

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
THURSDAY – MAY 17, 2018 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chair Jonathan Ham, Vice Chair Paul J. Beaudin, Raymond D’Amante, Jack Daly, Delia Sullivan, Alternate James Martin II, Alternate Myles Moran, Alternate Stephen Noseworthy

Members Excused: Alternate Don Landry

Members Absent: None

Staff Present: Planner Carole Bont

Staff Excused: Recorder Ellyn Franklin

Guests:

- **Steve Benedetto, Big Wood Construction, LLC**, 188 Loon Lake Road, Plymouth, NH 03264, agent and contractor for **Appellant & Property Owner Kevin Grimes, d/b/a “27 Black Mountain Road, LLC”**, and Elizabeth Grimes, Manager for “27 Black Mountain Road, LLC”, 12 Clarke Road, Needham, MA 02492, who own property at 27 Black Mountain Road, Lincoln, NH (Map 130, Lot 055) in the Mountain Residential (MR) District.
- **Andrew Noyes, Director of Operations, Loon Mountain Resort**, 60 Loon Mountain Road, Lincoln, NH 03251, as agent and appellant for two property owners:
 1. CLP Loon Mountain LLC
60 Loon Mountain Road
Lincoln, NH 03251; and
60 Loon Mountain Road
(Tax Map 126, Lot 020)
General Use (GU) District
 2. Mountain Club on Loon Owners’ Association
90 Loon Mountain
Lincoln, NH 03251
90 Loon Mountain Road
(Tax Map 126, Lot 018)
General Use (GU) District
- **Ken Mack, Snow Making Manager, Loon Mountain Resort**, 60 Loon Mountain Road, Lincoln, NH 03251

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 meeting minutes from:

- April 17, 2018

Motion to approve the minutes: Beaudin **Second:** Sullivan **All in favor:** 5-0
Motion carries.

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

A. Work on Rules of Procedure for ZBA.

1. Should the ZBA have a Board of Selectman member on the ZBA as an *ex officio* member?

2. Should the ZBA have a nonvoting member from the BOS on the ZBA?

Motion to skip this discussion until end of meeting: Beaudin **Second:** Sullivan.
All in favor: 5-0. **Motion carries.**

IV. NEW BUSINESS

A. 6:00 PM Var 2018-02 M126 L020 & L019 CLP Loon Mountain LLC Setback Variance

Loon Mountain Recreation Corporation as agent for CLP Loon Mountain LLC and Mountain Club on Loon Mountain Unit Owners Association – VARIANCE concerning Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) of the zoning ordinance known as the Land Use Plan Ordinance (LUPO) to build a replacement deck and to expand the deck further into the 15-foot setback areas of two properties owned by the two different owners.

1. Agent & Appellant:

Andrew Noyes, Director of Operations
Loon Mountain Resort
60 Loon Mountain Road
Lincoln, NH 03251

as agent and appellant for two property owners:

- a. CLP Loon Mountain LLC
60 Loon Mountain Road
Lincoln, NH 03251; and
- b. Mountain Club on Loon Owners' Association
90 Loon Mountain
Lincoln, NH 03251

2. Property Owners:

- a. CLP Loon Mountain LLC
60 Loon Mountain Road (Tax Map 126, Lot 020)
Lincoln, NH 03251; and
- b. Mountain Club on Loon Owners' Association
90 Loon Mountain (Tax Map 126, Lot 018)
Lincoln, NH 03251

3. Properties:

- a. 60 Loon Mountain Road (Tax Map 126, Lot 020) (aka Loon Mountain Ski Area)
General Use (GU) District
- b. 90 Loon Mountain Road (Tax Map 126, Lot 018) General Use (GU) District

Property owner, "CLP Loon Mountain LLC", (CLP) owns 60 Loon Mountain Road (Map 126, Lot 020) where a third-party Loon Mountain Resort (Loon) operates the Loon Mountain ski resort, in part, out of the "Octagon Lodge" which is located on the first property. The second adjacent property is owned by the "Mountain Club on Loon Owners' Association" (Mountain Club) located on 90 Loon Mountain Road (Map 126, Lot 018). On that second lot is a multi-story building of condominiums comprised of a mix of retail shops, restaurants and quarter

shares dwelling units. There is a large deck owned by “CLP Loon Mountain LLC” (CLP) that bridges the two (2) properties and provides access for skiers and customers to the Octagon Lodge as well as to the shops and residences at the “Mountain Club on Loon Owners’ Association” (Mountain Club) building. The Octagon Lodge and the Mountain Club buildings are in very close proximity to each other. The deck space includes room for seating, tables and standing space for spectators to observe skiers come down Loon Mountain. The deck is attached on one end to the Octagon Lodge and at the other end to the Mountain Club. The deck is old and needs to be replaced. The owners of both adjacent properties propose to both replace and expand the deck.

Almost the entire deck is within the fifteen-foot (15’) setback areas of both properties. Although almost the entire deck is on land owned by CLP Loon Mountain LLC, a small portion of the deck is on land owned by the Mountain Club on Loon Mountain Owners’ association where it attaches to the building. CLP Loon Mountain LLC owns the land on the slope side of the Mountain Club building. The proposed porch needs a variance as specified in the Land Use Plan Ordinance, Article VI Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) to encroach into the fifteen-foot (15’) front setback area.

Presentation:

Planner Bont began with a summary. Andrew Noyes is the Director of Operations for Loon Mountain Resort (Loon), as well as the authorized agent for this matter for Loon Mountain Recreation Corporation as well as both the Mountain Club and CLP. The Town received written authorizations from these two (2) property owners for Noyes to represent them. The President and General Manager of the Mountain Club Owners Association (OA) Mountain Club d/b/a Mountain Club on Loon Resort & Spa, Jeffrey O. McIver, signed the application for a variance as well. Jay Scambio is the President and General Manager of Loon Mountain Recreation Corporation d/b/a Loon Mountain Resort. He is also authorized on behalf of CLP Loon Mountain LLC, Boyne USA, Inc., Loon Mountain Recreation Corporation and Loon Mountain Realty, LLC, the owner and operational entitled of loon Mountain Resort and Loon Mountain Real Estate. Jay Scambio sent the Town an email here explaining his various roles. Scambio has also authorized Andrew Noyes and Rick Kelley to represent and communicate the needs of Loon Mountain Recreation Corporation with the respect to the deck that spans the property boundaries between CLP Loon Mountain LLC and the Mountain Club on Loon Owners Association.

Planner Bont said at one point, the curtilage, which is the land on the slope side next to the Mountain Club building, was owned by the predecessor to Loon Mountain Recreation Corporation (the predecessor- in-interest to CLP “Loon”). When Loon created the Mountain Club and then sold the Mountain Club to the Owners Association building, a little slice of curtilage on the slope side of the mountain went with it. She included quitclaim deeds and warranty deeds in the ZBA members’ packets. The packet includes a deed transferring that curtilage back to CLP Loon Mountain LLC. The easement deed was the Mountain Club on Loon Unit Homeowners’ Association granting to Loon Mountain Recreation Corporation. The surveyor hired by Loon Mountain Recreation Corporation for this application found that the land owned by CLP goes right up to the Mountain Club building. The proposed deck needs a variance per the Article VI District and District Regulations, Section B District Regulations,

Paragraph 4 (Dimensional Chart) which says that there should be a fifteen-foot (15') setback area in the General Use (GU) District.

Andrew Noyes sent some photos around the table, illustrating the deck.

Noyes said, last fall Loon went with their engineer to review some safety concerns. They realized they needed to replace some structural components of the deck in order to address issues of concern for public safety. They thought it would be a good idea to improve the pedestrian flow of the deck area in the process. Without this expansion, they would not be able to address some of the safety items in their plan which are as follows:

1. **Improve Egress from Bunyan Room:** This expansion will improve the egress from the Bunyan Room, making the deck all one level, eliminating the stairs and handicapped access ramp outside the exit/entrance. Previously, when you came out of the main exit/entrance, if you went to the left there were stairs and a ramp because the deck was on two levels. There will still be stairs going toward the gondola.
2. **Improvements Associated with Widening the Deck:** They also wanted to widen the deck on slope side, so the deck goes over the banking. The reasons for widening the deck are:
 - a. Widening the deck will prevent guests from sliding down the banking under the deck.
 - b. Widening the deck will allow Loon to widen the exit/entrance to the Bunyan Room in the Octagon Lodge which will improve traffic flow especially during an emergency.
 - c. Widening the deck will make it easier for disabled folks to access the Bunyan Room deck.
 - d. Widening the deck will also make it easier for pedestrians to exit and enter the deck from the Mountain Club side, because there will be less congestion. By widening the exit/entrance near the Mountain Club Deli, it will improve the egress that is currently restricted because of the deck's odd triangular shape.
 - e. Widening the deck will enable Loon to remove two buried propane tanks from underneath the deck and move them to a safer location.

Summary: The idea of improving the deck is not about putting more people on the deck, it is about improving the safety as described above, as well as making a better experience for guests of both the Mountain Club Deli located in a condominium unit in property owned by the Mountain Club and the Octagon Lodge on property owned by CLP and to improve the look of the deck. The proposed new configuration of the deck will make the deck much safer and more functional for all purposes.

Questions from Members of the ZBA:

Retaining Walls

Jack Daly said one of the issues raised by one of the ZBA members was the engineering of the boulder retaining wall. In lieu of a rock wall, would it be possible to extend the façade under the deck down a little further without having snow from below rot the material? Another suggestion was that Loon might consider just installing a rock barrier so you do not just have

two (2) four-foot (4') sections of rock wall. *[Note: The State Building Code and the Land Use Plan Ordinance both require that all retaining walls greater than four feet in height be engineered by a structural engineer.]*

Noyes said Loon has engineers from Horizons Engineering Inc. working with Tirey Associates, P.C., the consulting structural engineers, trying to decide which of two (2) options, an earth bank or an engineered and structured wall, is the better choice.

Banking Under the Deck and Retaining Wall

Sullivan asked Noyes, wasn't the banking under the deck part of a ski slope at one point? Noyes replied maybe, but that rock retaining wall has been there for 20+ years.

Handicapped Access Improved

Daly said he thinks the safety updates and improved handicap access will make the deck more accessible for everyone involved. He applauds Loon and their choice to do that.

No Objections from Abutters

Daly said he personally spoke with Mr. Scambio and Mr. Jeffrey O. McIver, whose property we are potentially encroaching upon. McIver said he had no problems with this proposed change and he thought it was a good idea.

Removal of Propane Tanks

Daly said when he walked the site with Mr. Noyes and saw the way the tanks were being moved, he thought it was a great idea and he thought the relocation spot was great as there is not a ski access or public access to it.

No Harm to Abutters

Daly said squaring off the deck makes all the sense in the world, and he does not think anyone or any abutter will be harmed by the deck, so he supports it.

Expansion Would Improve Deck Crowding

D'Amante said, he also walked the deck with Noyes, and he has walked that deck many times when people were out skiing. "You cannot stand and walk by simultaneously – it is pretty tight." He thinks some of these adjustments are very important for the safety of the people using the deck and the two adjacent buildings. "You see little kids who actually could get lost for years in sections of that deck."

Expansion Would Not Increase Impervious Surfaces

D'Amante said although squaring off the deck has received some discussion about increasing the amount of impervious surface on the lot, he believes that the ground is all pavement underneath the deck so he does not believe by expanding the deck Loon would be increasing the impervious surface by more than five hundred square feet (500 sf).

No Setback Area A Pre-Existing Condition

D'Amante said, in terms of the zero-foot setback area ["zero lot line"] between the CLP and the Mountain Club, that is a pre-existing condition and the Mountain Club does not have any problem with it. President and General Manager of the Mountain Club Jeff McIver is on board, on behalf of the Mountain Club.

Removal of Propane Tanks

D'Amante said that squaring the deck off at the ends is also an important safety feature. He was particularly pleased with the safety aspect of moving those buried propane tanks out from under the deck.

Location of Loon Mountain Road in Relation to Proposed Deck

D'Amante said there was a request that the plan show the location of Loon Mountain Road in relation to the proposed deck; Loon Mountain Road is already shown on the submitted plan. Loon Mountain Road is on the opposite side of the buildings from the deck. The ZBA members are looking at a proposal for something that is an improvement in safety and convenience.

Banking Under the Deck

D'Amante said he also likes the fact that the applicant is getting rid of the spot where people can slide underneath the existing deck.

Additional Parking

D'Amante said he heard that the Town needs more parking for the proposed increase in the size of the deck. He is not sure how many people go to Loon Mountain Resort just to stand on the deck. He thinks they go to ski. So, he does not think the ZBA will be allowing for an increase in the number of cars that need to be parked by granting a variance in this case. (1) it is a non-issue and (2) Loon has parking. He does not think members of the ZBA need to concern themselves with this fact.

Additional Questions

Beaudin said, he did not get the chance to look over all the information Planner Bont sent, but he still has some questions.

1. **Does Jeff McIver have Authorization to Sign for the Mountain Club:** Beaudin said as far as the application goes – the quitclaim deed that he received from Planner Bont states that LMRC shall not undertake any improvements that shall change, alter or reconfigure any of patterns of pedestrian and vehicular walkways and driveways or present egress and regress to the Mountain Club, without prior permission of the grantor. The grantor happened to sign the quitclaim deed for the president of the association. The president at that time was not Jeffrey McIver. He still has questions as to whether Jeff McIver has the ability to sign this on behalf of the Mountain Club.
2. **Extent of Expansion of Non-Conforming Use - No Hardship:** Beaudin said when it comes to the hardship portion of this – in the 2002 minutes, Loon Mountain came in looking for a special exception to build a new storage area, which was built next to the Octagon Lodge, which constitutes an expansion of a nonconforming use. What the ZBA is being asked to do is allow the expansion of a nonconforming use, “which requires a hardship reasoning”. The application submitted stated that Loon needs to expand the deck due to increase of business in the winter and summer. “This deck will also be instrumental in our wedding business.” I am unsure this can be clearly used as a basis for a finding of hardship as it relates to financial considerations for the reasoning to expand the deck. Safety would be a reason to allow an expansion, but he is not sure Loon could expand a

deck the same size as it is proposed and have it all relate to addressing safety issues.
[Note: The proposed expansion is 738 square feet.]

3. **Expansion into the Setback Area Previously Denied:** Beaudin said when he looks at the setback issue, he looked at a recent application the members of the ZBA had where the appellants were going to build a hotel and restaurant that intruded into the setback area. As a result, the ZBA denied the request for a variance to extend into the setback area.
4. **Fairness to All Appellants:** Beaudin said for him, this ZBA decision about the Mountain Club and Loon's request for a variance needs to be fair and just. When Town Manager-Planner Butch Burbank was here Beaudin listened to Burbank's advice about being fair and just and treating all appellants the same when the appellant was urging the ZBA to approve a request to expand a nonconforming use. If the ZBA grants this variance without a "hardship" to Loon, Beaudin is concerned that the ZBA decision will tell a lot of other applicants that expanding into the setback areas without a hardship is okay.
5. **Site Plan Review Approval is Required:** Beaudin said the deck is a "structure" and the proposed expansion is more than five hundred square feet (500 sf). Any expansion of greater than five hundred square feet (500 sf) requires Site Plan Review approval.
6. **Boulder Retaining Walls Require Engineering:** The boulder retaining wall requires engineering.
7. **All ZBA and Planning Board Minutes for the Mountain Club Have Not Been Provided:** Beaudin said he still has not seen any minutes or Notices of Decision from the Mountain Club.

All ZBA and Planning Board Minutes for the Mountain Club Have Not Been Provided

Planner Bont said Mary Pelchat went through all the minutes searching for documents related to Loon, but not the Mountain Club. Ms. Pelchat found no Notices of Decision for Loon. Bont did look at the section of the Land Use Plan Ordinance Beaudin spoke about where the nonconforming use had to have approval from the BOS or the designee. So, she talked to Town Manager Burbank, who signed approval for the nonconforming use as the BOS's designee and she emailed everyone the approval.

Planner Bont said that the recorded Mountain Club Planning Board approval she has a copy of is twelve pages, is called the 3rd phase, and was surveyed in 1986 – the same year that zoning was adopted at Town Meeting. The recorded Mountain Club approval was probably drafted five (5) days after the Town Meeting. The approved plan was actually signed by the Planning Board.

Purpose of Deck Expansion

Beaudin said this expansion of the deck is all about business. Beaudin asked Noyes, "Are you expanding the deck to make it safer? Can you make it safer by just putting a new deck on and making that safer?" The Bunyan Room is meeting its full capacity. The deck has to have capacity limits as well. Beaudin said he has a tough time approving the proposed deck expansion because the ZBA had other business people who wanted to expand into their setbacks and the ZBA refused to give them a variance. The proposed deck is clearly an expansion of a nonconforming use. Maybe Loon needs a Special Exception instead of a variance here, as they did in 2002.

Beaudin said that setbacks requirements have a purpose (i.e., to protect from fire, etc.) Beaudin said the setback requirements are there for a reason and the ZBA needs to be careful when considering whether to grant a variance.

Sullivan said that she sees nothing in this proposed deck expansion plan hurting anything at all.

Does Jeff McIver have Authorization to Sign for the Mountain Club?

D'Amante said, as to the question of authorization, Mr. McIver is authorized due to documentation the ZBA has received to act on behalf of the Mountain Club. The question of whether the president signs it or Mr. McIver is not a material question. The president has given him that authorization. In his law office, D'Amante has great familiarity with this type of authorization.

Beaudin asked why, under the Quitclaim Deed does the document say it must be signed by the grantor? D'Amante said the Mountain Club on Loon has given authorization, and they are perfectly able to do so. If there was a legal gap, it was bridged. Beaudin said that if D'Amante is okay with the authorization then he is okay with it as well.

Fairness to All Appellants and Distinguishing this case - Each Property is Unique:

D'Amante addressed Beaudin's question about the owner of the lot beside Rite Aid whose request for a height variance was denied. [*Property owner: Victor Del Regno, Trustee of Foreign III Realty – Map 112, Lots 002 & Lot 003.*] The ZBA turned down that request for a variance for setback reasons and numerous other reasons that pale in comparison to the setback issue in the subject Loon case. Every zoning board application stands on its own merits. No appellant can come before the ZBA and say that because the ZBA granted someone else something (like a variance or special exception), they should get one too.

D'Amante said that in that case, members of the ZBA unanimously agreed that the appellant was trying to put way too much on that site. The ZBA had major fire safety concerns. The hotel as proposed far exceeded the height restriction. The emergency egress from the hotel emptied right onto the sidewalk. The ZBA members had major concerns about the electrical service and safety.

D'Amante said the ZBA members had a sketch in front of them that did not provide parking for the site. The plan indicated that the lot had another section of the lot reserved for a possible restaurant. The proposal was deficient in all ways. In such a situation, you have a blank slate and you should comply with the zoning.

D'Amante distinguished this case from the hotel case. In Loon's case, the deck that bridges between the two properties and their two buildings is a pre-existing nonconforming situation. In the realm of square footage, it is a very minor improvement, but I think it is an important improvement especially in regards to safety. The very first step for improving safety is removing those propane tanks from under the deck, which is important for a lot of people. Also, improving the ability of pedestrians to get back and forth on the deck is an important safety measure. The space for pedestrian traffic is tight on the deck already. Imagine how ingress and egress on the deck would function in an emergency situation. From that perspective alone, D'Amante would say this deck expansion should be permitted. D'Amante said he had no difficulty sleeping at night about the ZBA decision for the site next to Rite Aid, knowing members of the ZBA did the right thing. The appellants were trying to put two (2) pounds in a one (1) pound box. The proposed hotel was not even engineered or thought out.

D'Amante said it was an insult to have that hotel plan brought before the ZBA with that level of incompleteness. By comparison, Loon's deck proposal is well thought out, safety oriented, and sensitive to concerns like the size of the impervious surface. The proposed plan actually pulls the stairs back which is a little better for that patio down below and the movement of pedestrians down there. I would suggest that the ZBA is being consistent in granting this request for a variance, and what is proposed to happen next to Rite Aid is an entirely different matter. Always remember that every case that comes before the ZBA stands on its own merits.

D'Amante said there are some other important features on this site, such as the change of grade. If you look where the driveway is, you will see the change of grade. When you work with a change of grade that creates a slight hardship as well, that can qualify to justify granting a variance. Loon's request is a limited request, constrained to do just what is necessary for public safety, emergency access, and taking into consideration the features and topography of the site.

D'Amante said the boulder retaining wall is not an issue before the ZBA tonight, and he does not think the retaining wall ever comes before the ZBA. Fire Chief/Code Enforcement Officer Ron Beard is part of the process for that. D'Amante knows the height limit for a retaining wall that is not required to be engineered is four feet (4'), but a lot can be done here to live with that four feet (4'), especially to the west. Loon could put in a pre-engineered wall, which is a good and responsible idea as well. D'Amante thinks it is justified.

Beaudin said he agreed with most of what Attorney D'Amante said, but he still had questions on the need for the expansion, heading toward Loon Mountain Road. When you look at a case of hardship, you look at what the hardship is. If the hardship is safety, why do you have to expand to make it safer? Beaudin realized that the deck had deteriorated from years of use and that the deck was shored up all last year, but why not just replace the deck instead of expand the deck. He understands that Loon wants to make that deck larger to increase business, but what is the hardship? Now there are no limitations on the deck. Loon could limit the number of pedestrians on that deck which would make the deck safer.

D'Amante asked how long the deck had been there. Beaudin said the deck used to be a wraparound deck, but around 1988 or 1989 when the Mountain Club's third phase was constructed, Loon added a section to the deck. Loon also added a paved walkway.

D'Amante said another aspect of this project is that not all initial construction decisions turn out to be the best decisions. He thinks the expansion of the deck was always meant to happen; the opportunity to expand the deck is here. Now, in addition to improving safety, Loon can improve the facility itself and make the deck more functional. Think about a situation where people were not going into the Bunyan Room, but coming out in case of an emergency. This expansion of the deck adds much more space for people to come out in a hurry.

Noyes said that the Bunyan Room does not have to be all that busy or have that many people in it to plug up the exit/entrance to the Bunyan Room. It only takes two (2) or three (3) people to totally block the exit/entrance.

Beaudin said, the bigger Loon makes the deck, the more people will come. Is the expanded deck really going to be any safer? When the deck is full, it is full. He agreed that granting a variance to expand the deck is not going to hurt anyone because the abutting property owners are in applying for a variance in conjunction. He just wanted to make sure the right person

signed the request for a variance. He is still stuck on the question, what is the real hardship here to agree to grant a variance. He thinks the expansion is needed, however, in order to justify the expansion, he just wants to know what the hardship is.

Daly said that if someone is in a wheelchair, it is extremely difficult to access the Bunyan Room and to exit or enter the deck. He does not think there is even the turnaround space to comply with the ADA requirements. The fact that Loon is going to alleviate the stairs and the ramp on the other end is vitally important. Delia Sullivan and he both know about this handicapped access problem because they both teach in the adaptive ski program. Loon has to think about people who are not on two legs; they need space to move around too.

D'Amante said, typically when the ZBA members are looking at whether to grant a variance to a property, they look at the property from the road; we have Loon Mountain Road out there. D'Amante suggested everyone turns their plan upside down. When they look at the property with the road along the bottom of the page, a driver on Loon Mountain Road would drive by the new deck faster than they could see it. The drivers would be looking at maybe a thirty-foot (30') section of the deck; they would not even see the whole deck. From that viewpoint, he does not think anyone driving by the Octagon Lodge and the Mountain Club on the north side looking in will be impacted in any way. This expanded deck will have zero impact to their experience and the site.

The ZBA gave Fire Chief Ron Beard permission to speak.

Fire Chief Beard said he has looked at this deck from a Fire Code Life Safety perspective and the current configuration of the deck is a bottleneck on the building. There is about one foot (1') or two feet (2') of overall width at the point where pedestrian traffic bottlenecks on the deck in front of the windows. The proposed deck expansion would add some more space to the egress point. Fire Chief Beard asked Noyes to confirm that Loon will have ground level access slope side. Noyes replied yes, there will be ground level access slope side from the Mountain Club. Chief Beard said the expansion will help Loon to meet its (Americans with Disabilities Act (ADA) requirements.

Fire Chief Beard said that when you calculate the means of egress you look at occupant loading. There are formulas to formulate that segment of egress. To get to the point of egress, you would have to go up the interior stairs on the ground level. More than likely in event of emergency, people will exit from the deck rather than going inside and downstairs. This expansion where the area where pedestrian traffic bottlenecks will improve evacuation.

Fire Chief Beard said that he really appreciates the transfer of the propane tanks to a more appropriate location. The location of the propane tanks had potential for creating a real catastrophe.

Chair Ham opened public comment.

Benedetto asked why instead of creating additional boulder retaining walls, why Loon does not just go up the street and pour concrete? Portions of every single rock wall in this area comes down in a storm. The rocks fall right through. Concrete will not move for 100 years. If you do not like how a concrete wall looks you can cover it. Concrete walls will not deteriorate to the same extent or become a safety issue a few years after they are built. Even the small concrete blocks are not made for our climate, and the concrete blocks fall apart after five (5) years.

Noyes said he will be putting in an engineered wall or a bank.

Benedetto said, make sure the engineer is from New England and knows the weather here. Fire Chief Beard said that Loon's engineer has a New Hampshire license, so hopefully he knows the north country.

Beaudin asked if this plan will need Site Plan Review. Planner Bont said there is a seven hundred thirty-eight square foot (738 sf) difference between the size of the deck that was there before and what is proposed to replace it. Under Site Plan Review, anything that exceeds five hundred square feet (500 sf) needs to be reviewed. The Site Plan Review Regulations are written in such a way that lawyers could agree to disagree.

Bont read the definition of "Change or Expansion of Use" from the Site Plan Review Regulations: "The addition of more than 500 square feet of floor area or other impermeable surface to an existing nonresidential or multi-family use."

Beaudin said a deck is also considered a "structure" by definition.

Planner Bont said that in a previous email from Andrew Noyes, Noyes said that a lot of the expansion of the deck would be constructed over pre-existing impervious surfaces, because Loon had tarred or paved over a fair amount of area under the deck. This means the deck is going to go over a surface that is already impervious. Using the Loon interpretation, that would make the increase of impervious surfaces slightly less than five hundred square feet (500 sf), more like three hundred square feet (300 sf).

D'Amante said had that issue been noticed for ZBA consideration, Loon could have asked the ZBA for a variance. Arguably, the deck is an impervious surface but the area under the deck is also impervious. The ZBA cannot act on this issue of whether Site Plan Review approval is required because that issue is not before the ZBA tonight, but he thinks the Town Code Enforcement could make an administrative decision, because these are rather unique circumstances. D'Amante said he would have no difficulty arguing and defending the argument that if Loon put a deck over tar, Loon would not be increasing the impervious surface.

Fire Chief Beard said that this deck is going to have gaps in between the boards. Fire Chief Beard argued that a deck is not an impervious surface because the deck is elevated and allows water to go through the floor boards. Planner Bont said that whether a deck is considered pervious or impervious depends on how it is constructed. In some ordinances a deck is considered to be a percentage impervious. Some zoning ordinances require decks to have certain minimum-sized gaps between the boards and several inches of gravel and plantings beneath the deck to minimize subsequent runoff to be considered pervious. A deck is not the same as having nothing to impede the flow of water there. The method for calculating how impervious a deck is, is similar to calculating how impervious certain pavers are that are designed to allow water to pass through.

Beaudin asked Planner Bont, hypothetically, if anyone in town wanted to expand their deck over their driveway would that mean they would not be required to get a Land Use Authorization Permit or get a variance to put their deck over the driveway because the surface of the driveway was already impervious? Would the property owner need to come before the town at all? Planner Bont said the Site Plan Review Regulations only apply to commercial or business properties, not single-family homes or duplexes. Beaudin said what if a business

wanted to do the same thing, such as expand over their parking lot, would they need to come before the Board? D'Amante said if the property owners exceed the threshold of five hundred square feet (500 sf.) they would need Site Plan Review approval.

Beaudin said that when the Town is comparing apples to apples it truly does meet the requirement. Maybe all we do is make a condition of approval that they go to Site Plan Review. Then you cover all the aspects of whether the expanded deck needs Site Plan Review approval. The proposed deck is a structure; it is supported by sonotubes. If any other business wanted to expand their deck by more than five hundred square feet, all of its square footage would be counted toward requiring Site Plan Review approval.

D'Amante reiterated that every zoning board matter stands on its own. Also, he is not talking about a decision being made by the ZBA that Site Plan Review approval is required, but rather about an administrative decision. Fire Chief Beard has already thought about this and is heading toward the decision that the Planning Board is not needed here. I believe every applicant would need to go through this same process. There may be other factors that change the decision.

Beaudin said that ultimately it is up to Planner Bont whether an applicant needs a review or not.

Chair Ham closed public comment.

Beaudin asked Planner Bont to get confirmation from the Town Attorney about whether this expanded deck needs Site Plan Review approval. Beaudin said that legal opinion would be relevant to the ZBA's mission in this case because a requirement that the Appellant get Site Plan Review approval can be made a part of the approval for a variance for this project, as it has been in the past. Sometimes an applicant will come before the Planning Board for Site Plan Review approval first; the Planning Board will grant approval as long as the applicant comes before the ZBA for a variance. Other times it happens vice versa.

Criteria 1:

1. Granting the variance would/would not be contrary to the public interest because:

Discussion:

Daly said the variance would not be contrary to the public interest because of some of the reasons stated in Noyes' application for a variance talking about the structural issues and the issues raised tonight – it is not increasing traffic congestion, tax base, etc. Basically, Noyes stated the reason why.

D'Amante said he thinks there are a few reasons enumerated in the application that do not necessarily support a variance. The first sentence supports a variance, due to structural issues and their concern for public safety. After examining it with our engineer, we concluded the deck should not only be repaired, it should be replaced. Add here that the two-thousand-gallon (2,000 gal.) propane tanks which are currently under the deck, will be removed to another location. Skip the next two sentences. It does not alter the character of the neighborhood or threaten the safety of the public. It does not decrease traffic safety. Leave out the tax base part. It will not create potential for sewage overload or risk damage to water quality. I would hate to have someone come back and pick through that to say it is not justified.

Criteria 1:**1. Granting the variance would not be contrary to the public interest because:**

The reason Loon is replacing the deck is due to structural issues and their concern for public safety. After examining the deck with their engineer, Loon came to the conclusion that Loon could not just repair the deck, the deck needed to be replaced. An expanded deck does not alter the character of the neighborhood. It does not threaten the health safety or general welfare of the public. It will not increase traffic congestion, decrease traffic safety or create potential for sewage/septic overloading nor risk damage to water quality. It will improve the fire safety of the buildings because Loon is moving the two (2) two-thousand-gallon (2,000 gal.) propane tanks currently under the deck to another location and because the egress from both buildings will be widened and improved. It will improve handicapped accessibility of both the Octagon Lodge and the Mountain Club Deli and the Mountain Club Owners Association building.

Motion that Granting the variance would not be contrary to the public interest because of the verbiage as presented by Mr. D'Amante: Daly Second: Sullivan All in favor: (4-0).

Abstain: Paul Beaudin Motion carries.

Criteria 2:**2. If the variance were granted, the spirit of the ordinance would be observed because:****Discussion**

D'Amante reworded the applicant's reasons as follows:

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

The expanded deck will not create any more congestion as it will give people more room on the deck. It will not threaten wetlands. It will not unduly or on a marked degree conflict with the ordinance, nor violate or undermine the legal purposes the zoning ordinance serves. It will improve the fire safety of the buildings because Loon is moving the two (2) two-thousand-gallon (2,000 gal.) propane tanks currently under the deck to another location and because the egress from both buildings will be widened and improved. It will improve handicapped accessibility of both the Octagon Lodge and the Mountain Club Deli and the Mountain Club Owners Association building.

Motion that if the variance were granted, the spirit of the ordinance would be observed because of the verbiage as presented by Mr. D'Amante: Daly. Second: Sullivan. All in favor: (4-0).

Abstain: Paul Beaudin Motion carries.

Criteria 3:

1. Granting the variance would or would not do substantial justice because...

D'Amante said present use would not be changing and construction of the expanded deck will be improving egress and handicapped accessibility. Daly said that the handicap issue and the safety issue apply to this item as well, because any loss to the individual is not outweighed by gain to the general public as an injustice.

Discussion

D'Amante and Daly reworded the applicant's reasons as follows:

Criteria 3:

1. **Granting the variance would do substantial justice because:**

The present use of the deck will not be changing. The use of the expanded deck is consistent with the area's present use as a ski resort. The expanded deck will improve the fire safety of the buildings because Loon is moving the two (2) two-thousand-gallon (2,000 gal.) propane tanks currently under the deck to another location and because the egress from both buildings will be widened and improved. It will improve handicapped accessibility of both the Octagon Lodge and the Mountain Club Deli and the Mountain Club Owners Association building. Any loss to the individual is outweighed by the gain to the general public.

Motion that Granting the variance would do substantial justice because based on the verbiage of Mr. D'Amante and Mr. Daly: Noseworthy **Second:** Sullivan
All in favor: (4-0). **Abstain:** Paul Beaudin **Motion carries.**

Criteria 4:

2. If the variance were granted, the values of the surrounding properties would not be diminished because:

Discussion:

Daly said the expanded deck has the support of the immediate abutter, who is a co-applicant. If anything, the expanded deck will enhance the value of the units in the Mountain Club. Again, the Mountain Club benefits because the propane tanks will be relocated.

Criteria 4:

1. **If the variance were granted, the values of the surrounding properties would not be diminished because:**

The expanded deck will not have any detrimental effect on the surrounding properties. It is the same use, just larger to improve egress and handicapped accessibility. It will improve handicapped accessibility of both the Octagon Lodge and the Mountain Club Deli and the Mountain Club Owners Association building. It will not block any of the views of any abutters such as water, sunsets, sunshine or the mountains. In fact, by being on the deck and having more space the owners and their guests to the Mountain Club and to Loon will be able to enjoy these views more.

Motion that granting the variance will not diminish the value of surrounding properties, based on the language presented: Noseworthy **Second:** Sullivan **All in favor:** (4-0).
Abstain: Paul Beaudin. **Motion carries.**

Criteria 5:

1. Unnecessary Hardship

- a. 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:
 - i. 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:
 - ii. The proposed use is a reasonable one because:

Discussion:

D'Amante said remove the "we need to expand the deck due to increase of business in the winter," line and the "in the summer, this will be instrumental in wedding business" line. Take out the sentence about people enjoying. Add a line about the improvement making the deck safer.

Sullivan asked, isn't condition 5:1b enough criteria to approve it? "The proposed use is a reasonable one?" Planner Bont said no, we need to discuss the unique condition of the property which differentiates it from other properties. I think the main unique element associated with this property is that the deck is on two lots and serves two separate facilities. (The walkway is on the Mountain Club's property.)

Attorney D'Amante said he would leave everything in item ii, add a line about public safety, handicap access, and removing the propane tanks from this location.

Criteria 5:

1. Unnecessary Hardship

- a. **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:**

Loon is unique in the Town of Lincoln, in that Loon is the only major ski resort in the Town. There is only room to expand the deck a couple of feet slope side; otherwise the deck will be too far out into the ski trail. Expanding the deck, a bit in the direction of the trail makes it safer as the deck is over the retaining wall a bit more, preventing someone from sliding under the deck. The unnecessary hardship would be caused by making it more difficult for Loon to improve the safety of the deck and attached buildings without expanding the means of egress from both the Mountain Club Deli and the Octagon Lodge.

- i. 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 Loon property is also unique because the only way to create this deck of dual purposes, as was the old one, was to connect the deck to the Mountain Club Deli which is owned by both Loon and the Mountain Club on Loon because it is part of the Mountain Club condominium as

a whole. The deck itself is unique because it is slope side on the mountain and has a great view of Loon and the surrounding area mountains.

ii. The proposed use is a reasonable one because:

This area is already being used for the purpose of a ski area, Loon is trying to make it safer and more functional. The Mountain Club on Loon and Loon are both in favor of having this deck as being proposed and feel it is a benefit to both. It will be consistent with being a ski resort. The expanded deck will improve the fire safety of the buildings because Loon is moving the two (2) two-thousand-gallon (2,000 gal.) propane tanks currently under the deck to another location and because the egress from both buildings will be widened and improved. It will improve handicapped accessibility of both the Octagon Lodge and the Mountain Club Deli and the Mountain Club Owners Association building.

**Motion to approve Criteria 5 with the corrections made to the application as suggested by D'Amante: Sullivan Second: Daly All in favor: (4-0).
Abstain: Paul Beaudin Motion carries.**

**Motion to grant the request for a variance by Loon Mountain and the Mountain Club: D'Amante Second: Daly All in favor: (4-0).
Abstain: Paul Beaudin Motion carries.**

B. Stephen Benedetto d/b/a Big Wood Construction, LLC for Kevin Grimes, d/b/a 27 Black Mountain Road LLC Variance – build within front setback

VARIANCE concerning Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) of the zoning ordinance known as the Land Use Plan Ordinance (LUPO) to construct a canopy within the front setback area.

Agent & Contractor for Appellant:

Steven Benedetto d/b/a Big Wood Construction, LLC
188 Loon Lake Road
Plymouth, NH 03264

Appellant & Property Owner:

Kevin Grimes, d/b/a “27 Black Mountain Road, LLC”
Elizabeth Grimes, Manager for “27 Black Mountain Road, LLC”
12 Clarke Road
Needham, MA 02492

Property:

27 Black Mountain Road
Lincoln, NH
(Map 130, Lot 055) Mountain Residential (MR) District

Grimes' home was built in 2001. The front of the house runs right along the 25-foot front setback line. Grimes' home has a 16'X6' canopy over the front door that sticks out over the setback line into the front setback area, however, the canopy does not touch the ground; it is like a large roof overhang. Appellant proposes to remove the current canopy over the front entry door, move the location of the canopy slightly, replace the 16'X6' canopy with a 12'X6' canopy

and support the canopy with stone veneer concrete pillars that extend all of the way to the ground. The home is located at 27 Black Mountain Road (Map 130, Lot 055) in the Mountain Residential (MR) District where the front, side and rear minimum setbacks are twenty-five feet (25'). The entire canopy as proposed will be located within the 25-foot front setback area. Lot is subject to a 2002 ZBA decision. The proposed porch needs a variance as specified in the Land Use Plan Ordinance, Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) to encroach into the twenty-five foot (25') front setback area.

Presentation:

For context, Planner Bont said the Grimes home was built in 2001, about the same time as David Rogers' property, which is right next door.

Planner Bont said she was researching previous court cases that involve a legal principle of *res judicata*, in other words "you can't have two bites of the apple." Daly said each ZBA case stands alone, like D'Amante previously stated, and we need to judge each case on its own facts.

Paul Beaudin said he disagrees – this case is returning for "two bites of the apple" after being refused by another ZBA. Beaudin asked Planner Bont to get a legal opinion to see if this Board has the authority to rehear a case with the same information. If you look back at our minutes from 2002, you will see that the previous owner went through and he think it is a point of order that the ZBA needs to verify before even examining the Request for a Variance.

Planner Bont said Attorney D'Amante looked it up and he does not think it needs to be the same party presenting. In the summary of the case between the Miriam Farm vs. the Town of Surrey, we had the same situation where the following elements must be established:

1. Parties must be the same or in privity with one another.
2. The same cause of action before the court is the same in both instances.
3. The first action ended with a final judgment on the merits.

Paul Beaudin said he remembered the previous owners were very hard against someone entering this twenty-five-foot (25') setback. Myles Moran said he believed it was because the slope is so steep back there that the cost of excavating or retaining walls is very high, and the lots would not be buildable today.

Beaudin said in the previous case involving Mark Wire and builders Dave Rogers and Danny Keefe, they were fully aware of the setbacks and the topography. They said, "We just have to make the house fit on the lot." But they were refused. Moran said they were told not to put anything in that twenty-five-foot (25') setback. Is there or is there not a canopy that enters the setback with a pair of "45s" attached to the house? This is illegal.

Beaudin said Selectman Jane Duguay asked if the owner could have something hanging from the house and not resting on the ground on sonotubes without violating the ZBA decision denying the variance. Beaudin said the abutting homeowners could have complained about the owner's unsupported canopy, but he does not believe they ever have.

Myles Moran agreed that we are revisiting something here that has already been done. The prior owners installed a canopy in the setback - something that is questionable at best.

Beaudin said all the abutters were notified and none of them showed up tonight, so maybe that means they do not care. But for us to revisit this decision made by a prior zoning board, he was unsure of the legality of it.

Planner Bont pointed out that the entire house next door is over the line. What is consistent in the neighborhood is one factor that zoning boards look at. For example, let's say your zoning has a 10-foot front setback, but all of the houses in the neighborhood are set back 5 feet from the road. Let's say you are going to build a house on your vacant lot and everyone else's house on the whole street is already in the 5-foot setback. The ZBA in granting a variance for front setbacks can look at the other homes in the neighborhood.

Daly said he went down and looked at the Grimes' canopy overhang. He met with Grimes' contractor Steve Benedetto and he looked at the plans. Daly also talked with Dave Rodgers, his next-door neighbor, and David Rodgers said he had no problem with it. Paul Mahoney, the neighbor on the other side, cannot even see the house from where is down in the hollow. Across the street is vacant and there is nothing going to be built there. Also, the reason why Daly would support hearing Grime's application is that there is going to be a new design here. Right where that overhang would come down, the footings were poured for the posts. There is a little railing there before entrance into the house. If you look at the design, they are proposing to take the canopy out, and put in a gable with some Adirondack style beams and come down with a stone pillar to the ground. He does not think anyone will be upset seeing it there, at least he does not see any audience members in opposition to it. It is a homeowners' right within reason to do something like this, as long as he is not offending anybody. Daly said he thinks the ZBA should have the hearing and see if the canopy as presented meets the test.

Paul Beaudin said in the minutes from the previous hearing on this, Don Korb spoke with a lot of people in this development, not all sixty but a lot, and his general feeling was that people were opposed to this. There was a lot of concern back then about getting the 25 feet setbacks adopted.

Jack Daly said to remind everyone why the 25-foot setback was adopted, they were actually dividing a lot up there and were actually building right across from Clark. That lot up there was subdivided and another lot was put on it. They were trying to stop someone from subdividing into smaller lots and putting trailers on them. This is why they put the proposal before town meeting to create a residential mountain district with a 25-foot setback.

Paul Beaudin said we need a legal opinion before we go through and hear this.

Chair Ham asked Benedetto for specifics on entering through the door. Benedetto said the house is a cookie cutter house built out of a kit. The door placement is more to give the best curb appeal and the door has to stay where it is. The goal is to have a platform walk. Right now, there is just a wooden box you step onto to get into the house.

Beaudin reiterated that we need to have a legal opinion before hearing the application.

D'Amante said he cannot really give his legal opinion because he said he has never done this case before. He has never encountered it, so therefore, has never looked into it. The case law he knows is if a variance is denied for a specific purpose, on a property, he always thought it is denied forever unless there is a material change in the request. So, either they come in for a different type of variance, or there is a material change in the neighborhood. I read this case a decade or so ago and have never needed or applied this legal principle to a case. Based on the

materials Planner Bont supplied suggests that this law does not apply if there is a change in ownership.

Paul Beaudin said if we grant the variance and one of the homeowners says, “This is wrong – back in 2002, we talked to someone about this and it was denied. We worked hard to get this variance denied.” That is how we end up in court, so he did not think we should just assume we can do this.

Attorney D’Amante said he believes the someone they should speak with Town Attorney Peter Malia. If the topic comes up and you are asking for a legal opinion here, he cannot give a legal opinion about this matter because he just does not know enough about this matter.

Motion to find out if we can legally hear this case: Sullivan **Second:** Beaudin

Benedetto said that is \$20,000 of work I am doing that I just have to stop, but if the ZBA cannot figure it out, the work just won’t get done.

Beaudin said we will figure it out to a date specific and talk to Attorney D’Amante.

Benedetto said the reason this variance did not go through before was that one abutter’s personal opinion that it should not happen. The Board previously did not care it intruded into the 25- foot setback. (Benedetto was not the builder back in 2002.)

Planner Bont said we can reschedule for Wednesday, May 30th at 6 pm.

Benedetto said the owners would be okay with not even changing the roof, just allowing a walkway underneath, leaving the roof as is and just putting piers underneath.

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

The Board will take home the selectman non-vote issue.

Moran said he thinks it would be good to have a selectman attend ZBA meetings who was not a voting member, but he thinks the real problem will be getting a Selectman to attend a ZBA meeting.

Martin said all the ZBA can do is ask, and if the Board of Selectmen says no then no one wants the job.

Planner Bont said the members of the Board of Selectmen cannot act individually, they have to act as one board.

Sullivan asked if the ZBA could make a request for the Board of Selectmen to discuss it and decide if they want to do it.

Motion to reach out to the selectman to see if they are interested in sitting on our Board in a non-voting position: Chair Ham **Second:** Daly **All in favor:** 8-0 **Motion carries.**

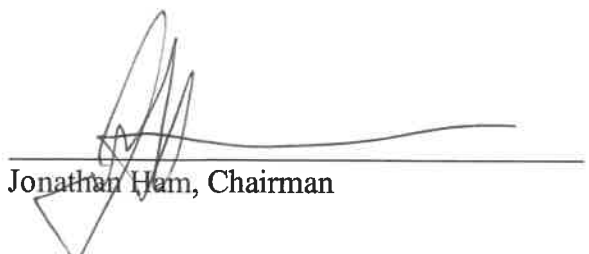
VI. PUBLIC PARTICIPATION AND OTHER BUSINESS: Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the ZBA will be heard only during a scheduled public hearing when all interested parties have the opportunity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

VII. ADJOURNMENT

Motion to adjourn: Sullivan **Second:** Daly **All in favor:** 4-0 **Motion carries.**

Respectfully submitted,
Ellyn Gibbs, Recorder

Date Approved: 7/24/18



Jonathan Ham, Chairman