

**LINCOLN ZONING BOARD OF ADJUSTMENT  
REGULAR MEETING MINUTES  
THURSDAY SEPTEMBER 8, 2016 – 6:00PM  
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

**APPROVED**

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**Present:** Chairman Jonathan Ham, Vice Chair Don Landry, Ray D’Amante (alternate), Paul J. Beaudin II, Board of Selectman Representative Jayne Ludwig

**Members Excused:** Jim Welsh (alternate), Jack Daly (alternate), James Martin II

**Members Absent:**

**Staff Present:** Town Manager and Town Planner Alfred “Butch” Burbank, Fire Chief Ron Beard, Planning and Zoning Administrator Carole Bont, and Wendy Tanner (recorder)

**Guests:**

- **Thomas Tremblay**, President of Coldwell Banker LinWood Real Estate & Lin-Wood Real Estate, Inc.

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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.

*Chairman Ham called the meeting to order at 6:00 PM  
Ray D’Amante was seated.*

- II. CONSIDERATION** of meeting minutes from:
- August 31, 2016

**Motion to approve the minutes of August 31, 2016 as amended.**

**Motion:** Ray D’Amante                      **Second:** Paul Beaudin                      **All in favor:** (5-0)

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

- A. 6:00 pm. Application for a Variance to put an addition onto a condominium unit encroaching into the fifteen foot (15’) rear setback area by twelve and four tenths feet (12.4’) and also into the fifteen foot (15’) Right-of-Way behind 90 Rams Horn Drive in the Rural Residential (RR) District that benefits abutting land owned by CLP Loon Mountain LLC to maintain ski trails on property located in the General Use (GU) District. (Note: Later finding: No Right-of-Way)**

**Public hearing was started on Wednesday, August 30, 2016, but not completed. Hearing was continued to a date and time certain: Thursday, September 8, 2016 at 6:00 PM.**

- 1. Case #: 2016 ZBA Var 2016-02**
- 2. Location:** Condominium Unit  
90 Rams Horn #H6 Unit 45  
(Tax Map 126, Lot 023000-07-00045)

Rural Residential (RR) District

**3. Applicants:**

Realtor Thomas Tremblay, President  
Coldwell Banker LinWood Real Estate & Lin-Wood Real Estate, Inc.  
189 Main Street, PO Box 700  
Lincoln, NH 03251-0700  
and  
Marion Deluca  
164 Range Road  
Windham, NH 03087

**4. Property Owners:**

Marion Deluca & William P. Deluca III, Trustees  
William P. Deluca III Revocable Trust  
164 Range Road  
Windham, NH 03087

**also**

**Addition is to be sited on common land owned by the Rams Horn Condominium Association**

60 Loon Mountain Road (Map 126, Lot 023) - Rural Residential (RR) District

**also**

**Right-of-Way is sited on common land owned by the Rams Horn Condominium Association**

90 Rams Horn (Map 126, Lot 023) - Rural Residential (RR) District

**also**

**Benefitted Estate for Right Of Way is land owned by the CLP Loon Mountain, LLC**

60 Loon Mountain Road (Map 126, Lot 020) – General Use (GU) District

**5. Application:**

Applicants Realtor Thomas Tremblay and Marion Deluca, request 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 building within the fifteen foot (15’) setback area.

Applicant proposes to construct an addition to the condominium unit 90 Rams Horn Drive #H6 Unit 45 (Map 126 Lot 023000-07-00045) owned by the Marion Deluca & William P. Deluca III, Trustees of the William P. Deluca III Revocable Trust, on common land owned by the Rams Horn Condominium Association.

The proposed addition would encroach into the fifteen foot (15’) rear setback area by twelve and four tenths feet (12.4’). The proposed addition would encroach twelve and four tenths feet (12.4’) into the right-of-way behind 90 Rams Horn Drive Unit #H6 (also referred to as Building 7). The right-of-way is for the benefit of CLP Loon Mountain, LLC that owns 60 Loon Mountain Road (Map 126, Lot 020). The purpose of the right-of-way is for access to maintain the ski trails on the property located on Map 126, Lot 020 behind the Rams Horn Condominium.

The subject property is located in the Rural Residential (RR) District. The abutting property is in the General Use (GU) District. The purpose of the addition is for modifications to enable handicapped access to the residential unit.

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

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

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

### **Did Applicant Meet the Conditions Set Forth at the ZBA Meeting on August 31, 2016?**

At the ZBA Meeting on August 31, 2016 the ZBA decided that the following conditions would need to be met before the ZBA could make a decision on this application:

1. A survey showing accurate measurements, any easements on the property, drainage and appropriate access for firefighting.
2. Written approval from the Ramshorn Homeowners Association (not an email) to build the addition.
3. Written approval from Loon Mountain or someone authorized to make decisions on behalf of CLP Loon Mountain, LLC (abutter) to encroach in the setback. Also in that approval, permission to use Loon Mountain property for firefighting purposes.

#### **1. Survey Plan:**

Town Manager/Planner Burbank said that Applicant Realtor Tom Tremblay delivered a new survey plan prepared by Deluca's Surveyor Gardner Kellogg showing the location of the proposed Deluca addition to the nearest boundary line with the abutter to the Town. The abutter is CLP Loon Mountain, LLC (formerly known as CNL Income Loon, LLC) hereinafter referred to as "CLP". The abutting property itself is known as "Loon Mountain".

Town Manager/Planner Burbank said that the survey plan the Town received today shows the Rams Horn – CLP property boundary line. The survey also shows the proposed construction which appears to reach well into the rear setback area very close to the property boundary line.

Town Manager/Planner Burbank said he thought that another potential big issue associated with the proposed project was drainage. There is a large and long drainage swale that runs along the edge of the property boundary line and channels snowmelt from the cross over ski trail between Blue Ox ski trail and Lower Picked Rock ski trail behind Rams Horn Condominium away from the condominium units.

#### **2. Homeowners Association Written Approval.**

Bont said that Applicant Tremblay submitted a letter with written approval from Ramshorn Homeowners Association (not an email) to build the addition which was included in the ZBA members' packets.

### **3. Written Authorization from Abutter to Move the Toe Slope:**

Town Manager/Planner Burbank said that Applicant Tremblay still has not received any written authorization from the abutting property owner (i.e., from Rick Kelley) to move the toe slope. Rick Kelley is the President and General Manager of Loon Mountain Recreation Corporation which operates the Loon Mountain ski and recreation area. Kelley is also the General Manager for the current property owner “CLP”. Town Manager/Planner Burbank said that Rick Kelley may be reluctant to issue written authorization as a result of the pending sale of the property known as “Loon Mountain” to a third party. Town Manager/Planner Burbank said that Kelley alluded to the fact that the principals of CLP usually take between six (6) and twelve (12) months to approve anything related to their property.

#### **Discussion:**

Paul Beaudin said that at last week’s public meeting the ZBA moved to continue this public meeting to today with conditions. One of the conditions was that the Applicant had to present the Town with written approval from a CLP representative to relocate the toe of the slope on land owned by CLP known as “Loon Mountain”. Without having that approval, Beaudin did not think the ZBA could continue this meeting unless the ZBA conducted a vote to allow it.

Applicant Tremblay asked if he could further present the Applicant’s case.

Beaudin said that would be up to Chairman Ham, as Beaudin was no longer the Chairman. Beaudin said he did not believe that the ZBA meeting could be held legally because the Applicant did not meet the conditions set at the prior meeting.

D’Amante agreed with Beaudin that there is a condition that has not been met. However, D’Amante said that since the ZBA created the condition, the ZBA has the power to amend the condition. D’Amante said the ZBA asked for a number of things from the Applicant, which included:

- A survey showing:
  - Accurate lot lines and building placement.
  - An indication on the survey that the surveyor had checked for all possible easements and the easements were to be accurately depicted on the survey
  - Proposed changes to the slope of the land behind the addition – on land of Loon Mountain – that will accomplish the goal of providing adequate access for fire protection that the Fire Chief requires.
- Written approval from Loon Mountain for the building to encroach into the setback and to move the toe of the slope for fire access, to provide adequate access for fire protection.

D’Amante said that although the ZBA cannot ignore the condition that the Applicant must receive written authorization or approval from a representative of Loon Mountain to move the toe of the slope on the abutters’ property, it is within the power of the ZBA to give a conditional approval. The conditional ZBA approval would say that some of the conditions have been met and the ZBA will approve the application with a condition that before construction can begin, the Applicant will bring to the Town an approval to move the toe of the slope from the abutter – the

appropriate Loon Mountain entity. The ZBA recognizes that pending a sale of Loon Mountain, the Applicant might not be able to get immediate delivery of such an approval. D'Amante said that if the Applicant were to get conditional ZBA approval and the ZBA felt comfortable that the other conditions have been met, then that condition would give the Applicants time to work with the new Loon Mountain owners to obtain an approval. It would also save the Applicant the expense and the time of coming back before the ZBA again.

### **Fire Safety Requirements:**

D'Amante said he did not see how the ZBA could ignore the fact that there is no way to get the necessary fire equipment, manpower or other necessities behind the building for firefighting purposes. D'Amante stated that the ZBA could give a conditional approval, with the approval to move the toe of the slope signed by the appropriate Loon Mountain entity being the outstanding condition.

Ludwig reviewed the letter from Fire Chief Ron Beard and asked the Chief if he was suggesting other alternatives. (The letter from Fire Chief Beard is attached to these minutes.)

Fire Chief Beard stated that after meeting with Applicant Tremblay at the Deluca's condominium unit he made some changes to his firefighting requirements for the Rams Horn Condominium Development that included part of Loon Mountain's property. Chief Beard said that in his opinion the Applicant should be required to obtain written permission from Loon Mountain to make the proposed changes to the toe slope.

Chairman Ham reiterated that the survey plan shows only two and half feet (2.5') of space between the Deluca's proposed addition and the property line with Loon Mountain, forcing any maintenance and firefighting efforts onto the abutter's property.

Fire Chief Beard said roughly five feet (5') of lateral ground space is required for every twenty feet (20') of ladder height to obtain a seventy-five degree (75°) angle.

### **No Easement:**

Applicant Tremblay confirmed that after research the surveyor found no snow-making or other easements along the property boundary line behind the building and that the issue was limited to encroachment into the rear setback. The fact that there were no easements was reflected on the survey.

### **Discussion re: Whether to Grant Conditional Approval or an Extension:**

Town Manager/Planner Burbank said he did not think the ZBA would be doing the Delucas any favors by making a decision with those conditions attached. Without an agreement in writing from someone authorized by Loon Mountain to enter into such an agreement the Delucas might have to change their plans six (6) months from now when Loon Mountain is sold to a new buyer. Without a written agreement, the Deluca's may have to reapply with some other plan and they would have to go through the ZBA process all over again. Wouldn't it be better to give the

Deluca's an extension to a date certain? For example, perhaps the ZBA could give the Delucas an extension for six (6) months from now or sooner if they get a reply from Loon? Then the neighbors and abutters have already received notice. That way the Town would not have to re-notice everybody. If the ZBA makes a decision tonight based on whether the Applicants can get written authorization from Loon (which they may never get) maybe eight (8) months from now when they get authorization they can get their Land Use Permit. Or if they do not get approval from Loon they will have to come up with Plan B and the Town can start the variance approval process all over again.

D'Amante said that either his or Town Manager/Planner Burbank's suggestion would get the ZBA to the same place with the least amount of expense to the Applicant. D'Amante would be in favor of either suggestion.

Beaudin said his only real concern is that the Applicants acquire permission from the abutter to change the drainage and the toe of the slope to get adequate fire safety access.

Applicant Tremblay said that as Fire Chief, the Fire Chief has a vested right to trespass on abutters' property in the event of an emergency. If the Fire Department needs to put a ladder up on the abutter's property to reach the Applicant's building, he can.

Applicant Tremblay said the drainage swale needs to be removed, cleaned and put back because it is currently full of silt from storms over the years. Applicant Tremblay said he hoped to negotiate with the Fire Chief. At one point the distance from the building to the existing toe of the slope is thirteen feet (13'). With the exception of moving the toe of the slope, Applicant Tremblay got the sense from Rick Kelley that Kelley would not have a problem with the Deluca's proposed addition. Initially, Applicant Tremblay believed that an approval from Loon was forthcoming, however "a change of heart must have happened and the approval was never sent".

Applicant Tremblay said that the idea behind public notice is that abutters and other residents can come to the ZBA public hearing and express their concerns to the ZBA. Applicant Tremblay thought that having no one appear at this hearing meant that things were going in the Deluca's favor. ZBA members disagreed.

### **Does The Deck Extend Onto The Land Of The Abutter?**

Bont said that she was trying to figure out the Applicant's plans and asked for clarification from Applicant Tremblay. She said she was looking at the new survey and comparing the new survey to the plans for the first floor of the proposed addition. On the survey there was no deck shown whereas on Page A102 of the first floor plan there is a deck shown. Coupling the survey with page A102 of the first floor plan the deck appears to extend over the property line onto land owned by CLP.

Applicant Tremblay said that proposed deck was coming off. That deck was not going to be built the way it is shown on the plans. Town Manager/Planner Burbank asked what would be

there instead of a deck. Applicant Tremblay said, “Just a step to get up into the house, no deck”. Bont walked around and showed the ZBA a copy of the plans and the survey.

Beaudin asked if the step and all of the building would be within the Rams Horn Condominium Association’s property. Applicant Tremblay said, “Yes, it will be within their property”.

There was a brief discussion as the ZBA reviewed the plan. Beaudin said that this plan would need to be changed to reflect the change and the Land Use Permit Application for the addition could not be approved as submitted. Beaudin said the ZBA was supposed to be protecting the setbacks and property rights of everyone.

### **Discussion About the Need For Abutter’s Authorization to Cut the Toe Slope Back:**

Beaudin said he supports this project but felt that the abutter approval to cut the slope back for drainage purposes was a requirement. Applicant Tremblay believed that permission would have been granted by Loon Mountain if the Fire Chief had not asked for the requirement of cutting the slope back for emergency access.

Beaudin said that the ZBA is there to help the Town staff as well the Applicants. Town Manager/Planner Burbank is telling the ZBA that the Town has a problem with people cutting into the setbacks, and the ZBA has to listen to that. Beaudin said the ZBA wants to be flexible and to be flexible they set conditions. The condition in this case is that the toe slope has to be cut back; this means the Applicant would need to get permission from the property owner to make a flat spot on the abutting property.

Applicant Tremblay said that the ZBA is designed to deviate from the rule in valid situations.

Applicant Tremblay said he would describe the Deluca’s situation and their home for the ZBA so the ZBA members could better understand Deluca’s issues. The Deluca’s pay approximately \$8,500 per year in taxes and have not been able to use this condominium as it is today for the past four (4) years. Applicant Tremblay said he agrees with the concepts of setbacks but believes that the Deluca’s have a valid reason for requesting a variance and that this case is within the “spirit of the ordinance” and that substantial justice would be done.

Applicant Tremblay described the extent to which Mr. Deluca was disabled and the type of wheelchair Mr. Deluca uses. The wheelchair itself weighs about 300 pounds. The wheelchair is very large and bulky – it is kind of a laydown chair. Applicant Tremblay described the difficulties the Delucas have maneuvering such a bulky chair in a home setting and the extent to which changes would need to be made to every space in the unit as well as adding an elevator to accommodate Mr. Deluca and his chair.

Applicant Tremblay said he also believes that if you have neighbors’ homes nearby and were making these changes the situation would be different because you would be infringing upon a resident’s property. In this case the Deluca’s neighbor is Loon Mountain and the abutting property is a ski slope. The Ram’s Horn Condominium Association encourages expansion of the condominium units. About sixty-five percent (65%) of the units have been expanded in some

way over the past thirty plus (30+) years. These expansions have enhanced the values and increased the prices of all the units at Ram's Horn.

Beaudin said in the letter from Fire Chief Beard the toe head on the slope needs to be changed otherwise the addition as proposed will impede the Fire Department's ability to implement fire safety in that building.

Ludwig agreed that all ZBA members want this Applicant to be able to use his home, however, there are fire codes to consider and the Fire Chief's letter cannot be negated.

Applicant Tremblay said that he wanted to point out that this building was an easy building to access in comparison to other buildings in the Ram's Horn Condominium Association. Applicant Tremblay believes that when this improvement is complete, if the toe of the slope is not moved, there will still be enough room to drive a pickup behind the building.

Beaudin said that everyone is worried about liability in this day and age. If there is a fire and someone is hurt. The Fire Chief testified that his fire department cannot access the house, and the Fire Chief has submitted a letter that he has a concern. If the ZBA allowed this building to go forward, the Town would be in for some "serious heat".

Town Manager/Planner Burbank said that when he heard about this case he was picturing a gentleman in a regular wheel chair; what he heard tonight is that Mr. Deluca is a gentleman in a two or three hundred pound wheel chair. Burbank said that if that gentleman gets trapped in that building, "as a former Fire Chief the hair just stood up on the back of my neck". The owner's situation necessitates ensuring that the Fire Department has adequate access to all corners of that building, especially if they have to get Mr. Deluca out in a hurry. This is not a single family home; there are seven attached dwelling units in Building #7 (90 Rams Horn Drive, Units 40-46).

D'Amante said the discussion has revealed how uncomfortable the ZBA members are with this case; none of the ZBA members are at ease making this difficult decision. All ZBA members want the Deluca family to be able to use their home; however, there are some duties that the ZBA has that are unique.

D'Amante said that, by comparison to the Planning Board, the ZBA is a very different entity. The ZBA is a quasi-judicial board with greater judicial duties than those of the Planning Board. The ZBA is compelled to look into matters even deeper than the Planning Board. No one, including an abutter, has to appear before the ZBA or object at the time of this hearing to be able to sue later. Even a new owner could sue the ZBA at some later period of time, depending on the situation.

D'Amante said with emergency apparatus the Fire Chief could go anywhere, but if the emergency equipment will not fit around the back of the building with the proposed changes this creates a fire safety issue. The safety of the Fire Chief and his team are also the Town's responsibility. Although the ZBA shuddered after hearing about the extent of Mr. Deluca's condition, they must also take into consideration the safety of the firefighters going into a fire to



execute rescues. Proper entry is required. What if firefighters cannot get in because the area does not conform? Are we putting both the home owner and the firefighters in jeopardy?

### **Rams Horn Homeowners Association Encouraging Development**

D'Amante said that Applicant Tremblay mentioned that the current Rams Horn Condominium Association's policy is to encourage development. D'Amante stated that he got the feeling that the Condominium Association is waiving the setbacks. "Well they can't do that." Waiving setbacks, granting a variance is something that the only the Town ZBA is authorized to do or the Town at a town meeting by changing the zoning.

D'Amante said occupant fire safety and the safety of the Town Fire Department are critical. This is the major reason for the conditions in the ZBA's decision. D'Amante said he would back the Fire Chief if the Fire Chief was concerned about his team going in there under these physical circumstances.

### **Discussion:**

D'Amante suggested a conditional approval and shared the following thoughts that would indicate that the ZBA is behind the Deluca's request. The ZBA is having a hard time saying "no". D'Amante asked the ZBA to reconsider and say "yes" with the condition that approval shall be obtained from the appropriate Loon Mountain representative. The Deluca family can then go forward if they get that condition filled. If the requirements of the Fire Chief are met, then the ZBA has addressed fire safety. Whatever design for the addition is finally presented would need to be approved by the Fire Chief. Public safety, fire safety, fire department safety and the safety of the Deluca family are all brought to bear here.

D'Amante said that looking at the plans given to the ZBA, he sees that there is also a deck on the property line with CLP. Applicant Tremblay said that at the time these plans were drafted and he applied for a variance no survey had been completed.

D'Amante said that since the setback is fifteen (15) feet and the Applicant knew the deck was in the setback, he could not see this ZBA giving a waiver or a variance that allows someone, or forces people to trespass on someone else's land. D'Amante reiterated that the ZBA has duties to all people. D'Amante said this is a tough case and he thought that no one would be happy with the outcome.

Don Landry said that he agreed with Town Manager/Planner Burbank's suggestion that the ZBA should grant the Applicant an extension to a date six (6) months from now. Landry thought that perhaps with what the minutes reflect happened at the ZBA meeting that CLP that owns Loon Mountain may have a change of heart. The fact that the family has been coming to ski in Lincoln for thirty (30) years is also a plus. Landry thought that if the changes to the toe slope are made that the Fire Chief requires it would be better for everyone.

**Does the Town's Stormwater Management Ordinance Apply?**

Chairman Ham asked Applicant Tremblay if the Delucas change the toe slope and expand the size of the roof will the course of the stormwater runoff or the drainage change. Applicant Tremblay said that changing the slope of the land behind the units and adding more roof line would displace more water off the roof.

Town Manager/Planner Burbank said he thought that was why the Storm Water Management Ordinance should come into effect with these developments. These changes do have an effect on the current drainage. Town Manager/Planner Burbank felt that the whole drainage plan for that Rams Horn building should be looked at.

Bont said that the Rams Horn condominiums were built in 1985. Since 1985 there have been changes to the Alteration of Terrain laws that could potentially impact the Rams Horn development. The State of New Hampshire's requirements have changed since Rams Horn's developers originally got their approvals from the State to construct Rams Horn. She does not think that the Town can go back and make Rams Horn obtain a new Alteration of Terrain Permit for this small a change.

***Applicability***

*An Alteration of Terrain Permit is required whenever a project proposes to disturb more than 100,000 square feet of terrain (50,000 square feet if any disturbance is within the protected shoreline as defined by RSA 483-B). Or if the project disturbs any area having a 25% or steeper land slope and is within 50 feet of any surface water, then a permit is also required. The program applies to both earth moving operations, such as gravel pits, as well as industrial, commercial and residential developments.* [www.des.nh.gov](http://www.des.nh.gov)

Bont said the Town's Storm Water Management Ordinance does not apply in this case because this case just does not fit the criteria set forth in the Ordinance. In order for the Ordinance to apply there must be at least fifteen thousand (15,000) square feet of terrain being disturbed or fifty percent (50%) of the lot being disturbed.

Bont said that although increasing the volume of water being displaced is going to have an impact on the current drainage, she was not sure to what extent that displaced water could be taken into consideration after the Alteration of Terrain Permit approval was granted by the State back in 1985. Now in 2016 the State has a much better understanding of how stormwater runoff should be managed and the State is much stricter now than they were when they granted the permit in 1985. It could be that this change will have no impact on the other units or the road, but we won't know until it happens.

Town Manager/Planner Burbank said that perhaps the ZBA should ask an engineer to look at these plans to see if the proposed changes will or will not affect the storm water runoff. That would be the best the Town could do as a governing body.

Town Manager/Planner Burbank found it troubling that a Homeowner's Association is encouraging expansion with no regard to the Town Zoning Ordinance. There was a concern that

future board of this Homeowner's Association would try to use the Deluca approval or the Finn approval to make more drastic changes. Town Manager/Planner Burbank was concerned that if the ZBA approved these two additions their approval could set a precedent for future changes to buildings in the Rams Horn Condominium Association. Town Manager/Planner Burbank said there are good reasons for enforcing a fifteen foot (15') setback.

D'Amante said he picked up on what was said about the Homeowner's Association encouraging extensions presumably in the setbacks. In this one case, because of the owner's disability and the special modifications required for access, if the Fire Chief did not have an access problem, D'Amante would not have a problem approving the variance.

Beaudin asked if there was an outstanding Cease and Desist Order on the Finn project. Bont said that she has been too busy to write one up.

**D'Amante made the following motion:**

**1. Finding of Fact:**

- a. The surveyor has certified that there is no easement on the property behind Building #7 for the benefit of CLP Loon Mountain, LLC along the boundary line between Rams Horn Condominium Association and CLP Loon Mountain LLC; and
- b. The members of the Condominium Association agreed and consented to the proposed improvement in writing.

**2. Decision on the question of "Unnecessary Hardship":**

- a. The special provisions of RSA 674:33,V regarding disability and not requiring the applicant to show hardship applies;
- b. Although a finding of hardship arising from the condition of a premises subject to the ordinance is not required, the proposal by the Applicant for an addition, including an elevator, is a reasonable accommodation necessary to allow a person with a recognized physical disability (quadriplegia) to reside in or regularly use the premises, and the addition is in harmony with the purpose and intent of the zoning ordinance;
- c. Based on the substantial construction involved in providing handicapped access to the house the ZBA would not require the improvements to be removed when Mr. Deluca is no longer living there;
- d. Under those circumstances as set forth in the Findings of Fact, and recognizing the absolute special unique disability situation here, the ZBA hereby approves the Applicant's request for variance, **subject to the following condition:**

3. **Condition:** The Applicant Deluca shall obtain written approval from the appropriate authority to enter or to go across the property line owned by CLP Loon Mountain, LLC, on property known as "Loon Mountain" to work on the slope to establish fire safety access that is acceptable to the Fire Chief.

**Motion: Ray D'Amante      Second: Jayne Ludwig.**

**Further Discussion:**

Beaudin said that there should be more discussion on drainage. Chairman Ham asked that the ZBA add wording about drainage to the motion for the correction of the slope toe.

Beaudin explained that the way the ZBA approves a variance is that the ZBA has to be satisfied that the applicant has satisfied the other four (4) criteria required to approve a variance. Beaudin says he understands that the Applicant does not have to prove “hardship”, but the ZBA still has to vote on the other four criteria. During that process the ZBA could focus on D’Amante’s motion.

D’Amante explained that by focusing on the “hardship” criterion his intention was only to confirm that the improvements would not be required to be torn down if the Applicant were to move out of the home.

Bont asked the ZBA members to find their copy of the Conditions that were handed out last week and cautioned that the ZBA cannot take a vote on each line, but on the whole thing. The Board discussed the proper procedure for voting on the different criterion.

**Condition: *For the following reasons, the values of the surrounding property would not be diminished...***

D’Amante said:

*If the applicant obtains written authority from CLP Loon Mountain, LLC, for its property described as “Loon Mountain” to move the toe of slope to provide for suitable fire access to this unit and the surrounding property with approval of the Fire Chief, then the values would not be diminished.*

**The ZBA unanimously agreed.**

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

Beaudin said:

*Granting the variance would not be contrary to public interest because it would allow the homeowners to use their property given the special needs of the individual in the house.*

Ludwig said:

*Granting the variance without permission from the Fire Chief and CLP Loon Mountain, LLC’s approval to expand their entry then it would be contrary to public interest because the addition would put people in jeopardy.*

Ludwig then rephrased her statement by saying that:

*And granting a variance would not be contrary to public interest if the Applicants obtained permission from CLP Loon Mountain, LLC , to expand into the setback and to move the toe of slope on Loon Mountain property behind the building with approval from the Fire Chief.*

**The ZBA unanimously agreed.**

**Condition:** *Denying the variance will create an unnecessary hardship for the applicant owing to special conditions of the property that distinguish it from other properties in the area.*

The ZBA agreed that the hardship criterion does not need to be met and asked to include the language D’Amante suggested earlier.

Earlier D’Amante made the following motion:

**1. Finding of Fact:**

- a. The surveyor has certified that there is no easement on the property behind Building #7 for the benefit of CLP Loon Mountain, LLC along the boundary line between Rams Horn Condominium Association and CLP Loon Mountain LLC; and
- b. The members of the Condominium Association agreed and consented to the proposed improvement in writing.

**2. Decision on the question of “Unnecessary Hardship”:**

- a. The special provisions of RSA 674:33,V regarding disability and not requiring the applicant to show hardship applies;
- b. Although a finding of hardship arising from the condition of a premises subject to the ordinance is not required, the proposal by the Applicant for an addition, including an elevator, is a reasonable accommodation necessary to allow a person with a recognized physical disability (quadriplegia) to reside in or regularly use the premises, and the addition is in harmony with the purpose and intent of the zoning ordinance;
- c. Based on the substantial construction involved in providing handicapped access to the house the ZBA would not require the improvements to be removed when Mr. Deluca is no longer living there;
- d. Under those circumstances as set forth in the Findings of Fact, and recognizing the absolute special unique disability situation here, the ZBA hereby approves the Applicant’s request for variance, subject to the following condition:

- 3. Condition:** The Applicant Deluca shall obtain written approval from the appropriate authority to enter or to go across the property line owned by CLP Loon Mountain, LLC, on property known as “Loon Mountain” to work on the slope to establish access acceptable to the Fire Chief to provide adequate access for fire and emergency purposes and establish adequate drainage on the new design.

Beaudin asked if the change would trigger the Town’s Storm Water Management Ordinance.  
Beaudin asked if there was a minimum requirement for the Storm Water Management Ordinance.

Bont said the in order to trigger the Storm Water Management Ordinance the Applicant would need to disturb more than fifteen thousand (15,000) square feet or more than fifty percent (50%) of the lot. D’Amante said that this project would not trigger the Town’s Storm Water Management Ordinance.

**The ZBA Unanimously agreed with the language of the motion.**

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

Beaudin and D’Amante said that substantial justice would be done by granting the variance because it would allow the owner to use his house.

**The ZBA unanimously agreed.**

**Condition 5: The spirit of the ordinance would be observed because...**

Jayne Ludwig asked for clarification: What does “spirit of the ordinance” mean?

Beaudin said the reason the ZBA is hearing this application is to decide whether to allow the Applicant to do something that is not in direct conformance with the Zoning Ordinance. So we are allowing them to do that so long as the spirit of the ordinance is observed. In this case one of the purposes of the setback is to promote life safety. The overall spirit of the ordinance is to protect life safety. Protection of life and safety is one of the primary foundations for establishing a Zoning Ordinance. Another goal or “spirit” of the ordinance is to treat everyone the same way, except under special circumstances which is what this case is.

Beaudin said that the spirit of the ordinance would be observed due to the special needs of the Applicant and making changes to the toe of the slope that would allow proper safety access. D’Amante agreed and added that he would refer to, “pursuant to RSA 674:33”. Beaudin said that all of these so far that we have done, we have covered the fact that the Applicant has to have permission from whoever owns that property to change the toe of the slope to meet the requirements of the Fire Chief.

**The ZBA unanimously agreed.**

Applicant Tremblay asked for the opportunity to speak.

**Motion to come out of deliberations to hear further testimony from Tom Tremblay.**

**Motion: Ray D’Amante      Second: Jayne Ludwig      All in favor.**

**Fire Safety Discussion:**

Applicant Tremblay said he would like the Fire Chief to consider the following.

1. There are literally thousands of units in this town that have crappy access.

2. This building has excellent access on both the east and west sides, the building is 200 feet long. There are only about 35 feet of the building that does not have the equivalent of a football field beside it. There is land all around the building.
3. The only issue that the Fire Chief has is that the land behind the thirty-five feet (35') is sloped. There is still plenty of room to put ladders up there.

Applicant Tremblay said that he would like the ZBA to consider the following. He tried to talk the Deluca's out of doing this project a half a dozen times because what they are about to do is very expensive. He encouraged them to think of other options for the family. However, the Delucas:

1. Have owned this place a long time.
2. Have relatives in the unit next door.
3. Have a lot of fond memories associated with this unit.
4. Want to do this.

Applicant Tremblay proposed that in lieu of requiring the Delucas to move the embankment, which is the big impediment right now, that the Delucas voluntarily put a sprinkler system in their unit. Applicant Tremblay said the Delucas will spare no expense to get their husband and father back into this house.

Applicant Tremblay said he spoke with several sprinkler companies over the years about different projects. Sprinkler companies advertise that no one has ever lost their life in a in a sprinkled building. Applicant Tremblay said he does not know if that is true, but he knows he has heard that claim from a number of different sprinkler companies. Applicant Tremblay said he could "almost guarantee it that they would put in a sprinkler system in this building if that is what it would take to get this thing approved." A sprinkler would enable the fire department to "get people out of the house if that was an issue and it would solve the little problem we are dealing with which is literally a few feet."

Fire Chief Beard said he would never object to someone offering to put in a sprinkler system. But in this case there are adjoining dwelling units. A sprinkler system would work to save the one unit that the sprinkler is in, but there are dwelling units on either side of the Deluca unit.

Applicant Tremblay said that there are fire walls between every unit and there is room to put ladders up on the other units if the fire department had to.

Ludwig said that she remembered learning that smoke kills more people than fire. So the sprinkler puts out the fire however it does not kill the smoke. Fire Chief Beard agreed.

Fire Chief Beard said that he would still need good access to get around the building even if it were a standalone unit without units on either side of it. If the units were detached there would be room in between the units so he could get to the affected units.

Fire Chief Beard said that he wanted the ZBA to know something about the Town fire trucks. The Fire Department's "cross lays" or their "quick attack hoses" on the trucks are one hundred fifty feet (150') long and this building where the Deluca unit is located is over two hundred feet

(200') long. If there was restricted access on that end and we needed to get to a middle unit, the fire department may not have hoses enough to get around to the back side of the building. If we had restricted access trying to get ladders to the third unit down, it would slow the whole process down.

Beaudin said to Fire Chief Beard that there are a lot worse places than Ram's Horn in Lincoln. Beaudin said that the ZBA really needs to take into consideration what the Fire Chief is saying. The Fire Chief is saying that he wants that access knowing there are places worse off than this one, having said that, he is the staff member in charge of fire safety. The ZBA has to respect his concerns. Beaudin said he could argue with Fire Chief Beard all day long, but he is not the one fighting that fire, Fire Chief Beard is.

Fire Chief Beard said that maybe the Delucas could meet with Rick Kelley who is the President and General Manager for the property owner, CLP Loon Mountain LLC, and Loon Mountain Recreation Corporation who manages the Loon Mountain ski resort and persuade him to allow the Delucas to retract the toe slope. He suggested that maybe the ZBA could put this meeting off for another week and see if the family gains some traction in getting that permission.

Beaudin said that by giving the Delucas conditional approval, all the Delucas need to do is get Loon to grant permission for them to retract the toe slope and then their variance is automatic. The Delucas would then just go into the Town Offices and apply for a Land Use Permit.

Fire Chief Beard said that he would be willing to go and sit with the Delucas when they speak with Rick Kelley.

**Motion to come out of public session and go back into deliberative session.**

**Motion: Paul Beaudin                      Second: Ray D'Amante                      All in Favor.**

**Additions and Expansions At Rams Horn Condominium Development:**

Town Manager/Planner Burbank informed the ZBA that Town staff has discovered in this process that there is a relative of the Delucas who live in the unit next door – the Finns. Staff is going to have to bring the Finns back in. The Finns own the end unit next door to the Delucas. They got a permit to build above the deck. The Finns' unit is even closer to the setback than the Delucas' unit. Staff is going to be discussing this issue of access again. Although it looks like the Finn's unit is within the setback area and within the property line, the ZBA is probably going to be hearing this whole scenario all over again.

Bont said that the Finns are building their addition into the setback above an expanded deck. She has no permit for an expansion of the deck. She does not know if the property owners at the time expanded the deck before zoning was adopted in 1986.

Beaudin said that, speaking in generalities, he would like to see if the Deluca case is a special case or not. When he went up to Rams Horn to look at the Deluca site, he noticed that there have been numerous additions, decks, and expansions onto units that have never come to the Town Offices for Land Use Permits or ZBA variance approvals. Beaudin said he does not know how



Town staff addresses that problem or how that problem gets taken care of but there is probably a first step somewhere. Otherwise the Town will have to go back and bring these property owners into the Town Office and say, “We can make you take that [addition] off” if you did not bring these additions or expansions to the Town’s attention by getting a permit or a variance. That is what Town staff needs to do so that people like Tremblay who follow the rules are not thwarted whereas people who do what they want without seeking Town permission get away with it. Beaudin said he felt bad doing this to Tom Tremblay and his client. “It’s a terrible thing.”

Beaudin said there are worse things. Beaudin said there are people who blatantly went out and constructed additions without a permit and without a variance.

Chairman Ham said that on the original plan from 1983 all the little decks are exactly the same size all down through there.

Bont added that if you stand at the Deluca unit and look down the row of units in Building #7, all the back decks still look to be the same size down that row except for the Finns and the Delucas.

Beaudin said if you look at some of the other units, you can see the new posts from where they expanded their decks. For their second level decks the owners have actually put in new footings and poles.

Beaudin said the ZBA has reviewed the five (5) criteria and must move for a general vote to approve or deny the request for a variance.

After reviewing the petition, considering all the evidence, hearing all of the testimony and by taking into consideration members’ personal knowledge of the property in question, before making a motion to approve the request, the ZBA made the following findings and motion:

**Finding of Fact:**

1. The surveyor has certified that there is no easement on the property behind Building #7 for the benefit of CLP Loon Mountain, LLC along the boundary line between Rams Horn Condominium Association and CLP Loon Mountain LLC; and
2. The members of the Rams Horn Condominium Association agreed and consented to the proposed improvement in writing.

**Condition 1: Granting the variance will not be contrary to the public interest because** *a variance would allow the homeowners to use their property given the special needs of the individual in the house. Furthermore, granting a variance would not be contrary to public interest if the Applicants obtained permission from CLP Loon Mountain, LLC , to expand into the setback and to move the toe of the slope on Loon Mountain property behind the building with approval from the Fire Chief.*

**Condition 2. The variance is consistent with the spirit of the ordinance because** *the overall spirit of the ordinance is to protect life safety and the spirit of the ordinance would be observed due to the special needs of the Applicant and making changes to the toe of the slope that would*

*allow proper safety access, provided the Applicant have permission from whoever owns that property to change the toe of the slope to meet the requirements of the Fire Chief.*

**Condition 3: Substantial justice would be done by granting the variance because** by granting the variance the disabled property owner would be enabled to access and use his house.

**Condition 4. Granting the variance would not diminish the values of the surrounding property** *If the applicant obtains written authority from CLP Loon Mountain, LLC, for its property described as “Loon Mountain” to move the toe of the slope to provide for suitable fire access to this unit and the surrounding property with approval of the Fire Chief, then the values would not be diminished.*

**Condition 5. Denying the variance will create an “Unnecessary Hardship” to the applicant (due to the special conditions of the property).**

1. The special provisions of RSA 674:33,V regarding disability and do not require the applicant to show hardship exists;
2. Although a finding of hardship arising from the condition of a premises subject to the ordinance is not required, the proposal by the Applicant for an addition, including an elevator, is a reasonable accommodation necessary to allow a person with a recognized physical disability (quadriplegia) to reside in or regularly use the premises, and the addition is in harmony with the purpose and intent of the zoning ordinance;
3. Based on the substantial construction involved in providing handicapped access to the house the ZBA would not require the improvements to be removed when Mr. Deluca is no longer living there;

Under those circumstances as set forth in the Findings of Fact, and recognizing the absolute special unique disability situation, the ZBA hereby approves the Applicant’s request for variance **subject to the following condition:**

**Condition:** The Applicant Deluca shall obtain written approval from the appropriate authority to enter or to go across the property line owned by CLP Loon Mountain, LLC, on property known as “Loon Mountain” to work on the slope to establish access acceptable to the Fire Chief to provide adequate access for fire and emergency purposes and establish adequate drainage on the new design.

**Motion: Ray D’Amante      Second: Jayne Ludwig      All in favor.**

Beaudin said the reason the ZBA is hearing this application is to decide whether to allow the Applicant to do something that is not in direct conformance with the Zoning Ordinance. So the ZBA is allowing them to do that so long as the spirit of the ordinance is observed. In this case one of the purposes of the setback is to promote life safety. The overall spirit of the ordinance is to protect life safety. Protection of life and safety is one of the primary foundations for establishing a Zoning Ordinance. Another goal or “spirit” of the ordinance is to treat everyone the same way except under special circumstances which is what this case is.

Beaudin said that the spirit of the ordinance would be observed due to the special needs of the Applicant and making changes to the toe of the slope that would allow proper safety access. D'Amante agreed and added that he would refer to, pursuant to RSA 674:33. Beaudin said that all of these so far that we have done, we have covered the fact that the Applicant has to have permission from whoever owns that property to change the toe of the slope to meet the requirements of the Fire Chief.

**Applicant Tremblay was reminded that he will need to submit a revised plan for Deluca for the addition without the deck to append to the Land Use Permit Application.**

Applicant Tremblay appreciates the ZBA's time.

There was a brief discussion with Applicant Tremblay and he left the meeting.

### **Municipal Law Lecture Series**

Bont arranged for the Law Lecture Series to be held in Lincoln and asked if any of the members of the ZBA would like to attend. There was a brief discussion about the different lectures. The members will get back to Bont if they would like to attend.

### **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 7:36 P.M.**

**Motion: Jon Ham**

**Second: Jayne Ludwig**

**All in Favor: (5-0)**

Respectfully submitted,

Wendy Tanner,  
Planning and Zoning Recorder

Date Approved: 11/22/16

  
\_\_\_\_\_  
Jonathan Ham, Chairman