



P L A N N I N G & Z O N I N G
D E P A R T M E N T

NOTICE OF DECISION - DENIED

ZONING BOARD OF ADJUSTMENT TOWN OF LINCOLN, N.H.

Case No: Var 2022-02 M121 L024 Di Iorio+Beato Nacnac – Ski In Ski Out Bridge in Rear Setback Area

You are hereby notified that the appeal of Appellant Beato Nacnac of Locati Architects, Inc., authorized agent for property owners Richard Di Iorio and Susan Di Iorio for a **VARIANCE** to build a ski in ski out bridge into the fifteen foot (15') rear setback area for their property at 24 Yellow Birch Circle in South Peak Resort (Map 121, Lot 034) concerning Article VI (District and District Regulations), Section B (District Regulations), Paragraph 2 (Land Use Schedule), Subparagraph 4 (Dimensional Chart) of the Land Use Plan Ordinance (LUPO) has been **DENIED** by the ZBA unanimous vote of five (5) members at a public hearing on June 1, 2022.

Appellant/Architect & Agent for Property Owners:

Beato Nacnac, AIA, Architect
Locati Architects
1007 East Main Street, Suite 202
Boseman, Montana 59715

Property Owner:

Richard Armand Di Iorio & Susan R. Di Iorio
79 Concerto Court
North Easton, MA 02356

Engineer:

Marc L. Burnell, PE
Horizons Engineering, Inc.
34 School Street
Littleton, NH 03561

Property:

24 Yellow Birch Circle (Map 121, Lot 034), General Use (GU) District.
Part of South Peak Resort Community Association.

Project:

The subject lot is within Phase I (68 Single Family Home Lots) of the development known as "South Peak Resort" and is located within the General Use (GU) District where front, side and rear setbacks are fifteen feet (15') from the property boundary line. No structures are permitted within the setback area. The proposed building plan to build a single-family residence includes a "ski-in and ski out" bridge from the house to the ski trail over the setback from the fifteen-foot property setback line all of the way to the property boundary line with Common Land owned by South Peak Resort to hook up with the ski trail that runs behind the subject lot across the street (Crooked Mountain Road) from the Pemigewasset Base Camp

all within the rear setback area. Appellants need a variance to put an 8.5-foot-wide covered ski bridge in the 25-foot setback area.

The ZBA hearing on Appellant's Request for a Variance was started on May 5, 2022. After a preliminary review of the Application for a Variance, the ZBA gave the Appellant the option to redo his application for a variance and continued the hearing until June 1, 2022 at 6:00 PM.

ORDER:

The application for a variance is hereby denied for the following reasons:

1. The application as resubmitted did not respond to the issues and questions posed by the NH State Statute or New Hampshire State case law and fails on its face. There was no hardship and no harm to the property due to the uniqueness of the property caused by the failure to have a ski bridge.
2. The subject property and the other abutting properties in the Yellow Birch Circle area have direct access by a granted Right of Way (ROW) which is directly adjacent to the subject property. Even if the ZBA wanted to grant this variance it is not within their power to do so. It is not the correct use of the ZBA's authority, in a limited fashion, to modify the zoning ordinance or the homeowner's covenant for the benefit of one property.
3. The hardship or harm must be unique and particularized to that property. If the subject property could not be used for the purpose of building a single-family dwelling or if there was no access to the property, that would qualify as a "hardship". The RSA is designed to cure a particular harm and not designed for the general aesthetic or other amelioration of a particular property. That is not the case with the subject lot.
4. Furthermore, for a significant portion of their application, Appellant cited as authority Article X, subsection 260-64. A, which comes from the zoning ordinance for the municipality of Lincoln, Rhode Island, not the municipality of Lincoln, New Hampshire! Statutes and ordinances from Rhode Island establish no precedent whatsoever for the Town of Lincoln, New Hampshire or for the State of New Hampshire.

Addressing the specific criteria upon which a variance shall be based, the ZBA finds as follows:

5. **Granting the variance would be contrary to the public interest because** building in a setback area is not in the public interest. Granting the variance will cause harm because it would allow the owner to use in his land in a manner that would increase the density of development and otherwise violate the Town zoning ordinance. The Land Use Plan Ordinance reads as follows:

ARTICLE II

PURPOSE

1. According to NH RSA 674:16, this Ordinance is designed to guide and protect the development of Lincoln in a manner consistent with the wishes of its citizens and in accordance with the Master Plan.
2. The purpose of this Ordinance is to promote the health, safety and general welfare of the inhabitants of Lincoln, to protect the value of property, and to prevent the overcrowding of land.

One major purpose of the Land Use Plan Ordinance and the public interest is "to prevent the overcrowding of land". Public interests related to the overcrowding of land include privacy, fire separation and neighborhood character.

That purpose is further described in the definition of "Setback" in the Land Use Plan Ordinance as follows:

47. Definition of "**setback**": "A line parallel to the front, side, and/or rear lot line and set back from said lot line a sufficient distance as specified in this Ordinance. The setback measurements establish the area in which all structures must be erected or placed. No part of a building or structure shall extend across the minimum distance specified in the Dimensional Chart located in Article VI, Section B."

The Land Use Plan Ordinance establishes what the level of density should be required to prevent overcrowding by establishing setback distances; in this area of Town in the General Use (GU) District; the setback requirement is fifteen-foot (15') front, side and rear.

The proposed ski bridge would extend almost the entire width of the setback area, to be within a couple of feet of the property boundary line.

Members of the ZBA have personal knowledge that there are other existing ROW easements in South Peak Resort that permit pedestrian or skier access points to the South Peak ski slopes, including from the subject lot.

The Town Zoning Ordinance prevents a property owner from building a structure, including a private ski bridge, across the set-back line into the setback area. The NH State Statute is an authorizing statute that permits the ZBA to grant a variance rather than a restrictive statute which prevents the ZBA from granting a variance. The NH State Statute does not authorize granting a variance because there is a trade off in the constitutional law between the individual right and the collective right. The trade-off is authorized when there is a particular harm or restriction on the property which would be unfair to the owner of the property for it not to be considered. That is the authorization schema according to the state constitution and that is the part that fails in this test which is the essential element that has to be present for the ZBA to grant the variance.

There is no particular harm or restriction on this property which would be unfair to the owner of the property for a variance not to be considered.

6. **Granting the variance would not observe the spirit of the ordinance because** there is no uniqueness to the topography of the subject lot. A project that creates congestion beyond that envisioned in the zoning ordinance, is an example of being contrary to the spirit of the ordinance. In this case, looking at the cumulative effect of a particular variance if it was granted to everyone in a similar situation, not just the impact of the Appellant's variance alone, it would violate the goal of preventing overcrowding if every lot in a similar situation were granted a variance to build a ski bridge in the setback areas right up to the property boundary line.
7. **Granting the variance would not do substantial justice because** the statement regarding other bridges in the area encroaching on various set-backs is not necessarily factual and the topography is not a unique situation as almost all the homes in the area have this type of topography. Taking a broader look at balance of public vs. private interest, the loss to the individual in this case is not outweighed by a gain to the general public.

The HOA's covenants are a private contract between private landowners whereas the municipal zoning ordinance is enabled by NH state statute. There is nothing in the State Statutes that precludes the Town from making municipal determinations that are in conflict with HOA terms. The HOA covenants cannot override a local municipal zoning ordinance. The ZBA can make decisions without consideration of or without regard to any decisions made by the HOA.

There are not "many" such ski bridges in the neighborhood. Between the first and second hearing, Town staff checked and found three (3) structures that might be considered "ski

bridges” and one (1) shed structure with a bench that were located on lots in the higher elevation of Hemlock Drive not as easily accessible to the ski trails (not the Yellow Birch Circle neighborhood) that were not specifically permitted and did not receive a variance. The other ski bridges were not brought before the ZBA for a variance and all variances are reviewed on a case-by-case basis. The ZBA has not approved any ski bridges in the setback areas on Hemlock Drive neighborhood as no request to build ski bridges in the setback areas ever came before the ZBA.

The ZBA noted that even if there were multiple ski bridges in Lincoln but that does not necessarily justify a variance. The ZBA needs to review the application and find out what the actual hardship is and not discuss what other neighbors may or may not have done.

8. **Whether or not the values of the surrounding properties would be enhanced or diminished or unaffected** by granting such a variance: The consensus of the ZBA is that whether the values of surrounding property would be diminished or not cannot be determined as no evidence in support of this criteria was submitted. The ZBA concluded that the ZBA did not have enough information to determine whether or not the values of the surrounding properties would be enhanced or diminished or unaffected by granting such a variance.

AND

9. **Denying the variance will not create an Unnecessary Hardship for the Appellant because the** topography of the subject lot is not unique. Appellant needed to show evidence of particularity and not simply claim that it is particular to the lot. It is necessary for the person requiring the particular exemption to specify in what way this is unique to this lot. There has been no effort made to do that. The ZBA found that the statement of the Appellants that the topography of walking up 15-20 feet makes it unique to this lot is just not so. The Appellants’ statement that it is unsafe to access the trail by the other ways that are established is not so, as it is not in the slightest, difficult. The ZBA found that there is no particularized harm to the subject lot owing to special conditions of the property that diminish it from other properties in the area, because there is an existing ROW point of access to the ski trail for all of the homes in the Yellow Birch Circle neighborhood, including the subject lot. The property can be reasonably used in strict conformance with the ordinance and a variance is not necessary. This common access point is not considered a “hardship” as it relates to the statute.

The ZBA pointed out that there is a lot of case law in the State of New Hampshire regarding what constitutes “hardship” for purposes of a ZBA granting a variance and on what grounds a variance can be granted. There is a summary of that case law in the application itself to assist the Appellant. The Appellant failed to make a case utilizing that case law.

The ZBA pointed out that the Town zoning ordinance prevents a property owner from building any structure (i.e., a private ski bridge) across the set-back line and into the setback area. The NH state statute is an authorizing statute that permits the ZBA to issue a variance rather than a restrictive statute which prevents a variance. The NH state statute does not authorize granting of a variance because there is a trade off in the constitutional law between the individual right and the collective right. The trade-off is authorized when there is a particular harm or restriction on the property which would be unfair to the owner of the property for it not to be considered. That is the authorization schema according to the NH state statutes and that is the part that fails in this test which is the essential element that has to be present for the ZBA to grant the variance.

According to a ZBA member who was a realtor who used to sell lots in South Peak, when the South Peak Resort development began, the lots were sold as either “ski in ski out” lots or “ski

back” lots. If there was not sufficient elevation to ski out of a lot onto a ski trail, owners could ski back to a ski trail. The ZBA agreed.

Appellant/Architect, Kyle Tague asserted that the proposed bridge would be approximately four (4) feet from the ski trail and a person would have to be off the trail to access it. There will not be any stairs spanning the four (4) feet to the trail, up to the property line, and the homeowners will need to traverse that distance. The distance to traverse will be approximately fifteen (15) feet if they have to stop at the setback.

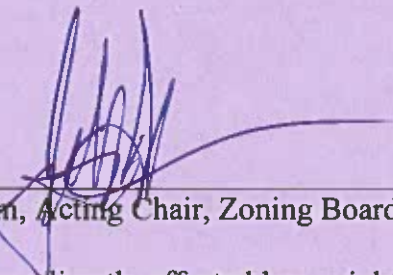
The ZBA found that the pitch of the next-door abutter’s lot (Abutter Scott Schermerhorn) and the neighboring lots are almost the same as the pitch of the subject lot. When the Appellants and their abutters need to gain access to the ski trail they can simply walk out of their homes, walk a short distance up to the ski trail and ski back down. There are no stairs or ski bridges there to help with the abutters’ access to the trail and the view of the ski area is not blocked. The ski back trail is only a short distance from the front door of subject lot and the other lots in the Yellow Birch Circle neighborhood.

The ZBA found that the Appellants failed to demonstrate in what way this particular property is harmed by the setback requirement. Directly adjacent to this property there is an easement and a [ski trail] passageway approximately twenty (20) feet from the proposed location of the front door of the property. A ramp, pathway or walkway could be built allowing for direct access to the ski trail without the need for a bridge.

The ZBA found that granting a variance for this private ski bridge would not add to the sense of community.

The ZBA found that the proposed bridge would not solve a problem, rather it would create a private entrance onto the trail and does not meet the requirements for a variance from the ZBA. Appellant’s’ case did not meet the requirements under the statute for the unnecessary hardship. There is no hardship in this case.

Date



Jonathan Ham, Acting Chair, Zoning Board of Adjustment

Note: The selectmen, any party to the action, or any person directly affected has a right to appeal this decision. See New Hampshire Revised Statutes Annotated, Chapter 677. This notice has been placed on file and made available for public inspection in the records of the ZBA on the above date and will be published in the newspaper. Copies of this notice have been distributed to the appellant, Planning Board, Board of Selectmen, Town Clerk, and Property Tax Assessor.

