turnarounds were not shown. McNamara said when he talked to the Planning Board at the Conceptual meeting the Planning Board indicated to him that they wanted some grassy area between the sidewalk and the building; they wanted some "aesthetics". They wanted the fifteen foot (15') wide roadway in the back to hook up to the road behind Rite Aid, Dunkin Donuts and Tedeschi's. The first turn would be a service entrance and would go all the way out to the back.

Mr. D'Amante asked Fire Chief Beard about the private utility road in the back of the lots (behind Rite Aid, Dunkin Donuts & Tedeschi's) on the south side of Main Street/NH Route 112. If the Appellant is adding another story to the building, he is putting more people higher up off the ground. Does the fire department have enough room at twelve feet (12') to safely maneuver to extricate those people? Chief Beard said that in answering the question, he is going to need the overlays with the radius of the corners of that road to make sure they can manipulate the largest piece of fire apparatus which is the ladder truck that is forty-eight feet (48') long. He would also need to take into account the collapse zones for the worst-case scenario. The Fire Department needs a safe working area which is usually one and a half to one (1½:1) which eats up some real estate.

Mr. D'Amante stated that he believes this is within the ZBA's jurisdiction. By adding another story, we are adding risk mitigated by fire access. Mr. D'Amante continued that the ZBA can state as a condition of approving the variance that if they go to the forty-one feet (41') maximum height, the road in the back shall be designed to the satisfaction of the fire chief for access and maneuverability as well as for fire safety with an adequate fire-fighting area.

Ms. Bont informed the room that in order for the microphone to adequately record the meeting people had to comment on the subject at hand one at a time.

Chief Beard said that in order to answer the ZBA's questions and to set forth the criteria to address the dimensional requirements of the building on the site he would need the Appellant's specifications for the building the Appellant is designing. This meeting was about a request to exceed the maximum height requirement. There are other issues associated with this project that the Planning Board will have to deal with but what he was shown so far will not work. Mr. D'Amante said that the request for a variance is to add height and if we are adding height we are increasing the risk to people and access to fire is complicated, to some degree. Mr. D'Amante said that if the ZBA grants a variance there should be a condition that fire access to the entire building, and specifically the rear, has to be to the satisfaction of the Fire Chief.

Mr. Beaudin asked Chief Beard if the State Building Code and the State Fire Code states what is required. Chief Beard answered yes, however, those requirements can be changed by the authority having jurisdiction, meaning the Fire Chief. The Fire Chief can make the requirements more stringent but not less than the minimum State requirements.

Town Attorney Malia agreed the Zoning Board of Adjustment (ZBA) has authority to add conditions in order to grant a variance. Mr. Beaudin used Herbert Lahout Shopping Center, LLC's request for a Special Exception to add a Propane Filling Station behind Aubuchon Hardware Store as an example. Town Attorney Malia distinguished this case from the Lahout case by saying that Lahout asked for a Special Exemption and this application is for a variance, so the criteria are different. Town Attorney Malia continued that Lincoln's four criteria for a Special Exemptions are vague and objective and did not give the ZBA authority to delve into issues involving safety, parking and traffic.

Town Attorney Malia said this application requires the 5-part variance test.

Criteria #1 – The Variance Will Not Be Contrary to the Public Interest

The first criterion is "the variance will not be contrary to the public interest" and there are good descriptions of the criteria in a Planning Board Handbook published by NH Office of Energy and Planning (NH OEP) now called the Office of Strategic Initiatives (NH OSI). Town Attorney Malia continued to read the description of the first criteria:

To Determine if the Variance Will Not Be Contrary to the Public Interest

- Ask if the Variance would alter the essential character of the neighborhood.
- Ask if the Variance would threaten the general health, welfare or safety of the general public.

Mr. D'Amante said that by approving the variance the ZBA would be allowing another whole fourth floor of rooms to be added which might create a safety issue for the general public if the Fire Chief cannot adequately fight a fire the way the siting of the building is shown on the plan. Mr. D'Amante said he is sure that there is a layout that would work. If the variance is granted, however, he would want to see a condition, set by the ZBA, that states that the siting of the building with its access would have to be to the fire chief's satisfaction.

Mr. Beaudin said he was very concerned about the Fire Department's access to the building from the back of the property. He would like to ask the Planning Board to continue requiring access from behind those properties south of Main Street/NH Route 112 for both customers, guests and employees as well as the emergency services. Mr. McNamara said the Planning Board asked for that and his client had adjusted the plan to accommodate that request.

PROPOSED Condition: Fire access to the entire building, and specifically the rear, shall be to the satisfaction of the Fire Chief.

Mr. Daly said the proposal deals with the accessibility issue with eight (8) ADA accessible units. Several years ago, when he was in charge of the adaptive sports program Mr. Daly did a study and in the entire town there were only two (2) rooms out of all of the rental rooms that met ADA accessibility codes. Mr. Daly feels it is important to not only make sure the rooms are accessible but also ADA compliant. Over the course of a year they offer 3,500 hours of adaptive sports lessons for people with various disabilities, not all mobility disabilities. He is pleased to see that the Hampton Inn is proposing to make accessible units available that are also ADA compliant. Although some of the rooms may be handicapped accessible, some of the rooms have beds that are too high, there was no roll-in shower, sinks were too high, there was no clearance under the sinks.

PROPOSED Condition: An adequate number of rooms shall be handicapped accessible and ADA compliant.

Mr. Burbank said, thinking of Main Street., whatever the height is decided to be it should be determined what overall height of structure should be. They should be told that whatever height dimension they are given they need to not go over that. We now have poles at the Alpine Adventures that have been approved that are about forty-five feet (45') high.

Mr. Beaudin said he is also concerned about the back portion of the property. He would ask the Planning Board to look at this. The access was meant to be for fire truck access as well.

Mr. D'Amante suggested having two numbers for the height – one number for the maximum roof height and another for the maximum height of a parapet and everything else. Town Attorney Peter Malia said the ZBA could do this, but that they needed to be very clear about exactly what they meant so the Planning Board and everyone would know what they were talking about.

Chief Beard said if they grant, for instance a fifty-foot (50') height variance they should indicate that this height is based on a flat roof design, because if the ZBA just approves fifty feet, then the next hotel comes in and says this was approved with fifty-foot (50') to the primary eaves they will want to go even higher with a six (6) story hotel.

Mr. Beaudin suggested that the ZBA ask the Planning Board to look at the current fire-fighting apparatus that has been added to the town inventory and to look at the additional safety features that have been added to the building requirements and take those into consideration when doing a Site Plan Review.

McNamara said that he had looked at various tall buildings in town and could tell that the roofline had been artfully lowered to comply with the thirty-five feet (35') to the primary eave requirement even though most of the building is far higher than thirty-five feet (35').

PROPOSED Condition: The height of the entire building shall be X feet height and no higher, everything included, meaning the parapet, and anything else.

PROPOSED Condition: The Planning Board shall be requested to make sure that road access to the rear of the building be adequate to give fire truck access.

Fire Chief Beard asked how far from the sidewalk were they considering placing the building. Town Manager/Planner Burbank said the plan submitted by the Appellant shows the building being eleven feet nine inches (11'9 ½") from the edge of the sidewalk.

PROPOSED Condition: The Planning Board shall be requested to make sure that in case of a fire the fire escape from the building does not dump the evacuees onto the sidewalk next to Main Street/NH Route 112 or onto the railroad tracks directly behind the lot.

Town Manager/Planner Burbank said if anything on the lot is within the right of way owned by the NH Electric Co-op ("the Co-Op"), that is of interest to the Co-Op. He believes the Co-Op's right-of-way is greater than eleven feet nine inches (11'9 ½") from the edge of the sidewalk so the NH Electric Co-op is extremely interested in this project. NH Electric Co-op has a super high-tension power line right-of-way up through there that feeds the substation; the Co-Op will not let anyone put a building within fifteen feet (15') of those high-tension power lines. The Co-Op's right of way is going to put the building back a lot further than the Appellant is planning to put it. Fifteen feet (15') would be the minimum setback from the power lines. The Co-Op cannot allow any building within fifteen feet (15') of that tension wire. The NH Electric Co-op asked how high the proposed building would be. When Burbank told them fifty-feet (50'), they were very concerned because with this height they are asking for that would make the building higher than their power lines.

PROPOSED Condition: The Planning Board shall be requested to make sure that the easement owned by the NH Electric Co-operative is not interfered with in any way, with regard to height or setbacks.

Ms. Bont added she thinks there is also a test well located on one of the lots to monitor for the gas leak associated with the Kancamagus Country Store.

PROPOSED Condition: The Planning Board shall be requested to make sure that the Appellant takes into account the test wells located on the lot(s).

Why was InnSeasons South Mountain Resort allowed to add another floor? They were allowed to add another floor because of the uniqueness of the property, in that the site of the InnSeasons was a brownfields site caused by the waste associated with the papermill. Ducharme found he had to excavate a significantly larger amount of hazardous waste or ash associated with the old papermill than they had estimated. Consequently, Ducharme had to dig another story deeper than he had intended to in order to remove the contaminated soil characterized as hazardous waste. He did not need any additional room for mechanicals or a laundry or anything else associated with his hotel as he already had those in place. Ducharme was granted a variance to put units in that section of the building to use the space created.

Mr. Daly said the ZBA should establish a guideline of not to exceed fifty feet (50') on the roofline. If the ZBA says "not to exceed a height of" fifty feet (50') there is a possibility that they would try to add another floor even though four (4) stories is the maximum number of floors of living space allowed in the Village Center (VC) District. Putting the limit on the roofline would be preferable. It was suggested that the ZBA could allow forty-one and four tenths feet (41.4') for the height of building with no occupied or living space above that. Buildings with a height of between forty-one and four tenths feet (41.4') to forty-six and four tenths feet (46.4') could be added only for aesthetics and to hide the mechanicals on the roof.

Forty-one and four tenths feet (41.4') would be the maximum roofline with no other part of the structure being able to exceed the forty-six and four tenths feet (46.4'). Mr. McNamara asked the ZBA to round it off to forty-two feet (42') and forty-seven feet (47') so that the limit would be easier to remember and keep track of. Town Manager/Planner Burbank said they should be clear that no other part of the structure can exceed forty-seven feet (47'). Not signs. Not air-conditioning units. Not parapets. Nothing! Burbank

said that height would also be consistent with the height of the poles at Alpine Adventures across the street. If this is what the ZBA approves, the Planning Board should take its cue from that decision. The Planning Board could decide whether to propose an amendment to the zoning ordinance (Land Use Plan Ordinance)

Discussion on what height of HVAC units might be on the roof and keeping the height consistent with surrounding poles and various other items.

Chief Beard responds that they need to keep in mind what the fire equipment can reach. The parapet height would be critical to the fire department's operations. When the Fire Department sets the ladder, the ladder is set at an angle at maybe forty degrees (40°). There is an adapter on the basket and they have six-foot (6') length or so that they affix to the front of the basket. If the firefighters go beyond the parapet to get on the roof and there is a lot of height to get down onto the roof, it would be impossible to put a fire fighter on the roof to ventilate the fire. That would be a Planning Board determination.

Mr. D'Amante mentioned the plans show the building being perpendicular to the road. When you are driving down the road, going east or west, you see the whole site because the bank is set back. He continued by saying the buildings around the site are set back further from the road (i.e., Bank of NH and Rite-Aid) than the five-foot (5') minimum setback requirement for the Village Center (VC) District. He asked what was wrong with turning the building ninety degrees (90°). By doing this the front of the building will be seen from both directions. They can do a lot with the two hundred feet (200') of frontage this would offer them. This would look better and the fire apparatus would have maneuvering room. There would be integrated parking lots all connected. There are three curb cuts. Town Attorney Malia said this is only a recommendation as the ZBA cannot make it a condition. Mr. Beaudin added with the plans as they are now, guests staying in the front and back rooms can only see up and down Main Street. By setting the building at a ninety degree (90°) angle the guests would be able to see the mountains from the front and back.

Mr. D'Amante read the potential conditions of the Zoning Board of Adjustment. These would be taken into consideration by the Planning Board as part of their hearings.

1. The top of the roofline for the occupied area is not to exceed forty-two feet (42') maximum.
2. The top of the structure, including the parapet for aesthetic purposes, is not to exceed forty-seven feet (47') maximum.
3. They (Dipak Patel d/b/a Hampton Inn) must comply with the New Hampshire Electric Co-op's minimum setback standards.
4. Fire access around the building and setbacks for access to the roof has to be provided to the satisfaction of the fire chief.
5. There must be an east-to-west connecting road along the back on the south side of the site, and across the full site to give full and free access to the back of the buildings east and west, for fire and other purposes.
6. The Zoning Board of Adjustment suggests that the Planning Board consider requiring the Appellant to turn the building so the main spine is east/west oriented with an area in the front for a separate lot, with integrated parking lots.
7. The handicapped accessible units should be made compliant with ADA (American Disability Act). [Chief Beard said this would happen anyway as it is part of the State Building Code, but it does not hurt to include it.]
8. The applicant needs to go to the NHDOT to obtain approval.

Carole Bont began reading off the criteria on the ZBA Variance checklist.

Criteria #1 - Granting the variance would not be contrary to the public interest because:

Appellant's Application: "It would allow for another large taxpayer to Lincoln's tax base. Minimal services from the town would be required and would add jobs to the community. Therefore, possibly adding to the tax rolls would be beneficial for all in the community; it also will cause no health or safety issues to the townspeople and fits in the commercially-zoned area with other businesses."

Motion that granting the variance would not be contrary to the public interest because:

Motion: Jack Daly Second: Paul Beaudin.

Discussion:

Town Attorney Malia interjected that the *Office of Energy & Planning's Zoning Board of Adjustment Handbook* (page II-10) stated:

"Regarding this criteria for the variance to be contrary to the public's interest it must unduly, and to a marked degree, violate the basic zoning objectives set in the zoning ordinances. To determine this: Does the variance alter the essential character of the neighborhood, or threaten the health, safety or general welfare of the public?"

Town Attorney Malia continued so if the variance does not alter the essential character of the neighborhood, and if the variance does not threaten the health, safety and general welfare of the public then the variance would *not* be contrary to the public interest.

Reasons granting the variance would not be contrary to the public interest because:

1. The variance will not alter the essential character of the neighborhood because there are other buildings and amenities surrounding this lot that are already that high.
2. The variance does not threaten the health, safety or general welfare of the public because:
 - If this proposed project goes to the Planning Board for Site Plan Review, the Planning Board will address the Fire and Life Safety aspects of the building and the site;
 - If this proposed project goes to the Planning Board for Site Plan Review, the Planning Board will address the potential for water and sewer overloading caused by adding more units;
 - If this proposed project goes to the Planning Board for Site Plan Review, the Planning Board will address the safety aspect of building materials (i.e., coated steel, strength, composites, etc.); and
 - If this proposed project goes to the Planning Board for Site Plan Review, the Town will notify NH Department of Transportation (DOT) which would provide input on increased traffic congestion, decreased traffic safety due to adding more units and be a part of the Planning Board hearing process.

Unanimous vote that the variance would not be contrary to public interest for reasons cited above.

Criteria #2 - If the variance were granted, the spirit of the ordinance would be observed because:

Appellant's Application: "Applicant believes the ordinance is in place to protect the public's views and aesthetics. The outcome of the project, based on height restriction being ten to fifteen feet (10'-15') higher, will have the same outcome and will not adversely affect the views on Main Street. The lots in question has plenty of road frontage and approved curb cuts are currently installed. There are no wetlands to violate the ordinance and the applicant believes it would be a great addition to the town."

Mr. Beaudin said that looking at the worksheet which describes the consideration of increased traffic, however, traffic is such a problem right now, that if we just addressed that one issue the ZBA would never approve anything. He asked how much of a deterrent to development did they want this to be. He continued that NH DOT will tell Dipak Patel if he can build a Hampton Inn there or not.

Town Attorney Malia said the *Office of Energy & Planning's Zoning Board of Adjustment Handbook* (page II-11) addresses a height variance, "the spirit of the ordinance which shows a variance request to exceed a height limitation. He read:

"For instance, a zoning ordinance might control building heights specifically to protect adjoining properties from the loss of light and air that could be caused by high buildings. The owner of a piece of property surrounded on three sides by water might be allowed a height variance without violating the spirit and intent of the ordinance, if the ordinance clearly states the sole purpose for the building height limitation."

"On the other hand, if a landowner requested a variance for a proposed building that would shut out light and air from neighboring property the granting of the variance might be improper."

Town Attorney Malia said this explanation was not very helpful as Lincoln's Land Use Plan Ordinance does not explain why this height restriction was put into place. They can assume it is to protect neighboring properties but it is not specific.

Mr. Beaudin, as a prior member of the Planning Board at the time said This height restriction was added because at that time the Town did not have a ladder truck to reach the upper stories. Chair Ham said that at that time, the reach of the ground ladder was only thirty-five feet (35'). For many years it was difficult getting a two (2) story building in Lincoln. Mr. Daley said he believed the height restriction also was to meant to protect views.

Motion was made that granting this variance would observe the spirit of the ordinance because:

- 1. The thirty-five-foot (35') height restriction was added because at that time the Town did not have a ladder truck to reach the upper stories. At that time, the reach of the ground ladder was only thirty-five feet (35'). The Town now has a ladder truck with a ninety-foot ladder.**

2. **The height restriction also was to meant to protect views and the height is in line with other buildings and amenities surrounding this lot that are already that high.**
3. **The spirit of the ordinance would be better fulfilled if the building were turned ninety degrees (90°).**

Motion: Jack Daly Second: Paul Beaudin

Mr. D'Amante would like to add that if the building were turned 90° the Planning Board's input, along with the ZBA's recommendation, would be helpful. Mr. Beaudin moved to add Mr. D'Amante's language to the reasons for criteria #2. Jack Daly seconded. All in favor.

Unanimous vote that granting this variance would observe the spirit of the ordinance for reasons cited above.

Criteria #3 - Granting the variance would do substantial justice because:

Appellant's Application: "This will fill a void on Main Street, that has been vacant for years. The Hilton brand hotel suggested for this site has been approved by them, is one of the most desirable hotel chains in the business. It adds jobs and tax revenue to the town, and in a tourist town known as the basecamp of the White Mountains, the location would serve our very important tourist base very well. Also, the fact that we now have life safety services to handle the height of this building is a great asset moving forward."

Mr. Beaudin said he thinks granting the variance would do substantial justice because the proposed development is consistent with the downtown area's present uses.

Mr. D'Amante said that granting the variance would do substantial justice because the loss to the individual, if not granted, would outweigh the gain to the general public.

Motion that granting the variance will do substantial justice because:

1. **The general public will benefit due to the fact it is consistent with the downtown area's present usage;**
2. **The loss to the individual, if not granted, would outweigh the gain to the general public.**

Motion: Jack Daly Second: Don Landry

Unanimous vote that granting the variance would do substantial justice for reasons cited above.

Criteria #4 - If the variance were granted the values of the surrounding properties would not be diminished because:

Appellant's Application: "Being in the VC (Village Commercial) district would only benefit the surrounding businesses by adding necessary dollars from the tourist base to all surrounding retail, restaurants and other businesses on Main Street. Having this variance approved would add to Lincoln's appeal. A guest could walk from the hotel to most anything downtown – shopping, theatre, swimming, biking, and kayaking. These are all bonuses to the other businesses in Lincoln."

Motion made that granting the variance would not diminish the values of surrounding properties because the proposed hotel is consistent with the downtown area's present usage.

Motion: Jack Daly Second: Paul Beaudin

Unanimous vote that granting the variance would not diminish the values of surrounding properties.

Criteria #5 - Unnecessary Hardship

Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- 1. There is or is not a fair and substantial relationship that exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:**

Appellant's Application: "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 because: The Village Center (VC) District does allow for four (4) floors of living space building in this zone. But to achieve this with the current standard of thirty-five feet (35') is a near impossibility, in the case of this project."

Mr. Beaudin said if they used the reasonable use test and by today's standards of constructing a four (4) story building would create an unnecessary hardship based on the current height restrictions it would allow him to construct this building.

Mr. D'Amante referred to Criteria #5 on the Summary Sheet. The first standard they have to meet is "owing to special conditions of the property that distinguishes it from other properties in the area". He continued that he is having a hard time finding a special condition of this property that justifies the height variance for hardship. Mr. D'Amante compared it to the earlier variance where there were specific conditions associated with the land itself, the funny shape of the lot, the extra-wide right of way for the road that was created when the interstate was created after the house was built and the tiny piece of the deck of a few square feet that was affected. Here they are talking about an entire floor on an unremarkable lot.

Mr. Beaudin asked if the unnecessary hardship was not being able to build a four (4) story building they need with that height restriction. To be viable as a hotel they need to have the additional floor. The town has allowed other buildings to increase height. It is not just the unnecessary hardship with just the lot, but also everything needed to meet the requirements with the lot.

Mr. D'Amante said with other cases the Town required the Appellants to comply with their primary eave standard of thirty-five feet (35'). The design of the building allowed them to build a four (4) story building consistent with that eave standard. RiverWalk got a variance because they were replacing a pre-existing nonconforming building with a building of the same height. What they are saying is the zoning ordinance is inconsistent with a thirty-five-foot (35') limitation and a statement of being able to build four (4) stories. That does not mean it is wrong or justifies a variance; it just means with one design they can build the hotel without a variance and with another design they cannot. They think the Land Use Plan Ordinance (LUPO) needs to be amended for consistency so you can have equity for different designs – a flat roof and a gable roof.

Mr. Burbank said the Appellant will combine the two lots. The Appellant wants to carve out separate lot for future development. In order to get the hotel and the number of rooms they need they had to add a floor. In his opinion that problem is their personal hardship but not the Town of Lincoln's and the hardship is not due to a unique aspect of the land itself. If the owner used the

entire parcel for the hotel there would be no need for a variance; but their intent is to “carve out” a piece for a possible restaurant in the future. They are creating their own alleged hardship.

Town Attorney Malia said the *Office of Energy & Planning’s Zoning Board of Adjustment Handbook* (page II-13) addresses some of the NH Supreme Court cases that attempted to make sense of some of the cases involving unnecessary hardship. Referring to page II-14, the NH Supreme Court determined that if there are special conditions of the property, all unnecessary hardship criteria has to begin with a finding that there are special conditions of the property that distinguish it from other properties in the area. Once the property’s special conditions have been identified, which distinguish it from other properties in the area, then they have to address:

- #1. the relationship test – no fair and substantial relationship exists between the general purposes of the ordinance provisions and the specific application that provision to this property; and
- #2. The reasonable use test – the proposed use to be a reasonable one.

If they, as a board, cannot find special provisions of the property that distinguish it from other properties in the area then they probably cannot find unnecessary hardship.

Mr. Beaudin asked if the section that was being pieced off belongs to the Appellant. Ms. Bont answered the Appellant does not own the two lots yet as he is a potential purchaser.

Town Attorney Malia said regardless of who owns the property they still have to find there are special conditions of the property that distinguish it from other properties.

Motion that the Appellant has NOT shown special conditions of the property that distinguishes the property from other properties in the area.

Motion: Paul Beaudin.

Second: Ray D’Amante

Discussion:

Discussion about the impact of the possibility of Mr. Patel buying only one of the lots, getting the variance and then going back to buy the second lot.

Mr. McNamara (Realtor for Mr. Patel) said the zoning on Main Street which is in the Village Center (VC) District does allow for a four (4) story building is a hardship. You cannot build a four (4) story commercial building on Main Street on any lot in the Village Center (VC) District which allows a four (4) story building without a variance. Wouldn’t that be a hardship?

Mr. Beaudin responded the hardship has to be owing to a special condition of the property. He asked Town Attorney Malia if they could do with this regards to what they did with the height.

Ms. Bont said an Appellant does not have to have the right to put a 100-unit hotel on any lot in Town no matter how small. That would not meet the criteria for the hardship test either. There are all kinds of other uses that are available that can be created on a smaller lot. Having a small lot in and of itself does not create a hardship based on the unique shape of the property.

Attorney Peter Malia reminded the ZBA that the first part of the fifth criteria is: owing to special conditions of the property that distinguish it from other properties in the area. Mr. Beaudin answered he felt it created a hardship because it is a smaller lot.

Discussion about what occurs if the buyer purchases both lot versus only one of the lots and whether that would create a hardship or not.

Town Manager/Planner Burbank responded that the applicant is purchasing two adjacent lots. He can fit the hotel on the two combined lots, but he wants to carve out a second piece for a future development. He would not have a hardship if he did not want to carve out that separate parcel. Carving out that separate lot is creating a hardship for the applicant. Because he wants to set aside a portion of the lot for a future development he shrank his lot for the hotel and he has to create four (4) floors in order to get in the required number of rooms on that smaller lot. He is creating his own hardship. The hardship is supposed to be connected to a feature of the lot itself. For the Del Regno lots, there is no such hardship associated with topography or a brownfield. This is a nice clean large, flat, rectangular-shaped lot which does not create a hardship.

Mr. D'Amante said there are no unique physical features, like ledge, steep drop offs, wetlands or an awkwardly-shaped lot which would all imply hardship. These are examples of physical topographical features. This two lots combined are a dream lot. It has good depth to it. It has good length. It is flat. It is clean. There is no evidence of environmental issues. He feels this hotel can be created without the parcel for the restaurant, but the Appellant needs to turn the hotel ninety degrees (90°). If he did this he would not need the variance. The claim of hardship of wanting to make more money is not hardship.

Mr. McNamara said he thought that maybe he would have to get NH Department of Environmental Services (NH DES) over to the lot to clear it before they can build on the lots because there is a monitoring well on the lot. Would that be a hardship justifying a variance?

Mr. D'Amante said no because NH DES will not let the Appellant build on the lot until the environmental problem is cleaned up and NH DES will require him to clean it up; so, will his insurance company. There are no special conditions on the property that justify granting a height variance based on hardship. Appellant can turn the building ninety degrees and get the same number of rooms he wants with three (3) stories instead of four (4) and perhaps still create a lot in front for the future development.

Mr. McNamara said "You are preaching to the choir".

Discussion about the recent request from NH Electric Co-op and their setback expectations – a minimum of fifteen feet (15') from their innermost primary line.

Mr. McNamara said to suppose the Appellant gets his lot line adjustment and then comes back to the ZBA with a new lot size. Would this make a difference? Mr. D'Amante said this would be a self-created hardship and would not constitute "hardship". The "hardship" would be created by Mr. Patel and Mr. Del Regno in concert together.

The ZBA asked for counsel's opinion before making a determine on these criteria. Mr. Daly asked Town Attorney Malia if the size of the building required to get to four (4) stories which is allowed in the Village Center (VC) District which requires approximately nine feet (9') or ten feet (10') per story outweigh the denial? You cannot get to that height due to the fact that the State Building Code requires each story to be a minimum of say nine feet (9') which takes the building above the thirty-five feet (35') to the primary eaves.

Town Attorney Malia responded that he agreed with Mr. D'Amante; he does not think the provision in the ordinance that permits a four (4) story building creates a special condition of the property that distinguishes it from other properties in the area. The Appellant is not entitled to a four (4) story building, it is permitted in the zone if everything else can be satisfied.

Unanimous vote that the Appellant has NOT shown special conditions of the property that distinguishes the property from other properties in the area.

Town Attorney Peter Malia suggested that someone make a motion that literal enforcement of the provisions of the ordinance would result in the unnecessary hardship and that they vote “no” to clean it up.

Mr. D’Amante added that if they vote no on the first motion they move onto the second criteria. The second criterion is: if they cannot establish the first criteria, an unnecessary hardship will be deemed to exist if and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance. Therefore, a variance is needed. On the second one they do not find that they cannot reasonably use the property in strict conformance with the ordinance.

Town Attorney Malia referred to the worksheet which is part of the Appellant’s application packet. If the Appellant cannot meet 5A (from the worksheet) you can still prove unnecessary hardship; the ZBA can still be considered unnecessary hardship using 5B from the worksheet. However, 5B still requires special conditions of the property that distinguish it from other properties in the area. 5B is an alternative method of meeting unnecessary hardship if the Appellant fails to meet 5A.

Motion that there are NO special conditions of the property that distinguish it from other properties in the area.

Motion: Paul Beaudin

Second: Ray D’Amante

Unanimous vote that there are NO special conditions of the property that distinguish it from other properties in the area.

Move that literal enforcement of the provisions of the ordinance would result in an unnecessary hardship; this is criteria #5.

Motion: Ray D’Amante

Second: Paul Beaudin.

Unanimous vote “NO”, that literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

The variance failed. The unnecessary hardship was defeated unanimously. Appellant managed to satisfy 4 of the 5 criteria but failed on proving unnecessary hardship because there were no special conditions of the property that distinguished it from other properties in the area.

Appellant’s options are:

1. To turn in an application for Site Plan Review for a building that meets the height requirements; or
2. Go to the Planning Board to request a change in the zoning ordinance known as the Land Use Plan Ordinance (LUPO) to have the Planning Board put the proposed change on the warrant with a recommendation for Town Meeting in March of 2018; or
3. To submit a petition for a warrant article to change the building height restrictions in the Land Use Plan Ordinance (LUPO) for Town Meeting in March of 2018; or
4. To appeal the decision of the ZBA to Grafton County Superior Court.

V. OTHER BUSINESS – ZBA members/alternates, Zoning Board Staff

- IV. PUBLIC PARTICIPATION AND OTHER BUSINESS:** Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Zoning Board of Adjustment will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

V. ADJOURNMENT

Motion to adjourn at 8:22 P.M.

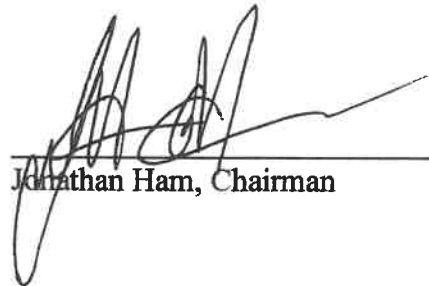
Motion: Jack Daly

Second: Ray D'Amante

All in Favor: (5-0)

Respectfully submitted,
Mary Pelchat
Recorder

Date Approved: 11 / 17 / 17



Jonathan Ham, Chairman