

**NEW DURHAM ZONING BOARD OF ADJUSTMENT**

***Public Hearing***

**New Durham School**

**June 13, 2017, 7:00p.m.**

**Present**

Terry Jarvis, Chair

Wendy Anderson, Vice Chair

Joan Martin

Stephanie Richard

David Shagoury, Alternate

Arthur Hoover, Left @8:55 PM +/-

Attorney Whitelaw

**Also Present**

Laura Zuzgo, Land Use Administrative Assistant

See attached sign in sheet

**Call to Order**

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

**Agenda Review**

Chair Jarvis suggested moving the Ethics Policy acknowledgement and review of minutes to the end of the agenda. The Board concurred.

**Public Hearing**

**Case #2017-002**

Chair Jarvis stated this hearing is for an application submitted by Varney Engineering on behalf of Chris and Sharon Shorette, for variances to Article VI, Section 3.a.1; Article XIV, Section C.1.e, and Article XXI, Section E.2.b.

Chair Jarvis asked if any member of the board has a real or perceived conflict of interest. Mr. Hoover indicated he does and would be stepping down from the board for this hearing.

Chair Jarvis stated the applicant must show material change in the application that warrants the Zoning Board to look at the application again. If this is not done, the applicant has no right to resubmit. Chair Jarvis provided a summary of her review of the application to the Board and Mr. Varney.

Mr. Varney presented comments outlining the changes in the application from the 2016 application. He stated that the garage and house are smaller and further back from the lake than the previous application. Chair Jarvis stated that her review of the map indicates there should be a request for variance of the left setback for the garage as it is less than 15 feet; this has not been done. Mr. Varney replied the drip-edge is not included in the building. Chair Jarvis asked Mr. Varney to go through the

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spreadsheet and outline all the specific changes in measurements and differences between the 2016 and 2017 requests. Chair Jarvis asked about the distance of the leach field from the house. Mr. Varney stated that the:

- Setback from the lake was initially 67 feet and is now 74 feet.
- Garage setback from the right side of property remains 15 feet;
- Left side setback was 58 feet, 62 feet is now proposed;
- Total square footage of 624 to 480 with a smaller garage;
- Total lot impervious surface was 24 sq.feet. and is now 19.8 sq.feet.;
- Leach bed setback was 97 feet and is now 86 feet;
- Right setback was 10 feet and is now 14 feet;
- Left setback was 78 feet and is now 71 feet
- Top property line was 7 feet and is now 15 feet;
- Distance from well to leach field was 84 feet and now 63 feet; distance of well from building was 24 feet and today 15 feet;
- Distance of leach field from lake was 97 feet and is now 68 feet.

Chair Jarvis asked the Board to determine if there is a material change from the 2016 application to warrant review of the 2017 application. Attorney Whitelaw explained the precedent of a case in the 1980s where it was determined that an application that is denied cannot be resubmitted in hopes of a different result. She explained significant changes must be made to an application along with explanation from the applicant to determine a material change and stated this is needed in order to maintain finality of decisions made by boards. Chair Jarvis noted that many of the members of the current board were not on the board at the time of the last application. Ms. Martin stated she was on the board for the last application but still does not see any significant changes to the prior application. She also asked about setbacks from the intermittent stream as none are listed. Ms. Richard noted the adjustments noted are still non-conforming with the exception of ??? which is barely conforming. The buildings impervious surface has been reduced from 17.5% to 15%. Mr. Shagoury agrees that the application has changed materially specifically regarding the building size and the leach field setback.

**Chair Jarvis made a motion that the application as submitted by Mr. and Mrs. Shorette for variances Article VI, Section 3.a.1; Article XIV, Section C.1.e. and Article XXI, Section E.2.b. for 2017 has materially changed from the 2016 application. Ms. Richard seconded the motion. Motion passed, 5-0-0.**

Chair Jarvis opened the public hearing for this application. Chris Shorette, applicant, thanked the Board for their work and gave a summary of their plans for their property. He referenced letters of support from their abutters. Mr. Shorette stated with the denial of their prior application, they worked to address all the concerns of the ZBA and stated the plans will help the non-conforming lot be more conforming. He also stated the changes of the leach field will be a significant improvement over the cesspools that have been used for the last 62 years. Mr. Shorette also outlined

the other planned improvements to the property. Mr. Varney made comments regarding proposed improvements and outlined the lot and setbacks on the tax map.

Chair Jarvis read the requirements for granting variances to the appropriate articles and sections. She stated she understands that there is currently no garage on the property and that it would require ordinance variances that would make the lot even more non-conforming. Mr. Varney stated only a corner of the garage is within the setbacks. Mr. Shorette asked if the garage was fully within the setback from the shoreline, would there be any problems. Chair Jarvis replied they have to look at the plans as presented for the public hearing. Ms. Martin asked for clarification on the overhangs. Mr. Varney replied 7 feet at the closest point. Mr. Shorette asked the Board to consider the application in its entirety, noting they want to make this their permanent home. Chair Jarvis asked if the current building could be upgraded to a year-round residence without a garage. Mr. Shorette stated they would not consider not having a garage in New Hampshire. Ms. Richard asked for clarification on the distance of the septic system to shoreline. Mr. Varney explained the features of the new system. Ms. Martin asked about the garage setback from the stream. Mr. Varney replied it varies from 13 feet to 20 feet.

Chair Jarvis opened the hearing to public comment.

Madeline Grandin, resident, stated she has known the Shorettes her whole life and thinks their proposal is a significant improvement over the last proposal and it will benefit the Town with an improved lot and increased taxes, as well as permanent residents.

Mr. Varney reviewed the requirements of the variances in comparison to the request.

Chair Jarvis closed the hearing for public comment.

Chair Jarvis walked the Board through the requirements of the zoning articles and variances. Mr. Shagoury stated he doesn't see how the proposed changes are going to make the lot any less conforming. Ms. Martin stated she recognizes the applicants are doing well to follow laws with a property that doesn't have a lot to work with. Chair Jarvis stated that while upgrading the septic system and the cottage is in the best interests of the public and the Town, the lot is not being made any less non-conforming. Ms. Richard stated the variances requested do seem to be within the spirit of the ordinances in regards to the septic system. Chair Jarvis stated the lot is going to be more crowded but agrees the upgrades of the cottage and septic are in the spirit of the ordinance. Attorney Whitehall stated she recognizes the lot crowding by the addition of the new building presents concerns; however that is addressed in the lot coverage and doesn't see that as being a reason to find the spirit of the ordinance is not being met. Ms. Anderson stated there is certainly benefit to the applicant as well as the abutters. Mr. Shagoury stated that when you upgrade a

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seasonal house to a year-round dwelling, there is an impact added to the Town. Ms. Martin stated that there would be increased run off. Chair Jarvis stated that while the house would remain in the same location, there was concurrence by the Board that the property value of surrounding properties would not be diminished. Chair Jarvis noted there are other options for the applicant to do with the property. Mr. Shagoury stated that for the property to be used as it is as well as for the proposed land, is not contrary to the spirit of the ordinance. Ms. Martin stated the ordinance is to protect the natural lake and disagrees that the proposed plan is in the spirit of the ordinance.

- Granting the variance would not diminish surrounding property values. All Board members felt that there would be no negative impact to surrounding values.
- Granting the variance would not be contrary to the public interest. The new septic and house which will bring in more taxes are in the public interest/have public benefit.
- Granting the variance would do substantial justice. Yes but only in regards to the house and septic.
- The use is not contrary to the spirit of the ordinance. While most ZBA members felt that replacing the cesspool with a septic system was not contrary to the spirit of the ordinance M. Martin stated the ordinance is to protect the natural lake and disagrees that the proposed plan is in the spirit of the ordinance.

Chair Jarvis stated they have now discussed all the criteria for the variances. Attorney Whitehall stated the final ordinance to discuss is whether to grant a variance on the basis of a hardship. Chair Jarvis stated she does not believe unnecessary hardship would occur for the applicant if the variance was not granted. She noted there are other options for the property to be considered. The Board concurred. Chair Jarvis stated many of the lots in the area are nonconforming, smaller and have the same issues as this lot.

- Denial of the variance would result in unnecessary hardship to the owner  
No. You can have a new house without having a garage.  
Non-conforming lot becomes more non-conforming.  
No hardship to not have a garage
- No fair or substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property. N/A

**Chair Jarvis made a motion to grant a variance for Article VI, Section 3.a.1 which would allow the septic tank to be 77 feet from the lake rather than 125 feet from the lake. Ms. Anderson seconded the motion. Aye: Chair Jarvis, Ms. Anderson, Ms. Richard, Mr. Shagoury; Opposed: Ms. Martin. Motion passed, 4-1-0.**

**Chair Jarvis made a motion to grant a variance for Article XIV, Section C.1.e. and Article XXI, Section E.2.b. allowing the building to be less than 75 feet from**

**the lake, with the garage being 74 feet from the lake. Ms. Richard seconded the motion. Opposed: Chair Jarvis, Ms. Anderson, Ms. Richard, Mr. Shagoury; Ms. Martin. Motion fails. 0-5.**

### **Pubic Hearing**

#### **Case: Green Oaks Realty**

Chair Jarvis stated the next case is a continuance hearing for a request for special exception to operate a commercial business operation by Green Oaks Realty on Kings Highway in an area zoned Residential/Agricultural/Recreational zoning district. She stated they have heard from the applicant and all abutters at the April 11 meeting. The hearing will now be opened for public comment from the general public, followed by rebuttal by the applicant, abutters and general public.

Keith Babb, managing member of Green Oaks Realty, gave comments in regards to concerns brought up at the last hearing, specifically regarding blasting operations for producing aggregate. He stated blasting is the safest its ever been, the site location is further than state requirements for blasting, they provide pre-blasting testing and surveys for wells, stated they use a blasting company that is fully licenses and insured. Ms. Richard asked for specifics in ensuring quality is maintained and how they would address issues if water quality were affected. Mr. Varney stated there is a protocol through the DES in monitoring water quality and explained the process.

### **Pubic Comment**

Ken Marshner, resident of Wolfeboro, stated he lives in the Sherwood Forest Development which is expected to be affected by this project. He stated he submitted a letter on March 24 to the ZBA which outlined their proposal more specifically and stated he has attended all the public hearings associated with this project. Mr. Marshner stated that with respect to the special exceptions by the ZBA, commercial use is the wrong use for the special exception rules especially within the Residential/Agricultural/Recreational zoned area. He referenced the Impact Report and noted this project is anything but a minor commercial use and stated a mining operating requested by Mr. Babb does not meet any of the criteria. Mr. Marshner stated one of the reasons for opening the pit is for the convenience of trucks and landscape materials; another reason is Mr. Babb indicated he needs to raise money to properly close his other pit on Kings Highway which was not closed in a timely fashion as required by permit. Mr. Marshner stated there are certain requirements that must be met and these reasons don't pass for being a special exception. He stated this project is a big deal with many residents concerned about the rezoning effects it will have on all. Mr. Marshner stated the Department of Environmental Services would require a groundwater monitoring system along with an Alternation of Terrain Permit which is 8 pages, not just a page and a half as presented by the applicant. He also noted that the plans presented to the Regional Planning Commission indicate 300 million tons of material, which is not indicated on the ZBA application. He noted none of the federal permit applications have been submitted

which should be prior to the local application for a special exception. Mr. Marshner stated the request and the project has no merit.

Nicholas Davenhall, resident, stated the law clearly states all landowner abutters are to be notified but only three abutters were notified, of which he was not one although he owns 40 acres directly across from the proposed property. He also stated his concerns with dump trucks on the road as well as concerns regarding location in proximity to his home and well.

John Kuc, resident, Wolfeboro, stated he has many concerns with this proposed project. He cited safety traffic studies as well as the projected truck traffic. Mr. Kuc stated he has done studies of the traffic in the intersection and noted the 2% number as indicated by the proposal needs to be looked at closer. He referenced a recent UCLA study indicating the hazards of diesel exhaust fumes; studies showing traffic affects; also noting calculations of the amount of quarry output. Mr. Kuc also raised the issue of proposed property values and suggests this needs closer examination. He stated the potential for groundwater contaminations, effects on property values, etc, are just a few of the negative impacts of this plan.

Richard ????, former resident, stated he recently sold his property located 300 feet from the quarry and had to drop his previously appraised price by \$50,000 in order to sell. He suggested finding a decent appraiser to give figures on property values.

Steve Peterson, resident of Wolfeboro, president of Sherwood Forest Development presented a map indicating the location of the quarry to the surrounding development. He asked about the monetary ability/bond requirements of Green Oak Realty to provide insurance to the residents of his development in the event there is a problem with water supply.

Gail Holme, resident, stated they purchased their land 28 years ago and entered into a covenant with New Durham and put 32 acres of their land into conservation to protect the water sources and wildlife. She stated the affects the project will have on the wildlife and lands is unthinkable.

Bob Mathis, resident, commented in regards to wells and how they need to be taken care of. He stated Mr. Babb indicates a survey will be sent out annually but where do they turn for immediate response to issues and he has little confidence that they will take care of affected wells; no environmental studies have been done and they haven't taken care of their prior pit. Mr. Mathis stated the offer of a single survey is insulting.

Jan Kaskiewicz, resident, Wolfeboro, stated they have lived on Middleton Road for 30 years, have worked hard to take care of their property on Rust Pond and are very concerned about the loss of property values with the gravel pit. They are also very concerned with the contamination of the air and water quality of the area as well as

the damage of the trucks on the roads, effects on wildlife, safety of residents on the roads.

Mr. Kuc stated back in April a question was asked about the dust from rock crushing and noted there is an EPA provision for particulate emissions known as “smoke school”. He explained the process and indicated it is something that can be measured and monitored.

Mr. Peterson presented a map showing their well being 2000 feet from the proposed blasting site. He stated he is on record with the State of New Hampshire as being personally responsible for the wells in the Development. .

### **Applicant Rebuttal**

Mr. Babb stated under the federal Department of Labor requirements they are required to do dust testing and have passed for the last 15 years. He stated regarding water testing, they don’t use any more than the average four bedroom house. Mr. Babb stated the Gentry Pit has been empty for years and all the material that is there is trucked in, noting that pit creates three times the amount of truck traffic as he will. He stated what is being referred to as the “old” pit actually has an active permit and he could start blasting there tomorrow.

Mr. Varney commented in response to Ms. Richard’s question from the previous meeting about blasting noise, explained the process of blasting and noted it’s a muffled noise not a big bang. He stated a correction to the time period of operation indicated at the last meeting is the end of April, after roads are posted. Mr. Varney clarified the ownership of this pit is Green Oak Realty based in Chichester, not Red Oak Realty. He stated the concern about truck tailgates slamming, that can be controlled by Mr. Babb. Mr. Varney stated that when driving by the property on Middleton Road, all that will be seen is a barrier of trees along the road; he clarified the Alton pit is not abandoned and has an active permit; he stated water samples are taken before and after the blasting cycle; dust testing is conducted regularly within acceptable standards; explained the alteration of terrain permit is to come after the Planning Board approval and that’s standard procedure; he stated the 2000 feet distance for blasting is DES procedure and the Planning Board can address issues if wells are affected; he stated this isn’t a quarry but rather an excavation site; the entrance meets the standards; they did a noise study which was given to the Board which no one else has done; there are no smoke or noxious fumes from what is being done; he stated the letter from NH Department of Revenue Administration was presented to the Board was by a state official who has a personal interest in this project and should not be looked at by the Board; property values will not be affected since you can’t see or hear the production; ; material will be provided to a lot of people, more than just the local abutters and has a an impact for the greater good.

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Chair Jarvis stated that while the two lots on which the project is proposed are both owned by the same owner, no application for a variance on setbacks has been submitted. Mr. Varney stated that's a single page application to the Planning Board that would be done after approval. Chair Jarvis asked the plan for receiving fuel oil, as well as the plan for the Rust Pond/Lake Winnepesaukee Watershed in the event of a spill. Mr. Babb replied they are no different than any other and would have fuel brought in by tanker every few weeks and spills would be handled the same way as any other spill elsewhere. Mr. Varney showed a map of the site and explained the watershed.

**Abutter Rebuttals**

Jason Rhimers, attorney with BCM Environmental, representative of the Lake Winnepesaukee Golf Club stated at the presentation made by the applicant at the last meeting, nothing related to the special exception was presented and offered to reiterate a summary of eight reasons why the application should be denied.

Attorney Rhimers stated there are also legal issues which require the application be denied: it is an industrial use under the language of the ordinance; the excavation regulations do not apply and are not substituted for the zoning ordinance; while other benign uses would not be permitted, this use could be in any zone; the area is a major residential and recreational area and industrial use is simply not allowed, even by special exemption; gravel pits are not allowed on steep slopes according to the urban growth suitability ordinance as indicated by the land use map; the burden of proof is on the applicant to show where the frontage is located, and that was done tonight but it's not where it needs to be; the noise and pollution studies are supposed to be done by qualified individuals. Mr. Rhimes stated the rights of the Golf Club would be violated because submitted documents were not made available prior to the meeting. He explained the realtor used for the appraisal is not a qualified or independent expert. Mr. Rhimes noted that a special exemption has long term affects as when a special exemption is granted, it extends to any future owner of the property.

Carolyn Buell, resident, abutter, stated that in reference to perception versus reality, the map shown by Mr. Varney as being "green" for forest, is in fact logged. The berm is only so high and you can see everything that is going on. Ms. Buell referenced NH State RSA regarding diminution of property values and stated the letter by the realtor indicates a "small operation" when in fact this pit is proposed to be twice the size as the existing pit and suggested the realtor is not an expert in determining the affects of a quarry on property values. Ms. Buell referenced a study conducted by Dr. Diane Height, an expert in rural and environmental economics; she outlined specific statements contained in the study related to property values. Ms. Buell presented an assessment of a proposed quarry operation for another location which was done by WEI Institute to study the impact of gravel mining on property values and outlined specific details. Ms. Buell presented a map indicating the radius of various impacts.



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Stacy Trite, resident, abutter, stated the applicant seems to be minimizing and dismissing the potential negative impacts of the project. She explained where her house is located in relation to the project, suggesting the map is very misleading; she stated the burden of producing a noise impact study is not on the abutters; the once a year survey for water quality isn't too reassuring; she hasn't seen anything showing that this production is needed in the area.

Kurt Devylder, Esq., legal counsel for the Hatfields and Buells, stated the presentation has changed from the first hearing in which Mr. Varney made the presentation on behalf of the applicant and noted his position is inconsistent. Mr. Devylder noted the applicant is not a resident of the affect towns; the maps presented by the applicant are inconsistent and asked the Board to go back and review his letter of April which reiterates this use is not only industrial but also commercial. He went on to point out that project will not serve the greater good and there is significant opposition within the community.

**Other Interested Party Comments**

Tom Spanks, resident, stated that as neighbors, they should consider everyone. He stated Mr. Babb's presentation is ridiculous and doesn't care about the neighbors; everyone else's property values are going to be affected so Mr. Babb can make money and stated this has gone on to far and needs to be denied tonight.

????, stated he has attended both meetings for this and noted there are no studies being presented whatsoever except "back of the envelope" calculations.

Mr. Kuc stated that in regards to refueling equipment, he has been in this position of doing so himself and stated you can't compare the process used at residences to how it is done in a mobile equipment. He stated simply "calling the Fire Department" is unacceptable process for spills and noted a plan is required to be in place where there is any potential for contaminants being spread to local waters and aquifers.

Mr. Varney stated the applicant is the only one to have made any presentation regarding property values which is the letter from the realtor and noted they have met the requirements for the zoning ordinance and would like to have this approved tonight so they can go before the Planning Board.

Mr. Spanks stated Mr. Varney has not presented a single official study on anything.

Chair Jarvis closed the public hearing and reviewed the zoning ordinance requirements for the special exemption. Ms. Richard stated she considers this to be both a commercial and industrial use. Ms. Martin stated???? Mr. Shagoury stated he sees it basically an industrial operation, not commercial.

**Chair Jarvis made a motion that the use of the application for a special exemption as a commercial property, however the use has been found to be a combination of commercial and industrial with the primary use of the property to be industrial. Ms. Anderson seconded the motion. Aye: Chair Jarvis, Ms. Anderson, Ms. Richard, Mr. Shagoury, Ms. Martin. Motion passed, 5-0-0.**

Chair Jarvis stated that within 30 days, the applicant can submit a request to amend the application to primarily industrial use; abutters would then be notified; the Board will consider all testimony that has been heard at meetings as part of the review and people will have the opportunity to speak as to whether a special exemption should be granted for a combination primarily industrial and commercial business. She stated because this is industrial in part, there are additional requirements the Board will consider in granting the request, pursuant to Article VII, A.2.b.

**Chair Jarvis made a motion to continue the application allowing 30 days for the applicant to submit an amended application consistent with tonight's ZBA finding that the primary use is industrial. Upon submission of the amended application, the public will be notified by certified mail, all costs paid by the applicant. Ms. Richard seconded the motion. Motion passed, 5-0-0.**

Chair Jarvis closed the continuation of the application submitted by Green Oaks Realty.

The review of minutes was postponed until the next meeting.

#### **Acceptance of Request for Variances**

The application from Marsha and David Laughton, Map 108, Lot 053, requesting variances to Article V, Section E and Article XXI, C.2. The application was reviewed for completeness.

**Ms. Richard made a motion to accept the application as complete. Ms. Anderson seconded the motion. Motion passed, 5-0-0.**

Chair Jarvis opened the public hearing.

Marsha and David Laughton thanked the Board for reviewing this application. Ms. ??? stated their property is a double lot, one bedroom home with a full foundation for further expansion however have since been told they cannot do so. Proposed plans and pictures were presented for review by the Board. Ms. ????? noted the variance is not contrary to public interest.

*New Durham Zoning Board of Adjustment*

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*APPROVED*

Chair Jarvis closed the public hearing. She stated it doesn't appear this variance would be contrary to public interest and even though it's a nonconforming use, the foundation is already in place. It was noted that the overhang in the plans are within the impervious limits of 20%.

**Chair Jarvis made a motion to grant the variance request for Article V, Section E and Article XXI, C.2. Ms. Richard seconded the motion. Motion passed, 5-0-0.**

The meeting was adjourned at 11:51pm.

Respectfully Submitted,

Jennifer Riel, Recording Secretary