

**LINCOLN ZONING BOARD OF ADJUSTMENT  
REGULAR MEETING MINUTES  
THURSDAY – DECEMBER 21, 2016 – 6:00PM  
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

**APPROVED**

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**Present:** Chair Jonathan Ham, Vice Chair Don Landry, Board of Selectman Representative Jayne Ludwig, Alternate Jack Daly

**Members Excused:** Paul J. Beaudin II, Ray D’Amante, Jim Martin

**Members Absent:**

**Staff Present:** Town Manager/Planner Burbank, Fire Chief Ron Beard and Wendy Tanner (Recording Secretary)

**Staff Excused:** Planning and Zoning Administrator Carole Bont

**Guests:**

- **Kevin McNamara** – real estate agent of RE/MAX in the Mountains, 264 Main Street, Suite 2, PO Box 175, Lincoln, NH 03251-0175, owner of 264 Main Street #2 (Map 117, Lot 120000-01-00015), and co-owner with Karen McNamara of 264 Main Street #3 (Map 117, Lot 120000-01-00003).
- **Gardner Kellogg** – surveyor and owner of Kellogg Surveying and Mapping, 254 Manns Hill Road, Littleton, NH 03561, applicant and authorized agent for property owners, Dennis G. & G. Joy Burk.
- **Paul Bankosky** – of Loon Mountain Real Estate Co., 60 Loon Mountain Road, Lincoln and resident of Woodstock, NH.

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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, Paul Beaudin and Jim Martin are excused*

*Jack Daly is seated.*

- II. CONSIDERATION** of meeting minutes from:

- December 8, 2016

**Motion put off the approval of the minutes until the next meeting.**

**Motion:** Jack Daly                      **Second:** Jayne Ludwig                      **All in favor:** 4-0

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

- A. 6:00 PM.** Lincoln Zoning Board of Adjustment (ZBA) **Request for an Equitable Waiver of Dimensional requirements or a Variance** per RSA 676:5,ii(b)

- 1. Case #:**                                      **2016 ZBA AA 2016-04**
- 2. Location:**                                120 Black Mountain Road  
    (Tax Map 130, Lot 103)  
    Mountain Residential (MR) District
- 3. Applicant & Agent for Property Owners:**  
    Surveyor Gardner Kellogg  
    254 Manns Hill Road  
    Littleton, NH 03561

**4. Property Owner:** Dennis G. & G. Joy Burk  
117 Tyson Drive  
Berryville, VA 22611

Applicant Surveyor Gardner Kellogg of 254 Manns Hill Road, Littleton, NH 03561, on behalf of property owners Dennis G. & G. Joy Burk of 117 Tyson Drive, Berryville, VA 22611, requests either **an Equitable Waiver of Dimensional Requirements or a Variance** from the zoning ordinance called the Land Use Plan Ordinance (LUPO), Article VI (District and District Regulations), Section B (District Regulations), Paragraph 2 (Land Use Schedule) “Dimensional Chart” to allow a building within the 25’ setback area. The subject property is 120 Black Mountain Road (Tax Map 130, Lot 103). The lot is located in the Mountain Residential (MR) District. The violation took place in 2009 when the property owners, after receiving a Building Permit from the Town, put an addition onto the back of the house that intruded about 10 feet into the setback area. The site plan attached to the application had what appeared to be a setback line on it, but had no measurements. The setback line on the site plan submitted was 15’ instead of 25’ from the boundary line. The violation has existed for 7 years with no enforcement action, including written notice, being commenced by the Town. The nonconformity was discovered by an agent hired by the bank just prior to an anticipated transfer to a bona fide purchaser. The property is subject to a purchase and sale agreement.

**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

**Motion to waive the reading of the full application.**

**Motion:** Jack Daly    **Second:** Jayne Ludwig    **All in favor.**

**Surveyor/Agent Gardner Kellogg authorized Agent for Burk:**

It was pointed out that there is a written agreement from Dennis Burk that Mr. Kellogg is approved to represent the applicant on this case.

**Presentation:**

Surveyor/Agent Gardner. Kellogg handed out drawings to the Board and explained where the encroachment is located.

Daly explained that the encroachment is an overhang where the roof on the rear of the house has been extended to create a wood bin and storage. There are no walls on the roof extension and the roof extension is held up by several posts.

There was a brief discussion about the property.

It was pointed out that in response to the seventeen (17) notifications sent out to abutters no abutters appeared at this meeting.

Surveyor/Agent Kellogg said that the house has been there over ten (10) years and the owners thought that everything on the property was in compliance until this transaction came up and an appraiser sent by a bank noticed the discrepancy.

Town Manager/Planner Burbank said that the original building was permitted by the Town.

Daly said that the owner was having problems on the front of the house with ice coming off the front and decided to enclose the deck.

Town Manager/Planner Burbank said that he did not believe that the paperwork talked about the addition of the roofline in the rear of the property.

Ludwig said that seven (7) years have passed since the addition was put on the house. When the site plan was submitted with the Building Permit Application (now called a “Land Use Permit”), there was a dashed line on the site plan, perhaps denoting the setback, but there were no measurements or any number of feet indicated on the site plan. The Planning Administrator at that time does not appear to have asked the applicant for the number of feet. Ludwig said that she believed that if the Planning Administrator had visited the property he/she would have discovered that the addition encroached into the setback area and was closer to the property boundary line than it should have been.

Daly said it appears that no one from the Planning Office visited the property after the addition was complete. The bank’s assessor is the one who found the error just a month ago when the property was listed for sale.

Ludwig said then the setback line was not clearly shown on the original site plan; it was just a dotted line with no dimensions listed. Ludwig asked if the Planning Board at that time ever asked applicants about the setback measurements and if that discussion showed up in any minutes.

Tanner added that there was nothing in the files that indicated anyone from the Town ever questioned the setback.

Daly added that the setback was once fifteen (15) feet and was later changed to twenty five (25) feet in a warrant article.

Ludwig said that the Covenants of Beechwood II from 1984 would not weigh on her decision. The Covenants of Beechwood II did say that property owners would have to notify the [homeowner’s] association if they surpassed the twenty-five foot (25’) setback. The property owner did have Loon Realty Corporation sign off on the changes to the home.

There was a brief discussion about a bathroom and water and sewer tap fees associated with the bathroom. It was determined that the fees were paid when the application was submitted.

Landry said that as far as money, the Town is all set.

Surveyor/Agent Kellogg agreed and said that the owner has been all paid up since the addition was done.

Town Manager/Planner Burbank said that we need an official ruling from the ZBA, because it is technically in violation of the Land Use Plan Ordinance, but the violation was just discovered. It has been there a long time.

Daly said that the Zoning Board of Adjustment (ZBA) should grant the request for an equitable waiver because the Town caused the problem by allowing the house and then the addition to go in in the first place. If someone had gone out to measure or check the setback or question the plan, that would not have happened. Or maybe it would have and the property owners would have requested a waiver in 2009.

Daly spoke with one of the direct abutters, Joan Corb. Corb told Daly that she has no issues with the encroachment. Another abutter, Steve Leoni, is in Florida and was unable to be contacted.

Daly said that in his opinion the violation was made be “in good faith”. He said that the Zoning Board of Adjustment (ZBA) should grant this waiver because he believes the violation was not intentional. The property owners have “come clean and would like it to be made right”.

**For the purposes of discussion Jack Daly made the following motion:**

**Motion to approve the request for equitable waiver of dimensional compliance.**

**Motion: Jack Daly Second: Jayne Ludwig All in favor: 4-0**

Ludwig briefly mentioned the bathroom again but noted that is not what the Zoning Board of Adjustment (ZBA) is concerned with. Ludwig also mentioned that there is a shed that looks like it is within the 25 foot setback. Nothing is mentioned about this shed and Ludwig would like to have it in the record that the shed appears to be within the twenty-five foot (25') setback.

Town Manager/Planner Burbank asked McNamara if the owner or new owner would have a problem moving the shed to get it out of the setback.

McNamara just noted that at this time of year (winter) it could be very difficult to move the shed.

Town Manager/Planner Burbank said that it should be documented that the shed will still be an issue even if the ZBA grants a waiver for the house.

Daly said that he spoke to the applicant’s closest abutter, Joan Corb. Joan Corb’s husband is an attorney. Joan Corb and her husband have no problem with the encroachment. Corb wanted their views about the encroachment in the record.

Ludwig said that she would like it to be clear that from her perspective, it looks like the Planning Administrator at the time did not ask the property owner to show on the drawing how many feet from the property boundary line the setback line was. The applicant had a line on the site plan to signify a setback, but no measurements indicated. The Planning Administrator did not inspect the property after the work had been completed.

Daly said, “Jayne, would you like to make a motion to add that to Wendy’s job description to go out and check measurements in the woods?” Ludwig said that she would love to hire a building inspector and believes the Town really needs one.

The Board went over the Worksheet:

### **Statement of Reasons – Equitable Waiver**

#### **1. Does the request involve a dimensional requirement, not a use restriction?**

Yes. The request involves the dimensional requirement of the twenty-five foot (25') setback.

**2. The non-conformity was discovered after the structure was substantially completed?**

Yes. The non-conformity was discovered seven (7) years after the structure was completed.

**3. The violation was not an outcome of ignorance of the law or bad faith but resulted from a legitimate mistake in measurement.**

Yes. The typical setback of fifteen feet (15') was used on the plans, but since no dimensions were written on the plans, it was unknown to the property owner.

**4. The non-conformity does not constitute a nuisance or diminish the value or interfere with future use of other property in the area?**

Yes. The non-conformity does not create any nuisance and property values are still rising in the Beechwood II area.

**5. Due to the prior investment made the cost of correction far outweighs any public benefit to be gained that it would be inequitable to require that the violation be corrected.**

Yes. The home has been lived in for seven (7) years and there have been no complaints or issues because of the violation.

**Motion to grant an equitable waiver.**

**Unanimous vote in the affirmative.**

The Zoning Board of Adjustment (ZBA) had a discussion about equitable waivers and when and how they would happen. Town Manager/Planner Burbank mentioned that the Town is currently working to see if these types of waivers can be recorded at the Registry of Deeds.

If the neighbor says they do not like the looks of the shed, the new owner will be back in to apply for a variance or move their shed.

Town Manager/Planner Burbank thanked the Zoning Board of Adjustment (ZBA) for coming together and said that these types of decisions need to be made by the ZBA. There are others who believe that these decisions should be made by the Town Planner or Planning Administrator, however, these are the types of decisions that the ZBA should be involved with.

Daly agreed that the ZBA is the correct Board to grant waivers. Landry agreed that the ZBA is the Board that should grant waivers.

Ludwig asked which has more weight, the Town Ordinances and Regulations or the Condominium/Homeowner Association Declarations and Covenants. Town Manager/Planner Burbank said that the Town's Ordinances trump the condominium/homeowner associations' declarations and covenants.

There was a brief discussion about covenants and ordinances in different associations and how to protect the current owners.

**IV. NEW BUSINESS**

**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 6:33 P.M.**

**Motion: Jack Daly**


**Second: Jayne Ludwig**

**All in Favor: (4-0)**

Respectfully submitted,

Wendy Tanner,  
Planning and Zoning Recorder

Date Approved: 01/05/2017

  
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Jonathan Ham, Chairman