

**TOWN OF NEW DURHAM
ZONING BOARD of ADJUSTMENT**

June 17, 2021, 7:00 PM

New Durham Town Hall

Approved August 12, 2021

Note: Town of New Durham offers no security assurances to those connecting via PC to a third party software and hardware not configured or controlled by our IT Service provider.

PRESENT

Terry Jarvis, Chair

Wendy Anderson, Vice Chair

Stephanie Richard, member

Linda Callaway, member

David Bickford, member

ALSO PRESENT

Robin McClain, Land Use Administrative Assistant

Mike Fillion, applicant

Tracy Fillion, applicant

Jessica O'Neil, resident

Joshua Thibeault, Varney Engineer, LLC

Deborah Randall, architect for applicant

Steve O'Neil, resident/Marjack Oasis, LLC

CALL TO ORDER

Chair Jarvis called the meeting to order at 7:01PM.

PUBLIC HEARING CONTINUED Case #2021-011

Application submitted by Varney Engineering LLC, on behalf of The Fillion Revocable Family Trust, Michael and Tracy Fillion, representatives.

Applicants are requesting variances to the following:

Article V Section E: Dimensional Requirements for Town of New Durham. E. Flood Hazard Area and Water Body Setbacks. No new buildings, except for water-related structures, shall be located in a flood hazard area, or less than seventy-five (75) feet from any water body or river.

Article XIV Section C.1.b: Shorefront Conservation Overlay District. Dimensional Requirements. Development with Waterfront Access: All development with water frontage or with rights of access to water frontage shall meet the following requirements: Building

Setback: Except for water related structures (see below), all buildings shall be set back a minimum of seventy-five (75) feet from the normal high water level.

Article XXI Section C.1: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided: 1. They conform to Non-Conforming Setback and height requirements below.

Article XXI Section C.2: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided. Such expansion does not make any existing lot, structure, or use more non-conforming within the terms of this Ordinance.

Article XXI Section G.2.b: Non-Conforming Buildings, Land or Uses. Non-Conforming Setbacks. Buildings: No new building, except for water related structures, shall be located in a flood hazard area, or less than seventy feet (75) feet from any water body or river course.

The property is located at Map 122 Lot 019 – 128 South Shore Road.

Chair Jarvis read the case into the record.

Chair Jarvis asked if any Board member has a real or perceived conflict of interest with hearing this case. Ms. Richard stated she would be stepping down from deliberating this case. Chair Jarvis asked if anyone in the public has a real or perceived conflict with any members of the board hearing the case. None was indicated.

Chair Jarvis stated the public hearing was opened on June 8, 2021, and continued at to tonight's meeting due to the lateness of the hour.

Chair Jarvis reopened the public hearing at 7:03PM.

Tom Varney, Varney Engineer, LLC, representative for The Fillion Revocable Family Trust, Michael and Tracy Fillion, stated a shed is being removed to reduce the lot size coverage. He stated the land is fairly flat and the coverage is low. The proposed lot size coverage is 16.2% and the building size is 14%, both under the ordinance limits. The driveway will be porous; the septic stays the same; there is a walkway from the parking area to the home. There will be a deck and a porous walkway to the dock. The landscaping will remain natural and minimally improved. Mr. Varney stated the proposed house is bigger in size than the current cottage and presented pictures of the proposed plans. He stated the pump house will be removed; the proposed septic system will be a two-bedroom system although the system is larger than normal due to the poor, wet soil conditions and high water table.

Chair Jarvis asked what percentage of the house will be in the 50' setback, as well as the 75' setback. Mr. Varney replied it hasn't been exactly calculated but most of the house is closer to

the 75' setback, likely under 10%. They tried to push the house as close to the road as possible but they can't get closer due to the location of the septic system. The portion in question is a screen porch, single story and where it goes to two stories is over the current footprint.

Chair Jarvis opened the public hearing to members of the public. No one spoke.

Chair Jarvis closed the public hearing at 7:14PM.

Chair Jarvis stated the Board members hearing and deliberating the case would be Chair Jarvis, Vice-Chair Anderson, Ms. Callaway and Mr. Bickford.

Findings of Fact

- The lot is 122.2' deep.
- The proposed house is 35.5' from the lake.
- Due to poor soil conditions, a larger than usual septic system is needed.
- The current house is 1,130 square feet; the proposed house is 1,970 square feet.
- The building lot coverage of the proposed house is 14.9%, which is within the ordinance.
- The current lot coverage is 10.5% and would be going to 16.2%, which is also within the ordinance.
- The current house is two bedrooms; the proposed house will have two bedrooms.
- The current house is one story; the proposed house will have a 14'x26' section that is one story and the rest will be two stories.
- The current impervious paved walkway and driveway will be replaced with porous materials.
- A new well will be installed.
- A 20x8.5' deck is proposed on the lake side of the house.
- There is a perennial stream on one side of the lot.
- The current septic system was installed in 2018.
- There is a box culvert on one side and an intermittent stream on the other side of the lot.
- There will be drip edges on the house to catch runoff on both sides of the house.
- There will be no basement, only a crawlspace.
- The existing shed and pump house will be removed.
- Approximately 5% of the proposed house is outside of the 75' setback.

Discussion Article V, Section 3; Article XIV Section C.1.b; Article XXI Section G.2.b.

Granting the variance would/would not be contrary to the public interest: Mr. Bickford stated it would be contrary due to the amount of area being expanded within the setback. Vice Chair Anderson stated it would be contrary as it is significantly increasing the amount of coverage within the 50' and 75' setbacks. Ms. Callaway stated her calculations show 55% of the 75' setback is taken up by building. Chair Jarvis stated she is concerned with the amount of expansion and it would be better if it were closer to the road.

The spirit of the ordinance would/would not be observed because: Mr. Bickford stated it would not be observed due to the expansion in an area where there should be none. Vice Chair Anderson stated it would not be observed as the spirit is to keep the square footage down for several reasons and even though the percentages are allowed, it's not allowed to go closer to the lake. She stated there are good measures included for decreasing the impervious coverage it is still too much, too close to the lake. She stated it increases the size of the house more than double. The Board agreed

Granting the variance would/would not do substantial justice because: Ms. Callaway stated it would not do substantial justice; the public isn't gaining enough. She stated this is a flat lot so there are options for moving the house further from the lake. The Board agreed.

For the following reasons the values of surrounding properties would/would not be diminished: Chair Jarvis stated surrounding properties would not be diminished; an old building would be torn down and replaced with a modern home. The Board agreed.

Unnecessary Hardship: Chair Jarvis stated there is fair and substantial relationship between what the ordinance is requiring; the ordinance is in place to decrease the amount of building near the lake both within the state's 50' setback and the Town's 75'. Vice Chair Anderson stated there is space to put in a new building outside of the setbacks. The Board agreed the proposed use is reasonable but there is too much of the proposed house within the setback.

Motion: *Based on plans dated May, 13, 2021, and information received at the June 8 and June 17, 2021 public hearings, I move to deny the following variances requests:*

Article V Section E: Dimensional Requirements for Town of New Durham. E. Flood Hazard Area and Water Body Setbacks. No new buildings, except for water-related structures, shall be located in a flood hazard area, or less than seventy-five (75) feet from any water body or river.

Article XIV Section C.1.b: Shorefront Conservation Overlay District. Dimensional Requirements. Development with Waterfront Access: All development with water frontage or with rights of access to water frontage shall meet the following requirements: Building Setback: Except for water related structures (see below), all buildings shall be set back a minimum of seventy-five (75) feet from the normal high water level.

Article XXI Section G.2.b: Non-Conforming Buildings, Land or Uses. Non-Conforming Setbacks. Buildings: No new building, except for water related structures, shall be located in a flood hazard area, or less than seventy feet (75) feet from any water body or river course.

Motion by Chair Jarvis. Seconded by Mr. Bickford seconded the motion. **Motion passed, 4-0-0.**

Chair Jarvis asked Mr. Varney if they want to go forward with the remaining variance requests to Article XXI Section C.1 and Article XXI Section C.2. Mr. Varney replied they do not want to go forward.

Review and Acceptance of Case #2021-012

Application submitted by Changing Seasons Engineering PLLC, on behalf of Marjack Oasis LLC, Thomas O'Neil, representative.

Applicants are requesting variances to the following:

Article V Section E: Dimensional Requirements for Town of New Durham. E. Flood Hazard Area and Water Body Setbacks. No new buildings, except for water-related structures, shall be located in a flood hazard area, or less than seventy-five (75) feet from any water body or river.

Article XIV Section C.1.b: Shorefront Conservation Overlay District. Dimensional Requirements. Development with Waterfront Access: All development with water frontage or with rights of access to water frontage shall meet the following requirements: Building Setback: Except for water related structures (see below), all buildings shall be set back a minimum of seventy-five (75) feet from the normal high water level.

Article XXI Section C.1: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided: 1. They conform to Non-Conforming Setback and height requirements below.

Article XXI Section C.2: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided. Such expansion does not make any existing lot, structure, or use more non-conforming within the terms of this Ordinance.

Article XXI Section G.2.b: Non-Conforming Buildings, Land or Uses. Non-Conforming Setbacks. Buildings: No new building, except for water related structures, shall be located in a flood hazard area, or less than seventy feet (75) feet from any water body or river course.

Chair Jarvis read the case into the record.

Chair Jarvis stated it was determined at the meeting of June 8, 2021 that the application for Case #2021-012 was materially different from materials submitted for Case #2021-007.

Chair Jarvis asked if any Board member has a real or perceived conflict of interest with hearing this case. Ms. Richard stated she would be stepping down from this case. Chair Jarvis asked if

anyone in the public has a real or perceived conflict with any members of the board hearing the case. None was indicated.

Motion: *To accept the application for Case #2021-012 as complete.* Motion by Chair Jarvis. Seconded by Vice Chair. **Motion passed, 4-0-0.**

Chair Jarvis opened the public hearing at 7:48PM.

Stephanie Richard, Changing Seasons Engineering PLLC, on behalf of Marjack Oasis LLC, Thomas O'Neil, representative, stated the proposal is for a small addition on the back side of the house. The plans are to lift the house and put a foundation under it and part of that work is to add a first floor bedroom. She stated regardless of this addition, the new foundation will be put in. No trees will be removed and landscaping along the lake will stay the same. The walkway and part of the driveway will be replaced with permeable pavers to bring down the lot size coverage and to mitigate the area of the new addition.

Chair Jarvis asked if the walkway between the house and the lake will be replaced. Ms. Richard stated it's not a walkway but just grass. She stated there is proposed erosion control during the construction process. The average slopes are 16% but the areas impacted are less than what would require a Conditional Use Permit from the Planning Board.

Thomas O'Neil, applicant, gave statements in regards to the last application, stating they listened to the Board's comments and concerns. These were taken into consideration when developing these new plans and application. Mr. O'Neil explained his parents are aging and having a hard time getting up the stairs; the proposal now is only asking for a first floor bedroom addition due to needs of family members with disabilities. The addition is around 200 square feet and it will increase the coverage by only 1.8% to a total lot coverage of 8.9%; the screen porch addition was eliminated; and the driveway layout was adjusted to meet the 20% lot coverage requirement.

Chair Jarvis opened the public hearing to members of the public. No one spoke.

Chair Jarvis closed the public hearing at 7:55PM.

Chair Jarvis stated the Board members hearing and deliberating the case would be Chair Jarvis, Vice-Chair Anderson, Ms. Callaway and Mr. Bickford.

Findings of Fact

- The current house is open underneath; the proposal is to put in a concrete foundation with a 245 square foot addition on the rear/road side of the house.
- The applicant would like to avoid disturbing more than 2,000 square feet of the property where there is an average of 16% steep slopes.
- The lot is 0.32 acres.

- The applicant does not want to demolish the cottage to move back past the 50' setback as it would require moving both the septic and leach fields and have a large impact on the rest of the lot requiring extensive movement of soils.
- The proposal is for an addition to be a first floor bedroom for the purposes of accommodating family members with disabilities.
- There are currently two bedrooms in the home on the second floor.
- After construction there would be one bedroom on the first floor and one bedroom on the second floor, as the second bedroom on the second floor would become an office.
- The building will remain 25' from the lake.
- Other than the addition on the rear side of the house, the existing footprint will remain the same.
- Current impervious coverage is 22.1%; the proposed is 20% which is within the ordinance.
- The building coverage is 8.9% and the proposed is 10.2% which is within the ordinance.
- The current septic system is functioning and approved by NH DES.
- Drip edges would be added to the house.
- Impervious surface in the walkways to the parking areas would be replaced with pervious surfaces.
- The lot is wooded with mature trees.
- A NH DES Shoreline permit will be required.
- The existing shed will remain.

Mr. Bickford asked if there was room to move the house back. The Board reviewed the plans and discussed the location of the septic tank. It was unclear whether the septic would need to be moved as well. Chair Jarvis noted the property was steep and is concerned with starting to move things around. She stated a lot of trees would have to come down and sees moving the house back would have more long term affects. She stated this request is for accommodating individuals with disabilities. Ms. Callaway suggested the footprint is being changed and the grandfather status is being disturbed so it's a chance to get things back where the ordinances require.

Discussion Article V Section E, Article XIV Section C.1.b, Article XXI Section G.2.b.

Granting the variance would/would not be contrary to the public interest: Chair Jarvis stated it would not be contrary and the request is reasonable. She stated she is concerned about denying the property owner the use of their property due to a disability; to move the house behind the 75' setback would do significant damage to the property and the lake. Vice Chair Anderson stated she agrees, it is a modest addition to be able to use the building and in the public interest the house is as far from the lake as possible. Ms. Callaway stated she agrees the use is reasonable and it's a modest addition, not on the lake side. She stated this is such a deep property and there is a level spot near the parking area where the house could be located and has long term concerns about granting the variance. She stated the safety factor isn't there for her. Mr. Bickford stated it would not be in the public interest as expansion is being done where it's not supposed to be. Vice

Chair Anderson stated in the public interest, the total coverage is being decreased down to 20% and that is something they want to see; they can't put an addition on a house and not have it attached. She stated the modest addition is for accommodating use of their house; she stated the Board can't require someone to tear down and move the house back if it is not part of their plans; they are keeping the existing house and keeping the footprint. She stated it would be then be a hardship to move it back, explaining the very large trees on the site and good soils would have to be destroyed.

The spirit of the ordinance would/would not be observed because: Chair Jarvis stated the spirit is being observed; the revisions to the plans include reduction of a side deck, decreasing impervious surface, and adding drip edges to redirect rain water. Ms. Callaway stated she is concerned about using the same rational for a property that is almost 200' deep and has room to make improvements within the ordinances and if changes are being made, these changes are not in the spirit. She stated the setbacks are there for a reason and understands there are some improvements being made but the property has the potential for meeting all the ordinances. Vice Chair Anderson stated its being observed because the impervious surface is being reduced, keeping the disturbance down and providing better infiltration for rain runoff. She stated a modest addition to be able to use the house is still within the spirit and they can't add on to a house without attaching it; rebuilding the entire house in this case isn't reasonable. They can only do what they can do with the house located where it is. Mr. Bickford stated there are ways of getting around the problems with the setbacks.

Granting the variance would/would not do substantial justice because: Vice Chair Anderson stated in this case it would do substantial justice; they are giving back to the public what is required with the 20% impervious coverage. Ms. Callaway stated she understands the reasoning for the addition, but the ordinance is to build on the footprint and this is adding to the footprint. She suggested turning the existing deck or sitting area into a bedroom as the impervious area is already there. Chair Jarvis stated granting the variance would do substantial justice as it will allow the property owners to use their house. Ms. Callaway stated she thinks it a stretch to say that as there are other options such as an elevator, reconfigure the rooms, or moving the house. Mr. Bickford concurred justice would not be done.

For the following reasons the values of surrounding properties would/would not be diminished: The Board agreed values of surrounding properties would not be diminished.

Unnecessary Hardship: Mr. Bickford stated he doesn't think it would be a hardship. Ms. Callaway concurred. Chair Jarvis stated she thinks it would be a hardship if the variance were denied; she stated it will restrict the property owners from use of their property. Vice Chair Anderson concurred; she stated what is being proposed and the conditions of the property, being very wooded with some steep areas, the reasons for what the applicant submitted the proposal is for all these reasons and she can't reasonably say it's not a hardship to move the whole thing back to the 75' setback. She stated they don't want a whole new house, they want a small addition and it's been proposed to be as far from the lake as possible, the impervious coverage

has been improved and the plans are within the ordinance. She stated the only reason the addition is within the 75' setback is because the house is staying on the footprint and the addition needs to be attached. Vice Chair Anderson stated it would be a hardship to deny the request for a variance; there is not enough of a relationship between the purposes of the ordinance and requiring them to totally demolish the home and move it back.

Ms. Callaway stated it is a hardship but she thinks there could be other options; most of the building is within the 75' setback and now more would be added. She thinks it's a choice more than a hardship. Chair Jarvis stated she anticipates substantial issues if they were to move the house back with materials during construction, excavation and a lot of disturbances that will drive materials into the lake. Ms. Callaway suggested the property can be used in strict conformance to the ordinances. Chair Jarvis questioned however whether the owners are able to use the house as they don't know for fact that inside the home can be reconfigured.

Vice Chair Anderson stated the property is not currently in conformance and cannot be because the building is already in the 75' setback and it's not being moved. In order to use their building, all they can do is add on a little bit. She stated the proposal is for an existing building, the building is where it is.

Ms. Callaway stated this house is for part-time use, and it would be making an exception she doesn't want to make. Chair Jarvis stated they can't make a distinction or base criteria on the difference between full or part-time use.

Vice Chair Anderson stated it would be a hardship if the owner feels like they can't use the property safely; they aren't proposing to redo or move the house, just a small addition to enable them to use it. Mr. Bickford stated he is concerned if they start making all these exceptions. Chair Jarvis explained they are to take each case as separate and unique; one case cannot set a precedent for a following case. She stated in her years on the Board, very rarely do they receive requests for an addition; it's typically a complete tear down and rebuilt which is a completely different ballgame.

Ms. Callaway stated she has a problem with this proposal supposedly addressing a safety issue within the house when there are inherent safety issues getting to the house from the parking area. Chair Jarvis stated the applicant explained how the access to the house is obtained safely and made it clear the home is not used in the winter.

Vice Chair Anderson noted the proposed plans also include rebuilding of the walkway; pervious surfaces are also shown to melt snow and ice more quickly. She stated a new walkway is safer than what is there currently. Vice Chair Anderson explained what they said saw on the Site Walk, including the tree cover and the effects of cutting those down and including the removal of root systems which would have a negative impact on the property and the lake. She reiterated the intent of the owners is not to move the house and stated the Board needs to take the proposal as presented. She outlined the reasons given by the applicants for their proposal as presented, which include the facts they don't want to disturb the land and would trigger the need for a Conditional

Use Permit; they don't want to disturb a lot of land and want to keep the property with the trees and character of the lot. She stated the proposal is not to rebuild the entire home; they want to only add on a small addition with the intent of keeping the home and character.

Motion: *Based on plans dated May 14, 2021, and information received from at the June 17, 2021 public hearing, to grant the following variances requests:*

Article V Section E: Dimensional Requirements for Town of New Durham. E. Flood Hazard Area and Water Body Setbacks. No new buildings, except for water-related structures, shall be located in a flood hazard area, or less than seventy-five (75) feet from any water body or river.

Article XIV Section C.1.b: Shorefront Conservation Overlay District. Dimensional Requirements. Development with Waterfront Access: All development with water frontage or with rights of access to water frontage shall meet the following requirements: Building Setback: Except for water related structures (see below), all buildings shall be set back a minimum of seventy-five (75) feet from the normal high water level.

Article XXI Section G.2.b: Non-Conforming Buildings, Land or Uses. Non-Conforming Setbacks. Buildings: No new building, except for water related structures, shall be located in a flood hazard area, or less than seventy feet (75) feet from any water body or river course.

With the following condition:

- A New Hampshire Department of Environmental Services Shoreline Permit shall be obtained.

Motion by Chair Jarvis. Seconded by Vice Chair Anderson. **Roll Call:** Vice Chair Anderson – aye; Ms. Callaway -no; Mr. Bickford – no; Chair Jarvis – aye. **Motion failed, 2-2-0.**

Chair Jarvis asked if the applicant wants to proceed with the additional variance requests for Article XXI Section C.2 and Article XXI Section C.1. Ms. Richard stated they do not want to continue.

APPROVAL OF MINUTES

Meeting of March 21, 2021– Site Walk: Edits were made. **Motion:** *To approve the minutes as amended.*

Motion by Chair Jarvis. Seconded by Vice Chair Anderson. **Motion passed, 3-0-1** (Ms. Richard).

Motion: *To accept the April 18, 2021 Site Walk minutes as revised.* Motion by Chair Jarvis. Seconded by Ms. Richard. **Roll Call Vote** 3-0-2. Mr. Bickford and Ms. Anderson abstained.

Chair Jarvis noted Ms. Richards left the meeting at 9:28PM.

Minutes of 4/22/21 minutes were edited, but will not be approved until 7/15/21 meeting in order to verify a date on page 14.

A Special Meeting was requested for July 15, 2021 to finish the rest of the draft minutes.

FUTURE MEETINGS

July 13, 2021, 7:00PM.

ADJOURN

Motion: *To adjourn.* **Motion by Ms. Anderson. Seconded by Mr. Bickford Roll Call Vote:** Vice Chair Anderson – aye; Ms. Callaway – aye; Mr. Bickford – aye; Chair Jarvis – aye. **Motion passed, 4-0-0.**

The meeting was adjourned at 10:45 PM.

Respectfully Submitted,

Jennifer L. Riel

Jennifer Riel, Recording Secretary