

**NEW DURHAM ZONING BOARD OF ADJUSTMENT**

**New Durham Town Hall**

**January 14, 2020, 7:00p.m.**

*DRAFT: These minutes are strictly a draft copy and are awaiting amendment or approval at a subsequent, duly noticed public meeting. Amendments to these minutes will be noted in the minutes of said meeting. The draft will be posted on the website as a draft copy for public informational use only.*

**PRESENT**

Terry Jarvis, Chair

Wendy Anderson, Vice Chair

Stephanie Richard

Linda Callaway– Excused Absence.

Paul Raslavicus

David Wessel, Alternate Member – Excused Absence.

**ALSO PRESENT**

Thomas Varney, Varney Engineering LLC

Mike Wawrzkeiwitz, applicant

Cara Kelley, resident

Jeff Allard, resident

**CALL TO ORDER**

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

Chair Jarvis asked Thomas Varney, Varney Engineering LLC and agents for the cases on the agenda, whether he would like to postpone the public hearings due to only four members present. Mr. Varney replied no.

**AGENDA REVIEW**

Chair Jarvis proposed moving the Approval of Minutes to the end of the meeting. The Board concurred.

**REVIEW OF NEW APPLICATIONS**

**Review and Acceptance of the Application for Case # 2020-001**

Submitted by Thomas Varney, Varney Engineering LLC, representing BJW Enterprises LLC is requesting a Special Exception to the following:

Article VII Section A1, Commercial Use (including Minor Commercial Use) in areas designated “Unconstrained Developable” or “Constrained Developable” on Land Use Suitability Map also see Groundwater Favorability Map.

The property is located at Map 250 Lot 138, 30 Depot Road. If the application is deemed to be complete a Public Hearing may be held.

Chair Jarvis read the case into the record. Chair Jarvis asked if any member of the board has any real or perceived conflict with hearing this case. None was indicated. Chair Jarvis asked if anyone in the public believes any member 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 the scale indicates 1" equals 40' as opposed to 1" equals 20' as required. She noted there is only a building outline and no further information relative to the building; per aquifer regulations, an environmental impact study is required but none is submitted. It was confirmed the fees would be coming in from Varney Engineering. Chair Jarvis stated additional information would be needed regarding the building. She noted that if the special exception is granted, a conditional use permit and full site plan review and approval would be required from the Planning Board. Chair Jarvis questioned the inclusion of landscaping plans. Mr. Raslavicus noted that the planning board in the past developed guidance documents in respect to landscape design within the town center district., . Chair Jarvis asked Mr. Allard if a Site Plan Review would include landscaping. Mr. Allard replied it may, depending on the location of the property although the Board hasn't reviewed a landscape plan in a few years and isn't clear on the specifics at this time. Vice Chair Anderson suggested the landscaping plan could address water quality issues and land contours as well but she knows this site and it's flat so doesn't see it being needed for that issue. The Board discussed the appropriate jurisdiction between the boards regarding landscaping and after further review of the plans and maps, it was agreed no landscaping plan is needed.

**Chair Jarvis made a motion to declare that the application for Case #2020-001 submitted by Thomas Varney, Varney Engineering LLC, representing BJW Enterprises LLC for Map 250, Lot 138, 30 Depot Road, as incomplete, pending receipt of plans of 1" equal to 20' or request for a waiver and plans showing utilities to the new proposed building. Ms. Vice Chair Anderson seconded the motion. Motion passed, 4-0-0.**

Chair Jarvis noted anything to be submitted for the next meeting has to be received by close of business on January 27, 2020.

Mr. Varney stated he has been using the Land Use Suitability Map and asked if that will be changing soon. Chair Jarvis stated new maps have been drafted and proposed but she does not know when new maps will be coming out. She stated the rules applied to this case would follow the maps they currently have. Mr. Allard stated there is a state law which makes warrant articles take effect prior to the vote, if its approved. Chair Jarvis stated she would research that. Mr. Varney stated that when he discussed this with the property owner, the special exception is being applied for the change in use and the location and should be the focus of it. Chair Jarvis stated because the special exception addresses the aquifer this sends them to the article regarding aquifers and it indicates the environmental study must be done. It was clarified the change of use would be from a gun shop to trailer sales and services; the zoning under mixed use requires a special

exception for a new commercial use. The applicant stated he may also be selling snowmobiles and it was clarified this also needs to be specified on the application.

**Review and Acceptance of the Application for Case # 2019-007**

Submitted by Thomas Varney, Varney Engineering LLC, representing Sean and Cara Kelley is requesting variances to the following:

Article V Section E Flood Hazard Area and Water Body Setbacks,  
Article XIV C.1(b) (Dimensional Requirements setbacks)  
Article XXI Section G.2 (b) (Decks, Stairs, and Walkways Non-Conforming Setbacks.)

The property is located at Map 109, Lot 33 & 34, 59 North Shore Road. If the application is deemed to be complete a Public Hearing may be held.

Chair Jarvis stated Case #2019-007 was heard in November and the appropriate number for this Case is #2020-002.

Chair Jarvis read the case into the record. Chair Jarvis asked if any member of the board has any real or perceived conflict with hearing this case. None was indicated. Chair Jarvis asked if anyone in the public believes any member has a real or perceived conflict with any members of the board hearing the case. None was indicated.

Chair Jarvis stated that during the November 12, 2019 meeting, Case #2019-007 was heard; variance requests were approved in part and denied in part. Chair Jarvis stated before this application can be reviewed further, they must determine whether the application is materially different from the application considered at the November 12, 2019 meeting. She stated her review of the applications show that what had been a south-side enclosed porch has been removed and is now a deck; there is a new porch on the rear of the deck which is outside the 75' setback; the changes to the lakeside deck continues to be an expansion of 8' to 12'. The Board concurred that the application is materially different.

**Chair Jarvis made a motion that the application submitted for the January 14, 2020 ZBA meeting is materially different than the one considered during the November 12, 2019 ZBA meeting. Vice Chair Anderson seconded the motion. Discussion:** Mr. Raslavicus stated he was not present for the November 12 meeting and questioned whether he should abstain. Vice Chair Anderson stated this application is materially different and doesn't see a problem with him hearing the case. **Motion passed, 3-0-1.** Mr. Raslavicus abstained.

The Board reviewed the application for completeness. Chair Jarvis noted page 1 indicates variances were granted in December but it should be November. She stated the narrative indicates the house is being built on the same foot print however the map indicates the existing house is 39' from the lake and the proposed house is 38' from the lake so it will

not be 100% on the same footprint; it does not include the deck. Ms. Richard noted this was discussed at the last meeting and determined to be a typo.

**Ms. Richard made a motion to accept the application for Case #2020-002 as complete. Vice Chair Anderson seconded the motion. Motion passed, 4-0-0.**

Chair Jarvis opened the Public Hearing at 7:45pm. The public notice was read into the record.

Mr. Varney explained the changes made to the plans since the last application which include making the deck 8' wide instead of 12' wide; the house is the same as was originally proposed as is the septic system; the porous pavement is a bit smaller now as the deck was added but they are still under the threshold for the building size and lot coverage. He stated the entrance will go through the deck and this is important to the applicants. Chair Jarvis asked if the south side deck would have stairs. Mr. Varney stated no, and the entrance to the house will be off the driveway into the house. The lakeside deck stairs will be 4'. Mr. Raslavicus asked if the rest of the property is being torn down; Mr. Varney replied it is being completely demolished and rebuilt on the same footprint. Mr. Raslavicus questioned whether they may rebuild on nonconforming lot and suggested Section C of Article XXI comes into play for a new building. The Board discussed the interpretation of rebuilding in a footprint. Mr. Allard stated his understanding is that there has never been anything formalized which indicates that if you tear down something on a nonconforming lot, you are allowed to rebuild on the existing footprint; he stated he is not aware of that ever being codified and they have always followed state statute on this issue which allows rebuilding and expansion. Mr. Raslavicus stated that if it's a new building, it needs to conform to nonconforming setbacks and height requirements. Chair Jarvis asked if they need to require more variances for a nonconforming structure on a nonconforming lot. She stated it was her understanding that if the house is rebuilt on the same footprint, it's not subject to Article XXI. All the setbacks and the variance being requested is for the deck being inside the 75' setback. Vice Chair Anderson stated the precedence goes that a building being rebuilt on the same footprint doesn't disturb anything more but they now need to look at the building and the new deck on the side. Chair Jarvis stated at the November meeting it was determined the new house would be on the same footprint. The Board concurred they didn't need to look at that.

Chair Jarvis read the case into the record. Chair Jarvis asked if any member of the board has any real or perceived conflict with hearing this case. None was indicated. Chair Jarvis asked if anyone in the public believes any member 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 and continued to discuss the appropriate variances needed. It was confirmed the obsolete cottage is being torn down and a new building will be built on the same footprint along with the addition of decks. Chair Jarvis noted the variances to replace the failing septic has already been granted. Mr. Allard stated the Planning Board has a definition of obsolescence and the Planning Board

has generally agreed that people have the right to tear their house down due to obsolescence, and suggested Section B of Article XXI would apply. It was noted the Building Inspector issues building permits when structures are being rebuilt on the same footprint. Chair Jarvis suggested having the footprint issue be reviewed by Town Counsel and discussed further with the Building Inspector for application to future cases.

Chair Jarvis closed the public hearing at 8:29pm. She stated the members of the board deliberating the case would be Vice Chair Anderson, Ms. Richard, Chair Jarvis and Mr. Raslavicus.

**Discussion- Article V Section E, Article XIV C.1(b), Article XXI Section G.2 (b)**

*Findings of Fact:*

- Lots 34 and 35 were voluntarily merged in August 2019;
- Septic and leach field variances were granted in November 2019;
- The plan is to demolish the current house and rebuilt a structure on the same footprint;
- The property has slopes between 10 and 25%;
- ; The proposal is to change from an 8-foot-deep porous deck to a 12-foot-deep porous deck towards the water in addition to a porous deck on the side.
- There will be an enclosed porch on the reach of the house outside of the 75' setback;
- There will be a garage outside of the 75' setback;
- Stairs to the lake deck will be no more than 4' wide;
- The house will be 39' from the water;
- No living space in the garage;
- The lake and side deck will have the ground underneath covered with porous materials; and
- The new porch is outside of the 75' setback.

*Granting the variance would/would not be contrary to the public interest:* Chair Jarvis stated granting the variances would not be contrary to the public interest; there will not be more impervious surface and efforts have been made to have as much pervious surface as possible. Ms. Richard and Vice Chair Anderson concurred. Mr. Raslavicus confirmed the deck is currently 8' wide and thinks it's a significant violation of the present setback requirement of 75 feet. He thinks the 8' is excessive for entrance purposes. He doesn't think it is in the public interest and other applicants will want to use this case as an example.

*The spirit of the ordinance would/would not be observed because:* Ms. Richard stated she believes it is observed as the deck will be open as opposed to enclosed. Vice Chair Anderson stated the point for the 75' setback is for decreasing the closeness of any building or impervious surface to the lake and the deck on the side is needed due to the site contours and slopes, and it will be pervious. Chair Jarvis stated she believes the spirit is being observed as there will be more pervious surface.

*Granting the variance would/would not do substantial justice because:* Chair Jarvis stated there doesn't seem there would be much more that could be done due to the slopes on the land and this will decrease the land disturbance. Vice Chair Anderson stated she believes substantial justice will be done as the design has an open deck to get to the entrance of the house as opposed to an enclosed deck. She stated it gets the owners what they want and need without impacting the public. Ms. Richard concurred and stated they are trying to remodel but the entrance seems to be staying in the same area. Mr. Raslavicus stated he would have liked to see the entrance moved.

*For the following reasons the values of surrounding properties would/would not be diminished:* Chair Jarvis stated that based on the plans, it doesn't seem like it will be more visible to neighbors and it will improve the taxable property. The Board concurred.

*Unnecessary Hardship:* Chair Jarvis stated that in this particular case, the ordinance is in place to protect the lake and doesn't see how the proposal of a pervious deck with pervious ground underneath it is going to harm the lake more than what is occurring now. She stated the property is similar in size to other properties in the area but they need to consider the steep slopes in the area and they won't be able to move everything back. Mr. Raslavicus stated the variance being requested is for the south side deck but doesn't see that the deck is required for the purposes of ingress into the house and making it 8' wide ignores the ordinance. He stated he doesn't see it as a variance issue but the ordinance doesn't make sense and suggested saying "no" so the ordinance can be changed. Ms. Richard stated it would be hardship to not give some relief through a variance. Vice Chair Anderson stated 8' wide deck is a good size for being usable and moving large items in and out of the house and would be prohibitively more difficult if less than 8 ft wide. Mr. Raslavicus stated after hearing Vice Chair Anderson's comment, he would withdraw his comments in opposition to the 8' width.

**Chair Jarvis made a motion to grant the request for variances to:**

**Article V, Section E, Flood hazard area and water bodies setbacks:** no new buildings except water-related structures shall be located in a flood hazard area or less than closer than 75' from any water body or river;

**Article IVX, Section C.1.B: Dimensional Requirements Developments with Waterfront Access:** all developments with water frontage or rights of access to water frontage shall meet the following requirements- building setbacks except for water related structures all buildings shall be setback a minimum of 75' from the normal high-water mark;

**Article XXI, G.2.b – Nonconforming Setbacks:** the following setbacks are required for nonconforming buildings, land and uses addressed by this article: no new buildings except water related structures shall be located in a flood hazard area or less than 75' from a water body or water course.

**With the following conditions:**

- **The house is to be at least 39' from the lake,**

- **A Conditional Use Permit shall be received from the New Durham Planning Board,**
- **A Shoreline Permit shall be received from the NH DES,**
- **Neither the lake or the south side decks are to ever be enclosed and are to be built of pervious materials,**
- **The area under the lake and south side decks are to have pervious materials underneath,**
- **The walkways on the right and roadside of the house as depicted on the plans are to be removed and replaced with loam and seed,**
- **The deck stairs are not to exceed 4' in width.**

**Ms. Richard seconded the motion. Motion passed, 3-0-1.** Mr. Raslavicus abstained.

**Continued Review and Acceptance of the Application for Case #2019-008**

Submitted by Bryan Berlind of Land Technical Service Corp. on behalf of Joshua Morgan, requesting a variance to:

Article V Section D (Building Setback from Property Line).

The property is located at Map 218, Lot 1, 76 King's Highway.

Chair Jarvis stated the application was received on October 21, 2019; the Board reviewed the application at the November 12, 2019 meeting and it was determined the application was incomplete. Mr. Morgan was informed of the items which were missing including payment of fees; all materials needed to be received by close of business on November 19 for review at the December meeting and Mr. Morgan was sent via email, a copy of the Procedural Rules of the ZBA on November 19, 2019. As of December 10, 2019 no documentation or fees had been received and the Board discussed the application extensively and agreed to keep the application open until the January 14, 2020 meeting; if the application was going to be heard tonight, all materials would need to be submitted by December 23. The Land Use Assistant sent a certified letter on December 12, 2019 which was received and signed for by Mr. Morgan and it reiterated the discussions at the November and December meetings.

**Chair Jarvis made a motion to declare Case#2019-008 as submitted by Bryan Berlind of Land Technical Service Corp. on behalf of Joshua Morgan, closed due to lack of action on the part of the property owner and their representative. Vice Chair Anderson seconded the motion. Motion passed, 4-0-0.**

Chair Jarvis stated at a recent meeting they discussed developing a spreadsheet for tracking cases. A draft spreadsheet developed by the Land Use Assistant was distributed for review by the Board and comments or edits are due by January 28. Chair Jarvis stated this will be a master list of all cases going on, to be updated as they go, with a goal of having all cases closed by December 31.

*New Durham Zoning Board of Adjustment Meeting*

*January 14, 2020*

*Approved April 14, 2020*

Chair Jarvis reminded members of the Board that they may need to register to run for the upcoming election. She stated she is up for reelection, as is Ms. Richard; Mr. Raslavicus stated he has not decided if he will run again.

**FUTURE MEETINGS**

February 13, 2020, 7:00pm, New Durham Town Hall

March 12, 2020, 7:00pm, New Durham Town Hall

**APPROVAL OF MINUTES**

Meeting of December 10, 2019 – Edits were made. **Chair Jarvis made a motion to approve the minutes as amended and with the addition of all other attendees. Mr. Raslavicus seconded the motion. Motion passed, 4-0-0.**

**OTHER**

Vice Chair Anderson stated she would like to create a spreadsheet for adding up costs. Chair Jarvis stated she is working on that to give to the Land Use Assistant.

**ADJOURN**

**Vice Chair Anderson made a motion to adjourn. Ms. Richard seconded the motion. Motion passed, 4-0-0.**

The meeting was adjourned at 9:24pm.

Respectfully Submitted,

Jennifer Riel, Recording Secretary