

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT  
Meeting Minutes, August 19, 2019

**Call to Order:** Chair Matt Morton called the August 19, 2019 meeting at 6:35 p.m.

**Present:** Chair Matt Morton, Ralph Estes; John Frink; Meredith Hoyt; Edna Mosher; Alternate Cathy Latchaw; Town Planner, Gerald Coogan and Jane Kendall, Recorder

**Public Guests:** Matthew and Samara Robertson; Attorney Tim Phoenix; Joe and Paula Akerley, Mandy and Rob Murphy; Denis Hebert; David Hislop; Attorney Bernie Pelech; Jessica Winston from Tighe and Bond; Brendon Quigley with Gove Environmental; Town counsel, Attorney Spector-Morgan; Town wetlands consultant, Mark West with West Environmental; Russ Cooke

*Chair Morton announced that there was a full board and that the alternate board member would not be voting.*

*Town counsel, Laura Attorney Spector-Morgan informed the Board that they could choose whether to address the five criteria for a variance for each variance request when there were multiple requests, or they could address the criteria once for several, but they needed to establish and adhere to the same procedure each time.*

**Public Hearings:**

- 1) A request by **Matthew and Samara Robertson** for a variance from Article VII, Table VII-1 to place a structure within 20 feet of the front setback where 40 feet was required on their property located at **183 Fox Point Road, Tax Map 11, Lot 18.**

The applicants, Matthew and Samara Robertson appeared before the Board to present their request to allow their shed on their property on the corner of Fox Point Road and Old Post Road. Ms. Robertson stated that they sent a letter to the Town explaining that they talked to neighbors with sheds, and then misinterpreted and

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interchanged the front and side setback requirements when they placed the shed. Mr. Robertson said they noted that that other sheds on Fox Point Road appeared to be within the setback, so they thought there was a precedence, and wondered if this was a selective enforcement of the article.

Ms. Robertson said that their historic home was built in 1825, and was 25 feet from the right-of-way, and already non-conforming. She said they tried to match the clapboard shed to the house, and placed it as a continuation of their fence to provide privacy and protection from the busy road for their young children.

Ms. Robertson said they had a copy of Newington's town history and were selective in the placement of the shed among their plantings to re-establish the historic formal gardens of Maria DeRochemont the house and its residence. Mr. Robertson said they also wanted to leave the area where a freed slave was said to be buried.

Board member, Ralph Estes asked if they had requested a building permit, and Ms. Robertson said they had asked neighbors with sheds, and were told they didn't need one for the size of shed they were putting up.

Mr. Estes asked how big the shed was, and Mr. Robertson said it was 196 square feet and approximately 12 by 16 feet.

Town Planner, Gerald Coogan said the building inspector drove by and told the builders to stop, left his business card. Mr. Robertson said it was a factory shed that was put up quickly, but they did call the building inspector that day. Ms. Robertson said they then applied for a building permit and it was denied.

Board member, Edna Mosher said it was her understanding that they placed the shed there to block noise from the house across the street, and Ms. Robertson said it was true that it was part of their reasoning.

Ms. Mosher said she asked three residents on Fox Point Road about the noise, and they all said it was very loud. Ms. Mosher said she felt badly that they had to endure the noise, and asked if they went to the neighbors to ask if they would be quiet for the children during certain hours. Mr. Robertson said they had, and Ms. Robertson said they probably didn't understand that sound reverberated into their back yard until they pointed it out.

Ms. Mosher asked about the locations of other sheds, and Ms. Robertson said she didn't want to call anyone else out. Ms. Mosher said some sheds may have been placed before there were setback requirements, but other residents that put sheds within the setbacks since that time had to move them. Ms. Mosher said she did a site walk, and although she felt badly about the noise, it would not be considered a hardship, and it appeared that they could push the shed back.

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Board member, John Frink asked if the shed was on a pad, and Mr. Robertson said it was on cinderblocks placed on gravel.

Mr. Frink asked if they could move the shed, and Ms. Robertson said they would either must remove a tree or something else to move the shed.

Chair Morton said he understood that they made an honest mistake, but they had to adhere to setback requirements, and move the shed just as others had been required to do.

*Ralph Estes moved to deny the request by Matthew and Samara Robertson for a variance from Article VII, Table VII-1 to place a structure within 20 feet of the front setback where 40 feet was required on their property located at 183 Fox Point Road, Tax Map 11, Lot 18. Edna Mosher seconded the motion.*

Town counsel, Attorney Spector-Morgan informed the Board denial of a request could be done if it only missed one or more of the five criteria. She said there had already been substantial discussion that the request did not meet the criteria, including hardship so they were not required to go through each of the criteria further.

*The motion to deny passed 4-1 with Meredith Hoyt opposing.*

- 2) A request by the **Joseph C. and Paul S. Akerley** Revocable Trust of 2012 for a variance from Article VII, Table VII-1 to allow 160.91 linear feet of frontage where 200 feet was required for a subdivision of their property located at **325 Fox Point Road Tax Map 9, Lot 2.**

The applicant's legal counsel, Attorney Tim Phoenix appeared before the Board on behalf of the applicants Joe and Paula Akerley and their daughter Mandy Murphy and her husband Rob who hoped to live on the lot.

Chair Morton disclosed that he and his family used one of Attorney Phoenix's partners, but had nothing to do with Attorney Phoenix or the applicants. Attorney Phoenix replied that he didn't see an issue so long as there was no bias.

Attorney Phoenix stated that the Akerley's property had been in the family since the 1970's, and there had been several subdivisions over the years leaving 23 acres to Mr. and Mrs. Akerley, of which they were proposing to cut out lot for Mr. and Ms. Murphy.

Attorney Phoenix said although the length of the five family lots was long enough to average 200 feet of frontage per lot, the result of subdivisions by family members and approved by the Newington Planning Board over the years, and the last subdivision in

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2012 only left 360 feet of frontage for the 23 acre lot so they would not be able to meet the 200 foot frontage requirement for more than one lot in a subdivision, and were proposing that the last lot only have 160' of frontage.

Attorney Phoenix noted that Article 4 under the General Provisions Section 10 of the Ordinance says that no more than one principle building and only one residential building per lot is allowed, and stated that there used to be a three dwellings on the lot, but the cabin was no longer used so there were only two homes now with 360 feet of frontage so replacing two extra dwellings with one on a subdivision would improve the non-conforming property.

Attorney Phoenix stated that letters of support for the request had been submitted by Heather and Robert Lewis, and Brandon and Lori Arsenault.

Attorney Phoenix stated that the variance request for frontage of two homes with a combined frontage of 360 feet would not diminish surrounding property values because the nearest neighbors surrounding the new lot were family members.

Attorney Phoenix said that it would not be contrary to the public interest or spirit of the ordinance to replace two dwellings with one home with the same combined frontage, nor would it threaten the public health, safety or welfare by replacing the location of the newer dwelling closer to the road for easier access.

Attorney Phoenix stated that denial would result in an unnecessary hardship, and that special conditions existed because the family and the Planning Board allowed lots to come out of the larger parcel, leaving a large, oddly shaped parcel with only 360 feet pf frontage, which would not be just to limit to only one residence.

Attorney Phoenix said that the reason for frontage was separation of neighbors, site distances, and storm water management, but those purposes would be met by averaging the frontage of all the family parcels along that stretch of Fox Point Road, and it would be an injustice to deny the use of the lot. Attorney Phoenix added that substantial justice would be served by granting the request, and there would be no benefit to the public that would outweigh any loss to the applicant.

Mr. Estes asked if there was anything that would prevent them from renovating the existing house. Attorney Phoenix said there was not, but they would prefer to build a new home on a subdivided lot loser to the road to bring the use closer to compliance.

Mr. Estes asked about a previous plan that showed a cul-de-sac, and if there was any intention for further subdivision in the future. Attorney Phoenix said that was a previous discussion, but was not the current request before the Board.

Mr. Akerley commented that they had looked at several subdivision plans over the years, including a plan with their abutter David Knight and the Ramunos. Mr. Akerley

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said their intent was to keep 12 acres in current use, and this request was only to create a lot so his daughter to move to the family lot.

Attorney Spector-Morgan noted that any proposals for additional subdivisions would require the construction of a road that met Town specifications.

Chair Morton commented that the Ordinance didn't permit shared driveways.

Attorney Spector-Morgan replied that the driveway was on the wrong side of the new lot anyhow.

Ms. Mosher asked if there was any way to move the drive, and Attorney Phoenix said the drive was at the edge of the property. He said they discussed different ways to split, but thought it best to keep 200 feet of frontage for the larger lot. Mr. Frink noted that they would still need the same variance anyway they split it.

Ms. Mosher commented that she couldn't understand why they couldn't give the new lot have 200 feet of frontage. Attorney Spector-Morgan replied that would then change the existing lot to a non-conforming lot with less than 200 feet of frontage.

Mr. Coogan suggested that they discuss the possibility of a lot line adjustment with Mr. Knight. Attorney Phoenix replied that he thought Mr. Knight couldn't as he only had 200 feet of frontage himself, and that that this was a reasonable request for such a large lot.

Mr. Coogan stated that the applicant would still need to go before the Planning Board for a subdivision proposal, adding that this proposal would create an odd shape for the larger lot that wouldn't meet form factor, which would require a waiver. Mr. Akerley responded that they liked their odd shaped lot and intended on keeping 12 acres in current use for their enjoyment of wild life, so they had no intention of subdividing further. Mr. Estes commented that there were many odd shaped lots in town. Attorney Spector-Morgan pointed out that form factors were not in the Zoning Board's jurisdiction so that couldn't be a consideration in their decision.

Chair Morton asked Mr. Akerley if they were living in his parents' house now, and Mr. Akerley replied that they did, formerly having lived in an apartment above the barn. He said no one was living there for last year and they were slowly dismantling it.

Mr. Akerley stated that the stretch of property belonged to his sister, Jan Stuart and her husband who lived in the first house, then his daughter Laurie and son-in-law Brandon Arsenault's family, then is oldest sister, and then he hoped to add his daughter Mandy and Rob Murphy's young family to this lot.

Ms. Mandy Murphy said she and her husband and children would love to join their parents and her twin sister.

Chair Morton commented that he understood that it would be nice to add his daughter to the Akerley compound, and it was too bad that it hadn't been planned out

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better, but the Board had never granted a variance for less than 200 feet of frontage on a Town road. Attorney Spector-Morgan responded that the Board could grant requests that had never been done so long as they met the criteria. Mr. Coogan asked if it would set a precedent, and Attorney Spector-Morgan replied that the Board reviewed individual requests on their own merit, and their decisions did not apply to all other proposals.

Planning Board Chair, Denis Hebert commented that the applicant had talked about a subdivision years before so he thought that the Board should consider frontage as access to the back of the larger lot. Chair Morton agreed that there was no telling what children or children's children would do with the property in the future. Chair Morton asked if the Board could make a stipulation that the property would not be subdivided further. Attorney Spector-Morgan replied that a Board could not impose a restriction on the use of the property in the future.

Mr. Hebert stated that the requirement for a Town road was 50 feet of width so they should allow for 165 linear feet to allow future development.

Attorney Spector-Morgan suggested that the Board could adjourn to another room to consult legal counsel for a discussion. Chair Morton temporarily adjourned the meeting at 7:35 p.m., and reconvened at 7:46 p.m.

Chair Morton closed the public hearing, and opened the discussion to Board members.

Mr. Estes commented that part of the applicant's hardship was that that the frontage was not divided evenly from the start, and it left a uniquely shaped lot. Chair Morton agreed that it was a large, unique parcel with little frontage.

Mr. Frink stated that he thought it was a reasonable request, but they would need to trust that the applicant would abandon the second residence on their lot if the variance was approved, and Attorney Spector-Morgan stated that the Board could make that a condition of approval.

*Ralph Estes moved to grant the variance request by the Joseph C. and Paul S. Akerley Revocable Trust of 2012 for a variance from Article VII, Table VII-1 to allow 160.91 linear feet of frontage where 200 feet was required for a subdivision of their property located at 325 Fox Point Road Tax Map 9, Lot 2 as presented and advertised, with the condition that there only be one dwelling per lot. Edna Mosher seconded the motion.*

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*Ms. Mosher stated that the request was not contrary to the public interest and it would not alter the essential character of the locality, or affect the health, safety or welfare of the public.*

*Ms. Mosher said that the building of a new home would help to increase property values. She added that there was a hardship because it was a large parcel with little frontage, and granting the request would follow the purpose of the Ordinance for reasonable use of property.*

*The motion carried and all were in favor.*

- 3) **Doloma Investment, LLC** requested the relief from Article VII, Table VII-1 to allow structures and parking areas within 24 feet of the front setback where 75 feet was required; relief from Article VIII, Section 6 to allow cutting and disturbance within the 25-foot wetlands buffer; relief from Article VIII, Section 7 to allow structures within the 50-foot wetlands buffer setback; and relief from Article VIII, Section 7 to allow structures within the 100-foot wetlands buffer on wetlands greater than 3,000 square feet regarding their property located at **141 Shattuck Way, Tax Map 20, Lot 4**

Attorney Bernie Pelech stated that they had presented several variations of the proposal to the Planning Board, and that this version was the result of a consensus.

Mr. Coogan informed the ZBA members that the Planning Board denied the previous proposal without prejudice because it had changed, and recommended that they review the wetlands and location of the building, and the Conservation Commission agreed with Town wetlands consultant, Mark West's report that the revised location would have less impact on more sensitive wetlands.

Attorney Pelech said that beaver activity and flooding had changed the wetland delineations over the years, and Mr. West and Brandon Quigley with Gove Environmental came to an agreement on the new wetlands delineation. Attorney Pelech said that Minutes showing that the Conservation Commission support were included in their proposal.

Attorney Pelech stated that they were asking for relief from Article VII, Table VII-1 to allow structures and parking areas within 24 feet of the front setback where 75 feet was required as a result of the Planning Board's recommendation that they move the site further from the more sensitive wetlands of the Paul Brook area.

no further curb cuts were allowed off Woodbury Avenue, so it would be necessary to go through the wetlands to gain access to the site from Shattuck Way.

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Attorney Pelech said that they were requesting relief from Article VIII, Section 6 to allow cutting and disturbance within the 25-foot wetlands buffer to enable site development.

Attorney Pelech stated that they were asking for relief from Article VIII, Section 7 to allow structures within the 50-foot wetlands buffer setback to allow the development of pavement, curbing, drainage, retaining wall, fence, guard rail, landscape, and a concrete pad for electric utilities.

Attorney Pelech said that they were requesting relief from Article VIII, Section 7 to allow structures within the 100-foot wetlands buffer on wetlands greater than 3,000 square feet for access through the wetlands from Shattuck way as required by the Planning Board.

Attorney Pelech stated that the request passed the Malarkey vs. Glenn test because it would not substantially alter the character of the surrounding businesses, the Fox Run Mall, the nearby veterinarian clinic, office complex, or the energy plants and other industrial uses along Shattuck Way.

Attorney Pelech said as it was a well-designed proposal, and the public interest, health safety and welfare would not be threatened, and it would not be contrary to the spirit of the ordinance.

Attorney Pelech said a hardship existed because it was the one of the last lots to be developed so stormwater runoff from all the surrounding properties had created unique limitations with wetlands, buffer constraints, beavers, briars and invasive species.

Attorney Pelech stated that there used to be a motel across from Mitchell's Gulf years ago, but this would be the first hotel, which was a reasonable use allowed by the Zoning Ordinance.

Attorney Pelech said that the public wouldn't benefit from denial, but the hardship to owner from denial would be substantial because of the way the wetlands converged on the property.

Mr. Frink asked about the previous proposal for a hotel on the site, and Attorney Pelech said that they had received approval for a Quintas hotel in 2007, but the economy went bad in 2008, and it was never built. Mr. Frink said he thought a variance approval always went with a property in perpetuity. Mr. Coogan explained that a variance had to be exercised. Attorney Spector-Morgan added that a variance had to be used within two years.

Mr. Frink commented that it was said that retention ponds prevent runoff to surrounding areas, but this was a case where it did affect this area over time. Attorney Pelech replied that stormwater management plans were now required for new

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developments. Board member, Meredith Hoyt asked if they had pre-treatment for the area, and Attorney Pelech said they did.

Mr. Frink asked if there were any pervious grass pavement areas on the site. Jessica Winston from Tighe and Bond replied that pervious grass pavement was more expensive because it would require a filtration system to collect water from the surfaces, so it was not included in the design. Mr. West added that pervious pavement required for to five feet of good soil for drainage and filtration, but there was evidence of a lot of clay, and disturbance from an old home and road.

Ms. Winston commented that they would use tree plantings to treat the runoff from the site.

Mr. Estes stated that he had done a site walk during the recent rain storm and it seemed like the Everglades. Mr. West agreed that it was a challenging site, but they now had accurate mapping that included uplands.

Mr. Quigley agreed that the parcel was highly disturbed by the heavy surrounding development that was built before stormwater management. He added that many areas of wetlands were created because of the roadway, and that the beavers only came in and changed areas with their dams that blocked the flow of water.

Mr. Quigley said he had flagged the site in 2014 after one of the beaver trappings, and the area looked like the bottom of a pond. He said his 2014 flags then disappeared, but additional flagging for the sewer easement had been added.

Mr. Frink said he couldn't see the stream delineation, and asked if Paul Brook flowed to a culvert to Shattuck Way. Mr. West replied that the area was probably flooded by the beaver dam and turned into a marsh. Mr. Quigley pointed out that most of Paul Brook was off site, but it did thread up to the Shattuck Way culvert. He said they would upgrade the culvert under the accessway, and it would drain to that same culvert under Shattuck Way.

Mr. Quigley said the blue area on the map was for the State wetlands permits that would go before the Conservation Commission for a recommendation. He said there were more sensitive areas with wildlife, so the proposal was to the impact the less valuable area. Mr. Quigley said there were a lot of invasive species in the area and several trees that were pulled and falling from invasive Oriental bittersweet.

Chair Morton asked when they intended to break ground, and Attorney Pelech replied that they hoped to receive approval from the Planning Board by November or December 2019, and then they would break ground in Spring 2019.

Chair Morton closed the public hearing and opened discussion from the Board.

Attorney Spector-Morgan informed the Board that they could make a single motion to approve each variance requests so long as each variance was discussed.

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*Ralph Estes moved to approve the Doloma Investment, LLC request for relief from Article VII, Table VII-1 to allow structures and parking areas within 24 feet of the front setback where 75 feet was required; relief from Article VIII, Section 6 to allow cutting and disturbance within the 25-foot wetlands buffer; relief from Article VIII, Section 7 to allow structures within the 50-foot wetlands buffer setback; and relief from Article VIII, Section 7 to allow structures within the 100-foot wetlands buffer on wetlands greater than 3,000 square feet regarding their property located at 141 Shattuck Way, Tax Map 20, Lot 4, and Meredith Hoyt second the motion.*

Mr. Frink said the front setback was easy to approve because it was a more desirable placement to limit wetlands impact, key to protecting wildlife area, and would not be contrary to the public interest, and the spirit of the Ordinance would be observed to allow reasonable use of the property.

Mr. Frink stated that surrounding properties wouldn't be devalued, and hopefully the wetland waters would not be adversely impacted with drainage treatment.

Mr. Frink said there was a hardship inherent in the condition of the wetlands on the property, and curb cuts were no longer allowed on Woodbury Avenue, so this was a reasonable request given the requirements and limitations of zoning. Mr. Frink said substantial justice would be served because development of this commercial property had been held up in limbo for years

*The motion carried and all were in favor.*

**Minutes:** *The Minutes for the October 1, 2018 and April 15, 2019 meetings were not included in the Board's packet, and approval was postponed until the next meeting.*

**Adjournment:** *John Frink moved to adjourn. Edna Mosher seconded the motion and the meeting adjourned at 8:51 p.m.*

**Next Meeting:** TBD

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