

**APPROVED**

**ZONING BOARD OF ADJUSTMENT  
PUBLIC HEARING  
Wednesday February 15, 2023 – 6:00PM  
Lincoln Town Hall, 148 Main Street, Lincoln NH**

\*Hybrid meeting available both in person with social distancing & masks & via Zoom Meeting Platform to allow for town wide participation. A quorum of the Planning Board member must be physically present at the meeting. Although there is space in the large conference room for 8-12 guests in addition to the Board members with social distancing, the public is encouraged to participate remotely using ZOOM.

**Join Zoom Meeting**

<https://us02web.zoom.us/j/81700766161?pwd=WUFKR2NlZk9xSzI1bVFPRWVzbyt4UT09>

**Meeting ID: 817 0076 6161**

**Passcode: 179696**

Find your local number: <https://us02web.zoom.us/u/kblNuPaMlG>

**Or dial by your location 1-929-205-6099 US (New York)**

(See also town website [www.lincolnnh.org](http://www.lincolnnh.org) for same link, meeting ID and passcode.)

**I. CALL TO ORDER** at 6:02 PM by Acting Chairman Jon Ham

**Members Present:** Acting Chairman Jon Ham, Chairman Ray D'Amante (via Zoom), Vice Chairman Mark Ehrman (via Zoom) Member Jack Daly, Member Delia Sullivan, Member Myles Moran (via phone Zoom for first portion of meeting), Alternate Susan Chenard.

**Excused:** Myles Moran (only for the last portion of the meeting when he lost cell phone signal while traveling)

**Staff present:** Planner Carole Bont

**Guests:**

- **Lusa M. Aurretto**, nonresident (**ABUTTER**) of 11 Naumkeag Court, Litchfield, NH 03052 and co-owner with Paul E. Aurretto of a vacant lot with an address of 221 Black Mountain Road #LO (Map 130, Lot 088) (via Zoom).
- **Paul E. Aurretto**, nonresident (**ABUTTER**) of 11 Naumkeag Court, Litchfield, NH 03052 and co-owner with Lusa M. Aurretto of a vacant lot with an address of 221 Black Mountain Road #LO (Map 130, Lot 088) (via Zoom).
- **Mark Ayvazian**, nonresident, (**APPELLANT**), of 44 Ashwood Avenue, Wilmington, MA 01887, co-owner with Lynne Ayvazian of 170 Black Mountain Road (Map 130, Lot 099), Lincoln, NH 03251.
- **Jake Belanger**, resident (**LANDSCAPE CONTRACTOR FOR APPELLANT**), of 9 Kinsman Ridge Rd, Lincoln, NH 03251 d/b/a White Mountain Landscaping, PO Box 983, Lincoln NH 03251-0983.

**II. CONSIDERATION of meeting minutes from:**

- November 02, 2023 (Present: Chairman Ray D'Amante (via Zoom), Acting Chairman Jon Ham, Member Jack Daly, Member, Delia Sullivan, Member Myles Moran (via Zoom), and Alternate Susan Chenard (via Zoom))

**Motion to approve the minutes as distributed by Member Daly**

**Second by Member Sullivan**

**All in favor**

**III. NEW BUSINESS (Staff and Zoning Board Member/Alternates).**

**IV. CONTINUING AND OTHER BUSINESS:**

**A. Request for Equitable Waiver of Dimensional Requirements & Variance (Var).  
[Var 2022-05 M130 L099 Ayvazian]**

**(1) Equitable Waiver of Dimensional Requirements to permit existing retaining walls greater than four feet (4') in height to remain in the twenty-five-foot (25') setback areas:**

**(a) east side setback area;**

**(b) west side setback; and**

**(c) front setback (and extending onto Beechwood II Common Land) and**

**(2) Variance to permit proposed permanent outdoor fire pit structure to extend into the side setback area.**

**Appellant:**

Mark Ayvazian  
44 Ashwood Avenue  
Wilmington, MA 01887

**Property Owner(s):**

Mark Ayvazian & Lynne Ayvazian  
44 Ashwood Avenue  
Wilmington, MA 01887

**Surveyor:**

Andrew J. Nadeau, LS, PLS  
President, Principal Surveyor  
Horizons Engineering, Inc.  
34 School Street  
Littleton, NH 03561

**Landscape Architect:**

Project Manager Chris Kessler  
Gradient Landscape Architects  
PO Box 311  
New London, NH 03257-0311

**Homeowners' Association: Beechwood II (or Two) Homeowners Association**  
(Map 130, Lots 060-61,86-111)

Michael D. Saitow, President  
The Beechwood II HOA  
11 River Glade Drive #1  
PO Box 1149  
Lincoln, NH 03251-1149

Michael D. Saitow, President  
The Beechwood II HOA  
34 Rockwood Road  
Hingham, MA 02043

**Request is for the ZBA to grant:**

1. An **Equitable Waiver of Dimensional Requirements** to allow the existing retaining walls erected in 2002 or earlier, located on both sides of the driveway into the lot to remain; portions of the retaining walls are in excess of four feet (4') in height and located partially within the 25-foot east and west side setback areas and with the 25-foot front setback area and within common areas. The violation by previous owners occurred when the walls were constructed to support the driveway to the house that was constructed in 2002. The portions of the LUPO pertaining to retaining walls were not in the LUPO in 2002. No enforcement action has been taken in 21 years.

**PRESENTATION:**

Mr. Ayvazian describes the project being considered for the Equitable Waiver of Dimensional Requirements as noted above. He refers to drawings that have been distributed to the ZBA members and describes the location of the driveway and the retaining wall. He explains the history of the house and is now trying to correct issues that weren't completed when the house was originally built.

**DISCUSSION:**

Planner Bont asks Mr. Ayvazian if he has talked with the abutter. Mr. Ayvazian replies that he has talked with him. Planner Bont has not received any objections from the abutter and they both agree that the abutter does not have any issues concerning the Equitable Waiver of Dimensional Requirements.

The ZBA members review the worksheet for the Equitable Waiver of Dimensional Requirements (see attached)

Planner Bont reads from the Proposed Finding of Facts: An **Equitable Waiver of Dimensional Requirements**.

Planner Bont reads the **EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS WORKSHEET** facts and support for granting the waiver (see attached). The ZBA members are polled after each item on the worksheet is read and they are all in agreement.

1. An Equitable Waiver of Dimensional Requirements is requested from Article VI (District and District Regulations), Section B (District Regulations), Paragraph 2 (Land Use Schedule), Subparagraph 2 (Land Use Schedule), Sub-subparagraph 4 (Dimensional Chart) of the Land Use Plan Ordinance to permit:

Pre-existing nonconforming retaining walls (portions of which exceed four feet (4') in height measured from the bottom of the bottom course to the top and therefore qualify as a "structure" under the definition of "Structure" in the LUPO) to remain within the twenty-five-foot (25') front and side setbacks. The retaining walls are located on either side of the driveway and support the driveway into the subject lot. The retaining walls are within the twenty-five-foot (25') front and side setback areas.

The retaining walls are also partially located on:

1. Land designated as "Common Land" and part of the land owned by the Beechwood II Homeowners' Association. The portion of the wall located on the Common Land is less than four feet (4') in height.
2. Land owned by Thomas G. Hayes & Susan Lohnes at 176 Black Mountain Road (Map 130, Lot 098). The portion of the wall located on the abutters' lot is less than four feet (4') in height.

**Facts in support of granting the waiver:**

1. The request involves a dimensional requirement, not a use restriction.
2. The violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the Town.

**Appellant explains:**

- a. The Ayvazians are the current owners and they purchased the home in July 2020.
- b. Original construction was in 2001.
- c. There are several retaining walls over four feet (4') in height that were built according to the rules in effect at that time.
- d. The violation has existed for 20+ years with no enforcement by the Town to their knowledge.

**The Planner agrees with Appellant's explanation above and adds.**

- e. According to the 2023 property tax assessment cards, the home on the subject lot was built in 2001; the home was first assessed in 2002.
- f. There were several pre-existing retaining walls over four feet (4') in height that were built at that time.
- g. On March 18, 2002, NH adopted a State Building Code that included requirements associated with the building of retaining walls. All retaining walls were required to be built in accordance with the NH State Building Code, including retaining walls in the Town of Lincoln.

- h. The Lincoln LUPO did not directly reference the NH State Building Code regulations for retaining walls at that time or until 2015.
  - i. The Town has not commenced or taken any enforcement action, including written notice, to have these retaining walls comply with the State Building Code or the Land Use Plan Ordinance.
- 3. Appellant satisfactorily explains how the nonconformity was discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to him, a bona fide purchaser.

**Appellant explains:**

- a. Original construction was in 2001 or 2002.
- b. There are several retaining walls over four feet (4') in height that were built according to the rules in effect at that time.
- c. The violation has existed for 20+ years with no enforcement by the Town to their knowledge.
- d. Appellant, the current owners purchased the home in July 2020.

**The Planner agrees with Appellant's explanation above and adds.**

- e. The current owners were *bona fide* purchasers in July 2020.
- f. The retaining wall structures on the lot were completed sometime between 2001 when the house was permitted and 2020 when appellants purchased the property.
- g. Both the appellants *and* the Town learned that the existing retaining walls with portions greater than four feet (4') in height were nonconforming when appellants applied for a Land Use Authorization Permit in 2022 to add a deck onto the rear of the house and discussed creating outdoor living spaces in the future.

**AND**

- 4. **Appellant satisfactorily explains how the violation was not an outcome of ignorance of the law or bad faith but resulted from a good faith error in measurement or calculation.**

**Appellant explains:**

- a. The violation was not an outcome of ignorance of the law or bad faith, but existed when the Appellants purchased the property in July of 2020.

**The Planner agreed with Appellant's explanation above.**

- 5. **Appellant satisfactorily explained how the nonconformity does not constitute a nuisance nor diminish the value or interfere with future uses of other property in the area.**

**Appellant explains:**

- a. The violation does not constitute a public or private nuisance nor does it diminish the value of property in the area because it has existed in its current condition for 20+ years.

**The Planner agrees with Appellant's explanation above and adds:**

- b. The nonconformity does not constitute a public or private nuisance. It does not involve an unreasonable or unlawful use of the property that results in substantial interference with the use and enjoyment of any person's property in the neighborhood. It does not involve a use of the property that results in an annoyance, inconvenience, discomfort or injury to another person or to the public. For example, there are no disturbing vibrations, pollution of stream or soils, smoke, foul odors, excessive light or loud noises.
- c. The nonconformity does not diminish the value or interfere with future uses of other property in the area. The abutting lots are residential use. The subject lot is a residential use. The nonconformity will not interfere with residential uses.

**6. Appellant satisfactorily explained how the cost of correction far outweighs any public benefit to be gained.**

**Appellant explained:**

- a. The cost of correction far outweighs any public benefit to be gained and it would be inequitable for the violation to be corrected.

**The Planner agrees with Appellant's explanation above and adds:**

- b. Moving the pre-existing retaining walls to the center of the lot would be cost prohibitive and there would be no substantial public benefit to be gained by doing so.

The ZBA members are polled after each item on the worksheet is read (above) and they are all in agreement.

Vice Chairman Mark Ehrman raises a question regarding whether any of the abutters are objecting to granting the waiver. Lusa Aurretto who owns land with her husband across the street, informs the ZBA that they do not have any issues with the ZBA granting the waiver at this time.

**PUBLIC COMMENT:** Joseph Chenard expresses concerns with how future non-compliant retaining walls will be handled. Planner Bont explains that in this case they will be leaving the wall "as is" and if the wall does require repair, it would be allowed. Vice Chairman Ehrman asks if this is to quiet an existing non-issue. The ZBA and Planner Bont all agree it is. Vice Chairman Ehrman suggests taking a vote to quiet the non-issue.

**Motion to approve the Equitable Waiver of Dimensional Requirements by Member Sullivan**

**Seconded by Chairman D'Amante**

**All in favor**

**Motion passes**

2. A **Variance** to allow a proposed permanent outdoor fire pit structure within the west side 25-foot westside setback area. The patio for seating surrounding the patio will be crushed gravel and does not qualify as a “structure” under the LUPO so no variance is required for the patio.

## **PRESENTATION/DISCUSSION:**

Mr. Ayvazian was previously asked by Planner Bont to provide some pictures and diagrams showing what the fire pit will look like. The ZBA members review the pictures and diagrams submitted by Mr. Ayvazian and he discusses the dimensions for clarification. Member Sullivan asks why they are putting the fire pit in the location seen on the drawings. The project’s contractor, Mr. Belanger, replies that there is a slope to the ground and it would encroach on the existing rock wall. He explains that this is the best place to fit the fire pit on the property. Mr. Ayvazian mentions that his closest abutter to the proposed fire pit, Thomas Hayes, has reviewed the drawings and has approved of them.

Member D’Amante expresses that the setbacks off the lot enhances the privacy of the neighborhood. The ZBA discusses the abutting road and agree that the buffer between Lot 105 and Lot 106 is enhanced by the access and parking.

Planner Bont reads the **Application for a Variance** as described above (see attached).

The ZBA members are polled after each item on each of the criteria listed on the Application and they are all in agreement.

### **Criteria**

1. Granting the variance would not be contrary to the public interest. All members of the ZBA are polled and agree with that statement.
2. Granting the variance would observe the spirit of the variance because the appellant says it does not violate or undermine the legal purposes the zoning ordinance serves or the reasons it is enacted. All of the ZBA members are polled and agree with that statement.
3. Granting the variance would do substantial justice because the appellant says the proposed development is consistent with the area’s present communities. All of the ZBA members are polled and agree with that statement.
4. Granting the variance would not diminish the values of the surrounding properties for the following reasons: It does not block the view to the water, the sunset, the sunshine, the mountains. All of the ZBA members are polled and agree with that statement.
5. Unnecessary hardship: The proposed use is reasonable and reflects current conditions on the site. The property cannot be reasonably used in strict conformance with the ordinance and variance is necessary to enable the reasonable use. The ZBA discusses adding that the slope of the land as a condition that justifies putting the fire pit in that

particular spot. All of the ZBA members are polled and agree with that statement.

The ZBA discusses the rules for fire pits. Joseph Chenard comments on the rules for firepits. He states that fire permits are required every year, a fire hole of more than two (2) feet can only be burned after 5:00PM.

**Condition:** The ZBA agrees to make a condition that any location change that bring the firepit closer to the setback would require permission from the ZBA.

- i. The request is a reasonable one because it is a firepit for residential use. It is a relatively small firepit. All of the ZBA members are polled and agree with that statement.

**Acting Chairperson polls the ZBA members to determine if they are in favor of granting the variance. All members are in favor of granting the variance with the following condition:**

**Condition:** The ZBA agrees to make a condition that any location change that bring the firepit closer to the setback would require permission from the ZBA.

- i. The request is a reasonable one because it is a firepit for residential use. It is a relatively small firepit. All of the ZBA members are polled and agree with that statement.

**The Variance with a Condition is Granted.**

**V. OTHER BUSINESS** *None*

**VI. PUBLIC PARTICIPATION AND OTHER BUSINESS:** *None*

**VII. ADJOURNMENT**

**Motion to adjourn by Member Sullivan**

**Second by Member Daly**

**All in favor**

Respectfully submitted,

*Judy Sherriff*  
Recording Secretary  
Date Approved: \_\_\_\_\_

March 15, 2023

  
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Acting Chairperson Ham