

**TOWN OF NEW DURHAM  
ZONING BOARD of ADJUSTMENT  
November 14, 2023, 7:00 PM  
*New Durham Town Hall, New Durham, NH 03855***

**MEMBERS PRESENT**

Terry Jarvis, Chair  
Linda Callaway, Member  
David Bickford, Member  
Heather Freeman, Member  
Bill Meyer, Member

**ALSO PRESENT**

Susan Stillwell, Land Use Assistant  
Tom Varney, Varney Engineering LLC  
Joshua Thibeault, Varney Engineering  
Tim Shanahan, resident  
Carol Shanahan, resident  
Sonja Leigh – via phone  
Brian Boop- via phone

**CALL TO ORDER**

Chair Jarvis called the meeting to order at 7:09 PM.

Introductions of the Board members were made.

Chair Jarvis outlined the Board's Rules and Procedures for public hearings for applicants and participants.

**Review and Determination for Completion Case #2023-013**

*Application submitted by Thomas Varney of Varney Engineering, LLC, on behalf of Brian Boop and Sonja Leigh for property located at Owl's Head Point Road, Map 108 Lot 048/001.*

The applicants are requesting Variances to the following within the Shore Front Conservation District and Steep Slopes Conservation District:

**Article VI. General Provisions/Use Regulations for Town of New Durham. C.**

**General Requirements. 3.a.ii.** No privy, cesspool, septic tank, or sewage disposal area shall be constructed or reconstructed less than seventy-five (75) feet from any well, or from a dwelling other than to which it is appurtenant;

**Article VI. General Provisions/Use Regulations for Town of New Durham. C.**

**General Requirements. 3.b.i.** No part of a leach field shall be located less than: twenty (20) feet from a property line on a lot less than 80,000 square feet; and

**Article XIV Shorefront Conservation Overlay District, Section C: Dimensional Requirements. 5. Lot Coverage:** Buildings shall not cover more than 15% of the area of a lot. No more than a total of 20% of the lot area, including buildings, shall be covered by impervious surfaces.

The applicant is requesting to construct a house on a vacant lot.

Chair Jarvis stated a letter was received October 10, 2023, requesting a continuance to November 14, 2023. Chair Jarvis stated after review, it was determined the public notice did not contain all the required information but was corrected and the request was granted.

Chair Jarvis confirmed all fees were paid, abutters notified, and public postings done.

Chair Jarvis asked if any Board member has a real or perceived conflict of interest with hearing this case. None was indicated. 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.

The Board reviewed the application for completeness. Chair Jarvis noted a new application was submitted to cover the variance that was missing with the previous applicant.

**MOTION:** *That the application for Case #2023-013 is complete and has sufficient information in the application package so the Board can make a decision.* Motion by Chair Jarvis. Seconded by Mr. Meyer. **Roll Call Vote:** Mr. Bickford- aye; Ms. Freeman- aye; Ms. Callaway - aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed 5-0-0.**

Chair Jarvis read the public notice into the record and opened the public hearing at 7:16 PM.

Tom Varney, Varney Engineering, LLC, representative for the applicants, stated they recently purchased the land and want to build a house on the lake; he stated the house will meet lot setback and size requirements. It will have a drive-in garage on the first floor; 4 parking spaces are provided. A well and septic system will be installed. A NH DES Shoreline Permit will be required. Mr. Varney stated the land was surveyed and photos presented to show the vacant lot. He distributed building floor plans for review by the Board. He stated the lot is flat and then slopes down to the lake; it is 175 feet deep. Most of the slopes are less than 15% and the lot is wooded. The lot size coverage and setbacks will be met; however, the building coverage is 15.3%. There will be a drip edge and porous pavement. The septic setback from the lake is met, but the side setbacks are not.

Chair Jarvis noted the table of required information indicates two bathrooms, but the floor plans show three. It was clarified there are actually four bathrooms and three bedrooms.

Ms. Callaway asked if the ground floor would be heated or have windows. Mr. Varney stated it would. The Board discussed the location of the septic on the lot. Ms. Freeman stated each set of plans is different and the information doesn't match with the table of information; some plans indicate four bedrooms versus three and the deck sizes vary; she is concerned about the inconsistencies and can't figure out how it actually looks. Chair Jarvis clarified the plans to be

considered are dated October 16, 2023. Mr. Varney stated the plans are just conceptual and are not architectural drawings. Mr. Bickford noted the Board is only considering the lot coverage and the septic tank for variances. Ms. Freeman stated when there are inconsistencies between plans, she wonders if there are other inaccuracies they aren't seeing. Ms. Callaway stated if they aren't sure of the dimensions of the building, they can't determine the lot coverage accurately. Mr. Thibault explained there won't be a basement; the garage will be on a slab and just the mudroom, garage, and bathroom on the ground floor; he confirmed the dimensions of the second floor will match the first floor. The second floor will have two bedrooms and three bathrooms; there won't be any space above this. The height of the building is not indicated on the plans.

Mr. Bickford asked about the distance of the septic tank to the property line. Chair Jarvis stated per Article VI, it needs to be twenty (20) feet. The distance of the septic tank to the abutters' property is thirty-five (35) feet.

Chair Jarvis asked if any steep slopes would be disturbed when building the house. Mr. Varney stated slopes will only be affected by the stairs.

Mr. Boop explained the plans indicate four bathrooms but the one at the ground level is a sink and a toilet in the mudroom. It will be a two-bedroom home with study/den/tv rooms as well.

Chair Jarvis opened the public hearing to input from abutters.

Tim Shanahan, abutter, stated his concerns are with the location of the septic tank and what will be done about the drainage on the hill in front of the lot, where the driveway will be located. Mr. Bickford stated that would be addressed by the Planning Board. Chair Jarvis explained that if the variances are granted, the applicants will need to go to the Planning Board for a Conditional Use Permit; she noted it is a private road so it will be up to the owners. Mr. Varney outlined the exact locations of the septic tank and leach field.

Ms. Shanahan stated they are in support of the proposal and look forward to having them as neighbors.

Ms. Callaway asked why the house wasn't shifted so the septic tank could be moved further from the Shanahan's house. Mr. Varney explained the location in relation to the rest of the lot and stated the septic system will be approved by NH DES. The Board discussed the number of bedrooms in relation to the septic system. Mr. Varney explained the number of bedrooms is determined by the lot size and soils. Ms. Freeman asked if there is any room to accommodate more bedrooms. Mr. Varney stated the leach field would change if it was going to be four bedrooms.

Ms. Callaway questioned why the lot coverage is not being reduced to 15% rather than 15.3% and the issue would be moot. Mr. Varney stated he has discussed this with the applicants and they can't make it smaller.

Chair Jarvis stated a variance is needed because instead of 15% building coverage, they are proposing 15.3% and asked the applicants why they need that extra percentage of building size.

Mr. Boop stated when they got their deed, it showed larger than the lot actually is and they didn't know the decking was counted in so they did try to get smaller; he stated they intend to live in this house year-round and would like to have the extra rooms such as a recording room. Ms. Callaway stated taking 2 inches off one side of the building would reduce it to meet the ordinance; she stated it is a small lot and the proposal is a large house with a lot of rooms. Chair Jarvis asked if there are any extenuating circumstances as to why they should grant the variance. Mr. Boop stated they are getting older; he stated when they designed the house, they did not understand the decking was included in the total square footage and they have already reduced it but don't want to reduce any more.

Chair Jarvis closed the public hearing at 8:21 PM.

Discussing and deliberating this case will be: Mr. Meyer, Ms. Callaway, Ms. Freeman, Mr. Bickford and Chair Jarvis.

### **Findings of the Facts:**

- The property is located in the Residential/Recreational/Agricultural District, in the Shorefront Conservation Overlay District and the Steep Slope Conservation District.
- A Conditional Use Permit from the New Durham Planning Board is required.
- Permission to build on a private road shall be obtained from the New Durham Board of Selectmen.
- A signed waiver of liability acceptable to the New Durham Board of Selectmen is required and filed with the Strafford County Registry of Deeds.
- The property is 0.36 acres with one hundred (100) feet of road frontage and 96 feet of water frontage.
- The total amount of building coverage is 15.3%.
- The building coverage is 2,413 square feet, or fifty-two (52) square feet over the 15%.
- There are four parking spaces, all of which will be located on the first floor underneath the main living space on the second floor.
- The house will be built on a slab.
- The setback to the road is thirty-four (34) feet.
- The building setback to the high-water mark is 75.9 feet.
- The building setback to the right side is twenty-two (22) feet and to the left is sixteen (16) feet.
- There will be two bedrooms; four bathrooms.
- The septic tank to the highwater mark is 138 feet.
- The septic tank to the abutter on one side is thirty-five (35) feet.
- The septic tank to the right side is ten (10) feet.
- The leach field to the highwater mark is 138.5 feet; leach field to the right and left property lines and the road are all (ten) 10 feet.
- The distance of the leach field to the abutting well is 130 feet.
- The building will not disturb any ground in the steep slopes.
- The stairway to the lake will disturb the steep slopes.

- The house will have a four-car garage at ground level with living space on the floor above and a deck.
- Stormwater measures include drip edges on the lakeside of the house, catch basin/dry well, and porous patio to be installed for storm runoff.
- The rain gutter under the eave is to be connected to the porous patio infiltration bed.
- Infiltration steps are to be installed for access to the lake.
- Wood steps will be installed over the steep shoreline banking.
- A four-foot high and 42-foot long retaining wall is to be installed along the east side of the driveway.
- A two-foot high and 20-foot long retaining wall is to be installed along the west side of the driveway.
- A 1,675 sq. foot porous driveway with a maximum width at the entrance of thirty (30) feet is to be installed.

***Discussion Variances Article VI, Section 3.a.ii and Article VI, Section 3.b.i***

*Granting the variance would/would not be contrary to the public interest:* Chair Jarvis stated it would not be contrary, because it is difficult to place the septic tank and leach field on a small lot; she stated both will be new. Ms. Freeman stated she still has concerns about the accuracy of the plans and concerns they are evaluating this based on a septic system that assumes a two-bedroom house but it is obvious by the plans that it's not a two-bedroom house; she stated the number of bedrooms is not dependent on the ownership and while the current owners may only be using two as bedrooms, there is clearly more than two bedrooms in the house, noting prior versions of the plans indicated the "recording room" and den were noted as bedrooms. Chair Jarvis suggested there could be a condition that the home must remain two bedrooms in perpetuity and recorded with the Registry of Deeds. Ms. Freeman stated she does not believe that is enforceable; she stated there is also a large number of rooms for a two-bedroom house and it doesn't make sense; it brings concerns about the neighborhood and environment, because the septic system would be overloaded if it's potentially used as a four-bedroom house. This would make it contrary to the public interest. Chair Jarvis stated the property will not support a four-bedroom leach field. Ms. Freeman stated she believes it is contrary because it's so close to the neighbors and due to the discrepancies. Mr. Bickford stated he agrees with Ms. Freeman. Chair Jarvis stated she has concerns that so many properties in the Shorefront Conservation District are being overloaded with people, but they can't assume the current or future owners will overload the property and they need to go on the information presented. Ms. Freeman stated her concerns are based on the plans presented, which have discrepancies and they need to look at the house and the property. Ms. Callaway questioned what this property can sustain; she stated the issue is building a house but shoehorning in the critical aspects such as the septic system; the property needs to be looked at by fitting the septic system in first and looking at the space for a house. She stated a 30-foot-wide driveway at the narrowest point is a lot for a small property; she stated a lot is being crammed into this lot. She stated there is room to make different configurations. Ms. Callaway stated the house is too big. She stated because of the size of the house, the septic system is being shoehorned close to abutters.

*The spirit of the ordinance would/would not be observed because:* Chair Jarvis stated she believes it would be observed as she agrees with the location of the septic tank and leach field. Mr. Bickford agreed. Ms. Freeman stated she does not believe it would be observed. Ms. Callaway stated it would not for the reasons previously stated. Mr. Meyer stated it would for reasons previously stated.

*Granting the variance would/would not do substantial justice because:* Chair Jarvis stated it does justice because the applicants want a home and have downsized from the initial request to comply with the ordinance; she stated not granting would not allow them to build at this point in time. Ms. Callaway stated she does not believe it would do justice and she believes there is a way to work within the building envelope to have the septic and leach field more in conformity. Mr. Meyer stated it would do justice as it would give the applicants a home. Mr. Bickford stated justice would be done. Ms. Freeman stated she has not heard any explanations as to why these variances are required other than they want to do something beyond what the ordinance allows. She stated she agrees the safety measures have been superseded by the desire to have certain features of the house and denying the variance would not prohibit the applicants from building on the property as there is still substantial space to build the necessary sanitary facilities to prevent contamination to the lake.

*For the following reasons the values of surrounding properties would/would not be diminished:* Chair Jarvis stated she doesn't believe the values will be diminished; it will make the property more taxable. Ms. Callaway and Mr. Bickford agreed. Ms. Freeman stated she believes the values could be diminished with an improperly placed septic system.

*Unnecessary Hardship:* Mr. Meyer stated the purpose of the ordinance is to allow building. Chair Jarvis stated the ordinance is there for a purpose and believes the applicant has shown that the condition of the property is such that the variance is needed to have a state-approved septic system and leach field. Ms. Callaway stated this lot is small but it's bigger than others and believes the setbacks could be met for the septic and leach field, and still allow for a reasonable-sized house. Ms. Freeman stated she does not believe there is a hardship and doesn't see anything that distinguishes it from other properties in the area that would support granting a variance. She stated if the variance is not granted, they could still build a house on the property.

**MOTION:** *Based on the plans dated August 28, 2023, the amended diagram dated October 16, 2023, the application signed September 15, 2023, and the addendum to the applications dated October 16, 2023, the public hearing of November 14, 2023, the Findings of Fact and Evidence in the Record, I move to grant variances to the following:*

**Article VI. General Provisions/Use Regulations for Town of New Durham. C. General Requirements. 3.a. ii.** *No privy, cesspool, septic tank, or sewage disposal area shall be constructed or reconstructed less than seventy-five (75) feet from any well, or from a dwelling other than to which it is appurtenant; and Article VI. General Provisions/Use Regulations for Town of New Durham. C. General Requirements. 3.b.i.* *No part of a leach field shall be located less than: twenty (20) feet from a property line on a lot less than 80,000 square feet.*

**With the following conditions:**

- The applicant must obtain a Conditional Use Permit from the New Durham Planning Board.
- The property shall never have more than two bedrooms.
- The applicant shall obtain a New Hampshire Department of Environment Services Shoreline Permit and septic system approval for two bedrooms.
- The applicant shall receive approval from the New Durham Health Officer for the septic system.
- The applicant shall comply with all applicable federal, state, county, and municipal law, regulations, and ordinances.
- The applicant shall submit “As-Built” plans to the New Durham Building Inspector at the conclusion of construction before a certificate of occupancy is issued.
- The applicant shall have all drainage and water plains signed off by the designer and Building Inspector.
- Approval from the New Durham Board of Selectmen to build on a private road shall be obtained.

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford - aye; Ms. Freeman - no; Ms. Callaway - no; Mr. Meyer - aye; Chair Jarvis - aye. **Motion passed 3-2-0.**

***Discussion Variances Article XIV, Section C.5***

*Granting the variance would/would not be contrary to the public interest:* Ms. Callaway stated it would be contrary as a decent house could be on this lot within the 15% building coverage parameters. Mr. Meyer stated it is not contrary because the 15% is an arbitrary point and he wouldn't prevent a house from going in for 0.3%. Chair Jarvis stated she does not believe it is contrary as it is only fifty-two (52) square feet. Ms. Freeman stated she believes it is contrary because of the discrepancies in the plans and descriptions and noted it is the applicants' burden to show that these factors are met and doesn't believe anything has been demonstrated to show the variance would not be contrary to the public interest. She believes that it is contrary and stated the 15 + or - is not how they should be applying the criteria otherwise it is unclear as to what the zoning requires. Mr. Bickford stated he agrees that it is contrary to the public interest and when you want to go over the ordinance, a good reason needs to be provided and none was presented.

*The spirit of the ordinance would/would not be observed because:* Mr. Bickford stated it would not be observed because it is unnecessary to go over the 15%; it is a large house for two people and it should have been scaled down. He stated it is putting a big house on a small lot and shoehorns the other aspects of the lot. Ms. Freeman stated she agrees the spirit is not observed for the reasons Mr. Bickford stated, she stated she hasn't received any information as to how this is consistent with the ordinance other than granting a variance based on personal preference. Mr. Meyer stated it is possible to reduce the building by fifty-two (52) square feet, but there isn't a point if it's only 0.3% out of the ordinance. Chair Jarvis stated she believes the spirit is met and sees fifty-two (52) square feet as minute.

*Granting the variance would/would not do substantial justice because:* Ms. Callaway stated it would not do substantial justice because there are no unusual characteristics of the lot or reason

why this property should be granted a variance. She stated she does not understand why the Town is the one that needs to make the accommodation for something that is trivial and can be changed. Mr. Meyer stated he believes it would do substantial justice as it's only .3%. Mr. Bickford stated he does not believe the house needs to go over and could just as easily be the right size and it is not their place to go a little more and a little more. Ms. Freeman stated she does not believe justice would be done for the same reasons. Chair Jarvis stated she believes justice would be done because it's only fifty-two (52) square feet and looking at the plans she sees they worked hard to get the building in the confines of the lot setbacks.

*For the following reasons the values of surrounding properties would/would not be diminished:* Mr. Bickford stated he doesn't believe they would be diminished. Ms. Freeman stated no evidence has been presented to indicate the values would not be diminished, and it is the burden of the applicant to show. She stated when it's a highly developed property and a property is overbuilt, the surrounding properties are diminished because an overbuilt property is a negative. A house built outside the zoning regulations is not generally a positive feature. Ms. Callaway stated she does not believe it would diminish the values as it is going to be a nice house. Chair Jarvis agreed.

*Unnecessary Hardship:* Ms. Freeman stated the denial of the variance would not result in an unnecessary hardship; it is still a buildable lot and there are options; there are no special conditions of the property to grant the variance. Mr. Bickford agreed. Ms. Callaway stated there are no special conditions on the property and does not believe there is a hardship as an adequate house could be built within the 15% ordinance. Mr. Meyer stated it would be a hardship due to increased design costs. Chair Jarvis stated she thinks redesigning could be a financial hardship, but it is certainly possible. The Board agreed the proposed use is reasonable. Ms. Callaway stated it is not reasonable to not meet the ordinance requirements without a good reason. Ms. Freeman stated the issue is not whether the house is nice, or they would be good neighbors but the issue is limited to the zoning variance.

**MOTION:** *Based on the plans dated August 28, 2023, the amended diagram dated October 16, 2023, the application signed September 15, 2023, and the addendum to the applications dated October 16, 2023, the public hearing of November 14, 2023, the Findings of Fact and Evidence in the Record, move to grant the variance to the following: **Article XIV Shorefront Conservation Overlay District, Section C: Dimensional Requirements. 5. Lot Coverage:** Buildings shall not cover more than 15% of the area of a lot. No more than a total of 20% of the lot area, including buildings, shall be covered by impervious surfaces.*

**With the same conditions as the previous motion.**

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford - no; Ms. Freeman - no; Ms. Callaway - no; Mr. Meyer - aye; Chair Jarvis - aye. **Motion fails 2-3-0.**

**MOTION:** *To deny the request for a variance to Article XIV Shorefront Conservation Overlay District, Section C: Dimensional Requirements. 5. Lot Coverage for Case 2023-013.* Motion by

Ms. Callaway. Second by Mr. Bickford. **Roll Call Vote:** Mr. Bickford - aye; Ms. Freeman - aye; Ms. Callaway - aye; Mr. Meyer - no; Chair Jarvis - no. **Motion passed 3-2-0.**

### **Letter from Building Inspector - Location of New Septic Tanks**

The Board reviewed and discussed the memorandum received from Building Inspector, Scott Lacroix, regarding proposed zoning ordinance changes to ensure septic tanks are at least 75 feet from the high-water mark, which is the same criteria used by NH DES. It was agreed to suggest the Planning Board have the Town Engineer review the proposal.

### **APPROVAL OF MINUTES**

Meeting of September 12, 2023, – Edits were made. **MOTION:** *To approve the minutes as amended.* Motion by Mr. Meyer. Second by Ms. Callaway. **Roll Call Vote:** Mr. Bickford - aye; Ms. Freeman - aye; Ms. Callaway - aye; Mr. Meyer - aye; Chair Jarvis - aye. **Motion passed 5-0-0.**

Meeting of October 10, 2023, Non-Public Session – Edits were made. **MOTION:** *To approve the minutes as amended.* Motion by Mr. Meyer. Second by Ms. Callaway. **Roll Call Vote:** Mr. Bickford - aye; Ms. Freeman - aye; Ms. Callaway - aye; Mr. Meyer - aye; Chair Jarvis - aye. **Motion passed 5-0-0.**

### ***Posting File PDF With Agenda***

Chair Jarvis stated there was recently a question raised whether application files can be shared electronically. It was agreed that it is public information and should be posted with the agenda.

### ***Response from NHMA Regarding Changes to Plans After Approval***

The Board reviewed the response from the New Hampshire Municipal Association. Chair Jarvis suggested that she, the Building Inspector, and Chair of the Planning Board sit down to discuss further.

### ***Grandfathering Discussion - Tabled.***

### ***Information from October 2023 OEP Program - Tabled***

### ***Planning Board Chair's Proposed Zoning Ordinance Changes***

The Board reviewed and discussed the proposed changes to the Shoreline Overlay District ordinance. Chair Jarvis stated she has some concerns she will bring to the public hearing.

### **CORRESPONDENCE**

The Board reviewed the following:

Notice of Decision from Planning Board RE: Map 101, Lot 039/008

Notice of Decision from Planning Board RE: Map 102, Lot 017  
Notice of Decision from Planning Board RE: Map 240, Lot 048  
Notice of Decision from Planning Board RE: Map 264, Lot 017 & 018

**NEXT MEETING:** December 12, 2023

**ADJOURN**

**MOTION:** *To adjourn the meeting.* Motion by Mr. Meyer. Second by Ms. Callaway. **Motion passed 5-0-0.**

The meeting was adjourned at 10:10 PM.

Respectfully Submitted,

*Jennifer Riel*

Jennifer Riel, Recording Secretary