

Town of New Durham Zoning Board of Adjustment Meeting

June 13, 2023

Approved August 8, 2023

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

June 13, 2023, 7:00 PM

New Durham Town Hall, New Durham, NH 03855

MEMBERS PRESENT

Terry Jarvis, Chair

Linda Callaway, Member

David Bickford, Member

Bill Meyer, Member

Wendy Anderson, Vice Chair – Excused absence

ALSO PRESENT

Susan Stillwell, Land Use Assistant

John Rattigan, Esq. of DTC Lawyers, PLLC

Tony Fallon, Architect

Tom Varney, Varney Engineering, LLC

Christopher Shields, applicant

Elizabeth Shields, applicant

Matt LoPiano, applicant

Josh Thiebeault, Varney Engineering, LLC

Steve Oles, Norway Plains

John Allard, resident

Jeff Allard, resident

Christine Bonoli-Stohlberg, applicant

CALL TO ORDER

Chair Jarvis called the meeting to order at 7:00 PM.

AGENDA REVIEW

No changes were made to the agenda.

Review and Acceptance of Case #2023-005

Application submitted by John Ratigan, Esq. of DTC Lawyers, PLLC on behalf of Christopher and Elizabeth Shields for property located at 10 South Shore Road, Map 19 Lot 037.

Applicants are requesting Variances to:

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.5: Shorefront Conservation Overlay District Dimensional Requirements: All development with water frontage or with rights of access to water frontage shall meet the following requirements: 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. And

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.

The applicants wish to add an attached garage to the existing house.

Chair Jarvis stated at the May 9, 2023 Zoning Board of Adjustment meeting, Ms. Callaway stepped down from this case due to a conflict and confirmed Ms. Callaway will continue to step down for the remainder of this case. Mr. Rattigan stated Ms. Callaway does not need to step down and objected. Ms. Callaway stated it is her decision and doesn't feel it is fair to the applicant as she didn't listen to all the previous discussions and will continue to recuse herself at this point.

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

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

Chair Jarvis stated the members deliberating this case would be Mr. Meyer, Mr. Bickford and Chair Jarvis; the applicant has the right to request a full Board and if requested, the case will be moved to the next meeting.

Mr. Rattigan reiterated he strongly believes that Ms. Callaway should sit on the Board to hear this case. Ms. Callaway stated she is not comfortable stepping in at this point.

Chair Jarvis stated at the May 9 meeting, items were identified which were missing from the application; a corrected set of plans has been received. The Board reviewed and discussed whether the application is now complete.

MOTION: *To accept the application for Case #2023-005 as complete as the application provides sufficient information to make a decision and to move forward with the case.* Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Meyer-aye; Mr. Bickford-aye; Chair Jarvis-aye. **Motion passed, 3-0-0.**

Chair Jarvis read the public notice into the record.

The public hearing was opened at 7:11 PM.

Tony Fallon, the architect for the applicants, stated when the applicants purchased the property, the ratio for the impervious surface was over 30%; he stated this proposal is for reconstruction with a deck on the front of the property and the building and impervious ratios are in compliance with the Town standards. Mr. Fallon stated the variance is for the water setback of 75 feet for the

garage; he stated the proposal is 51 feet but to have the garage beyond the setback would put it in the road as the lot is small. Mr. Fallon explained the lot predates the setback ordinance. He stated the impervious lot coverage is under 15% and under 20% building coverage. Mr. Fallon stated the proposal will make the lot attractive; he stated due to the materials of the driveway, they won't be able to use a snow plow and a snowblower will be needed, hence the need for a garage for storage. Mr. Fallon stated this will be a year-round residence for the applicants and a garage attached to the house is a reasonable request. He stated the size of the garage is 19 feet square while most garages are closer to 24 feet square so they are making attempts to keep the sizes proportional to the lot and others in the neighborhood.

Chair Jarvis stated the plans indicate the plans say the total lot area is 10,879 square feet while the current assessing card states the total lot area is 11,761 square feet. Mr. Fallon stated he followed the survey from Norway Plains. The Board agreed.

Mr. Fallon confirmed the house will be rebuilt on the existing foundation; they have a building permit of February 28, 2022, for the deck but the deck has been reduced in size. Chair Jarvis stated the building permit has expired so a variance would be needed for Article XXI, Section F.

Chair Jarvis stated the plans indicate the proposed house footprint is 1627 square feet and asked about the footprint of the garage. Mr. Fallon stated the garage is 361 square feet. There was a discussion about whether the second floor of the garage space is calculated with the total square footage.

It was confirmed the original home had two bedrooms and the proposed house will have two bedrooms; the proposed house will have the addition of a room and a garage.

Chair Jarvis stated a letter was received on March 31, 2023, indicating the proposal will decrease the impervious surface from 30.3% to 20.8%; the plans say its 19.9%. Mr. Fallon stated the letter was before the decrease in the deck size was made to the plans in an effort to comply with the ordinances.

Chair Jarvis said the septic system was approved in 1973 and asked why it won't be replaced. Mr. Fallon stated as of October 2023, the Building Inspector advised them to keep the existing system but just before the application for a construction permit, the Building Inspector requested plans for a new system, which were done. The plans were reviewed and Chair Jarvis noted variances will be needed for the setbacks of the new septic; she stated it will be up to the Building Inspector to determine how much of the area will be disturbed.

Christopher Shields, applicant, stated they intend to live in New Durham year-round and it would be nice to have a garage for storage. He stated the existing septic system was tested and passed.

Chair Jarvis noted the four required parking spaces were added and questioned why the garage wasn't moved closer to the road to get some of it out of the setback. Mr. Shields stated the space was used for the parking spaces and expanding the garage would increase the lot coverage.

Mr. Rattigan stated the impervious lot coverage is going to be reduced below 20.9% so a variance is no longer needed. He outlined facts for supporting the granting of the variance; he stated any benefit

to the applicant is not outweighed by a gain to the general public. Mr. Rattigan stated this property is unique from others in the area and the proposed use is reasonable.

Mr. Fallon stated the current deck and stairs are 242 square feet; the proposed is 28 by 9. Chair Jarvis opened the hearing to input from the public.

John Allard, resident, stated it was indicated at prior meetings by Chair Jarvis that grandfathering of foundations is permissible. Chair Jarvis clarified that is only applicable if building on the exact foundation. Mr. Allard stated per the RSA and ordinances, structures may be demolished and rebuilt with the same square footage as the original footprint; square footage can be expanded upward but the footprint cannot change. He stated all nonconforming structures within the 75-foot waterfront setback, must be moved back as far from the reference line as possible, per the State RSA. Mr. Allard stated multiple houses on South Shore Road have done the same in the last year but it is against the ordinance and questioned why the ordinances are not being adhered to. Chair Jarvis stated it is her interpretation of the ordinance that a foundation is part of a house; she stated 100% of the building has not been demolished and the foundation is intact. She suggested that if Mr. Allard has a different interpretation, he should discuss it with the Planning Board as they are the ones who write the ordinances. Mr. Allard stated there are five conditions that need to be followed for any structure within 75 feet of the lake; he stated the way the Board is interpreting the ordinances is not right and stated there are numerous houses that have been rebuilt in recent years and were not moved back from the lake.

Mr. Rattigan gave some suggestions to address Mr. Allard's concerns; he stated a town in a similar situation required all septic systems to be tested around the lake; test failure requires replacement. Chair Jarvis stated that the Septic Ordinance was passed in March 2023. She stated there is a committee going through every waterfront property and steps are being laid out to address noncompliance.

Jeff Allard, resident, stated he also disagrees with the Board's interpretation of grandfathering; he stated he is not aware of any concept in the State that supports grandfathering foundations. He stated the Shorefront Protection Act addresses nonconforming properties in RSA 483:B11,IV, noting rebuilding must be moved farther back. He stated if something is torn down, the intention of the Planning Board was that it needs to be moved back as far as possible. Mr. Allard stated the Planning Board did not anticipate people using a loophole regarding the foundation; the whole point of the RSA and ordinance is to have structures moved further back.

Mr. Allard asked what the second floor of the garage will be used for; he also asked if a new septic system will be installed. Chair Jarvis stated it will be a gym and there will be a new septic system; the septic will be less than 125 feet from the water. Mr. Allard suggested there be a requirement for a Conditional Use Permit from the Planning Board.

Steve Oles, Norway Plains, stated the buildings are not the issue, the rain is coming off the roof as clean runoff so the lake is not being polluted by the rain off the house. He stated there is an approved Shoreland Permit from the State; he explained property owners have legal rights that they do not have to move a structure back when demolishing and rebuilding, per RSA 483:B. Mr. Oles stated if this house is moved back further from the lake, there is no space for the septic.

Chair Jarvis stated the septic plan has been submitted and it will be up to the Building Inspector whether it will be acceptable.

Mr. Shields stated in the original application in May, a letter from an abutter was included, indicating support of the proposal. Chair Jarvis read the letter dated May 8, from abutter, Adam Costa, into the record.

Mr. Fallon outlined the shrubs and bushes they are planning to plant along the shoreline; he stated they are also proposing to turn the existing patio into its natural vegetative state. He stated in architectural terms, this project is being considered selective demolished while demolishing generally means it is all gone.

Tom Varney, Varney Engineering, stated the septic system is designed per the ordinance and is not at the discretion of the Building Inspector; he stated it is simple that if a system is within 125 feet of the lake, a variance is needed.

The Board agreed a Site Walk is not necessary. The Board agreed there is no need for a review of the plans by a third-party engineer.

Chair Jarvis closed the public hearing at 8:26 PM.

Chair Jarvis stated the members deliberating this case would be Mr. Meyer, Mr. Bickford and Chair Jarvis.

Findings of Fact

- The property is 0.249 acres.
- The property has:
 - 101.5 feet of road frontage
 - 108 feet and 112 feet on the sides;
 - 131 feet of Merrymeeting Lake frontage;
 - 12% slopes.
- The house was initially constructed in 1973.
- It has 2 bedrooms and a total of 5 rooms.
- The plans say the total lot area is 10,879 square feet.
- Plans say the proposed “house footprint” is 1627 square feet. Based on the testimony, the phrase “house footprint” includes the new proposed garage.
- The proposed garage will be 19 by 19 feet for a total of 361 square feet.
The property currently has 30.30% impervious coverage.
- The May 22, 2023 plans state there will be 19.9% impervious surface.
- The house is partially in the 50-foot water setback. The remainder of the house is in the 75-foot setback.
- The proposed garage will be entirely within the 75-foot setback.
- The house is being reconstructed on the previous footprint.

- The proposed house will have two bedrooms.
- The proposed house will have seven rooms.
- The square footage of the current deck is 222 square feet.
- The square footage of the proposed deck is 224 square feet.
- The new portion of the deck is 20 feet from the highwater mark.
- The septic field location is based on a “scaled location from the state-approved 1973 septic plan”, making it 50+/- years old.
- The applicants plan to install a new septic system which must comply with the New Durham Zoning Ordinance and the New Durham Septic Ordinance.
- The proposed garage will be set back 51 feet from the water line and is new construction.
- The garage is attached.
- Michael Travis, Realtor, Berkshire Hathaway Home Services submitted a letter stating this project will not diminish the value of surrounding properties.

Discussion Variance Article V Section E:

Granting the variance would/would not be contrary to the public interest: Mr. Bickford stated it would be contrary because it is within the 75-foot setback line; the desire to have a garage that is convenient, is not sufficient reasoning to grant the variance. Mr. Meyer stated he doesn't believe it is contrary as the rest of the building is within the 75-foot setback. Chair Jarvis stated she believes granting the variance would be contrary; she agrees there is a need to store items such as a snowblower, and four parking spaces are identified outside so a smaller storage building could be utilized.

The spirit of the ordinance would/would not be observed because: Mr. Meyer stated it would be in the spirit of the ordinance because it fits the usage. Mr. Bickford stated the spirit would not be observed because the ordinance restricts from building within the 75-foot setback. He stated the ordinance is very specific and says don't build in that area. Chair Jarvis stated spirit and public interest go hand in hand; she stated it's an incredibly small lot and she doesn't think adding a 19 by 19 square foot building is in the spirit of the ordinance on such a small lot within the 75-foot setback.

Granting the variance would/would not do substantial justice because: Chair Jarvis stated it would do substantial justice to the property owners but doesn't see any justice to the Town. Mr. Meyer and Mr. Bickford agreed. Mr. Bickford stated the purpose of the ordinance is to protect the water quality and he doesn't recall any justification for building a garage within the setback.

For the following reasons the values of surrounding properties would/would not be diminished: Chair Jarvis stated a letter was received from a professional in the real estate business, indicating values would not be diminished; no opposition was heard. Mr. Meyer and Mr. Bickford agreed values would not be diminished short term but potentially values could be diminished long term if the quality of the lake is diminished.

Unnecessary Hardship: Chair Jarvis stated she does not see any special conditions of the property; she stated it is similar to many of the properties in the immediate area. Mr. Meyer and

Mr. Bickford agreed there are no special conditions. Chair Jarvis stated it is reasonable to have a garage but not reasonable on a lot this small. Mr. Meyer stated it extends the usability of the property and is reasonable. Mr. Bickford stated its not reasonable with the space and proposal.

MOTION: *Based on the plans dated May 22, 2023, the application signed March 30, 2023, tonight's Public Hearing, the Findings of Fact and Evidence in the Record I move to grant a variance to: Article V Section 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.*

With the following conditions:

- The applicants shall obtain a Conditional Use Permit from the New Durham Planning Board.
- The applicants shall obtain New Hampshire Department of Environmental Services Shoreline Permit.
- The applicants shall comply with all applicable federal, state, county and municipal laws.
- The applicants shall receive variances to: Article XIV Section 2 and Article XXI Section F.
- The applicants shall receive approval from the New Durham Health Officer for the Subsurface Wastewater Disposal System, if applicable.
- The applicants shall submit a corrected set of plans (Size of lot; house vs house & garage) before a building permit is issued
- 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.
- No sleeping or cooking shall occur on the second floor of the garage.

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford-no; Mr. Meyer-no; Chair Jarvis-no. **Motion failed, 0-3-0.**

MOTION: *Based on the plans dated March 22, 2023, the application signed March 30, 2023, tonight's Public Hearing, the Findings of Fact and Evidence in the Record I move to deny a variance to: Article V Section 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.*

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 3-0-0.**

Chair Jarvis asked the applicant if they want to proceed with the remaining variance requests. Mr. Rattigan indicated they do.

MOTION: *Based on the plans dated May 22, 2023, the application signed March 30, 2023, tonight's Public Hearing, the Findings of Fact and Evidence in the Record, that a variance to Article XIV Section C.5. Dimensional Requirements, is not needed. Motion by Chair Jarvis. Second by Mr. Meyer. Roll Call Vote:* Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 3-0-0.**

Discussion Article XXI Section C.2

Granting the variance would/would not be contrary to the public interest: Mr. Bickford stated it is within the 75-foot no-build area so is contrary to the public interest. He stated the desire to have a place to store items is insufficient to override the ordinance. Mr. Meyer stated it is not contrary; the rest of the building is within the 75-foot setback and they need the storage space. Chair Jarvis stated she believes it is contrary; it is nice to have a two-car garage, however, there is a sufficient parking area in front of the garage; the entire building is within the 75-foot setback.

The spirit of the ordinance would/would not be observed because: Mr. Meyer stated it is observed because it fits the usage and there is no other place to put the storage/parking. Mr. Bickford stated the spirit is not being observed because it violates the ordinance to have a structure within the 75-foot setback. Chair Jarvis stated it would not be in the spirit as it is a fairly large building, all of which is in the 75-foot setback on a very small lot.

Granting the variance would/would not do substantial justice because: Chair Jarvis stated it would do justice for the applicants but not for the Town. Mr. Meyer and Mr. Bickford agreed.

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

Unnecessary Hardship: Chair Jarvis stated she doesn't know of any special conditions of the property; she stated it is very small but that is not unique to other properties in the area. The Board agreed there are no special conditions.

Chair Jarvis stated the proposed use is reasonable but having a garage of that size on a small lot is not reasonable. Mr. Meyer stated it is reasonable as it extends the usability of the home. Mr. Bickford stated it is not reasonable as it is in the no-build zone. The Board agreed there are no special conditions.

MOTION: *Based on the plans dated March 22, 2023, the application signed March 30, 2023, tonight's Public Hearing, the Findings of Fact and Evidence in the Record I move to grant a variance to:*

Article XXI Section C.2. 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: 2. Such expansion does not make any existing lot, structure, or use more non-conforming within the terms of this Ordinance.*

With the following conditions:

- The applicants shall obtain a Conditional Use Permit from the New Durham Planning Board.
- The applicants shall obtain a New Hampshire Department of Environmental Services Shoreline Permit.
- The applicants shall comply with all applicable federal, state, county and municipal laws.
- The applicants shall receive variances to: Article XIV Section 2, Article XIV Section 8 and Article XXI F.

- The applicant shall receive approval from the New Durham Health Officer for the septic tank.
- 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.
- No sleeping or cooking shall occur on the second floor of the garage.

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford-no; Mr. Meyer-no; Chair Jarvis-no. **Motion failed, 0-3-0.**

MOTION: *Based on the plans dated March 22, 2023, the application signed March 30, 2023, tonight’s Public Hearing, the Findings of Fact and Evidence in the Record I move to deny a variance to:*

Article XXI Section C.2. 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: 2. Such expansion does not make any existing lot, structure, or use more non-conforming within the terms of this Ordinance.

Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 3-0-0.**

Ms. Callaway rejoined the Board.

Deliberations and Decision for Case #2023-006

An Appeal of the Decision of the New Durham Building Inspector submitted by Eric Maher, Esq. of DTC Lawyers, PLLC on behalf of Christopher and Elizabeth Shields for property located at 10 South Shore Road, Map 19 Lot 037.

Chair Jarvis stated at the last meeting, several items were outlined for correction: submission of envelopes, documents referencing the Building Inspector’s decision of March 16, 2023, and the applicants’ representative will submit a letter explaining the errors in the application.

Chair Jarvis stated a letter of clarification dated May 23, 2023, was received on May 24, 2023; the 21 day deadline for additional information to be received prior to this hearing would have been May 22 and asked how the Board would like to proceed. The Board concurred with moving forward.

Mr. Bickford noted there are inconsistencies regarding the map and lot numbers on the documents and application. Chair Jarvis stated per the Town’s property tax card, 10 South Shore Road is Map 19, Lot 037.

Chair Jarvis read the public notice into the record. The case was started in May and continued to tonight.

Eric Maher, Esq., DTC Lawyers, PLLC, on behalf of the applicants, presented a summary of Findings of Fact for review by the Board. He stated this case relates to a decision of the Building

Inspector dated March 16, 2023 in which a request to extend a previously issued building permit was denied on the basis that variances were necessary, specifically Article V, E and Article XXI, Section C and F. He stated the property is currently approved for a single-family residence; until last year there was a 12 by 14-foot deck extending of the lake side of the house; in 2021 the Shields proposed a remodel of the home which would require a Shoreline Protection permit. On February 28, 2022, an application was submitted for a building permit for a deck, 12 by 36 feet. A permit was issued by the Building Inspector authorizing construction of that deck and a copy of the plans submitted to the Building Inspector was presented to the Board. Mr. Maher stated at the time the building permit was issued, the deck complied with the zoning ordinances in effect and it also complied with State statutes which allowed an extension of a deck toward a waterbody. Mr. Maher stated the permit was to be valid for one year with work commencing within 180 days of issuance. He stated the Shields obtained a Shoreline Protection permit; work was started within 180 days; no notice was sent to the Shields by the Building Inspector indicating the permit had been revoked or expired. Mr. Maher stated in December of 2022, substantial demolition work started on the property with general contractor, Jim Witham, the owner and principal of Two Guns Construction. This work included removing the deck and raising the structure down to the first floor; photos were presented to the Board. Mr. Maher stated on February 10, 2023, the project's framer died and left a substantial gap in the project; Mr. Witham notified the Building Inspector on February 22, 2023, prior to the expiration of the building project and asked for an extension. Mr. Maher presented a written statement from Mr. Witham as he was unable to attend this meeting. He stated the extension was granted by the Building Inspector at that time. In early March 2023, Mr. Fallon talked with the Building Inspector about the deck permit and then on March 16, 2023, the Building Inspector sent notice indicating that variances are needed for the deck. Ms. Callaway asked if they are sure the variances are in regard to the deck and not the garage.

Chair Jarvis noted the information submitted in the request for a permit in 2022 is not the same as the request in 2023. Mr. Maher stated per the provision of the New Hampshire State Building Code R105.5, every permit shall become invalid unless the work is commenced within 180 days or after the commencement of work; the Building Inspector is authorized to grant extensions up to 180 days. He confirmed the request for an extension was submitted in writing by email from Mr. Witham and provided a justifiable cause; at that time the Building Inspector indicated the extension would be granted but prior to March 16, 2023, nothing in writing was provided by the Building Inspector indicating otherwise. Mr. Maher stated when an applicant has invested substantially in a project, they are vested against changes in the zoning ordinance and allowed to complete a project. He stated there was extensive work completed and a distinct reliance by the Shields on the building permit and presented receipts indicating the scope of the work completed; he stated the entirety of the second floor of the house was removed; engineering and surveying work was completed and a Shoreline Protection permit was also obtained. Photos showing the work on the property were submitted for review by the Board. Mr. Maher stated under NH law, the Shields are entitled to complete their deck project. He clarified the zoning ordinance changed between the time the permit for the deck was issued, the work was started, and now. Ms. Callaway noted the deck is within 50 feet of the water so would go by the State regulations and not the Town's zoning ordinance.

Chair Jarvis noted the building permit was signed on February 28, 2022, by Celeste Chasse, not the Building Inspector, Scott Lacroix. Mr. Shields stated he met with Scott Lacroix to go over the plans and received the permit a few days later; he stated he picked up the permit from the administrative office.

Chair Jarvis stated she researched the zoning ordinances and confirmed the building permit was issued in accordance with the ordinances in effect at that time. Ms. Callaway stated she doesn't see where any of the variances apply to the deck but rather the garage. Chair Jarvis stated she agrees and the question now is whether the permit was renewed in a timely fashion.

Mr. Maher submitted an affidavit from Mr. Witham. Chair Jarvis read the affidavit into the record.

Chair Jarvis stated a letter was received from Scott Lacroix, Building Inspector and this was read into the record. She noted the letter from Mr. Lacroix contradicts the facts presented by Mr. Maher. Mr. Maher referenced the photos submitted, which were taken in December 2022, showing substantial work having been completed in regard to the deck.

Chair Jarvis noted the time is now 9:50 PM; per the Board procedures, no new cases are started after 9:30 so there are remaining cases that will need to be continued. The Board agreed to continue the review of this case until 10:00 PM.

MOTION: *To continue Case #2023-007, for an application submitted by Thomas W. Warney, PE of Varney Engineering, LLC on behalf of Christine A. Bonoli for property located at 149 Merrymeeting Road, Map 240 Lot 048, to July 11, 2023, at 7:00 PM, New Durham Town Hall.* Motion by Chair Jarvis. Second by Mr. Meyer. **Roll Call Vote:** Ms. Callaway-aye; Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 4-0-0.**

MOTION: *To continue Case #2023-008, for an application submitted by Varney Engineering LLC, on behalf of Matthew LoPiano, for property located at 309 South Shore, Map 113 Lot 26 and 69, to June 16, 2023, 7:00 PM at New Durham Town Hall.*

Motion by Chair Jarvis, Second by Mr. Meyer. Roll Call Vote: Ms. Callaway-aye; Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 4-0-0.**

Mr. Maher stated there was a confirmatory email dated February 22, 2023, from Mr. Witham to Mr. Lacroix and 21 days passed and Mr. Lacroix didn't correct Mr. Witham's understanding of the permit extension. There were no indications the permit extension was going to be denied. Mr. Maher stated the Building Inspector knew there was an issue and has an affirmative obligation per the State constitution to identify it but no concerns were raised by Mr. Lacroix until he ran into Mr. Fallon and indicated the permit was not going to be extended. He stated nothing was said by Mr. Lacroix to Mr. Witham to indicate the permit would not be extended and Mr. Witham relied on the initial phone call and confirmation email which was not rebutted.

Mr. Meyer stated he believes Mr. Witham was justified in receiving a renewal; they don't know what happened but it appears the permit was renewed. Mr. Bickford stated Mr. Maher's position is that the Building Inspector had an obligation to issue a renewal. Mr. Maher stated that is correct and cited *Laughlin on Land Use Planning*, which cites the New Hampshire Supreme Court. He stated property owners are entitled to complete their projects when substantial work has been started.

John Allard, resident, asked if expense was incurred on the actual deck itself. Chair Jarvis stated expense was incurred on the project. Mr. Allard asked if the deck was actually under

construction. Mr. Meyer stated permits were filed and the original deck was demolished to make way for the new deck; photos indicate the construction was underway. Mr. Shields stated expenses were incurred with all the deck materials that were purchased and on-site; then the framer died and deck work could not commence until the building was in a safe state to hang the ledger board; the ledger board was on the building when the work stopped.

Chair Jarvis stated a permit was issued October 3, 2022, to demolish the second floor and rebuild the two-story single-family home and the deck is referenced as being approved for expansion. She stated this building permit superseded the February 2022 permit for the deck only.

Jeff Allard, resident, stated the zoning ordinance changes being referenced solve the problem of the 75 versus 50-foot setbacks; he stated there has also been discussion in the past that proposed zoning ordinance changes should take affect up to 120 days prior or when it is posted publicly but does not believe this is relevant because the permit was already issued. He stated the permit was legal at the time it was issued.

Chair Jarvis closed the public hearing at 10:24 PM. She stated the Board members deliberating the case would be Ms. Callaway, Mr. Meyer, Mr. Bickford and Chair Jarvis.

Findings of Fact

- The property is 0.249 acres.
- On February 28, 2022, a building permit was issued for a 12 by 36-foot deck. It was signed by Celeste Chasse.
- The Building Inspector issued a certification relative to compliance on March 16, 2023, identifying the need for variances.
- Affidavits were received from James Witham, the owner and principal of Two Guns Construction.
- Included in the evidence is an email sent on February 22, 2023, which thanks Mr. Lacroix for agreeing to an extension of the deck permit.
- There is nothing in the record to reflect that a reply was sent by the Building Inspector stating that an extension was not granted.
- An application dated October 3, 2022, requesting to replace the primary structure on the existing foundation, construct attached garage, and expand the deck, signed October 3, 2022, by James Witham.
- A building permit, #2022-088, dated October 3, 2022, was issued for demolition to the first-floor deck and to rebuild a two-story single-family home.

MOTION: *To find that the Building Permit of October 3, 2022, covering amongst other things, the construction of a 12 by 36-foot deck is still in effect.*

Motion by Mr. Meyer. Chair Jarvis seconded the motion. **Discussion:** Ms. Callaway suggested the motion be amended to indicate the demolition of the deck is to put in a new one; she stated work will still need to start within 180 days. Mr. Bickford stated per statute, an applicant has the right to continue in good faith; he stated the demolition permit is different from the building permit. Chair Jarvis stated she believes the October permit covers the work for the deck as it is considered part of the house. She stated it is customary for this Board to determine a deck is part

of a house. Mr. Bickford stated this action is going to overturn the Building Inspector's decision. Ms. Callaway stated the wording of the application talks about the garage, the deck and primary structure; the building permit talks about the primary structure and deck with no mention of the garage and they are talking about different permits with different information on each page; she stated the October permit did not authorize a garage. Roll Call Vote: Ms. Callaway-abstain; Mr. Bickford-no; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 2-1-1.**

MOTION: *To overturn the Building Inspector's decision of March 16, 2023, to the extent that the Building Inspector determined that a variance was required to construct the 12 by 36-foot deck because the October 23, 2022, building permit authorized the construction of the deck and that permit remains in effect.* Motion by Mr. Meyer. Second by Ms. Callaway. Roll Call Vote: Ms. Callaway-aye; Mr. Bickford-aye; Mr. Meyer-aye; Chair Jarvis-aye. **Motion passed, 4-0-0.**

APPROVAL OF MINUTES

- Postponed.

ADJOURN

MOTION: *To adjourn the meeting.* Motion by Chair Jarvis. Second by Mr. Meyer. **Motion passed 4-0-0.**

The meeting was adjourned at 10:40 PM.

Respectfully Submitted,

Jennifer Riel

Jennifer Riel, Recording Secretary