

Town of Newington, NH

ZONING BOARD OF ADJUSTMENT

Meeting Minutes, Monday, April 25, 2022

Call to Order: Interim Chair John Frink called the April 25, 2022, meeting at 6:30 PM.

Present: Interim Chair John Frink; Bob Byrnes; Kathy Latchaw Alternate Board members, Will Gilbert and Derick Willson; Building Inspector, Steve Paquin and Recording Secretary Jane Kendall

Absent:

Public Guests: Joe and Paula Akerley; Brandon Arsenault; Attorney Timothy Phoenix; Andrew Johnson; Ben Johnson; Alan Thompson; Ann and Denis Hebert; Bob Blonigan; Ted Connors; Lulu Pickering

1) Request by **Scott Akerley** for a variance from Article VII to allow the construction of a new 36.5-foot-tall home where 35 feet is the maximum allowable height on property located at **327 Fox Point Road, Tax Map 9, Lot 2-1.**

Joe Akerley opened the meeting by stating that he was representing his son, Scott Akerley who was at his home in Baltimore.

Board member, Bob Byrnes asked if the hearing should be postponed until the applicant Scott Akerley was available. Mr. Akerley replied that Scott was his son and he had been approved as his representative to speak for him. Mr. Akerley said they were concerned with increased consultant, and construction schedules and expenses due to delays. Mr. Akerley went on to say he could also phone his son if there were any questions he could not answer.

Mr. Akerley stated that the existing building was close to the shoreline that it should be, so they were proposing to move the house back, but the slope of the shorefront necessitated a walkout basement so that they could build a three-story house that was allowed, and avoid a lot of fill that wouldn't compliment the landscape.

Mr. Akerley went on to say that no one would see the back side of the walk out basement, and the abutting Lazzara house had eight beds and baths and his sons new house would be dwarfed in comparison.

Mr. Akerley stated that the architect was not aware that the town measured height from the lowest grade to the highest point of a roof, and as a result they were 1-1/2 feet higher when measuring from the lowest slope at the back. Mr. Akerley added that this subdivision had already been approved by the planning board, however, it had come to light that the Planning Board was not authorized approve conditional uses in this case.

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Planning Board Chair, Denis Hebert confirmed that his board had approved a legal subdivision with the required frontage and water lines, but they still needed a variance for the three-story house because of the sloped terrain.

Interim Chair, John Frink said he wasn't aware that the Planning Board had already approved the subdivision so he had attempted to do a site walk but was not clear where the building site would be when he went up their driveway. Chair Frink said he would have liked to have seen a plan in the packet that showed where the house would be, but he wasn't sure now that a site walk was necessary. Mr. Akerley said his son Scott's new house would be partially built on the footprint of his former family home that was known as the barn, which was right beside his parents' home where they now resided. Mr. Akerley said he had lived there for 45 years, and they were welcome to stop in.

Chair Frink asked if there were any abutters present objecting to the request, and there were none. Chair Frink said he didn't have an issue with voting in favor of such a small discrepancy, but he wished the Board had been better prepared. Chair Frink noted that a high-pressure water line was being installed for 12 new homes had been approved by the City of Portsmouth Water Department for the subdivision, and asked where the new homes would be. Mr. Akerley explained that they only wanted to subdivide a lot for his son Scott to build a home on the family parcel, but were required to build a public road with a water line to meet the subdivision requirements for frontage for the new home. Mr. Akerley said that the Portsmouth water department would not allow any new taps off Fox Point Road so they were required to bring water in from Little Bay Road, and now other residents on Fox Point Road and Motts Cove Road could benefit from the high-pressure line.

Mr. Byrnes asked if there was a blueprint available for the board to review. Mr. Akerley son-in-law, and the applicant's brother-in-law, Brandon Arsenault Stated that the proposed building plans had not been completed yet, but it would be a traditional two-story home with a walk out basement. Mr. Arsenault went on to say that instead of using the mean height the town measured from the lowest point to the highest peak of the roof putting the height over 1 1/2 feet.

Attorney Tim Phoenix said he was not representing the family for the variance, but had represented them on the subdivision, And the ordinance states that a special exception may be granted by the planning board, However, the town building inspector, Steve Paquin knew that state law requires special exceptions to be granted by the zoning board of adjustment. The applicant followed the rules of the town, unaware of the state law because of confusion in the ordinance.

Lulu Pickering of little Bay Road asked why the height of residential buildings was limited to 35 feet. Chair Frink replied that he thought it had to do with the fire department ladder truck. Mr. Hebert added that the town determined that 35 feet would also be a reasonable height to allow three stories, and in this case, which would be measured from the backside of the building.

Mr. Paquin stated that 35 feet was standard in other communities in the state, only Newington's ordinance was written to measure from the lowest grade to the highest point of the roof, which was a disadvantage on sloped terrain, and that was the reasoning for

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Special Conditions. Mr. Paquin added that the front of this building would only be 27 feet high.

Alternate Board member, Derick Willson commented that there was not enough information as to why the building was near a slope, or why the architect didn't design the house differently.

Chair Frink said he was concerned that the request for relief might be denied because the board was not comfortable deciding without more information, but they could do a straw vote, and all the Board members agreed.

Mr. Byrnes said he felt that the application was incomplete, and the board shouldn't make a decision at this time.

Alternate Board member, Will Gilbert added that the board of select men had appointed three new members that evening, and he was concerned that there might be a new board the following week. Will Gilbert said he was concerned that additional information could come up that would cause the Board to change their minds, and thought that would be an injustice. Chair Frink agreed.

Mr. Arsenault agreed that the problem was would the town ordinance and not the board. Mr. Arsenault asked if the board would consider continuing the hearing for another week or two. Chair Frink said he would.

Mr. Paquin provided the Board with a copy of the site plan from the office.

Chair Frink closed the public hearing.

Discussion ensued regarding the pitch of the roof, and Mr. Paquin said the design was to keep the roof as low as possible.

Chair Frink said they usually didn't have a topography map, and it didn't seem substantial to the request.

Chair Frink reviewed the five criteria for granting a variance, noting that the spirit and intent of the ordinance with still be observed do too the excessive circumstances of the property. Mr. Byrnes wondered if they should adhere to the ordinance closer considering that the Great Bay was a special body of water.

Chair Frink said granting the variance would not diminish the value of surrounding properties.

Chair Frink said to deny the request would create a hardship for the applicant because of the special conditions of the property as the height related to a banking that was unique to the property.

Mr. Willson wondered if it would be acceptable to grant the request if they could change the design of the house. Chair Frink responded that he never felt it was his purview to consider the details of a building design. Chair Frink said it was his job to determine if the request met the five criteria or not, and he felt the slope of the property created a hardship. Mr. Byrnes commented that many properties had undulations, however.

Board member, Kathy Latchaw reiterated that the applicant had asked for more time to provide more information so that the board wouldn't deny the request out right.

John Frink moved to continue the public hearing to Thursday, May 5, 2022. Kathy Latchaw seconded the motion. All were in favor.

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2) Request by **Andrew Johnson** for a variance from Article VII to allow the construction of a new 42-foot-tall home where 35 feet is the maximum allowable height on property located at **3 Fabyan Point Road, Tax Map 47, Lot 6C**.

Attorney Tim Phoenix stated that his applicant had requested a variance from the height restriction because the Ordinance requirement to measure from the lowest point of a lot was problematic on the sloped property.

The applicant, Andrew Johnson passed out a rendering of a similar house design with a walk out basement. Board member, Bob Byrnes asked if the proposed house would have a cupola on the roof as depicted in the photo. Attorney Phoenix replied that it would not.

Attorney Phoenix reminded the board that the ordinance allowed the planning board to grant a special exception from the requirement to measure the height of a house from the lowest grade to the top of the roof, however, the state requires that special exceptions be granted by the zoning board of adjustment.

Interim chair Frink ask if there was a natural slope or if the builder was digging down into the property. The applicant Andrew Johnson stated that they were digging down a little to level the slope, but the frontage of the property was still significantly higher.

Attorney Phoenix stated that as soon as the applicant had ordered roof trusses and scheduled contractors as soon as he received approval for the special exception from the planning board, but then the building inspector informed them that the state requires the Zoning Board of Adjustment (ZBA) to grant special exceptions, not the planning board. Attorney Phoenix sad they were asking for the zoning boards understanding that the applicant was not responsible for the planning boards lack of understanding of the state's requirement.

Attorney Phoenix stated that as approved in the case of Maleky vs. Glen, the request for relief was both not contrary to the intent of the Ordinance and the Spirit of the Ordinance would be observed, and the variance would not alter the character of the surrounding community considering that anyone would have to drive around to the back of the property to see the full height.

Attorney Phoenix stated that the 35-foot height restriction was based on fire protection history, but current equipment could protect all areas of the property so the variance would not affect the health, safety, or welfare of the surrounding community.

Attorney Phoenix said the intent of the Ordinance was to prevent overcrowding, and fire protection, and there was no fair and substantial relationship between the ordinance and the application of the variance.

Attorney Phoenix stated that substantial justice would be done by granting the variance, and denying the variance would provide no benefit to the general public.

Attorney Phoenix sad the use was reasonable, and a hardship would be created if denied because materials including roof trusses, and windows had already been ordered, and subcontractors had already been scheduled.

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Board member, Bob Byrnes asked if the back of the property would be visible from the water. Attorney Phoenix stated that trees surrounded the property, and no abutters were present two object.

Mr. Byrnes asked if there was any room to move the placement of the house to avoid the need for a variance. Attorney Phoenix stated that the placement of the house was in an ideal location according to the owner, and property owners had the right to place their homes anywhere on lots so long as they met the setback requirements.

Mr. Willson responded that he was not sure if it was true that an owner had the right to place a house wherever he wanted, or if he could be required to move it to a more optimal place. Mr. Paquin said the Board had a right to deny a request if they thought a building was not in the right location, but an applicant could respond with an appeal.

Attorney Phoenix added that the entire lot sloped toward the back so there would be a problem wherever they placed the house. Mr. Paquin agreed. Mr. Johnson said he didn't see why the ZBA would deny his variance request considering the planning board had already approved his request for a special exception as they understood it at the time.

The applicant's brother, Ben Johnson stated that there were already three houses on Fabyan Point Road That were over 35 feet high, another on 375 Little Bay Road, as well the house is on Lydia Lane, so he felt the ZBA was overstepping to deny this reasonable request. Mr. Byrnes Responded that the board could only look at the application before them, and he couldn't speak to why other houses were allowed to be over the height limit.

Chair Frink commented that it was unusual for the Board to encounter a mix up over the understanding of the town's regulations for a special exception and the states regulations.

Mr. Byrnes said he would like to see a site plan with topography, and do a site walk before making a vote. Chair Frink said Fabyan Point Road Was a town road, and Board members could have done a site walk before the meeting. Chair Frink suggested that the board move forward with a decision.

Discussion ensued regarding voting members, and whether the chair should vote or not. Mr. Paquin pointed out that the two alternate members were voting and that a chair would usually vote last to break a tie.

Chair Frink stated that he didn't think the request would be contrary to the public interest, and Mr. Wilson agreed.

Chair Frink stated that granting the request would not be averse to the spirit and intent of the ordinance, especially considering that there was a conflict with the town's bureaucracy, and lack of definitions. Chair Frink went on to say that it would be unjust to hold the applicant accountable too strict requirements that were not clear after approval by the planning board.

Chair Frink stated that the housing development existed, and this home was part of and approved subdivision that would not diminish the value of surrounding properties.

Chair Frink said the property was sloped, creating a hardship no matter where the house was placed.

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Kathy Latchaw moved to grant the request by Andrew Johnson for a variance from Article VII to allow the construction of a new 42-foot-tall home where 35 feet is the maximum allowable height on property located at 3 Fabyan Point Road, Tax Map 47, Lot 6C. Will Gilbert seconded, and the motion passed 4-1, with Bob Byrnes opposing.

(Will Gilbert left at this point in the meeting at 8:10 p.m.)

2) Other Business and Discussions:

Mr. Paquin recommended that newly appointed members attend the next meeting to be sworn in, and that a new chair also be nominated.

Board of Selectmen, Brandon Arsenault stated that Bob Raymond and Jennifer Kent Weiner had been appointed by the Board of Selectmen, along with Planning Board representative, Peter Welch.

Mr. Paquin stated that the five current members of the Board needed to return for the Thursday, May 5, 2022, public hearing continuation, and new members would have to abstain because they were not present for the hearing.

Minutes: *John Frink made a motion to approve the Minutes of January 31, 2022, meeting. Derick Willson seconded, and all were in favor.*

Adjournment: *John Frink moved to adjourn the meeting. Derick Willson seconded, and the meeting adjourned at 8:15 p.m.*

Next Meeting: Thursday, May 5, 2022

**Respectfully
Submitted by:** Jane K. Kendall, Recording Secretary

These Minutes were approved and adopted by the Zoning Board of Adjustment at their May 12, 2022, meeting.