

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
TUESDAY – NOVEMBER 22, 2016 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chairman Jonathan Ham, Jack Daly, Board of Selectman Representative Jayne Ludwig, Paul J. Beaudin II, Jim Martin, Don Landry

Members Excused: Ray D'Amante

Members Absent: None

Staff Present: Town Manager/Planner Burbank, Fire Chief Ron Beard, Planning and Zoning Administrator Carole Bont, and Wendy Tanner (Recording Secretary)

Staff Excused: None

Guests:

- **Kathy Cook** – resident of 19 Coolidge Street (Map 113, Lot 135), Lincoln, NH 03251
- **Raymond Degrace** – resident of 4 Donovan Drive (Map 112, Lot 015), Lincoln, NH 03251
- **Denise Heredeem** – resident of 25 School Street, PO Box 372, Lincoln, NH 03251-0372
- **J. Richard Kenn**, resident and property owner of 20 School Street (Map 113 Lot 128), P.O. Box 247, Lincoln, NH 03251
- **Sue Kenn**, resident and property owner of 20 School Street (Map 113 Lot 128), P.O. Box 247, Lincoln, NH 03251
- **Laurel Kuplin** – resident of 25 Coolidge Street (Map 113, Lot 137), Lincoln, NH 03251
- **Frank Mulligan** – resident of 29 School Street, Lincoln, NH 03251, owner, Francis & Mercedes Mulligan, Trustees, of the 29 School Street Realty Trust at 541 East Third Street, South Boston, MA 02127
- **Leona Roussel**
- **Pam Palmer** – resident of 17 School Street (Map 113, Lot 100), Lincoln, NH 03251
- **Philip Porter**
- **Roy Whitaker** – of Lincoln Sign Company, 166 Pollard Road (Map 114, Lot 059), Lincoln, NH 03251, representing AMBA Hotel, LLC (Principal: Anil Patel) at 44 Bedford Street, Lexington, MA 02420 d/b/a Holiday Inn Express Inn & Suites at 21 Railroad Street (Map 112, Lot 017)

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- 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.

Ray D'Amante is excused.

Jim Martin arrived late.

Jack Daly is seated.

II. CONSIDERATION of meeting minutes from:

- October 19, 2016

Motion to approve the minutes of October 19, 2016 as amended.

Motion: Jack Daly Second: Jayne Ludwig In favor: 3-0

Paul Beaudin, Jim Martin and Don Landry abstained.

- September 8, 2016

Motion to approve the minutes of September 8, 2016 as presented.

Motion: Paul Beaudin Second: Jayne Ludwig In favor: 4-0

Jack Daly and James Martin abstained.

III. CONTINUING AND OTHER BUSINESS (Staff and Planning Board Member/Alternates).

6:00 PM. Lincoln Zoning Board of Adjustment (ZBA) **Administrative Appeal** per RSA 676:5,ii(b)

1. **Case #:** **2016 ZBA Adm App 2016-02 Mulligan – Heredeen M113 L103**
2. **Location:** Tax Map 113, Lot 103 - 29 School Street
Village Residential (VR) District
3. **Property Owner:** Francis & Mercedes Mulligan, Trustees
29 School Street Realty Trust
541 East Third Street
South Boston, MA 02127
4. **Petitioner:** Denise Heredeen Owns 25 School Street (Map 113, Lot 102)
25 School Street
PO Box 372
Lincoln, NH 03251-0372

Petitioner is appealing a decision of the Planning and Zoning Administrator made on May 4, 2015, involving petitioner's abutter's land to the ZBA. Petitioner requests ZBA grant an administrative appeal to be presented to the ZBA.

Petitioner and abutter to the subject property is Denise Heredeen 25 School Street, PO Box 372, Lincoln, NH 03251-0372. Her abutting property is 25 School Street (Tax Map 113, Lot 102). The Owner of the subject property is Francis & Mercedes Mulligan, Trustees, of the 29 School Street Realty Trust at 541 East Third Street, South Boston, MA 02127. The subject property is 29 School Street (Tax Map 113, Lot 103). The subject property and the abutter's property are both located in the Village Residential (VR) District where there is a 10 foot side setback requirement as set forth in LUPO, Article VI, Section B., Paragraph 4 Dimensional Chart.

Initially the owner of the subject property received a Land Use Permit to build a single family home. After he built the home, the property owner put in a window well to let light into the basement level. The window well encroached into the ten foot (10') side setback. The owner of the subject property was asked to submit an Application for a Variance. The owner submitted an Application for a Variance. The Chair of the ZBA reviewed the petition & recommended to the Planning and Zoning Administrator and the Town Planner that a

Variance was not needed because the window well did not fall within the requirements of the current Land Use Plan Ordinance; they agreed. They did not further process the Owner's Application for a Variance.

Petitioner complains that the Town's failure to require the property owner to request a variance has interfered with her peace and enjoyment of her property without notice and hearing as an abutter; Petitioner wants the Town to require the property owner to go through the Dimensional Variance review process before the ZBA.

ACTION: Upon a finding by the ZBA that the application meets the submission requirements, the ZBA may vote to accept the application for an Administrative Appeal 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.

Beaudin said that the administrative appeal fails to meet the requirements of the Zoning Board of Adjustment's Rules of Procedure. Beaudin said that the Rules of Procedure requires an administrative appeal to be filed within thirty (30) days of the administrative decision. Beaudin felt that in order to go forward with a hearing, the Zoning Board of Adjustment (ZBA) would need to vote on whether the applicant had "good cause" for filing a late appeal because the time between the date of the administrative decision and the date the appeal was submitted was longer than thirty (30) days.

Beaudin said he also felt that this was "an enforcement issue". The applicant who built the house had agreed with his neighbor to put up a fence around the window well and had not done so.

Bont stated that because there was no hearing scheduled for this application, the appellant did not have a specific date from which to calculate the deadline for making an administrative appeal. Because no hearing was scheduled, abutters were never notified. Abutters did not receive official notice of the Town's decision not to require the applicant to get a variance for this structure. Because there was no hearing, neither the applicant nor the abutter had the opportunity to be heard. When Abutter/Appellant Heredeem came into the office with her concerns, staff contacted the Town Attorney and the Town Attorney suggested that the abutter be allowed to bring an administrative appeal.

Paul Beaudin said that in reading the appeal, he understands that the abutter's concern was that a fence was not installed around the window well.

Bont said that Abutter/Appellant Heredeem was trying to make a reasonable compromise. She wanted to get her needs met without forcing her neighbor Mulligan go through the ZBA process to get a variance. In reality, the question is: Is the window well considered a "structure" located within the setback in violation of the zoning ordinance and therefore, needs approval for a variance in order to be a legal structure? Is the window well part of the "building" or a

“structure” as defined in the zoning ordinance? If not, does Mulligan who built the window well need to go before the ZBA for a variance? Heredeen is appealing the town staff’s administrative decision.

Paul Beaudin asked Heredeen if she was appealing the administrative decision to allow the window well (without a variance) or the fact that the fence was not built. Denise Heredeen said that she objected to the window well itself because the conditions of the agreement were not met and were later changed without her knowledge.

Paul Beaudin asked Heredeen, “If the window well was fenced, would you withdraw the administrative appeal?” Denise said, “If there was an eight foot stockade fence put up, the length of his house, four (4) feet from my property, I would withdraw it, yes”.

Paul Beaudin said that the only matter that was discussed with the applicant (“and it was me who discussed it”) was putting up a fence around the window well so children and animals would not fall into the window well area.

Heredeen read her letter to Town Manager Burbank dated September 10, 2016. (See attached.)

Heredeen read from the Lincoln Zoning Board of Adjustments, Notice of Public Hearing for ZBA to Consider Request for an Administrative Appeal per RSA 676:5,II(b) paragraph 3.

Initially the owner of the subject property received a Land Use Permit to build a single family home. After he built the home, the property owner put in a window well to let light into the basement level.

Heredeen said that the window well structure was never part of the building plans submitted to the Town. Regardless of the reason, Heredeen does not believe this structure is a “window well”. Window wells are built in semi-circles around the window at grade level from basement windows and are created to keep dirt out. A window well is not a cement foundation 5’6” wide x 11’6” long x 4’ deep alongside of the building.

Heredeen read some more from the Lincoln Zoning Board of Adjustments, Notice of Public Hearing for ZBA to Consider Request for an Administrative Appeal per RSA 676:5,II(b) paragraph 3:

The window well encroached into the ten foot (10’) side setback. The owner of the subject property was asked to submit an Application for a Variance. The owner submitted an Application for a Variance.

Heredeen said that what is missing from this statement is the verbal conversation that she and Town Manager Burbank had in 2014 that the “window well” was an illegal structure and it would have to be taken down if Frank Mulligan and Heredeen could not work something out.

Heredeen said she was under the impression that a variance was something that you get before you build, not after. Mulligan's Application for a Variance was submitted in the spring of 2015 and Heredeen was not notified.

Heredeen read again from the Lincoln Zoning Board of Adjustments, Notice of Public Hearing for ZBA to Consider Request for an Administrative Appeal per RSA 676:5,II(b) paragraph 3:

The Chair of the ZBA reviewed the petition & recommended to the Planning and Zoning Administrator and the Town Planner that a Variance was not needed because the window well did not fall within the requirements of the current Land Use Plan Ordinance; they agreed. They did not further process the Owner's Application for a Variance.

Petitioner complains that the Town's failure to require the property owner to request a variance has interfered with her peace and enjoyment of her property without notice and hearing as an abutter; Petitioner wants the Town to require the property owner to go through the Dimensional Variance review process before the ZBA.

Heredeen said that this is an after the fact change from the initial decision made by the Town Manager as expressed to Heredeen.

Heredeen said she would like to restate the fact that this structure is an "attractive nuisance". School children have been cutting through both properties since Heredeen moved there in 2001 which Heredeen does not have a problem with. However, Heredeen has recently seen kids playing and balancing on the wall of this 4 foot deep pit on their trip through.

Ludwig asked Beaudin how the structure did not meet the requirements within the Land Use Plan Ordinance if indeed it was submitted after the site was developed and built after that.

Beaudin said that he went to the Mulligan property (at Bont's request) and looked at the window well because he was the ZBA Chair at the time, While Beaudin was at the property he met the owner and looked at the window well. In his opinion the window well is not a "structure" ("building"). It has nothing on top of it. It is a window well that allows light into the basement. Beaudin agreed that it is a danger and said that during the conversation with the owner, Mulligan had agreed to put a fence around the window well that so that no one could fall into it. Beaudin did not believe that there were any discussions with Town Manager Burbank or Administrator Bont about requiring a fence the entire length of the property.

Jayne Ludwig asked for the definition of a "structure".

Bont said that both the word "building" and "structure" are defined in the Land Use Ordinance. Initially, the staff and Beaudin were looking at the word "building". Later, both words "building" and "structure" were reviewed.

<p>Building – Any three dimensional enclosure supported by columns or walls intended for the shelter, housing or enclosure or any individual, animal, process, equipment, goods or materials of any kind or nature. Building – also see Structure.</p>

Structure – Anything constructed or erected with a fixed location on the ground, or attached to something having a fixed location on the ground excluding amusement devices. Structure, for floodplain management purposes, also includes a walled and roofed building, a gas or liquid storage tank that is principally above ground, as well as a manufactured home.

Paul Beaudin does not think the window well meets the definition of either “building” or “structure”.

Bont explained that the zoning ordinance is comprised of many different parts and one of the parts is the Sign regulations, another is the Floodplain Development District and the Telecommunications Equipment and Facilities. All the different parts are all included in the one ordinance. The definition section of the zoning ordinance include words that are in all of the disparate parts of the zoning ordinance. Some parts of the ordinance define the same word differently.

Jack Daly said in his opinion the window well meets the definition of a “structure” because it is affixed to an existing building, so therefore it is a structure.

Paul Beaudin thought that somewhere in the ordinance he also read that a “building” should have something on top of it.

Town Manager/Planner Burbank said that everything that Heredeen said is factual. However, Bont and Town Manager/Planner Burbank just work here. Everything that was just discussed by Heredeen, Burbank, Beaudin and Bont went through Burbank’s office in less than 12-14 hours. Initially, when we looked at the zoning ordinance we did not think the window well was a “building” (or “structure”) so we asked Heredeen to try to work it out with her neighbor. In hindsight it looks like the window well could be considered a “structure”, if not a “building”. So there is an argument both ways.

Town Manager//Planner Burbank said that after staff consulted with legal counsel, it was decided that the ZBA Chair, (Paul Beaudin at the time), should decide if the window well should go before the ZBA for a variance. Town Manager Burbank said that he believes that is when Paul Beaudin made a visit to the site. At that point, that is when Town Manager Burbank and Administrator Bont were out of the picture. Paul Beaudin, as the ZBA Chair, made the call. Chair Beaudin said he did not consider the window well to be a “building” or “structure” and we moved on. That is exactly how it went down. Everything everyone said is factual. Town Manager Burbank agrees that the window well as it is, presents a dangerous situation. A fence was discussed and never happened.

Beaudin asked Heredeen if she was informed that the window well was not a “building” or “structure”. Heredeen said, “Never!”

Daly asked Heredeen for clarification on the location and size of the window well or “foundation”. Heredeen showed Daly the description and images. Heredeen said that the house itself was built on the setback at ten feet (10’) from the property line and the cement foundation

comes out five feet six inches (5'6") into the setback. The "foundation" or "window well" measures eleven feet six inches (11'6") long by five feet six inches (5' 6") wide toward the property line and is four feet (4') deep.

Paul Beaudin told other members of the Zoning Board of Adjustment (ZBA) that the ZBA needs to make a decision if they should discuss the issue or not since more than a year has passed since the administrative decision was made before the administrative appeal was filed. The administrative appeal was filed more than 30 days after the administrative decision was made.

Heredeen said that she was never notified.

Paul Beaudin said that was why he asked Heredeen if she had been notified. Beaudin said that the ZBA has to make the decision as to whether or not we think there is enough evidence or reasons to continue to carry on with this administrative appeal. It has been longer than a year.

Paul Beaudin understands that if Heredeen was not told that the window well did not meet the definition of a "building" or "structure", had she known that, she probably could have filed her appeal at that time. Paul Beaudin thought that would be a reason to allow the continuation and for the ZBA to hear this appeal. Paul Beaudin would like to hear from Bont or Town Manager Burbank that Heredeen was not notified.

Town Manager Burbank said that Heredeen knew about having to work out a solution with her neighbor. He said he did not understand how Heredeen felt she was not notified.

Heredeen said that she was never notified. Bont said that she remembers a discussion with Heredeen about a fence but cannot remember when or the sequence of events.

The Board discussed if they would hear this application.

Ludwig said that she would like to hear about the idea of the "structure".

Ludwig asked Paul Beaudin if his decision that the window well was not a "building" or a "structure" was made with any other Board members or if it was made alone. Beaudin said that he made the decision on his own.

Ludwig said "So, is that how the process works? Was that the process that was supposed to be followed by the Zoning Board of Adjustment? Or did your decision not to have the ZBA hear the case affect the process itself the first time around?"

Beaudin said "If you look at the e-mail from me dated May 4th to both Butch and Carole I said that I did not think that, given our current regulations that would be a good idea for safety reasons." Beaudin read part of his email; "...that this window well, given our current regulations, does not need a variance. A fence would be a good idea too for safety reasons."

Beaudin said they agreed that Mulligan would not be able to use the window well space for any additional part of the building footprint or for means of access or egress without a variance.

Ludwig said she thought that made sense because the window well is in the setback. Beaudin said he told Town Manager/Planner Burbank and Carole that a variance was not necessary.

Ludwig said that because Mulligan's Application for a Variance did not follow the complete process with the whole ZBA Board, is it even a process that has been validated? Don't you have to have a Board make a decision? When you are part of a Board, don't you have to have other members to agree or disagree on your decision? Ludwig said that ever other Board she is on they do. A single board member cannot act alone.

Beaudin said that the Chair of the Board sets the agenda. Ludwig said it sounded like Beaudin's decision not to have a ZBA hearing was a personal decision.

Beaudin said that he has never had a Board where every application that comes in they say, "Do you think this fits or doesn't fit?" It is usually decided by the staff first. Ludwig said, "Right, but you as the ZBA Chair got involved and made that decision without the other members."

Beaudin said he made that decision after talking to the Town Planner and the Planning Administrator. They looked at the application and looked at the regulations. They decided together that the window well was not a "building" or "structure", therefore it did not need a variance.

Beaudin said when applications come in, that is usually what you do. The decision has to be made somewhere or every application would be coming to the ZBA. Then the ZBA would be arguing about does it meet the requirement? Does it not meet the requirement? What threshold you would have it? If you did not do that the ZBA would meet on everything. So if that is the way it needed to be, I was never told that.

Ludwig said to Beaudin that if he was acting alone as the ZBA Chair and making that decision, with staff input, but with no other members of the Board present, he should not be.

Jayne Ludwig said to Beaudin, this means that you made a decision without any other ZBA members present and without any input from other Board members regarding this situation. Does that make your decision valid? And are you liable? If you are a member of a Board, you cannot act alone. You are not part of that Board unless you have your other members present. So as a Chair person you went out and made that decision on your own.

Beaudin said that he went out and took pictures of the window well.

Ludwig said that was one concern she had. The fact that the window well is a structure is another concern.

Town Manager/Planner Burbank said that at the time, Beaudin was Chair of the ZBA and setting the rules. Beaudin said he wanted to review the applications when they came in. Chairs do that. The Chair determines which cases come before the ZBA and he decided. At the time we agreed that this was not a "building". However, after hearing this tonight, I think that Bont and Burbank would urge the ZBA to proceed with this hearing and hear both parties, their case, and make a

decision as to whether or not this matter needs to go back for site plan. Burbank said he heard stuff here tonight that he did not realize. Burbank recommended the ZBA think about the parties and hold a hearing tonight.

Daly said that it appears from Beaudin's e-mail that when he met with Mulligan and Mulligan agreed to put up a fence and that is stated right in the email. Jack Daly asked Heredeen if Mulligan put up the fence, would the fence solve her issue.

Heredeen said that if Mulligan puts up the fence that she wanted, yes, it would solve her issue.

Beaudin said that there are two fences. Beaudin asked Heredeen if she was talking about a fence that goes the entire length of the property.

Heredeen said that when Mr. Burbank told her that it was an illegal structure back in 2014, he said, "Maybe you could work it out." There is no building inspector here so that is a problem. I then spoke with Mr. Mulligan and he said "anything you want", those were his words. Then he said that it won't be until the spring because it was winter time. I said fine, so I pursued the matter throughout the next year and a half, asking him about the fence. Mulligan told Heredeen he had the stuff to build the fence and he never said a word about a variance. Heredeen never received a notice from the Town.

Jack Daly asked Mulligan if he made a statement to the ZBA Chair that he would put up a fence. Mulligan said he did. Jack Daly asked if Mulligan is still willing to put up a fence.

Mulligan said that he spoke to Heredeen in mid-August and they talked about the fence. The problem with the fence was he did not have time to get a fence up. Heredeen said how about having the fence stop there? We agreed to put the fence along inside the front of it.

Heredeen said that they did not agree on the fence or what it was going to look like.

Mulligan said that they agreed to start the fence at that front of the house and run the fence all the way beyond, about 12 feet beyond the back of the house. Mulligan agreed to put the fence up and block that whole area off. "We wouldn't be sitting here if I had put the fence up already."

Jack Daly asked if Mulligan is still willing to put the fence up. Mulligan said that he is going to put the fence up but where it fell apart was in September, Heredeen came back over to him and said that he should put the fence 4 feet back from your property and I said I was not doing that, I am putting it on the flower bed where we agreed because there is no room there and it blocks all the light into my windows.

Beaudin said that Mulligan could put in an application for a fence and put up a fence. Bont said that for a residential fence he does not need an application for a fence. Beaudin said that he thought that Mulligan would need a permit to erect a fence. Bont said that a permit is only needed for commercial fences or fences greater than eight feet (8') in height. Mulligan said that he never agreed to put up an eight foot (8') high fence.

Jack Daly said that Mulligan told them he already had the stock for the fence. Daly asked Mulligan what size fence stock he bought. Mulligan said he bought the stock for a six foot (6') high stockade fence.

There was a brief discussion about fences and the different heights.

Bont read the ordinance on residential fences on page 23 of the Land Use Ordinance.

4. Residential Lots:

- a. Residential fences cannot be higher than eight feet (8') from the top of the adjacent ground.*
- b. Residential Fences shall be located at least 1 foot from the property line.*
- c. Common Fences as defined in RSA 474 may be constructed along the property line.*

Bont explained that paragraph c. would not apply because that type of fence was more a fence for farmers on adjacent properties who share a livestock fence and share ongoing maintenance for the fence.

Beaudin then said questioningly, "So he really doesn't need a permit to put a fence on his property." Bont said, "No, he does not".

Beaudin said that the fence could be eight feet (8') tall. Mulligan said he has a six foot (6') tall fence. Beaudin described his conversation with Mulligan at the time of his visit. He told Mulligan that just erecting a fence on one side would not stop people from coming onto the property. Beaudin told Mulligan that he needed to block access to the window well so people cannot get into that well or that pit. That is the discussion that he had with Mr. Mulligan.

Beaudin asked Heredeem which fence she wanted. Do you want a fence around the property or just around the window well?

Heredeem said that where the fence is located should be up to the Town. When she spoke with Town Manager/Planner Burbank in 2014 he said that the window well was an encroachment into the side setback. Heredeem thought that she and Mr. Mulligan were going to work out, but it didn't happen. Mulligan was going to apply for a variance. Heredeem then asked if a variance was something that you apply for after you do something. Beaudin said, "No."

Bont said that sometimes that does happen, people come for a variance after the fact. Paul Beaudin said that it happens because people do not understand the rules. Heredeem said that ignorance is no excuse.

Town Manager/Planner Burbank said that the original decision was that there was an encroachment into the side setback, but that he did not think it was a "building", so that is where the original conversation started and where the idea of encroachment came in. The safety concern was from the very beginning. The original discussions were that if the well itself would need to be fenced in some way, but Heredeem would work it out with her neighbor. We were

told that had been done. We just heard that it never got done. The idea of the fence to prevent access to the window well has now morphed into an eight foot (8') high fence along the entire length of the property which really does not protect people from falling into the hole.

Heredeen said that she does not care about the hole being protected, that is not her business. She cares more about the idea that Mulligan encroached into the setback. If Mulligan put up a stockade fence, she would go along with that. Heredeen said that Town Manager/Planner Burbank told her in 2014 that either the fence could be worked out or the window well had to come down. "Those were his words." Town Manager/Planner Burbank said that he was countermanded by the people he works for.

Beaudin said that he still does not think the window well is a "structure". His main concern then was for safety and he still feels that way. Beaudin said he is taken aback by the fact that Heredeen does not care about the safety and that she only cares that Mulligan has encroached into the setback.

Heredeen said that of course she cares about the safety, but the safety is Mulligan's issue.

Beaudin asked if Heredeen would be content if Mulligan put a fence up around the window well. Heredeen said that if was four feet (4') back from her property line and eight feet (8') high.

Daly asked if the fence was six feet (6') high would it be okay with Heredeen. Heredeen said that if the fence was four feet (4') back from my property and six feet (6') high, that is not what she wanted.

Daly asked if Heredeen would compromise with the six foot (6') fence. Heredeen said that only if the fence was the entire length of Mulligan's house, six feet (6') high and four feet (4') from her property. Beaudin said that the window well is almost the length of his house anyway.

Daly asked Mulligan if he was willing to compromise and make a six foot (6') high fence the entire length of his house and four feet (4') from her property. Mulligan said that he will agree to put the fence up where he originally agreed to which was at the back of the flower bed. Mulligan said that if the fence is four feet (4') off the property line the fence would be too close to the window well. Mulligan said he would put the fence on the edge of the flower bed (which is on his property) and apologized that he did not get the fence up sooner.

Heredeen said that when she originally discussed the fence with Mulligan, he said the fence would be whatever she wanted. She does not even know what he is putting up. Plastic, wooden, see through? She does not know what it is. Daly said that Mulligan said a stockade fence. Heredeen said that she did hear Mulligan say a "stockade fence", but he never said that to her before tonight.

Chair Ham asked Mulligan to explain to the ZBA and Heredeen what type of fence he was planning to install. Mulligan said that he could do either a stockade fence or sheet it with cedar. He has the posts but not the face board.

Chair Ham asked if Mulligan was opposed to putting something around the window well for safety reasons. Mulligan said that he was not and should have had it down by now.

Beaudin said that when he and Mulligan had their original discussion, Mulligan said the fence was not going to be between the well and Heredeen's property, but it was going to be around the well. Mulligan said that what he agreed to was that he would put a fence up around the property and fence in that area so no one could get in there. Ludwig agrees because the open window well presents a safety issue.

Beaudin said that he thinks the Board has two choices:

1. Bring this issue to a vote, agree to hear this appeal and eventually vote on whether to grant a variance; or
2. Have the two parties discuss the fence and agree to some sort of resolution the two parties can be happy with.

Jack Daly asked if Heredeen and Mulligan could step out of the room for 10 minutes and come up with some sort of agreement that would satisfy both parties.

Motion to recess this application for 10 minutes to the applicant and abutter can negotiate a compromise.

Motion: Paul Beaudin Second: Jack Daly All in favor.

B. 6:00 PM. Lincoln Zoning Board of Adjustment (ZBA) Request for a Special Exception

1. Case #: 2016 ZBA SE 2016-02 M112 L017 Holiday Inn Express Sign

Property: AMBA Hotel, LLC d/b/a Holiday Inn Express Inn & Suites
21 Railroad Street
(Tax Map 112, Lot 017)
General Use (GU) District

Applicant: Roy Whitaker Owner/Operator
Lincoln Sign Company
166 Pollard Road
Lincoln, NH 03251

Property Owner: AMBA Hotel, LLC, (Principal: Anil Patel)
44 Bedford Street
Lexington, MA 02420

Applicant Roy Whitaker of the Lincoln Sign Company, on behalf of property owner, AMBA Hotel, LLC, d/b/a Holiday Inn Express Inn & Suites at 21 Railroad Street (Map 112, Lot 017) for a Special Exception concerning Article VIB Lincoln Sign Regulations, Section 10, Sign Classification and Standards, Subsection i. Free Standing Sign and Subsection m. Internally Illuminated Sign.

Applicant proposes to put replace a very large pre-existing nonconforming internally lighted sign with a smaller internally lighted freestanding sign, however, the new sign would not conform to the sign regulations in the Land Use Plan Ordinance in that the size of the sign is larger than maximum 100 square feet, the size of the internally illuminated portion of the

sign exceeds 24 square feet and the support structure exceeds 50% of the allowable size of the sign.

The proposed sign requires a Special Exception as specified in the Land Use Plan Ordinance, Article VIB Lincoln Sign Regulations, Section H, Appeals, Subsection 2, Special Exceptions for Signs. The lot is located in the General Use (GU) District.

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

ACTION: The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting. 3

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.

Ludwig mentioned that current Land Use Plan Ordinance (the zoning ordinance) has a provision that all signs must be in compliance with the ordinance by January 2017.

Bont said that requirement that all signs must be in compliance with the Sign Ordinance portion of the Land Use Plan Ordinance will probably be on hold because of a US Supreme Court case having to do with signs. *Reed vs. Town of Gilbert*, 576 US ____ (2015). Right now the whole nation is up in the air about what to do about signs.

Reed v. Town of Gilbert, 576 U.S. ____ (2015) was a case in which the United States Supreme Court clarified when municipalities may impose content-based restrictions on signage. The case also clarified the level of constitutional scrutiny that should be applied to content-based restrictions on speech. In 2005, the Town of Gilbert, Arizona adopted a municipal sign ordinance that regulated the manner in which signs could be displayed in public areas. The ordinance imposed stricter limitations on signs advertising religious services than signs that displayed "political" or "ideological" messages. When the town's Sign Code compliance manager cited a local church for violating the ordinance, the church filed a lawsuit in which they argued the town's sign regulations violated its First Amendment right to the freedom of speech.

A majority of the Court held that the town's sign ordinance imposed content-based restrictions that did not survive strict scrutiny because the ordinance was not narrowly tailored to further a compelling government interest. Strict scrutiny should always be applied when a law is content-based on its face. Two concurring opinions argued that content-based regulations should not always automatically trigger strict scrutiny. Although some commentators praised the court's decision as a victory for "individual liberty", other commentators criticized the Court's methodology. Some analysts have also suggested that the case left open several important questions within First Amendment jurisprudence that may be re-litigated in future years.

Wikipedia

Bont said that although Benjamin D. Frost, Esq., AICP, Director, Public Affairs, New Hampshire Housing is an attorney who worked on a new sign ordinance for his Town of Warner, she thought the ordinance was awkward.

Motion to accept the application as complete

Motion: Paul Beaudin Second: Don Landry All in favor (5-0)

Whitaker, on behalf of AMBA Hotel, LLC, explained that the Holiday Inn Express sign he is proposing to put up is smaller than the Comfort Inn sign that is coming down.

Paul Beaudin asked Roy Whitaker if he had submitted written authorization to act on behalf of the property owner.

Motion to recess this application until Roy Whitaker can contact the owner for permission.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: (5-0)

Motion to reconvene the Heredeen's Administrative Appeal.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: (5-0)

Heredeen said that she and Mulligan have agreed that Mulligan going to put up a six foot (6') stockade fence one foot (1') from the property line.

Heredeen asked if it had to be (1') foot back if the fence could be on the property line. In unison, several Board members said that it has to be one foot (1') from the property line.

Heredeen said she also understood that Mulligan will enclose the window well area to make it secure.

James Martin asked if they would resolve this matter before the winter. Mulligan said he would try if the ground is not frozen. If the ground freezes and a fence cannot be installed until next year, the fence must be installed by May 30, 2017.

Note:

4. Prohibited Fences:

- a. The following fences are prohibited in the Town of Lincoln:
 - iv. Fences with the interior side (AKA "bad side") facing toward the abutters

Mulligan said that he was going to enclose the whole area.

Daly asked if the case is dismissed, like in a court of law, could the case be tried again if the fence is not put in. Beaudin said that Heredeen has the right to file again for the same reasons because if he does not meet that requirement that is the reason to do the administrative appeal.

Town Manager/Planner Burbank said that if the ZBA does not continue the hearing to a date certain, that would trigger the requirement that the Town would have to send out abutter notices again and the Town would have to pay for those notices.

Paul Beaudin said that if you continue the hearing to a date and time certain, the hearing would not have to be re-noticed and if everyone wants to come back again they can.

There was a long discussion about the fence and where it will be located on the property. Heredeen said that the fence will come out from the end of Mulligan's house and be a rectangular shape, down the length of the house and then back into the house again. There will be nothing that goes inside that fence and it will be down Heredeen's property.

Motion that this case is dismissed based on fact that the applicant and the abutter have come to an agreement with the requirement that Mr. Mulligan install a six foot (6') high stockade fence by May 30, 2017, a minimum of one foot from the property line, the length of Mulligans house and the window well will be secured.

Motion: Paul Beaudin Second: Don Landry All in favor (5-0)

The Board reconvened with the Holiday Inn Express application.

Roy Whitaker had Anil Patel on speaker phone. Anil Patel is the principal for AMBA Hotel, LLC d/b/a Holiday Inn Express. Anil Patel told the ZBA that Roy Whitaker of the Lincoln Sign Company is authorized to represent him and the Holiday Inn Express and Suites on this application.

"I am Anil Patel from Holiday Inn Express in Lincoln New Hampshire and I have hired Roy Whitaker to work for me on my hotel for the sign."

Whitaker explained the sign that was being taken down and the sign that is being put up. Whitaker showed the ZBA some photos of the signs.

Height:

- Whitaker explained that the railroad ties that surrounded the old sign have been taken out and the new sign will be installed at ground level 4 feet lower than the old sign.

Lighting:

- The sign will not be internally lit, it will be face lit.
- Whitaker said that the illumination is no longer a problem because the sign will now be externally lit.

Size of Sign:

- Whitaker is measuring the sign face based on the general provisions in the ordinance, which is where the words are, that is within the limits.

Size of the Post or Supporting Structure:

- The structure part is where it gets confusing. There are two sections in the ordinance, Whitaker read as follows:

Page 66 section 9. General Provisions.

a. Sign Area, ii.

- The maximum area of the structure of the sign is 50% of the allowed sign area and is calculated on the structural elements above the bottom of the sign. Posts or support structure below the sign are not included in this calculation nor is it considered a part of the sign's area.*

Whitaker said that he would say that the “shroud” on the sign should not even count. Whitaker said that when he went to the Planning Board, they considered the shroud or the bottom of the sign part of the sign and said that they could not vote on the sign because the sign was noncompliant.

Next Whitaker read:

Page 70, section I Free Standing Sign, ii Standards, c).

- a) Free Standing Signs in the Village Center (VC) Zone must not exceed fifty (50) square feet per single business, excluding structure, or one hundred (100) square feet in the General Use (GU) Zone. Multiple business properties are permitted one Free Standing Sign with only thirty-two (32) square feet allowed per business, not to exceed one hundred fifty (150) square feet, including the structure. The support structure for a Free Standing Sign must not exceed fifty percent (50%) of the allowable sign square footage. The maximum height for a Free Standing Sign, except in a residential zone is twenty (20) feet above grade and the maximum depth is one (1) foot except when the support structure is natural stone or stone-like product where the maximum depth is two (2) feet.*

Whitaker said, in the middle of that paragraph it says:

The support structure for a Free Standing Sign must not exceed fifty percent (50%) of the allowable sign square footage.

Whitaker said that he is urging the Board to not consider the “shroud” part of the allowable square footage of the sign. There was some discussion about the sign and whether the shroud or the sign base should be considered part of the sign.

Beaudin said that the proposed Holiday Inn Express sign is a nonconforming sign, but the sign for the Comfort Inn that was taken down is even more nonconforming, so the fact that the proposed new sign is less nonconforming than the old sign is a positive. The large nonconforming Comfort Inn sign could be replaced with a new sign the same size just by switching out the faceplate. Whitaker said that the Planning Board asked him if he could just change the face on the other larger nonconforming sign.

Ludwig asked if there was a reason why the new Holiday Inn Express sign was not made in accordance with the ordinance. Whitaker said that he thought he was following the ordinance. The Planning Board said that the ZBA needed to discuss it; the Planning Board passed the buck to the ZBA.

Daly said that Whitaker indicated that it was going to be externally lit. Bont said that Whitaker's client was now agreeable to making the sign externally lighted. Originally, the proposed sign was internally lighted.

Whitaker said that the remaining question is the post size at fifty percent (50%). Bont said that, design-wise, the shroud or post appears to be a part of the sign, but Whitaker is making a good argument that the shroud is not part of the sign.

Beaudin said that the post is seven feet (7') wide by fifteen feet (15') high. The sign is one hundred five (105) square feet. If you take the sign out of that calculation of area, the sign is only fifty-five (55') square feet. So the sign is over the size limit by five (5) square feet.

Whitaker said that although the ZBA could look at the sign that way, another other way to look at the sign is to treat the shroud as not a part of the sign base.

Beaudin said that he is looking at the proposed sign in a worst case scenario; the proposed sign would be over the size limit by only five (5) square feet if they include the shroud or sign base as part of the sign. Bont said that depends upon how the ZBA characterized the post. Whitaker said that the "post" is really a shroud covering the post.

James Martin asked if the wording says that the support structure is allowed to be fifty percent (50%) of the allowed sign area. The ZBA members answered with a resounding "yes".

Whitaker said that the LUPO also says that posts or support structure below the sign are not included in this calculation. Ludwig asked Whitaker if that was the reason for his initial confusion. Whitaker agreed.

Ludwig asked if anyone was questioned before the sign was built. Whitaker said that there were discussions before he called the manufacturer and said that "it sounds like it's a go". And then he went to the Planning Board and the Planning Board said he needed to talk to the ZBA.

Town Manager/Planner Burbank said that the issue was the degree to which the proposed sign was nonconforming. The Planning Board picked up on it immediately. They all agreed that the proposed new sign would be an improvement over the outsized internally lighted Comfort Inn sign that is there now. They agreed that the proposed sign would go a long way towards meeting the aesthetic goals the Town is trying to meet. Personally, to have to apply for a special exception for five (5) additional square feet seems extreme. However, down the road someone could challenge the sign because it did not have a Special Exception and they would probably be right. The staff thought that rather than allowing the overage administratively, it was better to have the overage approved and documented with a variance.

Whitaker said that he talked to Ben Clark, who is an abutter (Hobo Hills Golf & White Mountain Railroad), and Clark is in favor of the new sign. Whitaker introduced Raymond Degrace who verified that he is an abutter who is in favor of the project.

Motion to open public comment.

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

Ray Degrassy said that he is an abutter and is in favor of the proposed sign. It's a tourist area and we should help them find their hotel.

Ludwig asked if there was some way to clarify the confusion in the ordinance with the Planning Board so that someone does not make the same mistake. Whitaker said that he has offered his services to help rewrite the ordinance. Bont said that the Planning Board was very happy to have Whitaker's assistance.

Town Manager/Planner Burbank said that the whole sign ordinance portion of the Land Use Plan Ordinance will have to be rewritten because of a US Supreme Court ruling. This court case has just created a whole can of worms. Our sign ordinance is pretty in depth. After the Supreme Court case, the ordinance is almost to the point of being unenforceable. Any time the ZBA can make decisions that are in the spirit of what the Town is trying to achieve, they should try to make it happen.

Landry asked if the ZBA could put the ZBA's thinking in the minutes so if someone was asked to "go back on us" we could explain why we did what we did. We could add the photo of the comparison between the old sign and the new sign that will replace it, indicating that the new sign is smaller and less nonconforming.

Ludwig said that the ordinance is confusing. We recognize that as a Town we need to work on our ordinance. Ludwig said she "would agree to let this sign go" based on that fact.

Chair Ham asked about the other sign for the Holiday Inn Express that is off premise at the top of the Hobo Hills Golf sign near Main Street.

Bont said that the other free standing sign is off premise and is shared with two other businesses. The sign is a preexisting nonconforming sign. For that particular sign the applicant is not changing the sign, he is only swapping out the face. The applicant wanted to do something different for this particular freestanding sign.

Bont said that the applicant also changed out the sign on the building. This freestanding sign is easy to measure. The one on the building is not. The sign on the building is comprised of letters, but not mounted on a square or rectangle base that can be measured easily. For the building sign we had him calculate the area of the letters that comprise the sign. The Holiday Inn Express is over signed, so if he wants additional signage he should probably come into the Planning Board to get approval for an "Integrated Sign Plan".

There was a brief discussion about the different signs of the Holiday Inn Express.

Motion to close public comment.

Motion: Paul Beaudin Second: Jack Daly All in favor.

Motion to go into voting mode.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor.

Criteria...1– The sign (is – ~~is not~~) consistent with the Town of Lincoln Master Plan and the stated purpose of Article (Article VI-B Sign Ordinance) because:

Bont said that she believes that the sign is consistent with the Master Plan because the goal of the Master Plan is to have businesses tone their signs down. The signs should not be internally lighted. The signs should be smaller. The signs should be classier. Bont believes approving this sign would be consistent with the goals of the Master Plan and the stated purpose of the Sign Ordinance.

Beaudin said that the sign may be consistent with the goals of the Master Plan, however, the sign still does not meet the dimensional requirements of the sign ordinance and the sign requires a variance from the Land Use Plan Ordinance because it does not meet the goals of the Land Use Plan Ordinance. It does stay within the intention and the spirit of the Master Plan.

Affirmative vote was unanimous. Criteria 1 passes.

Criteria 2– The sign (will – ~~will not~~) enhance the tranquility of the neighborhood because:

Paul Beaudin said that the sign will enhance the tranquility of the neighborhood because the business will change the sign size to be smaller, the sign will be externally lit and it will meet the intentions and spirit of the Master Plan.

Bont said that in the Sign Ordinance the goals include reducing or eliminating confusion. This sign will reduce or eliminate confusion about the location of the hotel. Consequently people will not be knocking on the neighbors' door asking for directions and looking for the hotel.

Affirmative vote was unanimous. Criteria 2 passes.

Criteria 3– The sign (will – ~~will not~~) enhance the overall quality of the neighborhood in which it is located because:

Ludwig said the sign will enhance the overall quality of the neighborhood in which it is located because the sign and hotel are already located in a tourist neighborhood next to tourist attractions and tourist oriented businesses.

Affirmative vote was unanimous. Criteria 3 passes.

Criteria 4– The sign (will – ~~will not~~) resolve existing or potential hazards because:

Bont said that sign will resolve existing or potential hazards because drivers will find the hotel more quickly and easily because the sign will direct them.

The Board felt that Criteria 4 was “not applicable”. Vote was unanimous.

Criteria 5– The sign (will – ~~will not~~) improve unsightly distractions related to traffic, lighting, color, size, or the overall tranquility of the area because:

Bont said the sign will improve unsightly distractions related to traffic lighting, color, size, or the overall tranquility of the area because it is a reduction of size, externally lit, improves direction and less confusion.

Affirmative vote was unanimous. Criteria 5 passes.

Motion to approve the application for a Special Exception for the proposed Holiday Inn Express sign.

Motion: Jack Daly Second: Jayne Ludwig All in favor: (5-0)

There was a brief discussion about the Aubuchon Propane hearing, if and when the hearing was scheduled and how many members would be able to attend.

Bont said that Sean Bergeron will be representing Herbert Lahout at the meeting.

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

VI. 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.

VII. ADJOURNMENT


Motion to adjourn at 7:30 P.M.

Motion: Paul Beaudin Second: Jayne Ludwig All in Favor: (5-0)

Respectfully submitted,

Wendy Tanner,
Planning and Zoning Recorder

Date Approved: 11/30/2016



Jonathan Ham, Chairman