

December 14, 2021

Approved March 10, 2022

**TOWN OF NEW DURHAM
ZONING BOARD of ADJUSTMENT
December 14, 2021, 7:00 PM
New Durham Town Hall
APPROVED MARCH 10, 2022**

<https://us02web.zoom.us/j/88996906980?pwd=bUJ5RFJkL2VuY0xSUlNFUnlYNEt6dz09>

Meeting ID: 8899 9690 6980 Password: 784832

Or via telephone number: 1-646-558-8656; Meeting ID: 889 9690 6980 Password: 784832

*Technical difficulties contact Land Use Administrative Assistant Robin McClain at
ndlanduse@newdurhamnh.us. Assistance with Zoom application please contact Robin McClain
at ndlanduse@newdurhamnh.us or contact Zoning Board.*

Disclaimer: If technology fails, the meeting physically occurring will continue at the location

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PRESENT

Terry Jarvis, Chair

Wendy Anderson, Vice Chair – via Zoom

Stephanie Richard, member

Linda Callaway, member

David Bickford, member

ALSO PRESENT

Robin McClain, Land Use Administrative Assistant

John Ratigan, Esq., representative for Carol and Walter Shanahan

Sarah Barley, abutter – via Zoom

Steve Badger

Erin Badger

Nancy Bodwell, abutter

Philip Summers, abutter – via Zoom

Carol Shanahan, applicant – via Zoom

Greg Field, resident – via Zoom

CALL TO ORDER

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

PUBLIC RE-HEARING of Case #2021-015

Application submitted by Changing Seasons Engineering PLLC, on behalf of Walter and Carol Shanahan, Tax Map 108 Lot 107, Owls Head Point Road.

They are requesting variances to:

Article XXI Section C.1: Non-Conforming Buildings, Land or Uses. New Buildings and

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

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

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

Chair Jarvis stated the application was signed on March 16, 2021; the second application was dated June 1, 2021. A total of 9 variances were requested at that time. During the June 8, 2021 and July 13, 2021 Zoning Board of Adjustment public hearings, 7 of the 9 variances were granted. Chair Jarvis stated when the variances were granted, there were 7 conditions placed on the granting of the variances. After the notice of decision went out, a request dated August 5, 2021 was received requesting a rehearing. Chair Jarvis confirmed the request was received in a timely manner; the request was granted on August 10, 2021. The request for rehearing was postponed several times due to illness of board members and the inability to have more than 3 members present at any one time. Chair Jarvis stated the time for appeal of the 7 granted variances has passed.

Chair Jarvis read the public notice into the record.

Chair Jarvis stated a letter was received October 2, 2021 from abutter on lot 48, adjacent to the Shanahan property; this letter was read into the record. Mr. Kobakas stated he would be in favor of a 2 ft release on the setback requirements but not the proposed 4 ft encroachment. He stated he has a strong objection to the proposed location of the well. Chair Jarvis noted those two concerns have already been addressed in the other variances.

Chair Jarvis opened the public hearing at 7:07PM. to the applicants' representative.

John Ratigan, Esq., representative for Carol and Walter Shanahan, stated the facts that are in the record fully support the granting of the remaining variances and addressed the five criteria for the variances.

Mr. Ratigan stated the applicant has complied with applicable setback requirements by the 7 prior variances granted by the Board which address the deck setback and the setback of the well and septic. He stated the proposed plans do not make the lot any more nonconforming, given that the Board has already addressed nonconforming issues. He stated granting the variances will not

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87 be contrary to the public interest as they will not alter the essential character of the
88 neighborhood, nor will they threaten public healthy or safety. He stated the building will comply
89 with the building size of the lot at 14.3%; he stated it was an error of the Board to not find the
90 public interest standard was met with the remaining variances. Mr. Ratigan stated granting the
91 variance would do substantial justice and there is no evidence to indicate the character of the area
92 or health and safety of the public would be impacted. He stated the Board members who were
93 opposed to granting the variance did not acknowledge the criteria had been satisfied and the
94 record fully supports the spirit will be observed. He stated the public will not receive any
95 appreciable gain through the denial of the variances that will outweigh the loss to the applicant.
96 He stated Chair Jarvis noted this is the second smallest lot in the Owls Head neighborhood, and
97 the applicants have relocated the septic system to address concerns by abutters; the concerns
98 expressed by the Board members who spoke in opposition of the criteria were not consistent with
99 the findings of the Board met as to the criteria of each of the other variances which were granted.
100 He stated a letter from a local real estate professional was submitted, indicating property values
101 would not be diminished if the variances were granted; no professional rebuttal was submitted.
102 He stated the Board found there was a hardship presented by this application for all the variances
103 were granted; the same approach is supported by the facts with these two remaining variances.
104 Mr. Ratigan stated an email was received from the Fire Chief who confirmed there are no safety
105 issues with building on the lot.

106 Mr. Bickford confirmed variances were received for side setbacks.

107 Chair Jarvis opened the public hearing to members of the public.

108 Nancy Bodwell, abutter, read a letter from her sister into the record. She stated hardships do not
109 exist; she stated they should have done due diligence before purchasing the land and prior to
110 proceeding with any plans. She stated the need for 8 variances suggests the plan was conceived
111 without regard to the land; she stated the house does not fit the lot or neighborhood. Ms. Bodwell
112 addressed comments made by Mr. Ratigan; she stated there is no precedence that any one
113 variance must be approved subject to approval of other variances and should be considered
114 alone. She stated the lot cannot accommodate the requirements of the septic and infrastructure
115 and it should not be allowed to be made more nonconforming. Ms. Bodwell stated the Board
116 found the application for Case #2021-015 to be materially different from #2021-08 but none of
117 the square footage of the house was reduced. She asked the Board to look at the long-term
118 impact of these plans and to deny the variance requests.

119 Greg Field, resident, stated he is two houses from the Shanahan property; he stated he is
120 concerned Section C.2 is being assumed to be included in other things talked about and making
121 the property more nonconforming. He stated it is his understanding the Board should consider
122 whether the granting of the variances combined, result in creating a total change in the
123 conformance of the property.

124 Chair Jarvis stated since there is nothing on the property, anything done on it makes it more
125 nonconforming.

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126 Erin Badger stated she is the Shanahan's daughter; she clarified the house is not 3,000 sq ft as
127 stated by Ms. Bodwell and is actually closer to 2,200 sq ft; the house across the street is 3200 sq
128 ft and recently sold for over \$1,000,000 and finds it difficult to say building a home under the
129 size constraints could make anyone else's home value diminish.

130 Ms. Callaway stated the plans indicate the total impervious surface is 2200 sq ft. Stephanie
131 Richard, Changing Seasons PLLC, stated the basement will not be a finished space; there will be
132 a first and second floor but the second floor will lose space with the eaves of the roof.

133 Ms. Richard stated in regard to making the lot more nonconforming, anything built on the lot
134 will do so; she stated in regard to Article XXI, those variances have been granted and the
135 nonconforming part of Article C should also be granted.

136 Mr. Ratigan stated with the granting of the other variances, the criteria for nonconforming has
137 already been met. He stated it is difficult to have these two sections added independently upon
138 from the rest of the ordinance. He stated granting these two variances will not be inconsistent
139 with actions already taken.

140 Chair Jarvis closed the public hearing at 7:41PM.

141 Chair Jarvis stated the members deliberating the case will be Vice Chair Anderson, Ms.
142 Callaway, Mr. Bickford and Chair Jarvis.

143 *Findings of Fact*

- 144 • Variances have been granted to Article V, Section D; Article V, Section E; Article VI,
145 Section C.3.a.1; Article VI, Section C.3.a.2; Article XIV, Section C.1.b; Article XXI, Section
146 G.1.b and Article XXI, Section G.2.b.
- 147 • Currently there are no buildings on the lot.
- 148 • This is the second smallest lot on Owls Head Point Road.
- 149 • The applicant relocated the septic system to address concerns raised by abutters.
- 150 • An opinion was submitted by a realtor that the proposal will not decrease the value of
151 surrounding properties.
- 152 • A house across the street recently sold for over \$1,000,000.
- 153 • An email dated August 5, 2021, in which Mr. and Mrs. Shanahan thanked the Fire Chief for
154 discussing their proposals, indicates there are no fire safety issues.
- 155 • The exact size of the house is not known, with abutters stating the plans are 3,000 sq ft and
156 the applicant's engineer indicates it is not 3,000 sq ft.
- 157 • Mr. Kobakas, abutter, submitted written documentation stating he would accept a 2 ft release
158 of the setback but not the 4 ft encroachment, however the pertinent variance has already been
159 granted.
- 160 • The plans indicate the entire residence will be 1996 sq ft, including the garage.
- 161 • The New Durham Zoning Ordinance states building coverage cannot exceed 15% and this
162 will be 14.3%; the impervious surface is 16.2%, which is under the 20%.

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Chair Jarvis stated with the granting of the variances to the setbacks, in essence, they are saying the request complies with the requirements. She stated the various items, which were not complied with were granted variances, so they do comply via the variances. She stated if they say they don't want to make the lot more nonconforming, nothing can be built on the lot. She stated she feels this is a fair and appropriate request for variances to Article XXI, Section C.1 and C.2.

Mr. Bickford stated he does not agree with the request as it is going beyond the setback of 15 ft; the house is much larger than it needs to be for this size lot; he stated the setbacks are there for safety reasons and doesn't think it's fair as it's a major breach of responsibility to the ordinance. Chair Jarvis noted they are now in compliance with the ordinances as the Board indicated by majority vote with granting the variances.

Ms. Callaway stated she hasn't changed her position; she stated they should look at one of the variances granted was the 75 ft setback with the deck and effort was made to get the entire house behind the setback. She stated if the house had been in the 50 ft setback, the variance for the deck would not have been needed. She stated adjustments were made for the septic system and moved; they made a decent effort to do that, noting the size and lot coverage are within the limits of the ordinance. Ms. Callaway stated that because of those reasons, she doesn't believe it's fair to ask them to completely redesign the plans and it would be hardship for the applicants for the Board to turn it down at this point. She stated they looked at the variances on their own then step back to look at the whole thing and doesn't believe it's egregious to grant at this point.

Vice Chair Anderson stated the things she is concerned by, have to do with the fact that part of the house is a garage; she stated they have never considered a garage as part of a need for the living quarters. She stated there was no reduction in the size of the garage or house and they went over the side setbacks. She stated even though the Board looked at the side setback separately, when considering all of it together, the Board has allowed the coverage to go into the setbacks with the garage. Vice Chair Anderson stated the size of the lot is so small compared to others around it.

Discussion Article XIV, Section C. 1 and C.2

Granting the variance would/would not be contrary to the public interest: Vice Chair Anderson stated it would not be contrary; the application with the size of the house is fair. Ms. Callaway stated she agrees; the house fits within the constraints of the size of the lot; there is a decent septic and back from the lake. Mr. Bickford stated it is contrary as it is not in compliance with the side setbacks; he stated he doesn't understand the need for a 2400 sq ft house and it should be shrunk and codes applied. Chair Jarvis stated she does not feel it is contrary; she stated variances were granted to various setbacks; the house is outside the 75 ft setback; plans have been redone based on comments of the Board with concern about the location of the septic system.

The spirit of the ordinance would/would not be observed because: Chair Jarvis stated the spirit is being observed, noting variances have been received for the setbacks; redesigns were done as suggested. Ms. Callaway agreed. Mr. Bickford stated the spirit is not being observed as the west side setback is encroached. Vice Chair Anderson agreed with Chair Jarvis.

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Granting the variance would/would not do substantial justice because: Ms. Callaway stated it would do substantial justice; she stated the individual variances were granted and when considering the project as a whole, letting them build a house on their property would do justice. Vice Chair Anderson agreed; she stated the septic was moved and plans redesigned with the best application put forward. Mr. Bickford stated he disagrees; there is no justice and pointed to the westerly setback, noting there is no need to not reduce the size of the house to fit the size of the lot. He stated it should be denied and plans redone within the building envelope. Chair Jarvis stated she believes justice would be done in granting the variance; she stated the building size and lot coverage is within the ordinance and variances were received for multiple setbacks, which inherently says they are in compliance.

For the following reasons the values of surrounding properties would/would not be diminished: Chair Jarvis stated she doesn't believe values would be diminished; this will be a taxed at a higher rate and a statement from a realtor was received indicating the proposed plans would not cause values of surrounding properties to go down. The Board agreed.

Unnecessary Hardship: Ms. Callaway stated she believes there is a hardship and is not a fair and substantial relationship. Chair Jarvis stated there is not a fair and substantial relationship however the proposed use is reasonable. Mr. Bickford stated he believes there is a fair and substantial relationship. Vice Chair Anderson stated the request is reasonable, the lot is very small and they have done what they can within the constraints given. She stated the side setback is fairly minor compared to the other issues they have dealt with including the septic and lake setback.

Motion: *Based on information and discussion of the public hearing of December 14, 2021 in response to the request for a rehearing for Case 2021-015, that the following variances be granted:*

Article XXI Section C.1: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided: 1. They conform to Non-Conforming Setback and height requirements below;
Article XXI Section C.2: Non-Conforming Buildings, Land or Uses. New Buildings and Structures; Alteration and Expansion of Existing Non-Conforming Uses. All non-conforming property may be used for new construction of buildings and/or structures (including septic and leach fields) and any non-conforming building may be altered and expanded provided. Such expansion does not make any existing lot, structure, or use more non-conforming within the terms of this Ordinance.

With the Stipulation:

- All conditions granted to the variances previously granted in 2021 shall continue and be part of this decision.

Motion by Chair Jarvis. Seconded by Ms. Callaway. **Roll Call Vote:** Vice Chair Anderson – aye; Ms. Callaway – aye; Mr. Bickford -no; Chair Jarvis-aye. **Motion passed, 3-1-0.**

Finalize Changes in Zoning Board Rules and Procedures

The Board reviewed and discussed suggested edits to the procedures.

Motion: *To approve the draft procedural rules for the New Durham Zoning Board of Adjustment as discussed at the meeting of December 14, 2021.* Motion by Chair Jarvis. Seconded by Ms. Richard. **Roll Call Vote:** Vice Chair Anderson – aye; Ms. Callaway – aye; Mr. Bickford -aye; Ms. Richard – aye; Chair Jarvis-aye. **Motion passed, 5-0-0.**

Planning Board Proposed Zoning Amendments

The Board reviewed and discussed the proposed amendments to Article XIV and XXI. Chair Jarvis suggested adding an exception to Article VII; she stated they also need to ask for a definition of minor commercial use. Vice Chair Anderson will draft a definition for deck versus porch.

Vice Chair Anderson left the meeting at 9:04PM.

APPROVAL OF MINUTES

Meeting of November 9, 2021 – Edits were made.: *To approve the minutes as amended.* Motion by Mr. Bickford. Seconded by Ms. Callaway. **Motion passed, 4-0-0.**

Next Meeting: January 11, 2022

ADJOURN

Motion: *To adjourn.* Motion by Chair Jarvis. Seconded by Ms. Richard. **Motion passed, 4-0-0.**

The meeting was adjourned at 9:35PM.

Respectfully Submitted,

Jennifer Riel

Jennifer Riel, Recording Secretary