

*These minutes were approved at the April 11, 2023 meeting.*

**ZONING BOARD OF ADJUSTMENT  
Tuesday, March 21, 2023 at 7:00 p.m.  
Town Council Chambers, Town Hall  
8 Newmarket Road, Durham, NH  
MINUTES**

**MEMBERS PRESENT:** Micah Warnock, Chair  
Neil Niman, Vice Chair  
Joseph Warzin, Alternate

**MEMBERS ABSENT:** Chris Sterndale, Mark Morong, Leslie Schwartz (unable to connect via Zoom due to technical difficulties)

**OTHERS PRESENT:**

**I. Call to Order**

Chair Warnock called the meeting to order at 7:05 pm.

**II. Roll Call**

Chair Warnock introduced Vice Chair Niman and Alternate Warzin as present for the meeting. He also indicated that Leslie Schwartz was attempting to attend via Zoom; however, there were some technical difficulties and it was uncertain if she would be able to vote in this meeting.

**III. Approval of Agenda**

*Vice Chair Niman **MOVED** to accept the agenda for tonight's meeting, **SECONDED** by Alternate Warzin, and **PASSED** 3-0-0 (Member Schwartz was unable to vote via Zoom).*

Chair Warnock left momentarily to allow a member of the public admittance to the building.

**IV. Seating of Alternates**

Chair Warnock stated that with Mr. Sterndale absent, Alternate Warzin will be seated as voting member. He further stated that, as it didn't appear Ms. Schwartz would be able to vote remotely, the Board had three voting members for tonight's meeting.

**V. Public Hearings:**

Chair Warnock informed the applicant that they have the right to postpone the hearing if they choose given the number of voting members present, or they can move forward with the application. Anthony Jones stepped forward to speak representing the applicant and asked if it would be possible to present their information this evening and postpone the vote to the next meeting. Chair Warnock stated that wasn't an option. The applicant decided to move

forward with the application.

- A. *On a petition submitted by Jones & Beach Engineers Inc, Stratham, New Hampshire on behalf of Robert and Elena Kendall, San Jose, California, for an **APPLICATION FOR SPECIAL EXEMPTION** [sic] as specified in Article XII.1, Section 175-54 Table of Dimensions of the Durham Zoning Ordinance seeking the maximum allowable building height by a special exemption [sic] of 35'. The property is shown on Tax Map 215, Lot 36 and is located at 5 Fox Hill Road in the Residence C Zoning District.*

Chair Warnock reviewed the procedures for the public hearing, stating the Board will open the hearing for the applicants and give the applicants a chance to present their case. Board members will have an opportunity to discuss any questions or concerns with the applicants before opening the hearing to the public. The Board will then invite anyone who chooses to speak to do so before the public hearing is closed. If members of the public choose to speak, they should approach the microphone, introduce themselves, provide their address, and address all questions to the chair. Once the public has had a chance to speak, the Board will close the hearing and deliberate before voting.

Anthony Jones from Jones & Beach Engineers rose to present the application. The applicant is seeking a special exception for the maximum building height of over 30' but less than 35'. He stated they believe they meet the three criteria required for a special exception as laid out in the zoning ordinance. He referred to a map of the area, indicating there is a low-density residential area on Fox Hill Road. The special feature is the tidal brook that runs through that area. The applicant is proposing a single-family building on this lot. The dwelling is set back 150' from the brook, well outside most restrictive overlays. The building is a traditional single-family home. The layout of the lot is a standard driveway on the front with the garage on the right side of the dwelling, which is the low point of the building. Given the plans for a walkout basement, Jones & Beach had to average the two grades to come up with the average building height. Durham defines building height through the mean ridgeline of the gable ends; those measurements are included in the application. The applicant believes they need the extra building height because of the unique walkout basement situation. To the first criteria, the unit won't be detrimental to the use and character of the neighborhood; it is similar to the other buildings in the neighborhood, as it is a single-family residential dwelling with a similar sized footprint located in the middle of the lot with lots of vegetation around it. As to the second criteria, the house is a single-family residential and is allowed in this district. The increase in height is not going to result in an injurious or noxious detriment to the neighborhood. As to the third criterion, the building is placed center to the lot, so there is no risk to health and safety in that regard. The building is nestled in a valley, so there won't be any site lines above trees. If final approval is granted, there will be a well and sewage system that meets requirements and a stormwater management plan that mitigates any erosion concerns.

Mr. Art Guadano rose to share his portion of the presentation in support of the applicant. Due to technical difficulties, he brought his computer to the Board so they could review the digital images related to his presentation. The applicant explained how they identified the mean grade of the lot. He reviewed the town's tax map to illustrate

where the applicant intends to locate the dwelling. The front of the house is a two-story house similar in height to the others in the neighborhood and roughly 27' high on the front elevation. The issue is the walkout basement, which causes a shift in the mean elevation, putting the height at about 33', so they are asking for the exception. In terms of the scale of the house, the height of the roof is similar to the other houses in the neighborhood. He ran through photos of the other homes in the neighborhood.

***NOTE:** Due to technical issues, a portion of the meeting was not recorded. At this point, the video skips to public comments for those in opposition to the application, with a member of the public from Durham Point Road speaking. The minute taker was unable to determine the speaker's full name and exact address.*

Linda Rhodes stated she knows the owners have the right to put their dwelling back from the property line, but it is on a very high hill, which means she will be looking up at it. From her driveway, she can see the stakes indicating where the building will be. She also indicated concern that for half of the year there will not be any vegetation at all buffering the view. She states that while the people from the road will not see the extra five feet, she definitely will and it is detrimental to her. She acknowledged the owners have the right to build what they want there and appreciates that they have committed to not cutting down too many trees, but the extra five feet will be noticeable, and she prefers the Board not grant the variance. Vice Chair Niman stated that he thinks the reason they want the extra five feet is due to the mixed roof lines and asked her if she likes the look of the mixed roof lines. Ms. Rhodes stated she is more of a traditionalist and feels this looks like something that was airlifted from San Jose to Durham, so she is not particularly thrilled with the architecture. She stated Durham has zoning ordinances for a reason. Chair Warnock asked the abutter if she could speak to any of the special exception criteria and identify what would be detrimental to the character of the neighborhood. She stated there is an adverse impact to the character or appearance of the neighborhood. She said she is pretty much the neighborhood for her area on Durham Point Road because there is only one other house on the driveway who is not an abutter. Alternate Warzin asked if she was able to see other houses from her property or if this would be the only house she could see. The abutter stated she can see other houses in the winter.

Chair Warnock invited any other member of the public to speak in opposition and encouraged those who speak to do so specifically to the criteria the Board will use to make a determination.

Daniel Benz, 3 Fox Hill Road, echoed some of Ms. Rhodes' concerns about the height being detrimental to the neighborhood, as it will be quite high on the hill. Regarding vegetation, there really isn't good coverage for a good part of the year. He stated without the vegetation for the full year and given the proposed height, it would be detrimental to the neighborhood. At Vice Chair Niman's request, Mr. Benz pointed out where he is located on the map.

Katrina Benz, 3 Fox Hill Road, spoke to the exception about the character of the neighborhood. She stated that the homes are all at a lower point in the lot while this home will be located at a higher point on the lot. She stated the description of the house

as “nestled in the valley” is not at all correct; if you review a topographical map, you can see the dwelling is placed at a high point.

Mr. Guadano rose to rebut some of the abutters’ concerns. He asked Ms. Rhodes if there were many trees in the back of the lot. Ms. Rhodes replied there is a series of oak trees. He stated that the applicant’s property on the other side of the creek is fully wooded with mature woodlands. Regarding the height, he noted that the side of the house that would require the extra height is at elevation 40’. He stated that Ms. Rhodes would not see the full height and would actually see less than 30’. The way the applicant has sculpted the area with the grades takes that into account. The placement of the dwelling is in the middle of the lot to provide privacy on all sides. There is no avoiding putting the dwelling somewhere on the hill, as the whole site is a hill. The distances to the different houses provides minimal impact to the adjacent neighbors. As the walkout is on the back of the house, they will not see the full height of the house; they will see the lower portion of the house. Vice Chair Niman asked to clarify the arguments being presented, asking if the applicant is saying the neighbors would only see 30’ of the house while the abutters are saying they would prefer to see only 25’ of the house. Mr. Guadano stated the zoning limit is 30’. The special exception, which is allowed by the ordinance, is 35’. Because of the walkout basement, the applicant is more than 30’. The reality is the abutters are seeing less than any house would be allowed to build.

Mr. Jones stated he appreciates that the other homes in the neighborhood are placed on the low point; however, this lot doesn’t have a buildable low point, as the low point is the stream with an even slope to the top. The actual top of the lot is almost at 59’. If you’re standing at the road, you would not be able to see the rooftop because the berm would be in the way. As to the river, he can’t speak to any vegetation on the other side of the river, but on the applicant’s property, they intend to keep as much of the vegetation as they can. He said they are open to planting buffer vegetation, but they will be limited to what they can plant near the water. The Board asked if the applicant could address what the neighbors on Fox Hill would see. Mr. Jones stated the applicants are trying their best to key into the hill to avoid being on top of the hill. Mr. Guadano stated that looking from 3 Fox Hill, the grade on that side of the property is mostly under 30 feet. The impact is no different than if there was no special exception. Vice Chair Niman stated that if the applicant didn’t key into the hill, they could build a 30’ dwelling by right and that is what the abutters would be looking at. Mr. Guadano stated the view from the neighbor is within the 30’ range; it’s just around the rear of the house where you would see the full walkout basement. He points to the grades on the architectural plans to highlight the view from 3 Fox Hill is really that of a two-story building. Toward the rear of the property is where the grade drops.

Ms. Yang, 7 Fox Hill Road, spoke via Zoom and stated that the height would be bothersome to her view. She asked what the distance is between her house and the applicant’s house. Chair Warnock stated it is in the realm of 300 and 500’. She asked if she could visit the site with the Board to determine the impact. Chair Warnock stated that wouldn’t be possible unless the Board determines they need to have a site visit. She stated she has similar concerns regarding the height as the other abutters. Chair

Warnock asked to clarify if Ms. Yang's concern is the height of the house and the possible decrease in vegetation would impact her view of the house. She confirmed those are her concerns.

Katrina Benz wanted to clarify that the berm would not obstruct her view of the house. Chair Warnock clarified that the applicant stated she would see the part of the house that is above ground but not the extra height portion side of the house with the walkout basement.

Mr. Jones stated the vegetation issue is tricky. The applicant is trying to maintain as much vegetation as they can. They have situated the house as far away from the abutters as they can. He stated the applicant is open to the Board restricting them with buffer plantings or anything they felt was necessary to accommodate the abutters.

***Vice Chair Niman MOVED to close the public hearing, SECONDED by Alternate Warzin, and PASSED 3-0-0.***

Chair Warnock stated if the dwelling didn't have a walkout basement, there wouldn't be the need for an exception. Vice Chair Niman stated that it's the keying into the hill that triggers the need for the exception, but the Board has heard testimony that the abutters won't see more than 30', so it's not clear why the Board would say they couldn't have a walkout basement. The applicant could forgo the walkout basement and still build a home that is 30' high. He stated the applicant has a right to ask for 35' given the Town ordinance. Regarding the second and third criteria, Vice Chair Niman stated these two criteria are not at issue. The issue is clearly with the first criteria. He reads the first criteria and stated a residential home is not going to be detrimental to the character or enjoyment of the neighborhood. Chair Warnock stated it looks like one of the neighboring homes is above the 30' limit with their inground basement. Alternate Warzin stated looking at the overview, it seems 3 Fox Road dwelling is also a large dwelling. Vice Chair Niman read the final line of the criteria and stated he doesn't believe there to be an obvious or adverse violation of the character or appearance of the neighborhood. Alternate Warzin pointed out some of the houses in the neighborhood look older and some look newer. Vice Chair Niman stated he believes the application meets all three criteria and the Board should grant the special exception.

***Vice Chair Niman MOVED to APPROVE the application for SPECIAL EXCEPTION on a petition by Jones & Beach Engineers Inc, Stratham, New Hampshire on behalf of Robert and Elena Kendall, San Jose, California as specified in Article XIII.1 [sic], Section 175-54 Table of Dimensions of the Durham Zoning Ordinance seeking the maximum allowable building height by a special exception of 35' by virtue of meeting the criteria for special exception. The property is shown on Tax Map 215, Lot 36 and is located at 5 Fox Hill Road in the Residence C Zoning District. SECONDED by Alternate Warzin and PASSED 3-0-0 through roll call vote: Warzin - aye, Niman - aye, Warnock - aye.***

Chair Warnock stated there is a one-month appeal period. The application has been approved.

**VI. Other Business:** Finding of Facts / Statement of Reasons

Chair Warnock explained that the Supreme Court requirements now state Zoning Boards cannot just deny applicants; they must state the specific reasons for their denials. The Board addressed the finding of facts for tonight's hearing in the public hearing and deliberations agenda item.

**VII. Approval of Minutes:** November 15, 2022

*Vice Chair Niman MOVED to approve the minutes of November 15, 2022, SECONDED by Chair Warnock, and PASSED 3-0-0.*

**VIII. Adjournment**

*Vice Chair Niman MOVED to adjourn the meeting, SECONDED by Mr. Warzin, and PASSED 3-0-0.*

Adjournment at 8:07 pm  
Daphne Chevalier, Minutes taker