

**LINCOLN ZONING BOARD OF ADJUSTMENT  
REGULAR MEETING MINUTES  
WEDNESDAY – JULY 3, 2019 – 6:00PM  
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

**APPROVED**

**Present:** Chair Jonathan Ham, Vice Chair Paul Beaudin, Member Ray D'Amante, Member Jack Daly, Member Delia Sullivan, Alternate Myles Moran, Alternate Susan Chenard, and Alternate Margie Gozdiff

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Town Planner Carole Bont, Director of Public Works Nate Hadaway, Fire Chief/Health Officer/Code Enforcement Officer Ron Beard

**Consultant (Legal) Present:** Town Attorney Peter Malia

**Staff Excused:** Recorder Ellyn Franklin

**Guests:**

- **Michael Hamori**, nonresident (APPELLANT), of 304 Salem Street, Andover, MA 01810, co-owner with Sonya Hamori of 11 Beechnut Drive, (Map 130, Lot 120).
- **Sonya Hamori**, nonresident (APPELLANT), of 304 Salem Street, Andover, MA 01810, co-owner with Michael Hamori of 11 Beechnut Drive, (Map 130, Lot 120).
- **Kevin Halloran** – nonresident (ABUTTER), of 5 Nicholas Drive, Franklin, MA 02038, co-trustee with Kimberly Halloran of the Halloran Heirloom Ownership Trust that owns 14 Beechnut Drive, (Map 130 Lot 121).
- **Cinda D'Amante**, resident (ABUTTER) of 188 Black Mountain Road, Lincoln, NH 03251, owned by Dannalea D. D'Amante, Trustee, GST Exempt Separate Family Trust, 18 Bay Street #1, Cambridge, MA 03129, President of Beechwood II Homeowners Association which is an active association, but not incorporated. (Beechwood II is an abutter to Beechwood I) and wife of ZBA member, Raymond D'Amante.
- **Paul E. Aurette** – nonresident (ABUTTER), of 11 Naumkeeg Court, Litchfield, NH 03052, co-owner with Lusa M. G. Aurette of 16 Beechnut Drive (Map 131, Lot 008) and 221 Black Mountain Road #LO (Map 130, Lot 088).
- **David Beaudin** resident, of 10 Louis Lane, PO Box 245, Lincoln, NH 03251-0245, and co-owner with Mary Conn of 10 Louis Lane (Tax Map 116, Lot 004), Lincoln, NH 03251-0245 and Lincoln Water Plant Operator.
- **Taylor C. Beaudin**, resident, owner with Sarah H. Chandler of 8 Louis Lane Lincoln, NH 03251, representing uncle & business associate William Conn d/b/a Lincoln Trucking & Excavating LLC at 177 Connector Road, Lincoln, NH 03251-9720, representing property owners William Conn and Cynthia A. Conn.
- **Di L. Lee Gordon**, nonresident (close neighbor but not a direct abutter) co-Trustee with Stephen A. Gordon of the Stephen & Di Gordon Family Trust, 63 Tirrell Road, Bedford, NH 03110 that owns 30 Beechnut Drive (Map 131, Lot 007).

*Note: Voting members were all the regular members. Vice Chair Paul Beaudin acted as Chair when Jon Ham was briefly excused from the room.*

**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. The meeting was called to order at 6:05 PM by Chair Jon Ham.

**II. CONSIDERATION** of meeting minutes from:

- June 19, 2019 (Present: Vice Chair Paul Beaudin, Member Jack Daly, Member Ray D'Amante, Member Delia Sullivan, Alternate Myles Moran and Alternate Susan Chenard)

**Motion to approve minutes from June 19, 2019: Daly**

**Second: Beaudin**

**All in favor: 6-0**

**Motion carries.**

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

- A. 6:00 PM. Status Update: Michael and Sonya Hamori – Var 2018-07 M130 L120 Hamori - Variance – build retaining wall within side setback**

**VARIANCE** concerning Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) of the zoning ordinance known as the Land Use Plan Ordinance (LUPO) to build a retaining wall that encroaches into the twenty-five-foot (25') side setback areas.

**Appellants & Property Owners:**

Michael and Sonya Hamori  
304 Salem Street  
Andover, MA 01810

**Property:**

11 Beechnut Drive (Tax Map 126, Lot 020) – Mountain Residential (MR) District

**Other Property Owners Directly Impacted by Retaining Wall:**

James Burrows & Reny Burrows  
75 Clairemont Road  
Belmont, MA 02478

**Impacted Property:**

5 Beechnut Drive (Tax Map 130, Lot 119) – Mountain Residential (MR) District

**Surveyor:**

Stephen B. Tower, NH LLS, NH Designer  
Sabourn & Tower Surveying and Septic Design, PLLC  
1022 Daniel Webster Highway  
North Woodstock, NH 03262

**PROPOSAL:**

Appellants requested a variance concerning Article VI (District and District Regulations), Section B (District Regulations), Paragraph 2 (Land Use Schedule), Paragraph 4 (Dimensional Chart) of the Land Use Plan Ordinance (LUPO). The home and original driveway were built in 1978. The lot is steep and narrow. Hamoris' driveway runs along the northern boundary of the lot within the 25' side setback area. Appellant proposes to substantially expand and extend a retaining wall substantially greater than four feet (4') in height that will extend almost all of the way to the back of the lot. The purpose of the extended retaining wall is to support the driveway and the house and to mitigate run off from the Hamori lot onto the neighbor's lot.

Hamoris already built most of the proposed retaining wall without a Land Use Authorization Permit. The home is located in the "Beechnut I" development, however the Beechnut I Homeowners Association is not active. The home is located at 11 Beechnut Drive (Map 130, Lot 120) in the Mountain Residential (MR) District where the front, side and rear minimum setbacks are 25 feet. Almost the entire retaining wall as proposed will be located within the 25-foot front setback area.

The proposed retaining wall needs a **variance** as specified in the Land Use Plan Ordinance, Article VI Article VI District and District Regulations, Section B District Regulations, Paragraph 4 (Dimensional Chart) to encroach into the twenty-five foot (25') front setback area.

During the Public Hearing held on November 7, 2018, upon reading through the five criteria, the Board found everything was addressed satisfactorily except Criteria 2.

- **Criteria 2 says: If the variance were granted, the spirit of the ordinance would be observed. The variance will in no way violate the spirit of the ordinance.**

The Board agreed that the Hamoris need a completed survey for this lot. If it turns out that the retaining wall is located entirely on Hamori's property, they can proceed as planned. If the retaining wall is not located entirely on Hamori's property, Hamori will need to secure an easement from James & Reny Burroughs.

On May 15, 2019, the ZBA reviewed email letter from Hamori updating the ZBA on the status of survey. ZBA requested that Hamori come in to update them on the status of the retaining wall.

**Discussion:**

Planner Bont introduced members of the Town staff who are attending the meeting to answer questions about the Hamori situation.

- Public Works Director Nate Hadaway
- Fire Chief/Health Officer/Code Enforcement Officer Ron Beard
- Planner Carole Bont
- Town Attorney Peter Malia

Planner Bont also introduced Appellants Michael and Sonya Hamori and invited them up to the table to speak with members of the ZBA.

Members of the ZBA were given digital versions of the following documents in addition to other documents:

1. Survey for Michael S. & Sonya A. Hamori, surveyed December 2018 by Sabourn & Tower Surveying and Septic Design, PLLC, 1022 Daniel Webster Highway, North Woodstock, NH 03262. Paper copies of Page EX1(Existing Conditions) and C4 (Construction Plans) from that digital set.
2. Design plans prepared for the Town of Lincoln for a Project described as “Loon Mountain Roadway and Utility Reconstruction Project” for the recent roadwork done by the Town on Black Mountain Road, East Branch Drive, Beechnut Drive, Wood Court & Brook Way entitled: “Design Plans for the Loon Mountain Roadway & Utility Reconstruction Project Black Mountain Road, East Branch Drive, Beechnut Drive, Wood Court & Brook Way, Lincoln, NH” dated April 7, 2016, prepared by Hoyle, Tanner Associates, Inc., Pease International Tradeport, 100 International Drive #360, Portsmouth, NH 03801.]

**Presentation by DPW Nate Hadaway:**

Member Paul Beaudin asked Public Works Director (DPW) Nate Hadaway to explain the difference between the existing conditions and the post conditions plans and how it affected this project to understand the historical background the led to the issues associated with the subject property.

Director of Public Works (DPW) Nate Hadaway directed the ZBA members to look at the inside corner of Beechnut Drive on Page EX2 Existing Conditions East Branch Drive (Sheet 6 of 24), where the topography lines show where the Hamori it is a very steep embankment. DPW Hadaway said that according to the existing conditions map, that embankment along the roadway adjacent to the Hamori property at came directly to the edge of the roadway pavement.

DPW Nate Hadaway directed the ZBA members to look at Page C4 Construction Details of the detailed plans for the roadway project. DPW Hadaway explained that the contractor in order to follow those detailed plans the contractor needed to excavate around that corner next to the Hamori lot in order to establish a ditch line with a two-foot (2') shoulder and a two-foot (2') ditch that is one foot (1') deep. DPW Hadaway said that a two-foot (2') gravel shoulder is standard roadway construction with a two-foot (2') ditch as shown in the typical on the plan for this construction project. DPW Hadaway said that in order to create a roadway next to a steep embankment the contractor was going to have to excavate to get that four-foot (4') construction detail in to create the ditch line which ultimately goes into a cross culvert that comes across the road (which is part of the new construction) into a catch basin. DPW Hadaway said that as that part of the road was being constructed, the contractor (Caulder Construction, LLC) was excavating to establish that limit. DPW Hadaway said that as that work was being done, large boulders were pulled out of that ditch. The boulders were placed into the embankment as a field change by the contractor as well as the engineer and DPW Hadaway to stabilize the embankment in order to establish the two-foot (2') shoulder and the ditch line.

Member Paul Beaudin asked DPW Hadaway whether the road surface itself, the width and location, changed when the contractor did the excavation. DPW Hadaway said the road width



did change. The road was previously a bit narrower than before. He did not know what the previous width of the road was at that spot off the top of his head without checking the plans.

Member Paul Beaudin asked DPW Hadaway if the road in its prior condition was narrower than in its current condition and whether all of the construction for the updated roadway stayed within the Town's right-of-way. DPW Hadaway affirmed that all of the work was within the Town's right-of-way.

Member D'Amante asked whether during the construction, the contractor pulled large boulders out of the ditch. DPW Hadaway answered in the affirmative and said the Town also pulled large boulders out along the area where the ditch for the cross culvert was established. The Town also had to remove the sewer manhole cover right there on the edge of the roadway. "This is Lincoln. It is all rock." As the Town (with its contractor, Caulder Construction, LLC) pulled the rocks up, the Town used those rocks to stabilize the embankment behind the ditch line. Those rocks helped create the base of that bottom wall that is there today.

Member Paul Beaudin asked DPW Hadaway if the wall that the Town made along the ditch line was taller than four feet (4'). DPW Hadaway said he did not know how tall the wall was; during the construction process the bottom wall that is there now came to be whatever height it is now.

Member Paul Beaudin asked DPW Hadaway to confirm that the Town built the wall from the entrance of the Hamori driveway all of the way to be tied into the existing retaining wall at the bottom of the embankment on the abutting property owned by James and Reny Burrows.

DPW Hadaway said that the lowest wall close to Beechnut Drive is the wall the Town built along the edge of the ditch line. DPW Hadaway said the Town only added onto the wall that goes down along the side of the roadway on the Burrows' property near the driveway to the Burrows' property; Burrows had a pre-existing wall if you look at the survey plan. *(Note: The pre-existing wall is shown on the survey plan with four (4) rocks that are shaped differently than the new boulders added that are shown as oval shaped.)* That location is also where the inlet to the drainage culvert is located.

Member D'Amante said he was looking at the photos of the pre-existing condition of the Hamori driveway and Beechnut Drive near that corner. DPW Hadaway said he had already seen the photos. Member D'Amante said the photos show a bunch of trees and bushes and other vegetation holding the driveway in place. DPW Hadaway said that the grubbing and cutting the trees and brush was part of the plan for construction and the contract and all of that took place within the Town's right-of-way. DPW Hadaway said the photographs that Member D'Amante was looking at do not accurately reflect the slope of the terrain the ZBA is looking at – the photo flattens out the terrain. Member D'Amante said that the stonewall that is there at the bottom was put in by the Town. DPW Nate Hadaway agreed.

Member D'Amante said that as a starting point the Town owns the lower wall and the land underneath the retaining wall. He did not see any retaining walls up above. DPW Hadaway said there were no retaining walls above. Member D'Amante said in his opinion in the photos (Google Earth photos from 2014) he was looking at what appears to be a pretty stable area. Member D'Amante said "we" moved up there in 1989 and he does not think the driveway or roadway has changed any since 1989 and during that time he had not witnessed any issues or runoffs or any problems at that site because of the vegetation, the trees, the slope, etc. Even if the slope was in the Town's Right-of-Way, the Town should have stabilized that access.

DPW Hadaway said, until we got back that four feet (4') that destabilized the area. That destabilization is what required the Town to do some stabilization. In typical road construction you have some options.

- 1) Use the materials that are there which is what we did – we used the rubble that we excavated out of there;
- 2) Use precast blocks; or



- 3) Use Gabion baskets



What is a **gabion** basket or **gabion** retaining wall? Gabions and vegetated **gabions**

A **gabion** (from Italian gabbione meaning "big cage"; from Italian gabbia and Latin cavea meaning "cage") is a cage, cylinder, or box filled with rocks, concrete, or sometimes sand and soil for use in civil engineering, road building, military applications and landscaping. For erosion control, caged riprap is used. <https://en.wikipedia.org/wiki/Gabion>

Gabion baskets are laced together to create a **wall**. Using vinyl coated or galvanized steel mesh improves the durability of the **baskets**. **Gabions** require a firm stable foundation for placement. These structures are not appropriate if the **ditch** bottom is eroding and may undercut the **Gabion**.

DPW Hadaway said he and the engineers on behalf of the Town chose the more practical and more economical thing to do and used the materials they excavated on site instead of trucking the excavated materials away and bringing in new materials.

Member Delia Sullivan asked DPW Hadaway if the work that he and the contractor did on the lower retaining wall was in the design prepared by the engineers. DPW Hadaway said that for

this section of the project they had to “make a field change” as they went through the area because they could not keep the embankment stable. The land was also very wet there.

Member Jack Daly asked DPW Nate Hadaway what the width of the right-of-way for the Town was at that corner. How many feet back? DPW Nate Hadaway said he did not know; he would have to scale it off the plan.

Member Jack Daly asked if the Town went into the Hamori driveway. DPW Nate Hadaway said the Town only went into the Town’s right-of-way. Member Daly questioned whether said that the Town went into the Hamori driveway and removed the trees and the brush along their driveway on the corner and that caused some destabilization of the Hamori driveway that needed rocks to hold back the driveway so it did not wash out.

DPW Hadaway said the destabilization was caused more by the establishment of the ditch created by pulling the rubble out. Member Daly said there is a ditch down below, there is the driveway way up above it; something has to be used to hold back the sloped earth between them; that something was a retaining wall. DPW Hadaway agreed.

Member Delia Sullivan showed DPW Hadaway a photo and asked if the lower wall was the wall that the Town built and whether the upper wall was the wall the Hamoris built. DPW Hadaway agreed. When Delia Sullivan showed DPW Hadaway the photo the Hamoris said showed that “the Town” built the upper wall as well she asked DPW Hadaway if the Town built those upper walls. DPW Hadaway disagreed; DPW Hadaway said the Town did not build those upper walls. Member Delia Sullivan showed the photo to everyone on the ZBA.

Vice Chair Paul Beaudin asked whether Hoyle, Tanner & Associates thought that the Town could slope the embankment. DPW Hadaway said the Town could not slope the embankment because the terrain was too wet and unstable; the field engineer from Hoyle, Tanner & Associates hired by the Town made this decision.

Appellant Sonya Hamori said that in relation to area shown in the photos, Town Manager Butch Burbank and her husband, Michael Hamori, went back and forth about the \$2,000. According to Appellant Sonya Hamori, DPW Hadaway went out and inspected “the entire picture”. According to Appellant Sonya Hamori, “the lower wall has never been a part of anything;” the lower wall is what [DPW Nate] Hadaway just mentioned, when they were making an “on the fly change of holding that [slope] back”. Appellant Sonya Hamori said that the bottom tier that is along the road is the Town’s wall.

Vice Chair Paul Beaudin asked to hear from DPW Hadaway first. DPW Hadaway confirmed that the lower wall is the wall that the Town built. The Town only added on what is going down to the rocks on the Burrows’ property.

Member D’Amante said that “the function of laying out the road” moved the slope at least four to five feet (4’-5’) further in toward the Hamori driveway, in addition to clearing all of the brush and the trees, etc. According to Member D’Amante, the Town project changed the slope from where it was widened up to the top of the driveway.

DPW Hadaway said that the only slope that was changed was from the top of where that lower wall is to the Beechnut Road roadway surface; that was the Town’s limit of excavation. That was all the Town dug and the excavation all happened within the Town’s right-of-way.



Vice Chair Paul Beaudin said this lower wall closest to the road constructed on behalf of the Town appears to be taller in height than four feet (4'). That wall was done by the engineer or with the engineer's approval, but according to the NH State Building Code and the Town of Lincoln's Land Use Plan Ordinance, any retaining wall that is greater than four feet (4') requires an engineer saying that the wall is okay. Did the Town receive the engineering okay?

Planner Bont said her understanding from Town Manager Burbank was that the wall was not like a traditional retaining wall, that it was more like riprap set into the bank. DPW Hadaway clarified that what the Town constructed was a retaining wall. Vice Chair Paul Beaudin said the boulder retaining wall was above four feet (4') in height.

Member D'Amante said that he presumed from the way DPW Hadaway described the wall that the contractor hired by the Town put in the lower boulder retaining wall.

Planner Bont clarified that the reason people are confused by the discussion about who was responsible for what part of the retaining wall is that the same contractor did the work for the Town as did the work for the Hamoris. Caulder Construction, LLC did the work for both the Town and the Hamoris. [Caulder Construction LLC, 5 Macaul Drive/271 Lost River Road, North Woodstock, NH 03262]. The contractor who won the bid for the roadway construction project and was hired by the Town was Caulder Construction, LLC owned and operated by Rex Caulder. The Town paid for the construction of the lower wall and the lower wall is within the Town's right-of-way. The Hamoris also hired Caulder Construction, LLC to do their work on their retaining walls. Members of the ZBA said they did not care to hear about that.

Member D'Amante said that all the trees, brush and the vegetation as shown in the two photos were removed by the Town as part of the project between the new stone wall along the roadway and the Hamori's driveway.

DPW Hadaway said that the top of the Hamori driveway is actually in the Town's right-of-way. All of the trees that the Town removed as part of the road work were in the Town right-of-way for Beechnut Drive.

Chair Ham asked DPW Hadaway to confirm that what DPW Hadaway was saying was that slope from the top of the wall built by the Town did not change from the top of the wall up to the Hamori's driveway. DPW confirmed by saying, we did not excavate further up.

Alternate Myles Moran asked DPW Hadaway if what the Town did could be considered "in kind replacement"? Member D'Amante said, no, there was no retaining wall there before. The Town created the lower retaining wall.

### **Is the Town Exempt from State Building Code Requirements?**

Vice Chair Paul Beaudin asked Planner Bont whether the Town was required to comply with the State Building Code and the Town's Land Use Plan Ordinance that requires a retaining wall greater than four feet (4') has to be engineered by a structural engineer. Planner Bont said the Town is exempt from some of its own regulations, but she is not sure whether the Town is exempt from this particular requirement as the *State* Building Code applies. Vice Chair Beaudin said he understood that the Town was exempt from Town regulations, but did not know if the Town would be exempt from State Building Code requirements. He asked Town Attorney Malia for his assistance. Town Attorney Malia said he would try to find the answer to that question while the meeting progressed. There is a statute that exempts certain municipal projects from



Subdivision Regulations and Site Plan Review Regulations. He did not know if that statute would apply to State Building Code Construction requirements for a retaining wall.

Vice Chair Paul Beaudin said that in his opinion, if the Town expects these people (the Hamoris) to comply with the State Building Code then the Town should comply with the State Building Code as well. He asked DPW Hadaway if he had any more comments about the project.

DPW Hadaway said that in the end, the entire project was approved and signed off by the engineer of record.

#### **Changes to the Hamori Driveway:**

Member D'Amante asked DPW Hadaway, at the point where the Hamori driveway hits Beechnut Drive was the Hamori's driveway shortened any? There is a telephone box there or something. He did not remember that telephone box being there before.

DPW Hadaway said partway up the driveway there was an existing pedestal; the pedestal was moved by the NH Electric Cooperative "The Co-op". At the driveway end is a transformer pad. The transformer vault under the pad is a precast square container. DPW Hadaway said they did propose to the homeowners a few options to help stabilize the embankment from the top of the wall the Town created to their driveway.

#### **Options for Address Erosion:**

DPW Hadaway said the Town through its engineers [Shawn M. Tobey, Project Manager/field engineer for Hoyle, Tanner & Associates and William (Bill) Davidson, PE, Vice President of Hoyle, Tanner & Associates] did propose two options to the Hamoris for some bank stabilizations:

- (1) Loam and seed the area above the wall;
- (2) Put up riprap along the bank.

The owners – the Hamoris – did not want either option.

Member Delia Sullivan asked DPW Hadaway if the Town knew that their project on the road had destabilized the Hamori driveway at the time that the Town left and the project was signed off. Did you know that the Hamoris would have to do further work to their driveway to keep it from eroding?

DPW Hadaway said that both the engineer and he did not believe that they had destabilized the Hamori driveway from the top of the Town's lower wall to the top of the Hamori's driveway. DPW Hadaway said that the Hoyle, Tanner & Associates field engineer disagreed with the Hamoris that the Town needed to do more work to stabilize the Hamori driveway, and that is why the field engineer on behalf of the Town proposed those two options "so that everybody would be happy": (1) erosion stone; or (2) loam and seed.

Member Daly said that lacking that option "they" chose to design a higher wall.

Planner Bont said that there was no engineer who designed a higher wall at that point. The engineer came into the picture after most of the higher walls had been already constructed. *(See attached letter from Gregsak Engineering, Inc., dated September 14, 2019.)*

Appellant Sonya Hamori disagreed. "We have documentation."

Member D'Amante said, "I just want to make that I am clear, all of the trees and brush that were holding up their driveway on that slope were also gone so, in essence, that is a level of destabilization, I would think. Would you agree with that?" DPW Hadaway said, "Could be".

Chair Ham asked the members of the board to pose their questions for the Hamoris.

**Presentation by Hamoris:**

Appellant Sonya Hamori said, "Starting with the photograph that Delia Sullivan just showed. That entire wall. We took pictures. We have the time date stamps of both the pictures to coordinate with both the inspection and approval. Pictures and date stamps."

Appellant Sonya Hamori said, "You will ask, how does Rex Caulder build a wall and I wish that Rex Caulder was here because he could verify everything that we are saying of what he constructed, when he constructed it and how he constructed it and who paid for it."

Appellant Sonya Hamori said, so part of the reason that that upper wall cost the Hamoris, in essence, \$2,000 is because there was a dispute as to whether or not and how destabilized the Hamori driveway was. All of the stumps as well as the stones were pulled out of the ground of the embankment and these materials were thrown into a dump truck. Appellant Sonya Hamori took pictures. She and her husband showed up Labor Day Weekend of 2017, to see that all of the trees had been cut down. She was shocked. She had no idea that this road reconstruction project was happening. She called her husband and said you are not going to believe this, but all of the trees are gone. And then she started taking pictures of what happened then and for the next few weeks. Meanwhile, boulders were carted away and stumps were removed. And she kept thinking, and she had many conversations with DPW Nate Hadaway. She had a conversation with the engineer that brought her to tears because the engineer was standing in the middle of her driveway telling her that basically he can do whatever he wants to with the Hamori land because the Town has the right-of-way over the Hamori land. Appellant Sonya Hamori said, "To this point, that may be legal, it just felt very wrong."

Appellant Sonya Hamori said, that over time, over the next few months as the rains came and her driveway was clearly washing away to the point where she could not even go up her driveway. Appellant Sonya Hamori said the project was designed so poorly that so much erosion happened to her driveway that her driveway was collapsing down into the ditch.

Appellant Sonya Hamori said the bottom wall that wraps the road was part of the original construction. The bottom wall was down at the bottom of the embankment and out of there and that original wall has nothing to do with happened to her embankment and driveway. It was the upper retaining walls that were built that stabilized her driveway. The upper retaining walls are what contractor Rex Caulder of Caulder Construction, LLC, the Town and the Hamoris worked out as a solution. The Hamoris would contribute \$2,000 and the Town would contribute \$2,000. That is also the reason the upper boulder retaining walls only ever went to that edge of the driveway and ended there. The Town was not willing to pay to stabilize the bank any further. They were stopping to where they believed that they had rounded the corner into the roadway area.

Appellant Sonya Hamori said there is also a pin at the roadside that is in many of these pictures. She thinks they all – meaning the Town, the contractor Rex Caulder and the Hamoris – all of them believed was the Hamori property marker between the Hamoris and the Burrows. It seems

that either that pin had been moved or the pin was identifying something different, but that was not the property boundary marker pin and that is where the wall rounded around.

Appellant Sonya Hamori said that if members of the ZBA look at the picture that Delia Sullivan brought out, that upper wall is the wall that rounded that the Town had built, and she has the time date stamp for that picture, as well as the approval of Town Manager Butch Burbank approving the payment to contractor Rex Caulder for that wall. Construction stopped after that. In 2017, all construction vehicles had left.

Appellant Sonya Hamori said that in 2018 she said to contractor Rex Caulder: "Here, you are finishing every body else's wall, just give me a quote for what it would cost to finish our wall and to stabilize the top part of our driveway." According to Appellant Sonya Hamori, Contractor Rex Caulder said he thought there was going to be a problem with the Town. Rex Caulder said, I really want you to work with the Town. At which point Michael Hamori went in to say, "Okay what do we need to do?" The Town told him to hire an engineer. The regulations had changed. No wall could be over four feet (4'). According to Appellant Sonya Hamori they wanted to do everything right so Michael Hamori went to see Town Manager Butch Burbank and Planner Bont who recommended Gregsak Engineering, Inc. They hired engineer William (Bill) M. Gregsak, PE, from Gregsak Engineering, Inc., PO Box 271, Chester, NH 03036. Appellant Sonya Hamori said Engineer Gregsak to come out to tell them if they could build and extend onto the retaining wall shown in the picture the ZBA has in front of it with engineering designs submitted to the Town prior to Rex Caulder doing anything. Appellant Sonya Hamori was not at that meeting, but "Michael can tell you, all was approved." According to Appellant Sonya Hamori, Rex Caulder was a part of some of those meetings and Rex would not start until he knew that the wall was approved; then according to Appellant Sonya Hamori, "The Town approved the wall." And Rex Caulder started construction for them which was just finishing those tiered walls.

**NOTE:** Planner Bont never attended any meetings about the Hamori wall at which Rex Caulder was present or participated. Unless these meetings took place with Town Manager Butch Burbank alone, these meetings never took place and representations that Rex Caulder participated in any meeting with Planner Bont was NOT accurate.

Planner Bont and Town Manager Burbank did meet with Michael Hamori after he received the Cease and Desist letter. They both told Michael Hamori that unless he was building retaining walls less than four feet (4') in height, he needed to hire a structural engineer to design a retaining wall, oversee the construction of the wall and then sign off on the wall. Hamori said that he wanted to see if an engineer could design walls that were less than four feet (4') in height so he could avoid all of that.

**NOTE:** For the record. Nothing built as a wall on the Hamori property was approved by the Town Planner. The Town Planner did not issue a Land Use Authorization Permit for any part of the wall because according to the letter submitted by Engineer Gregsak, portions of the wall that were already built without a Land Use Authorization Permit were greater than five feet in height and those walls were not designed by a structural engineer and were not signed off by a structural engineer in violation of the State



*Building Code and in violation of the Town Land Use Plan Ordinance. The walls were built by Rex Caulder for Michael and Sonya Hamori. The Town had no input in the design or construction of the retaining walls other than the lowest wall next to the roadway that is solely in the Town's right-of-way.*

*During their discussions in the field during the road construction when the Hamoris complained about erosion of their driveway, DPW Nate Hadaway, Town Manager Butch Burbank and the field engineer were present. Town Manager Burbank offered \$2,000 towards a solution. Michael Hamori decided he wanted the Town to pay \$8,000. Butch refused. The Town through the Town Manager did contribute \$2,000 to whatever the Hamoris and Rex Caulder figured out could be "solution" for the erosion acceptable to the Hamoris.*

*No plans and no preconstruction control affidavits for any portion of any retaining wall was ever submitted to the Town. Engineer Gregsak never submitted a plan for the wall already built. Engineer Gregsak never submitted a plan for the extension he planned to add onto the unpermitted wall. Engineer Gregsak did submit a "typical" with his letter dated September 14, 2019, indicating that he would try to have the remainder of the wall built in layers – each layer of which would be less than four feet (4') in height so that he would not need to submit an application for a Land Use Authorization Permit.*

Sonja Hamori said then they had the November 7, 2019 ZBA meeting (at which Planner Bont, DPW Hadaway and Town Manager Burbank were not present) and subsequently the Hamoris had a survey completed. Sonja Hamori said she was mortified to find that the wall they finished was actually on her neighbors' property.\*\* Sonja Hamori continued, "Thank goodness my neighbor is a really good person to work with and stuff" because she was mortified that not only was the wall that the Town built to help retain our driveway\* was also partially constructed on James and Reny Burrows property [at 5 Beechnut Drive (Map 130, Lot 119)], which the ZBA can see (she has large copies of the survey), but so was the portion of the wall they built. It was just mortifying to Appellant Sonya Hamori that the Hamoris had built their wall on the Burrows property which they did not learn until the property was surveyed.

***\*(NOTE: The Town did not design or build the wall to retain her driveway she is talking about. The Town gave her \$2,000 towards finding a solution acceptable to the Hamoris for addressing the problem of erosion in their driveway. The Hamoris hired Contractor Rex Caulder to build their retaining wall who also happened to be the Town's contractor for the roadway.)***

***\*\* (NOTE: Actually, in the Cease and Desist Letter the Town informed the Hamoris that we believed the unpermitted retaining wall the Hamoris were constructing was on their neighbors' property.)***

Appellant Sonja Hamori said James Burrows is perfectly fine with an easement; James Burrows put his consent in writing. James Burrows is perfectly fine with doing whatever needs to be done to help them resolve this. Appellant Sonja Hamori said the retaining wall they built also solved a



problem for the Burrows' property because when the road construction happened, the Burrows were having huge water issues in their home. Appellant Sonja Hamori said the Burrows ended up with water issues because of how much the pitch of the roadway had dropped it actually created a runway into his driveway. Appellant Sonja Hamori said the Burrows who had never had a problem with water in his basement, found that both his basement and his garage were now flooding. Appellant Sonja Hamori said because of the way the walls have been constructed with tiers and proper drainage the retaining walls are pulling a lot of water away from the Burrows' property.

Vice Chair Paul Beaudin asked Appellant Sonya Hamori if the Gregsak Engineering, Inc., letter from William M. Gregsak, PE dated September 14, 2018 with an attached typical was supposed to be the plan used to build the remaining tiered boulder retaining wall. Appellant Michael Hamori answered "yes".

Vice Chair Paul Beaudin asked Appellants, "Were all of the walls that were supposed to be built after that time supposed to be built like that?"

Appellant Sonya Hamori said, "No, no, no. That picture is of the wall that was built before Gregsak Engineering came out." "You will note that in his letter he [Gregsak] says that he has to tie into "the six foot wall that the Town has previously built"\* \*\*.

**\*NOTE:** Again, the Town did not design or build the six-foot (6') wall Appellant Sonya Hamori is talking about. The Town contributed \$2,000 towards the solution desired by the Hamoris. The Hamoris paid Contractor Rex Caulder to build it.

**\*\*NOTE:** The September 14, 2018 letter from William M. Gregsak, PE, says: "However, the new wall will tie into an existing boulder retaining wall that is presently approximately five feet six inches (5'-6") tall. Therefore, there will be a short five to ten-foot (5'-10') section of new wall that will be constructed with a maximum height of five feet six inches (5'-6")."

An argument ensued as to what sections of wall Rex Calder and his company Caulder Construction built while working for the Town and what sections of wall Rex Caulder built while working for the Hamoris.

Vice Chair Paul Beaudin said "Who designed this section of wall?" Appellant Sonya Hamori said, "The Town built it. I don't know. We did not engineer it." Contractor Rex Caulder "was carrying it down, tiering it down."

Vice Chair Paul Beaudin asked Planner Bont if the Town built the wall. Planner Bont said, "No. The Town did not build that portion of the wall. According to Town Manager Burbank, the Town gave the Hamoris money to hire a contractor to do what they wanted to have done to address the erosion in their driveway.

Appellant Sonya Hamori insisted that the Town built the wall. Planner Bont and DPW Nate Hadaway disagreed.

Vice Chair Paul Beaudin asked whether the first part of the wall on property owned by the Hamoris was part of GEI's [Gresak Engineering, Inc.] engineering design. Sonya Hamori said it was not.

Vice Chair Paul Beaudin asked who paid to have the first part of the wall on the property. Sonya Hamori said, “We paid \$2,000 and the Town paid \$2,000. Sonya Hamori, “I think that Rex honestly gave us a deal because he also felt bad. He pulled all of our boulders out.”

Vice Chair Paul Beaudin said, “For \$4,000 Rex Caulder built all of this wall here?” Michael Hamori said, “He knew what we were going through and he spent a lot more and did a lot more to mitigate the water issues by building swales into the woods.”

Vice Chair Paul Beaudin said he talked to Rex Caulder up at the site. Rex Caulder told Paul Beaudin that he built the wall only to a certain section – spot. He said he had nothing to do with the very top. Rex Caulder said he built the whole thing. But as far as the Town’s portion, it only went from the entrance where the Hamori driveway was to down to where...”

Appellant Sonya Hamori interrupted and said, “I am sorry, but you are misunderstanding what Rex said. If Rex were here he would explain.”

Vice Chair Paul Beaudin said, “I was standing with Rex Caulder in front of the wall, Ma’am.” I walked it with Rex Caulder. Paul Beaudin said he said to Rex Caulder, “Where did you start and where did you stop for the Town?” Rex Caulder said, “I started here on the street and where you walk back to Mr. Burrows’ property he stopped and he said he thought that...”

Appellant Michael Hamori interrupted and said, “He built that bottom rung that goes around and that was part of the \$4,000. “NOT THE STREET! UP!”

Appellant Sonya Hamori also interrupted. “UP! He built that!”

Vice Chair Paul Beaudin said when he met with Rex Caulder on site, Rex Caulder told him that where the wall starts to tier off, that was where (somewhere in there) is where responsibility for that agreement to do work up to \$4,000 that the Hamoris had with the Town ended.

Appellant Sonya Hamori interrupted. “Did you have that picture with you?”

Vice Chair Paul Beaudin said, he did not need the picture because he was standing right in front of the wall.

Appellant Sonya Hamori said, “But Rex [Caulder] may not remember exactly where the wall ended. That picture that you have was taken the day Rex Caulder’s equipment left. His truck with his name on it is there in that photo.”

Vice Chair Paul Beaudin said, “Right where it [the wall] starts to tier. I stood right in front of the wall with Rex Caulder and I asked him. Where did you start and where did you stop for the \$4,000 that you were paid?” Rex Caulder told Vice Chair Paul Beaudin that.

Appellant Sonya Hamori brought her two (2) photographs up to show Vice Chair Paul Beaudin. Sonya Hamori said, “This is Rex Caulder’s truck. This is literally the day before. These pictures were taken one day apart. That is when Rex Caulder was done. Michael [Hamori] took the picture when Rex Caulder was done. Rex Caulder’s truck happened to be sitting there. We took the picture the next day too. That picture was taken on November 1, 2017.”

Vice Chair Paul Beaudin said to Appellant Sonya Hamori, looking at the photos provided by Sonya Hamori, “See where this [wall] tiers off? Right here is where Rex Caulder told me [Paul Beaudin] that he stopped.

More argument ensued.

Delia Sullivan asked, “Can I interrupt? As I recall, at the November 2018 ZBA meeting the Board agreed that the wall was fine as it is built now in the four-foot (4’) increments, tiered. The only question the ZBA had was, is the wall on the neighbor’s property and would the neighbor give Hamoris an easement?” In her opinion, that was the only question for the ZBA to address tonight. Why are we rehashing all of this? We are not debating whether the wall is an engineered wall or not. This ZBA Board already decided the wall is okay as it is. In the future, yeah, it probably should have been engineered.

Planner Bont said that at the November 2018, ZBA hearing the ZBA did not have anyone present to represent the Town. The Planner was not there, the DPW Hadaway was not there and the Town Manager was not present at the meeting to answer any questions.

Chair Jon Ham said he was not saying he disagreed with Member Delia Sullivan, however, he thought that as a Board, until they saw a survey and an engineering plan for Hamori’s wall, the ZBA was not going to go any further. Vice Chair Paul Beaudin agreed. The wall is well over four feet (4’) high. Does it comply with the State Building Code. Vice Chair Paul Beaudin said if he looks at GEI’s plan, Engineer Gregsak designed a wall that does not meet the State Building Code requirements because it is a six-foot (6’) wall.

Appellant Sonya Hamori said: We have the emails from Town Manager Butch Burbank where he has approved payment for the wall. We have pictures of the wall with the time date stamp on them of when that wall was constructed. And that is the ONLY wall. Rex Caulder would not even build a wall until we had an engineer come out. What is it that you think we have done that is not what we are telling you?

Member Paul Beaudin said that the main question is whether this wall was designed and constructed to meet State Building Code (as set forth in the Town Land Use Plan Ordinance) which changed in 2009.

*[Note: The NH State Building Code is the 2009 International Building Code (IBC 2009). The Town of Lincoln’s Land Use Plan Ordinance requires compliance with the State Building Code.]*

Appellant Sonya Hamori asked: Designed by us or designed by the Town? Paul Beaudin said, he knew there was a Cease and Desist and the wall continued to be built after the Cease and Desist.

Appellant Sonya Hamori said, “That was a different wall. That is not even what you are looking at! That is a wall that you cannot even see in that picture.

Vice Chair Paul Beaudin said, “It is the wall off the backside.”

Appellant Sonya Hamori said, “It is straight off the backside!”

Appellant Michael Hamori, said, “When did the Building Code change?”

Fire Chief/Code Inspection Officer Ron Beard said: The requirement pertaining to retaining walls has been in the State Building Code for a long time - at least since 2009.

Appellant Sonya Hamori said, “That point was brought up when Michael [Hamori] said he remembers that an engineer signed off on it and he met with [Planner] Carole [Bont] and [Town Manager] Butch [Burbank] about it.” According to Appellant Michael Hamori, Town Manager Butch Burbank stated, “That’s on me.” Appellant Michael Hamori said that in an email, Town



Manager Butch Burbank stated that he had DPW Nate Hadaway go out and look at the wall (the ZBA has those emails provided to the ZBA) and the ZBA has the time date stamps on the photos and on the emails.

Appellant Sonya Hamori said when Rex Caulder worked with the Hamoris and Rex Caulder was looking for a point of reference “when he was working for the Town” Rex Caulder said he was not going beyond the corner of the Hamoris’ deck. The Hamoris’ deck and the corner of their deck was the marker Rex Caulder was using. The photograph does not give you a good indication of where that is, but the survey does give a good indication of where that is. Appellant Sonya Hamori brought a copy of the survey plan up to the table to show the ZBA to point out the location of the Hamori deck in relation to the retaining walls. Appellant Sonya Hamori pointed out the first section that Rex Caulder built. She also pointed out where the Hamoris had Gregsak Engineering design a wall for with a four-foot tiers. According to Sonya Hamori, her description matches the photograph. Appellant Sonya Hamori said their driveway was collapsing as well as eroding.

Vice Chair Paul Beaudin said the ZBA now has two (2) parties that are responsible for a retaining wall that is over four feet (4’) high: the Town and the Hamoris. The ZBA cannot talk about the Town section of the wall (is the Town legally responsible or not), but the ZBA can talk about the Hamori section of the wall.

Town Attorney Peter Malia said the statute he was looking for that addresses whether the municipality has to comply with its own municipal regulations is RSA 674:54. (See Appendix A.). The statute says, in essence, that a municipality or the State of New Hampshire making a state or municipal use of land owned by the State or municipality typically is exempt from local land use regulation, however, there is a process that must be followed which is the municipality is supposed to provide plans to the Planning Board 60 days prior to the beginning of construction. The Planning Board can then hold a public hearing. The Planning Board does not have the authority to deny the project. The Planning Board does have the authority to issue nonbinding comments on the project. The public hearing is designed to allow the public to be notified of what is being proposed gives the Planning Board a chance to sort of weigh in on it. The Town can be exempt from local land use regulation.

Vice Chair Paul Beaudin pointed out that the regulations that pertain to retaining walls that exceed four-foot (4’) in height are not local land use regulations. The relevant regulations are State Building Code regulations.

Appellant Michael Hamori asked, can you exempt projects only on Town land? Just because the Town has a right of way, does that allow the Town to be exempt from that State Building Code requirements?

Town Attorney Peter Malia said that he does not think that the Town’s construction of a retaining wall in excess of four feet (4’) in height would be exempt from the State Building Code.

Town Attorney Peter Malia said that addressing the point that ZBA member Delia Sullivan made, the minutes from November 7, 2018 do conclude by saying Hamori asked the ZBA if they could review the application criteria before he left for the night. Upon reading through the five (5) criteria, the ZBA members found that each criterion was addressed satisfactorily except Criteria #2. Criteria #2 says: If the variance were granted, the spirit of the ordinance would be



have to be observed; granting of the variance would have to in no way violate the spirit of the ordinance.

Town Attorney Peter Malia said that at the last hearing the ZBA stated they needed a completed survey for this lot. If it turns out that the retaining wall was entirely on the Hamori property they can proceed as planned. If it turns out that the retaining wall is not located entirely on the Hamori property, the Hamoris would need to secure an easement from James and Reny Burrows who own the property where most of the retaining wall is located.

Member Delia Sullivan said in her opinion, the ZBA should not be discussing whether or not the Town's wall is legal or the Hamoris' wall is legal. Right now, that wall is working.

Vice Chair Paul Beaudin said he is concerned that the ZBA not set a precedent for other contractors and property owners who do not think they need to follow the State Building Code in building retaining walls greater than four feet (4') in height. He does not think we should allow retaining walls that are greater than five feet (5') high that are not engineered and do not comply with the State Building Code and are not built to the State Building Code specifications. How can the Town say one contractor has to comply and another contractor does not?!

Member D'Amante asked Town Attorney Peter Malia what the date of the last hearing was. The last hearing was November 7, 2018. Attorney Peter Malia said, the ZBA did not take a final vote in 2018. The ZBA did not approve or deny the variance. The ZBA did leave the Hamori with the impression that the final hurdle for them to clear would be the survey and if the retaining wall was built on the neighbors' property, they would need an easement. Otherwise, the Hamoris could proceed as planned. The ZBA has not voted on the variance yet. The ZBA can change their minds in light of new information they received, but that is what the November 7, 2018 minutes say.

Vice Chair Paul Beaudin said, he understands the complexity of trying to upgrade the roadway, putting in ditching, drainage and feeding the driveways into the roadways and making it all work. However, there is a State Building Code and the Land Use Planning Ordinance echoes the building code. There is someone in Town who perished due to the failure of a boulder retaining wall. That is why the Land Use Plan Ordinance includes reference to the State Building Code for retaining walls. He does not see how the ZBA can give a variance on a retaining wall that does not meet the State Building Code requirements that was also voted on by the Town in the Land Use Plan Ordinance.

Fire Chief/Health Officer/Code Enforcement Officer said, "You, the Board would be accepting legal responsibility on behalf of the Town for not complying with the State Building Code if something happens with that wall by granting a variance."

Chair Jon Ham said he understood and that he was present at the meeting when the Hamoris left the meeting and the point was to get a survey from the Hamoris to find out whose land the wall was on. Members of the ZBA still had questions about whether parts of the retaining wall were in excess of four feet (4') high or not. That was his clear understanding. The ZBA still needed an engineered wall if the wall was over four feet (4') high.

Vice Chair Paul Beaudin agreed. Beaudin said that in addition, the retaining wall is supposed to have both a Pre-Construction and a Post-Construction Affidavit as part of the approval process. Those items have not been provided yet and the whole wall is already built. We do not have any pre or post approvals for any part of the retaining wall.

Member Jack Daly said, one of the portions of the wall is noncompliant. It is the part of the wall **that the Town built.\*** Is that correct? Paul Beaudin said yes. Member Jack Daly said so that error is on the Town so the liability is on the Town for that.

**\*NOTE:** Again, the Town did not design or build the upper walls. The Town contributed \$2,000 to fix the problem of erosion. The Town did build the lower retaining wall next to the Beechnut Drive roadway portions of which the Town understands are greater than four feet (4') in height.

Member Daly asked what other part of the wall is noncompliant? Like Paul Beaudin, he walked the wall and talked to the contractor about it. You know, it meets the four-foot setbacks. It rises four feet and then it goes back a way and then it goes up another four feet...

Planner Bont asked if the ZBA members had looked at the materials she sent them from the State Fire Marshal's Office. In order to avoid having to have an engineered wall, the maximum of four-foot (4') tiers have to be comprised of one foot (1') under the ground and three feet (3') above the ground, followed by a flat course of two (2) times the exposed height of the wall which would be a total course of six feet (6') before the next tier starts. Then the next four-foot (4') tier starts. One-foot (1') underground, three feet (3') above ground, another flat course of six feet (6') to the next tier. Otherwise the weight and force of the entire wall is focused on the bottom row of the bottom wall. The wall is now considered to be a twenty-foot wall instead of a four-foot (4') wall. Having the proper engineering for retaining walls is considered a safety issue. That is how the State Fire Marshal's Office explained it to us as a safety issue.

Vice Chair Paul Beaudin asked if DPW Hadaway knew exactly where the line is as far as what was paid for or committed by the Town for the \$4,000. The engineer or someone must have told Caulder how far to go.

Appellant Sonya Hamori said, "That picture is it!"

DPW Nate Hadaway said there was no set length. He agreed with the them. There was nothing that was agreed upon like a ten-foot (10'), twenty-foot (20') or thirty-foot (30') wall. The Town did not agree on the footage of that. He wanted to reiterate, that the "As-Built" for the road project were stamped by an engineer of record – Hoyle, Tanner & Associates, Inc. So that means everything, included in the road project is stamped by the engineering firm of record – Hoyle, Tanner & Associates, Inc. – which includes, but is not limited to, the walls built by the Town in this project. It includes ONLY what the Town built as part of the Beechnut Drive project.

Appellant Michael Hamori said he thought he could say something that would help the ZBA. According to Appellant Michael Hamori, initially when he talked to Town Manager Butch Burbank he was discussing eight thousand dollars (\$8,000) to do the wall. Town Manager Burbank was not willing to split the cost of eight thousand dollars (\$8,000) fifty-fifty (50-50) with the Hamoris and pay four thousand dollars (\$4,000). Michael Hamori said he does not know if it was "a budgetary thing" or approvals or what. According to Michael Hamori, Town Manager Burbank said the most he could do was two thousand (\$2,000). So, the Hamoris and the Town agreed. The Hamoris went back to Rex Caulder and talked to Caulder about it. As DPW Hadaway just confirmed, the Town and the Hamoris did not make a decision to go to a specific line. "It was in the scope of work: shore up the driveway, do the wall." Appellant Michael Hamori said he thought he could say something that would help the ZBA. According to

Appellant Michael Town Manager Burbank said he would have DPW Hadaway come out and look at it. Make sure it is secure and everything because the engineer has to do the sign-off. Appellant Michael Hamori said he thought he could say something that would help the ZBA. According to Appellant Michael that was the date. That is why it was so important to have those photos the day before DPW Hadaway came to review the retaining wall.

Vice Chair Paul Beaudin said, he did not know how an engineer from Hoyle, Tanner & Associates could sign off on a retaining wall that does not meet the State Building Code.

Town Attorney Malia said that there are two separate issues with the wall:

1. the height of the wall; and
2. the construction of the wall within the setback.

Town Attorney Malia said if you look at the minutes and agenda for tonight, it only talks about the setback issue. The ZBA's job is to determine whether to grant a variance to the Hamoris for the twenty-five-foot (25') setback. That is because you do not get a variance if you want to build a wall in Lincoln that exceeds four feet (4') in height. If you build a wall that exceeds four feet (4') in height you have to prove to the Town that the wall has been engineered and built properly according to the engineer's specifications. So, if they or anybody in Lincoln builds a wall that exceeds four feet (4') in height and they have not provided sufficient engineering plans to the Planning Department then that is an enforcement action. I would think that then the Town would send a violation notice to that property owner and say that if you do not comply with the Town's construction requirements then they cannot build retaining walls in excess of four feet (4'). You cannot come in and get a variance for that. You either have to prove that it has been engineered and built properly or take it down and rebuild it. What the Hamoris are asking for is a variance for a construction of the boulder retaining wall within the twenty-five-foot (25') setback.

Vice Chair Paul Beaudin said that any rock wall over four feet (4') in height is considered a "structure" by the definitions in the Land Use Plan Ordinance, so a "structure" needs to meet the twenty-five-foot (25') setback requirement because it is in the Mountain Residential (MR) District. If this boulder retaining wall is indeed over four feet high then it becomes a "structure" and that is why it needs to meet the twenty-five-foot (25') setback requirement.

Appellant Sonya Hamori said that all sections that are over six feet (6') tall may all be within the setback of the Town's right of way area. Appellant Sonya Hamori said that she thinks the only part of the Hamori wall that is near six feet (6') is where the wall ended when it was originally built by the Town in 2017\* and paid for with monies contributed by both the Town and the Hamoris. The Engineer Gregsak references the height of the end of the wall of five feet six inches (5'6') tall in his letter dated September 14, 2018. Appellant Sonya Hamori said Engineer Gregsak then designed and oversaw the construction of the wall that was reduced in height from that point that was in compliance with the State Building Code standards which is what they hired him to do. Engineer Gregsak created the engineering plans for the walls and then worked with Rex Caulder to make sure the walls were built within the State Building Code requirements. They got the recommendation from the Town to hire Gregsak to make sure they were in compliance. Appellant Sonya Hamori said they have been trying to be in compliance with the Town has been asking them to do all along.



**\*NOTE:** Again, the Town did not design or build the upper walls. The Town contributed \$2,000 to fix the problem of erosion. The Town did build the lower retaining wall next to the Beechnut Drive roadway portions of which the Town understands are greater than four feet (4') in height.

Member D'Amante said that the ZBA is not creating precedent by granting a variance. No variance granted sets a precedent. Every site stands on its own because of uniqueness. D'Amante said we are not talking about assigning blame, we are talking about facts. These are the facts:

1. There was an existing house;
2. There was an existing driveway without problems – that never washed out and never eroded.
3. Behind the house is the White Mountain National Forest so the Hamors cannot move anything on their lot further to the south.
4. There was a very steep slope between their house and the neighbor's house;
5. There was a lot of evidence of previous stabilization in those photos with a significant number of boulders, trees, brush and a significant amount of vegetation that kept that driveway and the area where their house is stable for all of those years;
6. Then there is an intervening event which is the widening of the roadway and ditching along the roadway. (No blame. Widening, improving and ditching the roadway was a good public purpose. However, in order to improve that road the Town had to take out all of the materials that provided stabilization for the Hamori driveway and house.)
7. The widening of the roadway exponentially increased the slope going up to the Hamori's driveway and destabilized the embankment.
8. One of the things that justifies a variance is the uniqueness of the [parcel] situation. This parcel is unique and the result of that roadwork "put them in a jeopardizing situation".
9. The Town built and owns the lower retaining wall. The Town owns it. The wall is the Town's responsibility.

Member D'Amante said he believes that Town Manager Butch Burbank did an admirable thing by stepping up and offering to share the cost of the upper driveway stabilization. The cost was needed because the destabilization of the Hamori driveway was needed to widen the roadway. The situation snowballed. Now the Hamoris are worried that they will not be able to maintain what they need for stabilization.

Member D'Amante said he believes all those unique things show incredible hardship. If the ZBA grants this variance the ZBA is not held to grant any similar variances. None of these unique things were created by the property owners.

The Town acted responsibly. The ZBA can help mitigate the situation for the Hamoris and the Town. To avoid further Town liability, the hardship is also a justifiable circumstance.

**Motion to grant this variance and condition it upon the Hamoris obtaining an easement from their neighbor (James & Reny Burrows) for the portion of their boulder wall that are**



**beyond their property boundary line and on the Burrows land. D'Amante  
Second: Beaudin**

**Discussion:**

Member Daly said he wanted to make sure that the easement appeared as a recorded document in the Grafton County Register of Deeds. An easement has to be recorded.

Town Attorney Peter Malia asked if the ZBA wanted to give the Hamoris a certain period of time to record the easement like one hundred twenty (120) days. Members of the ZBA agreed.

Vice Chair Paul Beaudin said that he understands what D'Amante said about the uniqueness of the property, but he did not see that there was a hardship here as they should have stepped back and looked at how they could accomplish their goals with an engineer and build a wall that complied with the State Building Code. Both of the Town and the homeowners should have done that - not just put up a retaining wall that does not comply with the State Building Code. Uniqueness of the property does not take away from the fact that you still need to build a retaining wall properly.

Member D'Amante said he thinks the opportunity to do that was removed by the Town's moving the roadway closer to the Hamori's property. But more importantly, by removing the area that was stabilized for their driveway and their house – that definitely created a hardship unique to this site.

In response to questioning by Chair Ham, DPW Hadaway said that the engineer from Hoyle, Tanner & Associates, Inc., signed off on the "As-Built Plans" for the entire project of roadway work, but just on the lower retaining wall; the engineer did not sign off on any of the upper retaining walls.

Chair Ham asked whether any additional trees were cut after the Town cut whatever trees or brush they needed to cut to do their roadway project or were there never any trees from where the Town took trees out on up the Hamori lot. DPW Hadaway said the only trees the Town cut were in the Town's right-of-way. Chair Ham said he was having trouble wrapping his head around the Hamori argument because the Town did not change anything up where the other walls were built. He asked the Hamoris if they were saying that the Town made other changes that affected up where their house was. Appellant Sonya Hamori brought the survey up to the table once again to point out where the trees were removed.

Chair Ham said there was no evidence of engineering on a plan. There was nothing submitted by Engineer Gregsak that showed where the retaining walls were going to be placed. There was just a "typical" cross section of a stone retaining wall that did not look anything like what was actually built. For example, there were lots of flat rocks in the typical. There are no flat rocks in the actual wall.

Appellant Sonya Hamori said that part of their agreement with Engineer Gregsak was that he would inspect the wall during its construction and sign off on the wall after it was constructed. Chair Ham asked her if she had a copy of the sign off from Engineer Gregsak here. Appellant Sonya Hamori said she did not know. She would have to ask.

Vice Chair Paul Beaudin said that if Engineer Gregsak signed off on the wall and took legal responsibility for the upper retaining wall he would be happy.

Appellant Sonya Hamori said the Hamoris did not supervise the portion of the wall that “the Town built”\* and that portion of the wall that “the Town built” is over four feet (4’) high. The Town supervised Rex Caulder for that part of the project.

**\*NOTE:** Again, the Town did not design or build the upper walls. The Town contributed \$2,000 to the fix the problem of erosion. The Town did build the lower retaining wall next to the Beechnut Drive roadway portions of which the Town understands are greater than four feet (4’) in height.

Argument ensued about whether the Town signed off on the work Rex Caulder did for the Hamoris on the retaining wall in 2017.

Appellant Sonya Hamori said did Town Manager Burbank provide anyone with a picture of exactly what the Town paid \$2,000 for? Because we did.

Member Daly said we are here to discuss a variance for building a wall within the side setback area.

In response to a request for clarification, Planner Bont said that Town Manager Burbank said that the Town did not contribute to the design of the solution. The Town did provide money for the solution. Burbank said he understood that the retaining wall he helped pay for was the second wall along the driveway to the edge of the Hamori property line within the Town right-of-way. Fire Chief Beard agreed with Planner Bont and further clarified what Town Manager Burbank told he and Planner Bont earlier in the day.

Appellant Michael Hamori said Town Manager Burbank said “I am going to contribute to make this solution amicable for you and your wife and after the work is completed. I will instruct Rex.” That is where it went.

**Motion to open public comment: Daly**

**Second: D’Amante**

**All in favor: 5-0**

**Motion carries.**

**Kevin Halloran**, the Hamori’s neighbor at 14 Beechnut Drive who lives directly across the street from the wall. Kevin Halloran testified that the Town clear-cut the entire hill. There was a lot of foliage there. The Town caused the entire problem. Hamoris would not have had to do anything if the Town had not fixed that side of the road. There was just gravel up there. Every time it rained the rain would push everything else down there. He believes the Town should have repaired the Hamori’s driveway.

**Delia Sullivan** asked the Hamoris if the wall they built on their own was engineered. The Hamoris replied affirmative.

**Member D’Amante** said some of the wall is in the Town’s right of way but only what the Town agreed to and built.

**Cinda D’Amante, President of the Beechnut II Homeowners Association** from 188 Black Mountain Road represented the Beechnut II Association, as Beechnut II homeowners are all abutters to the properties in Beechnut I. As a Homeowners Association, they support the Hamoris and empathize with the situation they are in. All of the property owners who live up there think that elements of the lots and houses built in the 1960s through 1980s, such as lot

lines, are questionable given today's standards. The Hamoris' house is one of those questionable lots and houses. As neighbors, they recognize that the Hamoris have definitely improved their home since moving there, and ask the Town and all the boards involved to keep that in mind.

Appellant Sonya Hamori said that their process included going back and forth seeking advice from the Town for an engineer referral. They paid for the engineer to come out and submit plans to the Town, and they also followed up with the Town and asked if they needed anything before they asked Rex Calder to finish the wall. Appellant Sonya Hamori said they were told that they did not need anything because the plans were submitted and the wall was less than four feet (4'). Appellant Sonya Hamori said Michael Hamori was told this directly.

Vice Chair Beaudin said the Town is concerned because if someone is ever hurt due to a rock falling from the wall, the question will be about who built the wall and whose fault it is.

A discussion ensued about date stamps on the photos of the wall. Appellant Sonya Hamori said that the entire wall was built in 2017 and she said she has neighbors present to verify that. The Board agreed that the wall was built in 2017.

**Motion to close public comment: Beaudin**

**Second: D'Amante**

**All in favor: 5-0**

**Motion carries.**

**Motion to grant the variance with two conditions to be satisfied within 120 days:**

**(a) secure an easement from James Burrows and provide a recorded copy to the Town of Lincoln, and**

**(b) provide to the Town of Lincoln confirmation by a licensed engineer that the portion of the wall built in 2018 highlighted in yellow on the attached plan meets all applicable state building codes: D'Amante**

**Second: Beaudin**

**All in favor: 5-0**

**Motion carries.**

#### **I11. NEW BUSINESS**

*None.*

#### **IV. OTHER BUSINESS**

*None.*

**V. 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 Planning Board will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

There was no public participation.

**V. ADJOURNMENT**

**Motion to adjourn at 7:48 pm:** Beaudin

**Second:** Sullivan

**All in favor:** 6-0

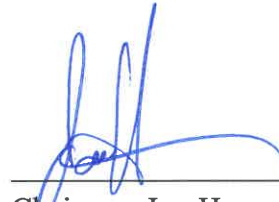
**Motion carries.**

Respectfully submitted,

Recording Secretary,

Ellyn Gibbs

(Finished by Planner Carole Bont)



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Chairman Jon Ham

Date Approved: October 16, 2019



**APPENDIX A.****TITLE LXIV  
PLANNING AND ZONING****CHAPTER 674****LOCAL LAND USE PLANNING AND REGULATORY POWERS****Governmental Use of Property****Section 674:54****674:54 Governmental Land Uses. –**

I. In this section, "governmental use" means a use, construction, or development of land owned or occupied, or proposed to be owned or occupied, by the state, university system, the community college system of New Hampshire, or by a county, town, city, school district, or village district, or any of their agents, for any public purpose which is statutorily or traditionally governmental in nature.

II. The state, university system, community college system of New Hampshire, county, town, city, school district, or village district shall give written notification to the governing body and planning board, if such exists, of a municipality of any proposed governmental use of property within its jurisdiction, which constitutes a substantial change in use or a substantial new use. Written notification shall contain plans, specifications, explanations of proposed changes available at the time, a statement of the governmental nature of the use as set forth in paragraph I, and a proposed construction schedule. Such notification shall be provided at least 60 days prior to the beginning of construction. Either the governing body or planning board of the municipality may conduct a public hearing relative to the proposed governmental use. Any such hearing shall be held within 30 days after receipt of notice by the governing body or planning board. A representative of the governmental entity which provided notice shall be available to present the plans, specifications, and construction schedule, and to provide explanations. The governing body or planning board may issue nonbinding written comments relative to conformity or nonconformity of the proposal with normally applicable land use regulations to the sponsor of the governmental use within 30 days after the hearing.

II-a. Any use, construction, or development of land occurring on governmentally owned or occupied land, but which is not a governmental use as defined in paragraph I, shall be fully subject to local land use regulations.

II-b. The construction and operation of any solid waste disposal facility on land owned or occupied by any city or town within another city or town shall be subject to local land use regulations to the same extent as if the land were owned and occupied by a private entity. Nothing in this paragraph shall affect the construction and operation of a solid waste facility on land owned by a solid waste management district formed under RSA 53-A or RSA 53-B or any combination of municipalities authorized by an act of the general court, if the land is located within a city or town that is part of the district.

III. This section shall not apply to:

(a) The layout or construction of public highways of any class, or to the distribution lines or transmission apparatus of governmental utilities, provided that the erection of a highway or utility easement across a parcel of land, shall not, in and of itself, be deemed to subdivide the remaining land into 2 or more lots or sites for conveyance for development purposes in the absence of subdivision approval under this title. For purposes of this subparagraph, "transmission apparatus" shall not include wireless communication facilities.

(b) The erection, installation, or maintenance of poles, structures, conduits and cables, or wires in, under, or across any public highways under RSA 231, or licenses or leases for telecommunication facilities in, under, or across railroad rights of way. For purposes of this subparagraph, "structures" shall not include wireless communications facilities.

IV. In the event of exigent circumstances where the delay entailed by compliance with this section would endanger public health or safety, the governor may declare a governmental use exempt from the requirements of this section.

**Source.** 1996, 262:1. 1998, 281:2. 2007, 29:1, eff. May 14, 2007; 361:32, eff. July 17, 2007.

