

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
THURSDAY – JANUARY 5, 2017 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chairman Jonathan Ham, Board of Selectman Representative Jayne Ludwig, Paul J. Beaudin II, Vice Chairman Don Landry.

Members Excused: Ray D'Amante, Jack Daly, Jim Martin

Members Absent:

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

Staff Excused: Town Manager/Planner Burbank

Guests:

- **David Barlow** – owner of 82 Rams Horn Drive #G6, Unit 00052 (Tax Map 126 Lot 023000-08), Lincoln, NH 03251
- **Jim Martin** – contractor for East Branch Builders and resident of 72 Pollard Road (Tax Map 117, Lot 058), Lincoln, NH 03251
- **Brenton (Brent) W. Drouin** – abutter and resident of 2 Hay Hill (Tax Map 132, Lot 058) in “The Landing” owned by Brenton W. Drouin, PO Box 788, Lincoln, NH 03251-0788 and Owner of Century 21 Mountainside Realty, 49 Main Street, Lincoln, NH 03251.
- **Stuart Anderson** – resident of Woodstock, NH and works for Alba Architects, LLP, 137 Main Street, North Woodstock, NH 03262

- 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, Jack Daly and Jim Martin are excused

- II. CONSIDERATION** of meeting minutes from:

- December 8, 2016

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

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: (4-0)

- December 21, 2016

Motion to approve the minutes of December 21, 2016 as presented.

Motion: Jayne Ludwig Second: Don Landry All in favor: (3-0)

Paul Beaudin Abstained

- 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 2016-06**

2. Location: 82 Rams Horn Drive #G6, Unit 00052

(Tax Map 126, Lot 023000-08)

The lot is located in the Rural Residential (RR) District.

3. Applicant & Property Owner of Record:

David S. Barlow
640 Lewis Wharf
Boston, MA 02110

4. Applicant & Buyer/Prospective Property Owner:

Richard Alimenti
52 Stiles Road, Suite 201
Salem, NH 03079

5. Applicant David S. Barlow (Owner of Record) and Richard Alimenti (Buyer) 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 to encroach within the 15 foot setback area. The subject property is located in the Rural Residential (RR) District. Applicant estimates that the violation took place approximately 20 years ago, prior to the time the current property owner purchased the property in 1999. The house encroaches about 4.3 feet into the 15 foot setback area. The violation was not discovered until recently during a review of potential additions and renovations contemplated by the proposed purchaser. The violation has existed for approximately 20 years with no enforcement action, including written notice, being commenced by the Town. The nonconformity was discovered by a surveyor hired just prior to an anticipated transfer to the purchaser. The property is subject to a purchase and sale agreement. The property owner seeks dimensional relief for the proposed buyer to maintain the existing footprint and to build a second story on the encroachment with no further dimensional encroachment on the ground.
6. **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.
7. **ACTION:** The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting.
8. **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

Presentation:

Stuart Anderson of Alba Architects, LLP, presented on behalf of the two applicants. Anderson described the property at 82 Rams Horn Drive unit G6. The property was highlighted on a map as the end unit in close proximity to the Loon Mountain ski trail. Anderson represented David Barlow, the current owner of record, and Richard Alimenti who is a prospective buyer. Anderson said there is currently a purchase and sales agreement in place for this property. The

Board has copies of letters of authorization stating that Stuart Anderson is representing them as their agent (both the owner and prospective buyer) at this hearing.

Anderson said that his services were retained to look at potential additions and renovations to the property for the prospective buyer. During the course of his research, there was some concern about the location of the existing building in relation to the lot boundary line. A survey was completed which identified that the existing building encroaches four and three tenths feet (4.3') into the fifteen foot (15') setback. Anderson stated that the green area as shown on the "Partial Site Plan" submitted by Stuart Anderson of Alba Architects, LLP, is the area that encroaches into the setback. Anderson said made the following statements of fact to support the Application for an Equitable Waiver of Dimensional Requirements:

- The encroachment has existed for approximately twenty (20) years.
- The encroachment predates the current owner (Barlow), who purchased the property in 1999.
- No enforcement action or written notice has been issued during this period.

Anderson said the request is for either an Equitable Waiver of Dimensional Requirements or a Variance for the prospective buyer to:

- Maintain the existing footprint with the four and three tenths foot (4.3') encroachment into the setback; and
- Allow a second story to be built on top of that same four and three tenths foot (4.3') encroachment with no further encroachment into the setback.

Anderson said it was unclear to him if he should be applying for a Variance or an Equitable Waiver of Dimensional Requirements, so on the advice of Planning Administrator Bont, he submitted both applications to the Zoning Board of Adjustment (ZBA).

Town Planning and Zoning Administrator's Response:

Bont said that the Application for an Equitable Waiver of Dimensional Requirements is based on what exists right now, not including the proposed addition. Bont explained that the applicant is requesting the ZBA for forgiveness for the previous encroachment which would be more appropriately dealt with under the Equitable Waiver of Dimensional Requirements. Bont said the request for a Variance would have to do with asking the ZBA for permission to increase the amount of volume within the setback area by putting on a second story above the one story sunroom and an addition above the deck and the single story portion of the building. On the plan the "proposed addition" and "proposed deck" shown in white on the plan on the north side of the building do not appear to be in the setback area.

Bont said that one of the problems the Town has been having town-wide is that the developments are being built on the sides of mountains. The density of those developments is based on specific numbers submitted with the Alteration of Terrain (AoT) Applications to the State of New Hampshire, Department of Environmental Services (DES). Sometimes the AoT Permits are based on inaccurately low numbers. NH DES is looking at is the impediments to the flow of water down the mountainsides and making sure there is appropriate drainage so that runoff does not interfere with either the buildings or infrastructure (like roads) being built at Rams Horn or anything else located downhill from there.

Bont said that there were three issues she discussed with the Town Planner in connection with this request:

1. Whether or not to address the Alteration of Terrain issues that might be raised by placing an addition in the path of the culvert or the drainage ditch that channels water off the ski slope.
2. Whether there should be a proposed modification of the Stormwater Management for the whole development in this area. Bont is not sure how or if the Stormwater Management Ordinance with its proposed amendments would apply. The idea is that drainage should be addressed with the plans for any proposed addition and to be sure that whatever is proposed will not interfere with drainage or stormwater runoff.
3. Whether rock retaining walls will need to be moved in connection with any proposed addition. Some of those retaining walls could be over four feet (4') in height. If the new retaining walls are greater than four feet (4') in height the walls are required to be engineered by a New Hampshire licensed Structural Engineer. The actual construction of the retaining walls would also need to be signed off on by the Structural Engineer after being built. This would require periodic inspections by the Structural Engineer as the wall(s) were being built. Bont said that the rock retaining walls do not show on the plan.

Planning Board Questions:

Anderson said that the proposed addition and deck are shown only in “concept”; the actual footprint and boundaries of the proposed addition have not been fully determined. Part of the purpose of this request is that the property owner would like to know, should the property change hands, would the new owner be able to move forward with the renovations. Anderson stressed that the proposed additions on the plan was only a “concept” at this point in time. It is shown on the plan as a potential development, but not indicative of what may happen with a new owner.

Paul Beaudin asked if the proposed deck was open. Anderson said, “Yes”. Beaudin continued asking if the proposed addition is closed in. Anderson said, “Yes”.

Paul Beaudin asked about access. Can the Fire Chief get access to the back of the building? Beaudin said that adding more occupied space into the woods where there is no access by fire, ambulance or safety personnel could be an issue. Beaudin asked if the Fire Chief would address access to the area by fire trucks. Beaudin stated that if they were going to change the location of rock retaining walls and drainage, proper plans and specifications would have to be submitted to the Town that would meet Town specifications.

Bont said that the specifications for the retaining walls come from the State of New Hampshire. The Town has something in their Land Use Plan Ordinance (LUPO) to trigger reminders that the retaining walls greater than four feet (4') in height have to be in compliance with the NH State Building Code (International Building Code – IBC 2009).

Paul Beaudin said that because any construction plans would have to be checked by the Town and those plans would have to be in compliance with the State Building Code, he was not concerned about the rock [retaining] walls “because of the stringent state regulations”. Beaudin said, if the retaining walls are not constructed appropriately, they “will not be approved for building”.

Discussion re: Expansion of a Nonconforming Building:

Paul Beaudin said that the areas designated in green on the plans are described by Anderson as “an expansion of a non-conforming use”. These proposed expansions would not be allowed except if they were a lawful expansion of non-conforming use. Beaudin gave an example of a lawful non-conforming use: “If there were a fifteen foot (15’) setback and you built to the edge of that setback and then the setback was changed to twenty-five feet (25’) and you were already built into that setback.” Beaudin said he does not have a problem with the fact that the building is already built within the setback area and meets all the requirements for an Equitable Waiver, but he does not believe that expanding upon a nonconforming use is the real issue. Expanding upon a nonconforming use goes against the Town’s Land Use Plan Ordinance (LUPO).

Fire Chief Beard said that particular building does have a large retaining wall. Consequently, if a fire started in that unit, the Fire Department could only work from one side of the building because of the size of the embankment. The Fire Chief said that the site definitely presents a challenge to put out a fire as it is configured today, but if the Applicant were allowed to expand on that nonconforming area, it would only add to the difficulties.

There was a brief discussion about what the Applicant was requesting. Stuart Anderson had stated that the partial site plan that he submitted was only a “conceptual”, or one possibility that the owner or new owner could do. In an attempt to understand what the Board’s responsibilities are, Bont explained that the applicant would like to build above the green area.

Paul Beaudin said that the issue with building an addition in the green area is that they are requesting an “expansion of a nonconforming use” that was created when the original building was constructed. Bont said that the ZBA could grant a Variance for an addition to a nonconforming use and that is what the applicant is asking for. The ZBA could also deny the request.

Jayne Ludwig asked if a revised Alteration of Terrain (AoT) Permit would be required from the State DES to revise the drainage plan where the drainage will have to be altered to accommodate the proposed deck. Bont said that a revised Alteration of Terrain (AoT) Permit would be required only if the Applicant wants to construct the new deck and addition. The “conceptual” drawing was drawn for the purpose of showing a potential buyer what could be done with the property.

Jayne Ludwig said that it was her understanding that the rock retaining walls were already built and the walls were above four feet (4’) high. Anderson said that was correct.

Paul Beaudin said that the ZBA’s Rules of Procedure have a section for approving an Equitable Waivers of Dimensional Requirements. In order to grant an Equitable Waiver, Sections a, b, c, d and e would have to be met. The Equitable Waiver can only be granted for the existing building. Beaudin said that to expand upon a nonconforming use was a totally different issue. Beaudin clarified that there were two issues for the ZBA to look at.

1. To either approve or deny the existing building that is in the setback, with an equitable waiver of dimensional requirements; and
2. To either approve or deny an addition or expansion to a nonconforming use.

Anderson said that the ZBA should look at the definition of “expansion”. Anderson does not believe that adding above the deck or adding another floor to the one story section of the

building constitutes an “expansion” because there are no further encroachments. Anderson said, “The building will still be four and three tenths feet (4.3’) into the setback [area] and there is no further dimensional expansion of the nonconforming use.”

Paul Beaudin said that any change or expansion to the nonconformity is not allowed. Beaudin said he did not feel that a four and three tenths foot (4.3’) encroachment comprised a very large section of the home. Beaudin said he did not think it would be that much of a hindrance to the Applicant to prohibit him from further building or expansion of that noncompliant section.

Paul Beaudin said he did not think the ZBA had any jurisdiction over the proposed additions off the back of the building as shown on the plan, unless the area of the lot disturbed met the square footage requirements for stormwater runoff. However, Beaudin said he thought that someone who was intending to occupy that building should have concerns if the Fire Chief has said that there is no fire safety access to the rear of the building, and very limited access to the front. The owner should want to think about the fire access problem before he goes and puts on an addition in those areas. Beaudin said that first, the ZBA should be concerned about the equitable waiver of dimensional requirements for the part of the building that is in the setback area and has been for twenty (20) years. Then, the Board could discuss the expansion of nonconforming use which Beaudin feels is the real issue.

Don Landry verified that when talking about water runoff and drainage, the area on the site plan shown in green area is a deck right now. Stuart Anderson said:

- The smaller green area is a deck.
- The larger green area is a solid one-story roofed over room that exists today.
- The green areas in question on the map are partially enclosed and partially deck.
- The owner would like to build on top of the one-story room and build a portion of another room on top of the deck which is already in the setback.
- There is no further encroachment into the setback, just another room.

Don Landry asked if the proposed addition would have the same amount of stormwater runoff from that roof. Anderson said “Yes. It is the same roof, just a higher level.”

Paul Beaudin said that recently the Town discovered a number of additions were built onto Rams Horn condominiums that were not permitted or reported to the Town. Beaudin said that if the ZBA allowed the Applicant to expand a nonconforming use that decision would not help the Town; that decision would not help to keep what is going on up there in line with the Town Land Use Plan Ordinances (LUPO).

Jayne Ludwig said that the ZBA does not want to set precedence by allowing this type of change.

Paul Beaudin said that the Barlow – Alimenti Application for a Variance does not involve a very large area so that if one person gets a variance, others will follow suit. The Town has issues up in Rams Horn as a whole; although a field visit indicated that many additions were constructed up at Rams Horn, no one in the Town office knows how the many additions got built up there without a Land Use Permit. Beaudin asked Anderson if it was that important to have the second space on top of the nonconforming section of the house. Anderson said that to the prospective buyer, it is, yes.

Paul Beaudin said that he could not see the ZBA voting in favor of allowing the applicant to expand a nonconforming use. Beaudin said that there has to be some accountability for enforcing the provisions of the existing ordinances. Beaudin said that it was bad enough that the nonconforming use happened, but to allow the nonconforming use to get bigger does not support the spirit of the ordinance but goes against it.

Anderson asked the ZBA members where the ordinance explains “expansion of use” as including volume.

Paul Beaudin pointed out in the Land Use Ordinance, Article III, where the ordinance explains when you have a lawful expansion and an unlawful expansion. Beaudin explained that a *“lawful expansion of nonconforming use” would be if the nonconforming use was legal when it came into existence, but which solely due to the adoption or an amendment of this ordinance, no longer conforms to or complies with its terms.* Beaudin said that if that setback requirement had been changed to put a section of the home into the setback area, the ZBA could probably let it go. But the setback area has never changed out there. At the time the original building was built it was nonconforming. Beaudin said that was the whole issue. The section of the home that is in the setback area is there because of a nonconformity; that section of the house was built into the setback from the start. That section of the house never had any Variance or Special Exception to allow it to be built within the setback area. To give the applicant permission to expand on that nonconforming use is pretty tough to do. Beaudin said that Anderson or the owner would really have to convince Beaudin and the other members of the ZBA that there was a real hardship of some magnitude to get the ZBA members to agree they should support an expansion of nonconformity.

Ludwig asked if the Applicants went to the Planning Board with the additions that they would like to build. Bont said that the Applicants would not need to go to the Planning Board. They would need to fill out a Land Use Permit application for the additions and they have not done that yet. Anderson said that they have not reached that point yet. Anderson said that he was looking for clarification because the ZBA was looking at nonconformity of three dimensions and not two dimensions. Anderson said he does not see where the ordinance defines volume.

Chair Ham said that Article III, Section C, number 3 reads: *“A nonconforming use may not be expanded...”*

There was a brief discussion of the location of the building.

Paul Beaudin read Article III, Section B *“...no building, structure, or land shall hereafter be used, constructed, or altered unless in conformity with the applicable provisions of this Ordinance.”* Beaudin said that the nonconformity would be altered. Whether it was two (2) dimensional or three (3) dimensional did not matter; it was being altered. What is there now is where the nonconformity comes in. Beaudin said he has no problem with what is there now, staying there, because no one caught the nonconformity until this time and the ZBA can make it acceptable through the Town’s regulations. Beaudin said that somewhere along the line the ZBA has to draw the line. Beaudin said *“We cannot keep expanding nonconforming uses. Can you imagine where we would be?”*

Barlow asked:

- If the ZBA approved the Variance [did he mean the Equitable Waiver of Dimensional Requirements?] because what already exists, existed 20-25 years ago?

- Does that then reset the standard by which the ZBA would then consider allowing him to build up on that? As opposed to these two things coming in together?
- When one event happens first, so then it no longer is a nonconforming use, it is accepted by the Board. Then would you address the issue of building up on it [i.e., the nonconformity]?

Paul Beaudin said Barlow would still be expanding that initial nonconformity. The ZBA would address the request for the expansion by checking to see if the nonconformity was permissible based on the criteria listed in paragraphs a, b, c, d and e of the Land Use Plan Ordinance (LUPO). Beaudin said that expanding on a nonconforming building does not in any way attach itself to the act that you are allowing. “If [the ZBA] approved such an expansion with everyone, could you imagine? Where do we stop? Where do we go from there?”

Bont said that the Board had a hearing and granted a variance on a nonconforming deck, but the decision was based on special circumstances. The man was disabled and he could not use his unit or get access to his unit without modifying his unit significantly.

Barlow asked if the ZBA was okay with what happened a long time ago, does that then redefine the nonconformity as now conforming? Are the house and the deck within the setback area still considered “nonconforming”?

Paul Beaudin said that he does not think that the ZBA decision granting the Equitable Waiver of Dimensional Requirements redefines the nonconformity as “conforming”; that portion of the house and deck is still nonconforming. The ZBA could decide the other way. The ZBA could decide that they really do not think that Barlow or the people who built that nonconforming unit prior to Barlow’s taking ownership did their due diligence before purchasing the unit. The ZBA could decide that they do not think that the unit should be allowed to remain within the setback area. What would you do then? Barlow said he understands.

Paul Beaudin said that the nonconformity was a mistake. The ZBA should not penalize the current property owner for the mistake if it was the result of the Town’s prior mistake of not noticing the nonconformity. However, the ZBA should not allow an expansion on a prior mistake.

Anderson said that if the ZBA granted the Equitable Waiver of Dimensional Requirements the Barlow unit would change from its current status as an illegal nonconforming building to a legal nonconforming building.

Paul Beaudin said that the ZBA should vote on the five criteria listed in Section 4, “Equitable Waiver” in paragraphs A, B, C, D and E of the ZBA Rules of Procedure. The Barlow unit is in the setback area and is nonconforming. The ZBA will have to go through the list of criteria and make sure that no one on the ZBA has any problems with the application meeting those criteria. Beaudin asked Bont if she agreed. Bont agreed.

Paul Beaudin said that the building that is already there is within in the fifteen foot (15’) setback area. The ZBA can grant relief under the “Equitable Waiver” section of the ZBA’s Rules of Procedure. Beaudin said he does not think members of the ZBA have an issue with the proposed deck or the proposed addition as shown on the plan that are not within the setback area. Beaudin said he did not think the ZBA had any jurisdiction over those proposed changes since they were located outside of the fifteen foot (15’) setback area. Beaudin said he does not know if the

proposed changes would trigger issues with the Stormwater Management Ordinance because of lot coverage up at Rams Horn. The life safety issues also may cause other problems with the proposed additions.

Anderson asked if the ZBA had previously granted any relief for an expansion of a nonconforming use. Paul Beaudin said, “Yes they have”, but the one they granted was for a very special circumstance.

Anderson questioned if the ZBA had only granted that relief once. Paul Beaudin said that the ZBA does not grant very many of them. Beaudin said that he has been on the ZBA the longest and he does not remember granting many of them unless the case involved a real hardship. Ludwig said that the ZBA does not deny waivers to be mean; the ZBA’s purpose is to follow the ordinance.

Anderson said that he understands, but if the ZBA granted half of the requests for relief, then the ZBA has set a precedent. Ludwig said that being a small town, it could really be trouble for the town.

Paul Beaudin said that “precedence” is a hard thing to argue in a court of law. Anderson said, “For both sides.”

Anderson asked what the ZBA saw as its primary concern, commenting that there was no increase in the amount of stormwater runoff with a second story. Bont said that the Fire Chief’s concern is that the proposed living space above the nonconforming portion of the building is not readily accessible to the Fire Department.

Paul Beaudin said that his biggest concern is if the ZBA allows the Applicant to expand a nonconforming building, even though only a very small section of building is within the setback area, that decision would set a precedent that the ZBA would have to defend because the Applicant’s property did not have a “real hardship”.

Barlow asked if the ZBA would distinguish the nature of the nonconformance. For example, Barlow attempted to track down the history of his unit’s nonconformity. He tried to find in the Town records when and where the owners who made this little expansion without going through Town’s permitting process, but the Town could not find any records. Barlow thought that by going through Town records he might find a Variance that allowed this nonconformity.

Paul Beaudin said that at Rams Horn there were two units that were nonconforming. The owner of one unit came in to request a waiver for an expansion of a nonconforming unit. In the process of looking at that unit, the Town noticed that the unit next to it had been already expanded without coming to the Town for a permit or a variance either. This was just recently – within the past year. The Town does not have the manpower to drive around and look at everything being built in Town. That expansion could have happened and no one would have noticed it.

Barlow asked if it was possible that an expansion happened and the owner had received a Variance for it. Paul Beaudin said that unfortunately the Town does not have a record of a variance or any confirmation of a variance being granted for that property so the ZBA has to take into consideration the possibility that a variance does not exist. Bont said that Planning staff searched the computer archives, the Map & Lot files and the ZBA minutes and nothing was found.

Barlow said that if “we” dug deep enough and found that there was a Town granted variance, would that change “the whole game”; if his unit was in conformance and had been allowed so then could he build above it? Paul Beaudin said that then Barlow probably would not be appearing before the ZBA asking for a Variance because the nonconformance would have been approved as a Variance and would not be an unpermitted nonconformance. Without any documentation the ZBA cannot assume that nonconformance was approved at an earlier date. Beaudin explained that there were other places “up at Loon” where the setback was fifteen feet (15’) and later was changed to twenty-five (25’), but that is not the case here.

Barlow said that there was a nasty mold infested section of the unit when he bought the unit seventeen (17) years ago. Barlow renovated the unit because he could not possibly live there with the mold that existed.

Ludwig said that usually a person who wants to build obtains a Land Use Permit from the Town first. If a previous owner received a building permit from the Town, the Town would know how far back from the property boundary line the owner had to build to avoid building within the setback area.

Paul Beaudin said that lots of changes have been made up at Rams Horn over the years.

Barlow said that the people he bought his unit from were the first owners in 1985. Barlow was only the second owner beginning in 1999. Anderson said that given the minor nature of the encroachment he thought that the builder was not aware that he was actually encroaching into the setback area. Ludwig said that some people would just build into the setback areas anyway.

Chair Ham asked Barlow and Anderson if the plan was to “go up” in only that section. Anderson said that the two proposed sections on the site plan are only a conceptual idea to build over the garage. The proposed areas are all well within the building envelope and do not intrude into the setback areas.

Barlow said that his unit was the only unit without an addition built over the garage. Paul Beaudin said that there were some units in the lower or middle sections of Rams Horn that did not have an addition built over the garage. Anderson said that is the only point within the setback where they are looking to “go up”.

Chair Ham asked how many square feet of the building was indicated by the little triangle of green area shown on the Site Plan. Anderson said that it was about fifteen (15) or sixteen (16) square feet.

Don Landry asked if the proposal was to build above the deck too or just the shaded green area. Barlow said that the plan was to build above the larger area, the small area is the deck. Bont said that the bigger part is already built. Anderson said that it was built as a single story.

Barlow and Anderson approached the ZBA with the plan and discussed with the ZBA what the actual plan was and what part of the plan was only “conceptual”. Anderson explained to the ZBA where the proposed building would be. Barlow also explained where previous mold was removed during previous construction.

After several minutes the meeting continued.

Fire Chief Beard reviewed the possible issues the Fire Chief would be concerned about with the ZBA. Rock retaining walls and fire safety access were discussed as well as drainage for the ski hill that would be blocked if the drainage shown on the site plan was moved.

Motion to open public comment.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: 4-0

Applicant David Barlow said that this is a two part request.

1. The variance for the historical nature of this for an equitable waiver of dimensional requirements.
2. The other would be expanding the section that is in the setback by adding an additional floor.

David Barlow said the approval of the design [for the additions] comes later.

Ludwig said that if the Board did not vote to approve the Equitable Waiver of Dimensional Requirements to allow the applicant to leave the structure already there, then the ZBA would have to require the applicant to remove it. However, the ZBA Rules of Procedure allow the ZBA to vote to grant relief.

Chair Ham said that the Board should vote on the first issue and then come back to the second issue.

Paul Beaudin said he would have to withdraw his first request in order to return to the issue at a later time. Beaudin said, hypothetically if the ZBA granted the applicants' request for an Equitable Waiver for what is existing and did not grant the applicants a variance to add on the second story, and later the Town or the Applicant found that an earlier ZBA granted a variance or a special exception to allow the previous owners to build into that fifteen foot (15') setback area, then Beaudin said that he may vote to allow it then.

Bont said that sometimes people have copies of documents that the Town does not have or has misplaced or has not been properly filed.

Don Landry asked if the loss of sale considered a hardship where it is related to money. Bont and Beaudin said that financial considerations of the owner are not considered a "hardship" for the purpose of granting a variance.

Paul Beaudin said that first floor renovation was not a consideration.

Motion to close the public comment.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: 4-0

The ZBA reviewed the criteria on the Equitable Waiver of Dimensional Requirements Worksheet:

- a) The violation was not discovered by any owner, former owner, owner's agent or municipal official until after the structure had been substantially completed.
Unanimous vote that this is a true statement.
- b) The violation was not caused by ignorance of the law, misrepresentation or bad faith, but was instead a good faith error in measurement.
Unanimous vote that this is a true statement.
- c) The physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.

Unanimous vote that this is a true statement.

- d) Due to the degree of past construction or investment made, the cost of correction so far outweighs any public benefit that it would be inequitable to require that the violation be corrected.

Unanimous vote that this is a true statement.

- e) OR. In lieu of the findings in (a), and (b) above, the owner may demonstrate that the violation has existed for 10 years or more, and that no enforcement action has been commenced against the violation by the municipality or any person directly affected.

Unanimous vote that this is a true statement.

Motion that the applicant conforms to criteria set forth in Section 4 Equitable Waiver, paragraphs (a)-(e) above as set forth in the ZBA Rules of Procedure and to allow the applicant an equitable waiver of dimensional requirements for existing property that is within the setback.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: 4-0

Paul Beaudin said that members of the ZBA do not see any issues with the part of the existing building that is within the setback; the ZBA sees a problem with the expansion of the nonconforming areas.

Chair Ham said that he does not have a problem with the expansion if the expansion does not change the footprint of the property, but he does understand that there are issues up there that keep coming up.

Ludwig said that the ZBA will set a precedent if we approve the variance for expansion of the nonconforming areas.

Chair Ham said they are not talking about impacting a lot of property.

Motion to allow the expansion of nonconforming use for discussion only.

Motion: Paul Beaudin Second: Jon Ham

Paul Beaudin said he understands Barlow wants to expand to make the property look good but the Town has a lot of issues with unpermitted expansions. Rams Horn in particular has had issues. Beaudin believes it is a problem if the ZBA approves Barlow's request for a variance because approving the variance would go against our Land Use Plan Ordinance (LUPO).

Ludwig said that her concern is that the ZBA should not set a precedent.

Chair Ham said that Barlow gets the variance, Barlow (or his purchaser) wants to build up and it makes sense. Chair Ham asked what the Applicant's options are if the ZBA said "no".

Bont said that the Applicant could make a motion for reconsideration or he could appeal it to the Superior Court.

Ludwig said that change is hard. In Lincoln for a lot of years, a lot of people have been coming up here to the land of the free and home of the brave and the ZBA has given them whatever they want. What has happened throughout that time is that the Town then gets into trouble in different ways because people are not following the provisions of the Land Use Plan Ordinance and other ordinances. People just build what they want. It is very difficult to change course and to say "no". Ludwig said that in her opinion if the Town has an ordinance the Town needs to

follow the provisions of the ordinance or not have them at all. Ludwig said if Barlow as around in the 1980's, building went up everywhere. It was a horrible sight. It is now the twenty-first century and the Town has to "bring ourselves into that time".

Chair Ham asked if the Board would like to vote.

Bont asked Anderson if there was any way to add the second floor without its being in the setback area.

Anderson said that it was conceptually possible but they had not looked at that option. Aesthetically they want to build what looks good, but apparently, aesthetics are secondary in the ZBA's opinion.

Paul Beaudin moved to vote on his motion to allow the expansion of nonconforming use. Two against. (Beaudin and Ludwig) One for. (Landry) Motion fails.

Anderson asked for clarification of the ZBA's votes on the criteria for a Variance as indicated in parts A through E of Section 2 "Variance" of the ZBA Rules of Procedure.

Paul Beaudin said he did not think that this project would satisfy the criteria for a variance. Beaudin said that the original request was to allow the nonconforming use to continue and the second request was to allow an expansion of the nonconformity. Bont said that second request is a request for a Variance; the ZBA should go through the questions on the Variance Worksheet to see if the project meets the criteria for a Variance.

The Board went through the Variance Worksheet.

1. Granting the variance (would – ~~would not~~) be contrary to the public interest because.

Beaudin thought that granting the variance for the proposed addition (in the green areas) would be contrary to public interest because an addition would expand a nonconforming use and in an area where there is are life safety issues due to limited fire suppression access as far as the Fire Chief is concerned.

There was a brief discussion about the voting process.

Unanimous vote that granting the variance would be contrary to the public interest.

2. Granting the variance (~~would~~ – would not) observe the spirit of the ordinance because.

Chair Ham said granting a variance for the proposed addition (in the green areas) would not observe the spirit of the ordinance because they are proposing to build a nonconforming addition in the setback area limiting fire suppression access. Ludwig agreed. Beaudin agreed but said that granting a variance conflicts with the ordinance because it is an expansion of a nonconforming use.

Unanimous vote that granting the variance would not observe the spirit of the ordinance.

3. Granting the variance (~~would~~ – would not) do substantial justice because.

Ludwig said that granting the variance would not do substantial justice because no hardship was found. Beaudin agreed. Chair Ham read “Is the proposed development is consistent with the areas present use.” “Rule: Any loss to the individual that is not outweighed by a gain to the general public is an injustice. What is the loss to the individual?” The owner can still put an addition on the house, just not within the setback areas.

Unanimous vote that granting the variance would not do substantial justice.

4. For the following reasons, the values of the surrounding properties (~~would~~ – would not) be diminished.

Beaudin said the values of the surrounding properties would not be diminished; granting the variance might increase the value of the surrounding properties.

3 members voted that granting the variance would not diminish the values of surrounding properties. Ludwig did not know how the Board would know the answer to that question and she abstained.

There was a brief discussion about the development, where windows were located, how to tell if the value of the surrounding property would be affected and Brent Drouin added that in his opinion, granting the variance would increase the value of the development by \$200,000 per unit

5. 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. There (is – is not) a fair and substantial relationship that exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

Unanimously vote that the applicant does not meet the “unnecessary hardship” criteria.

Motion that the expansion or the variance to grant the building in the nonconforming use area not be granted because the vote on items 1, 2, 3 and 5 were not in favor of the applicant.

Motion: Paul Beaudin Second: Jayne Ludwig All in favor: 4-0

IV. NEW BUSINESS

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

- a. 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.

Elected Boards

Paul Beaudin mentioned that the Board of Selectmen will put in an article on the Annual Town Meeting warrant to change the membership of both the ZBA and the Planning Board from appointed to elected positions. Beaudin thought that a good reason for this was that all your appointments would be official as far as voting goes. Beaudin thought such a change would be a positive thing.

Bont said that the only problem was getting people to run for the positions. Where she worked before they had elected Planning Board members. Town staff had trouble finding and then convincing people to run. The Town Selectmen had to appoint members after the election.

Paul Beaudin said that could happen anyway, but at least now if the Boards are elected, if no one runs for the positions the Planning Board will appoint their own members. The Planning Board will ask potential candidates the questions that they want to ask them or the Board of Selectmen can. Beaudin said that if members need to be appointed by the ZBA, the current ZBA members can ask the candidates for appointment, “We get cases about this, that and the other thing. What do you think about that?” At least the members of the ZBA can invite the applicants whom they want to be on the ZBA. Beaudin said that when he was ZBA Chair he personally went out and solicited candidates; he asked people if they would be on the ZBA.

673:12 Filling Vacancies in Membership. – Vacancies in the membership of a local land use board occurring other than through the expiration of a term of office shall be filled as follows:

- I. For an elected member, by appointment by the remaining board members until the next regular municipal election at which time a successor shall be elected to either fill the unexpired term or start a new term, as appropriate.
- II. For an appointed, ex officio, or alternate member, by the original appointing or designating authority, for the unexpired term.
- III. The chairperson of the local land use board may designate an alternate member of the board to fill the vacancy temporarily until the vacancy is filled in the manner set forth in paragraph I or II. If the vacancy is for an ex officio member, the chairperson may only designate the person who has been appointed to serve as the alternate for the ex officio member.

Paul Beaudin said by changing the positions to elected, rather than appointed, enables the Town to put the positions on a better schedule so that it is easier to keep track of people’s terms; no one has to remember when their term is up. Currently, the Board of Selectmen has to try to remember the length of each member’s term and how long they were on the board and figure out whether their term is up. When you do elect someone on a land use board by a vote, it is automatic. It also gives other residents an opportunity to serve on a board.

Bont said that it does not matter whether the land use board members are elected or appointed the members are supposed to serve a three (3) year term and the members’ terms are staggered. Town staff has to figure out the terms either way.

Ludwig said that if the Town adopts the warrant article to elect the Planning Board and ZBA members then the boards may not have any members to vote. Ludwig said there has to be an option in the warrant article that someone has the right to appoint members of the land use board if no one runs for the position, so she would put that in the warrant article. Ludwig said that the good thing is that if a board member has to run for the position, they are more apt to attend the meetings. They can prioritize their lives a little bit. Ludwig believes attendance would be higher.

Beaudin said that the best reason for changing the terms is that the Town can better determine whose term is supposed to be up and whose is not.

Motion that the ZBA supports the Board of Selectmen's proposed warrant article to have members of the ZBA elected instead of appointed.

Motion: Paul Beaudin

Second: Jayne Ludwig

All in favor: 4-0

Life Safety

Fire Chief Beard said that he was happy to hear the Zoning Board of Adjustment (ZBA) addressing life safety issues. He thanked members of the ZBA. He does not remember that happening very often in the past. Fire Chief Beard said that because the Town is running out of developable land it is getting more challenging to build on the lots we have left.

Paul Beaudin commented that there was nothing the ZBA could do about tonight's expansion. If the Land Use Plan Ordinance (LUPO) needs to be changed, the Planning Board should direct its attention to life safety issues. Beaudin said that the ZBA has to support the current regulations that Town has adopted, however, the Planning Board should consider regulating something that causes providing adequate life safety access difficult. When applicants come into the Town Office to get a Land Use Permit, on their application "Life Safety" issues should be a consideration.

Bont thought that the regulations that address life safety issues, like fire access, fall under the State Building Code. Fire Chief Beard said that just because the Town did not adopt RSA 155-A to enforce the State Building Code, the Town's failure to do so does not make anybody exempt from the NH State Building Code. Bont said that the problem is that because the Town did not adopt RSA 155-A the Town does not have any tools to monitor any of those Life Safety regulations.

Ludwig said that it was better to let them know that we have it than not.

Paul Beaudin said that if the Fire Department and other Town Safety Services do not have access to the rear of the building and the life safety code says that you have to have a certain access in the rear of the building; that is where the Fire Chief can come in.

Bont said that perhaps the Land Use Plan Ordinance (LUPO) should make it clear that the part of the reason for the setback requirement is to allow life-safety access. Maybe the LUPO needs to make it clear that maybe fifteen feet (15') feet is not an adequate setback in certain areas where the terrain is very steep.

The Board discussed life safety issues, in general, before they adjourned.

VI. ADJOURNMENT

Motion to adjourn at 7:25 P.M.

Motion: Paul Beaudin Second: Jayne Ludwig All in Favor: (4-0)

Respectfully submitted,

Wendy Tanner,
Planning and Zoning Recorder

Date Approved: 08/16/2017



Jonathan Ham, Chairman