



TOWN OF WARNER

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Zoning Board of Adjustment

Minutes of April 12, 2023

Town Hall in the Lower Meeting Room

The Chair opened the ZBA meeting on at 7:03 PM.

A. ROLL CALL

Board Member	Present	Absent
Jan Gugliotti	✓	
Beverley Howe	✓	
Barbara Marty (Chair)	✓	
Lucinda McQueen	✓ arrived 7:05	
Derek Narducci	✓	
Harry Seidel (Vice Chair)	✓	

Also present: Janice Loz, Land Use Administrator

Public Attendance: James McLennand, Attorney Ariana McQuarrie of Alfano Law Office, PLLC., representing the abutter, Linda Dylment – Abutter.

2. NEW BUSINESS

A. Application for an Equitable Waiver of Dimensional Requirements

Case: 2023-01
Applicant: James McLennand
Agent: James McLennand
Address: 225 Couchtown Road
Map/Lot: Map 15, Lot 053-3
District: R-3

Details of Request: Requesting an Equitable Waiver due to the rear corner of an additional structure found to be 7 feet into the current 40-foot setback for the R3 zoning.

The Chair explained that the board will review the checklist of the application, then the applicant will present the application. The burden of proof is on the applicant. The board can ask questions at any time during the presentation. Then the public hearing will be opened, abutters will speak first, then anyone else that has standing can speak. Then the public hearing is closed, and deliberation will begin.

Lucinda McQueen arrived at 7:05 PM

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The Chair asked the board if they had questions about the application being complete. Harry said he couldn't judge this case without a site plan, showing the building on the site. They have plans of the site, plans for the building and an aerial photo of the site, but they do not have a plan drawn to scale that shows the existing or proposed buildings with respect to the property line. Harry said the board needs to judge an Equitable Waiver and they do not know where the property and setback lines are relative to the building. He said everything else is fairly complete.

Lucinda agreed she would like to see where the building is going on the property. Also, she was concerned that some of the numbers don't jive. The setback is 40 feet, the paperwork said 4 feet although on a drawing Lucinda referenced it indicated 33 feet to the setback, which would be a 7-foot encroachment. So, the details of the request don't match the drawing that was given.

Janice asked the board to be mindful that the application checklist does not require a site plan. The Chair said, no, but we require a drawing to scale, showing the distances to the setbacks. The Chair said that was not included. The Chair said it is checked off indicating it was supplied. Janice said that is because it is noted in the drawings, it is also noted in the verbiage.

Harry said the issue for him, was the drawing indicated 33 feet and shows a line and that line is the setback line where it intersects the building. But, they do not know whether that setback line was correct. Harry said all the applications the ZBA get with a building on the site, need to have that footprint, it is probably one of the most important things and we need a site plan. Harry said they are going to have to come back with that information.

The Chair asked the board if they have enough information without the site plan to go forward with the application and make a decision. She said, if not then they would have to find a denial without prejudice and have them come back with that information.

Jan G. asked how did this happen was it a surveying problem? The Chair said that is something to be determined. Jan G. asked whether it is 4 feet, 7 feet or 12 feet on Couchtown Road is it really going to make a material difference? Jan G. said she understands Harry's statement and it is the right thing to do but is that the necessary thing to do.

The Chair said that is what they are deciding, can they make a decision on this application even though it is not complete as per the checklist. The Chair asked, do we need the applicant to come back with a plot plan?

Beverley said if the neighbor next door ever wanted to sell their property, they would have a major problem. The Chair said that that part of the discussion will come up in the hearing. Jan G. thought Beverley's statement was a very good point, as to why the actual setback would make a difference. The Chair asked Jan G. if she thought an actual plot plan showing the distances is necessary. Jan G. said she would withdraw her question and agrees that a plan is necessary.

The Chair asked if the board wanted to make a motion. She said it would be a motion to deny the application without prejudice until the applicant can come back with the information required in the checklist. Beverley asked if that meant they had to reapply

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and pay all the fees. The Chair affirmed. The Chair said the board has determined they cannot make a decision without the necessary drawings. Janice said the board could waive the fees if they choose. The Chair was concerned that the town would be on the hook to re-notice a future public hearing. The Chair said the other possibility is to accept the application and say they cannot make a decision without a plot plan, then continue the meeting to a noticed date within two months.

Jan G. asked is a site plan something have to spend \$5,000 for a surveyor to do. The Chair said sometimes applicants are completely capable of producing a to-scale drawing. Janice said a site plan has a whole different set of guidelines other than just drawing something to scale. Janice thought it was important to delineate what the expectation is in the application.

Harry said he has drawings done on a regular basis. A survey may cost \$5,000 to \$6,000, along with deed research. He said a surveyor could prepare an 'existing conditions' plan of the property without all the research, or just the corner that is the issue. It amounts to half a day in the field and half a day in the office. Harry said someone going for a building permit really should get that, so we are not in this position. Harry said James would have been served well and wouldn't be here is that had happened. The Chair said the building permit does require a site plan. Harry said that he knew that, but it wasn't caught.

Janice said they have a plot plan for the property. Harry said it doesn't have a building on it. Jan G. asked if that plot plan could be used to just draw the buildings on it. The applicant, James McLennand, interjected and said he actually did do that. Janice opened the large format plans and passed one of the plans to Harry. Harry said it is drawn but, we don't know the precision of the angle drawn on the plan.

James said he was told that was fine, that is why he didn't draw the whole building on the plan. He said the corner of the garage is laid out on the plot plan. Harry said a smaller scale of that drawing would be useful. James said the plan with the garage is there. Janice asked James to approach the board's table and show the board the drawing of the garage on the property. James pointed out to Harry and the Chair where the garage was indicated on the plot. Harry asked if the building is squared on the lot, if it was measured to the property line. James indicated that it was and that a surveyor came to help him with all the measurements, which coincide with what is laid out in the drawing showing just the corner of the garage. The scale was 1 is equal to 0.49 feet because it is such a large map. Harry said he did not see this plan. Janice said the plans were in the Land Use office for viewing by the board. The board passed around the plans to view. Harry said he was fine with that documentation.

The Chair said they are not basing anything on a hand-drawn presentation. Harry said they are trusting that James is giving us accurate information, this was not done by a licensed surveyor, which is what it should be. The Chair said in a perfect world. The Chair said they are accepting the application in its form. Harry asked if they accepted the application as complete. The Chair said, yes.

Harry made a motion to accept the application as complete. Beverley seconded the motion. Discussion: None. Vote Tally: 5 – 0.

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James McLennand introduced himself, he lives on 225 Couchtown Road. He has applied for an Equitable Waiver. The agenda said the garage was four feet over, the application doesn't state that. Once the full measurements were realized we were over by seven feet. When he applied for the building permit, his contractor asked him to bring down the plans they had. He submitted them and they received the permit and started construction. He became aware of the problem when Tom Baye, Building Inspector, told him a complaint had been filed against him. Since then, he has not done any work on the garage. That is when they started taking measurements to see what was going on. The garage used to be off to the right side of the house. But they converted that into living space under a separate permit. Once that was completed, they started working on the garage. He's a mechanic so he wanted a nice big garage. The house actually sits up on a knoll. He referenced a picture from Capital Well, which shows the proposed house but not the delineation of the land as it falls from it. There is a steep drop to the right side of the house and on the left side also. James pointed to the picture up on the video screen in the meeting room, showing the garage and driveway which goes up and to the left where it was a bit steeper.

The reason the garage was there was because once you get to the top of the driveway there isn't a whole lot of room. They decided if they made it come forward more then it wouldn't be safe for parking. Especially in the winter to be parked on an angle. Which is why we pushed it back to be more level with the main part of the house.

Harry asked when he got the building permit and went to the compliance officer Building Inspector did you show him a plot plan with the drawing of the house? James said, no, when he spoke with his contractor, he wasn't available that day. So, he asked James to bring the documentation he had into the Building Department and submit it for the permit. That was what he did, he signed for the permit and then they received the permit.

Harry said was important for the board to determine whether it was a good faith mistake. Harry clarified that James didn't know that he needed to have a plot plan. James said he didn't know. Harry asked if the contractor didn't know either? James said apparently not. Harry asked if the contractor was local. James said, yes.

Beverley asked who issued the permit, who actually looked at it? Beverley said that is who should have seen it. James said he believed it was Tom Baye, Building Inspector. Beverley asked was that after it was built. James said before it was built.

Jan G. said after you received the permit to build, you received a complaint. James said the complaint was from the abutter, his next door neighbor. An overview photograph of the property and the neighbor was shown on the video screen.

The Chair said in the building permit application includes a graph that shows all the setbacks in each zone. She said, so you knew at the time what the setbacks were from the abutter's lot. James said honestly, he did not know. His contractor handed him the information and asked him to submit it because he couldn't get down there. He didn't actually look at any of the stuff. The Chair said when you sign a building application you say you will abide by all the ordinances. James said, yes, he understood that, but he did not know the setbacks were 40 feet and he is not sure his contractor knew that either. The Chair said on question c of the conditions it says, "it was not an outcome of ignorance of the law." She said so you are saying you were not aware. James said,

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yeah, I was not aware. James said it may be a mistake by the Contractor because all the setbacks in all the adjoining towns are a maximum of 30 feet. James said he can understand why his contractor may not have thought about it.

Harry asked James why on the application the very first question is not answered. The Chair said because it has not been there for more than 10 years. Harry clarified by reading the question “does the request involve a dimensional requirement not a use restriction? Yes or No.” James said he forgot to check that. Harry confirmed that it is a dimensional requirement. James said, yes.

Beverley read part of the applicants’ response to item b, “Upon arrival of the Inspector for the complaint the foundation and main structure had been completed.” Beverley said, so he didn’t know, it was done already what was he going to do.

The Chair asked if Tom Baye had been out to inspect the footprint, as well? James said he wasn’t there, but his understanding was Tom Baye came out when the foundation had been completed for the final pour to make sure that the slab was all set.

The Chair told Beverley she didn’t think Tom Baye was responsible to measure for the setbacks. Beverley said she didn’t think he was either. She said really, it is not his fault, it should have been done before. The Chair said, yes before construction started. Beverley wondered who would have done that.

James said Tom showed up after the complaint was received. Tom did a measurement and realized they were over the setback. James said when they realized they were in violation everything stopped. They were told initially to get a variance and then they were told about the Equitable Waiver, which was filed.

The Chair read item 3, “Explain how the nonconformity does not constitute a nuisance nor diminish the value of the adjoining property.” James said in the photo showing the aerial overview, (also on the video screen) with the amount of trees between the abutter’s house and my house you can barely see. He added there were additional photos taken from the back of the garage towards the house. The photo were now on the video screen. James indicated on the photo where the stone wall was.

Harry said the neighbor made a complaint and asked was the neighbor still making that complaint. The Chair said she thought they would hear that in the public hearing.

James asked the board to look at the photo from the second story of the garage looking out. It was shown on the video screen.

Lucinda asked if setbacks vary from one part of the town to the next? The Chair indicated, yes, for the different zones. Harry said it is 40 feet for this property.

Beverley said for visibility there is no problem, although there could be other problems. James said they were over the setback not over the boundary line. There are no additional plans to go any where else. They aren’t planning to move anything off the back of it or anything of that nature.

Jan G. asked if they could agree not to cut the trees down? James said the trees are not on his property.

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Harry said the drawings show a shed addition. James said, yes that has not been built. He was more than willing to push it back within the boundary line. It's just an additional car port.

Harry said we can see what it looks like from your property. Although, they can not see what it looks like from the abutter's side. Harry said on the other side they may be looking through the trees.

The Chair asked James to address number 4. The site work was \$36,000, the materials for the project was \$30,000 and labor \$40,000. So, it was a little over \$100,000 for the garage. For him to move it, would potentially mean he would have to demo the whole thing, because he doesn't have enough money to do anything after that.

The Chair asked if there were any other questions from the board. Harry said, no questions. The Chair asked James if he wanted to state anything before opening it up to the public. James said, no.

The Chair opened the public hearing.

Attorney Ariana McQuarrie introduced herself as representing the abutter, Linda Dymont. Attorney McQuarrie said what they are looking at right now for an Equitable Waiver she suggested the board refer to the statute that governs this request, RSA 674 section 33-a (RSA). The RSA was visible on the video screen.

Attorney McQuarrie said Mr. McLennand is in an unfortunate situation given the finances that have already been spent but, this is not the alternative for his relief. The applicant has not demonstrated either that the error was in good faith or by a measurement or calculation made by him or his agent nor by any error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.

Attorney McQuarrie asked the board to bring their attention to 1.b. of RSA 674:33-a. Under the statute the board is only able to grant this Equitable Waiver if, and only if, the board makes all of the following findings. So, under section b the violation was not an outcome of ignorance of law or ordinance. She said they all heard the same testimony, so that is exactly what it is ignorance of the ordinance. Even if it was an error, the legislative history is such that we can't do what we want and ask for forgiveness later, from the town. Moreover, it is not just ignorance of the law or the ordinance, but it is an obfuscation. So, clearly, Attorney McQuarrie thinks that her client and everyone on the board can initially share the concerns over the site plan submission. She would submit that even if he was to submit a survey, it needed to be before the build. When Mr. McLennand submitted the building application, whether there was a misrepresentation or an obfuscation. According to the law dictionary obfuscation is essentially, he submitted something that was hard to read or illegible or with intent to mislead. She would suggest that is exactly what they have with that application.

Attorney McQuarrie continued to say that essentially they have a site plan that was submitted, or a plan that was submitted, arguably . . . and she has looked at the documents extensively as well. It was hard for her to make the determination, although

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she didn't know where that document from tonight even came from. She didn't receive it from any 91:A requests, that she submitted.

Attorney McQuarrie said the burden is on him to prove, it was a good faith error in measurement or calculation by him or his agent or an error in the interpretation of the ordinance. She said they have heard neither of those things. They have actually heard evidence to the contrary supporting her clients' position. Measurements weren't even started to be taken until the Building Inspector came out. The law requires that before you build you do your due diligence.

Beverley interjected, it was before it was built, it was on November 9 that the Building Inspector was there. The Chair said, but Tom doesn't measure for setbacks. The Chair said there are a couple of times when he has to go and inspect and the first one is when they finished pouring the foundation, then again before the utilities went in.

Attorney McQuarrie said based on her review of the record the first time, by Mr. McLennand's application sometime in January, potentially the 6th when there was an error that was noticed, based on her review of the information. Her point is that is when the measurements began not when the foundation was poured. He had the opportunity to make sure he was in compliance before commencing with building. Additionally, nothing in the application outlines any findings that the board would have to find to grant this. Essentially, not only was sub-section 1.a. not met, that is what she is really challenging here, but the board does have to find all of those. Essentially, they knew in November the original permit contained an illegible copy because in the Select Board meeting of January 31st Chairman Bower stated that the copy was fuzzy as outlined in the meeting minutes.

Attorney McQuarrie said attaching this obscure plan is reason alone to deny the request at this juncture. Moreover, in the review of the 91:A request for documents they received an email on March 20, 2023 from Judy Newman Rogers to Mr. McLennand asking for more clear plans. Apparently, there may have been an attachment the next day in a "pdf." All the documents we had were in connection with the application for tonight's meeting. She was unsure what she was looking at when she looked at those as well.

Attorney McQuarrie said not only does the law state that the board not grant this at this juncture but, if the board was to consider it, she would suggest that it is very ripe for an appeal. She understands there are equitable concerns, and she appreciates all of the board's attention to all of the details to make sure they have all the documentation before going forward. She said in regard to 4 feet or 7 feet, the law does not take that into consideration it is either a violation or it is not. The case of Dembiec v. the Town of Holderness, 167 NH 130, basically says the plain language of the statute does not confer general equitable jurisdiction upon a Zoning Board. Under those statutes the Zoning Board has the authority to grant equitable relief from a zoning ordinance only when the statutory prerequisites for an equitable waiver have been satisfied. What she takes that to mean is the board's determination was "well it doesn't really matter it's not too far into the setback" the law doesn't allow for that decision to be made or to make equitable decisions in that regard.

Attorney McQuarrie referenced supreme court case Taylor v. the Town of Wakefield,, 158 NH 35, a 2008 case. Essentially, the ZBA granted an application for an equitable waiver

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for a 35-foot wide waterfront access easement for a waterfront property. In that case the frontage requirement per the zoning ordinance needed to be 100 feet. They contemplated the equitable argument and granted the waiver, it was affirmed by the ZBA in an appeal and in superior court, but overturned in the supreme court. The supreme court essentially said in that circumstance they may have been entitled to equitable relief in the conveyance to a bona fide purchaser for value. She submits the court holds bona fide purchasers for value at the highest level because they just sort of walk into their situation. The court said even if the purchaser didn't suffer any diminution of value of the property without the waiver the record did not support either that there was a good faith error or measurement and calculation or that the person that issued the building permit was ignorant about the zoning ordinance, just like we have here. The record does not support that.

Attorney McQuarrie said Mr. McLennand confirmed today that he did not start measuring prior to the commencement of building. Under the statute that is a clear ignorance of the law, ordinance, or failure to inquire. Also, someone had asked if he knew at the time that he had violated the setback and he said no. It just outlines the ignorance of the law, ignorance of the ordinance itself. Additionally, there was a statement that after he became aware he stopped building immediately. Upon information from her client, that is not true.

Attorney McQuarrie addressed the board's interest in the view from the abutter's property. She has photos for consideration of the board. One photo is from her clients' bedroom window. The photos were circulated to the board. Derek asked if the photos were from the first story or second. Linda responded from the second story window. The second photo also shows the building completed. Derek asked if it was from the property line. Linda said close to the property line. The lawyer said these photos were from February. You can see the building is complete, and this was after the building inspector came and it was completed. The Chair said on the photo the date is January 3, 2023.

Attorney McQuarrie said, in conclusion, even though Mr. McLennand finds himself in an unfortunate situation given the money spent, the board does not have the authority under the law to make the calculation whether this is a big deal or to grant equitable relief under that regard. We are bound by the equitable waiver statute and there is direct supreme court case law for the circumstances that we find ourselves in that this record was devoid of anything alleging a good faith error in judgement prior to building. At the time of the building permit submission there was misrepresentation and obfuscation of the plan. The importance of upholding these types of ordinances is just so people can't do what they want on their property and ask for forgiveness after the fact. It was a contemplative decision as represented in his application that he chose that area for safe parking. That is not what the spirit of the ordinance is meant to uphold. Because he hasn't met his burden of proof for 674:33-a, the board should deny the equitable waiver.

Beverley said, you know this is the Zoning Board of Adjustment. Attorney McQuarrie said, yes. Beverley said it's nice to say it's the law but, this is the Zoning Board of Adjustment and that doesn't apply. The Chair said it absolutely applies. Beverley said they permit all kinds of things. The Chair said if they meet the conditions. The Chair said what the abutter's representation was saying is the four conditions for the equitable waiver, that the second one is not being met. All four of the conditions must met to grant

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a waiver. Harry said the second condition is 2.b. The Chair read 647:33 section B “the violation was not an outcome of ignorance of the law or ordinance, failure to inquire or obfuscation or misrepresentation or bad faith on the part of the owner, the owner’s agent or representative. But it was instead caused by either a good faith error in measurement or calculation made by the owner or owner’s agent or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit.”

Jan G. said it sounds to her like textbook failure to inquire.

Harry, Beverley and the Chair had a conversation referencing RSA 674:33-a and how the conditions do not match up numerically with the conditions on the town’s Equitable Waiver application. Harry said are you going to explain how the violation was not an outcome of ignorance or bad faith but resulted in a legitimate mistake.

The Chair asked if there were any more questions for Ms. Dymont or her attorney. Harry said given that the structure is 7 feet plus-or-minus from where it should be. Is it your view that if it was several feet back, it would not be seen in the same way? Attorney McQuarrie was not sure what the vantage point would be and certainly for the record did not want to speculate. She said the question was whether it is a public or private nuisance, which is part c of the statute. She was not arguing that point. She said the applicant has the burden of proof for proving all of them. Even if this was completely invisible from her client’s property it wouldn’t matter under the RSA.

Harry asked the attorney what would be a fair remedy? Attorney McQuarrie said she wasn’t in a position to make that determination. She said the law supports the Zoning Board of Adjustment’s authority to consider that and she cited case law. It is certainly what everyone would hope to see happen but unfortunately the law doesn’t even allow us to consider that. She would suggest that is not the avenue for an equitable waiver.

Harry commented that in the abutter’s view there was nothing that can be done. There is no reasonable remedy in her client’s view. Attorney McQuarrie said she doesn’t have a remedy. But, she would direct the board’s attention to the Taylor v. The Town of Wakefield. The supreme court did consider that and said while it might be an equitable calculation and analysis to go through the Equitable Waiver of Dimensional Requirement it is not the avenue and it suggested to explore alternative avenues. The supreme court didn’t even say what that alternative avenue would be.

Derek asked how was this violation found in the first place? Who discovered it? How did the 7-foot violation come about? Attorney McQuarrie said her client had heard sounds of building and noticed that it seemed to be very close to the stone wall that was near the property line. She made the town aware as early as December. She thought a house was being built beside her. Derek asked when did the town do the actual measurement? Linda and her attorney said they thought it was the Building Inspector, Tom Baye, on January 6. Linda said the homeowner didn’t stop building for weeks after that. Linda said the original house is 50 feet and this one is 33 feet, so this is 17 feet closer than the original house. She made a comment noting the structure was pretty big.

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The Chair asked if there were any more questions for the abutter. Beverley asked the Chair if they could ask questions to the owner. The Chair said yes until the hearing is closed. The Chair thanked the abutter and her lawyer for the presentation.

James said he did not receive a letter notifying him that the inspection does not conform until the 27th of January. He said the letter was in the board's packet. He noted it took them 15 days to deliver the notice. Beverley and James had a conversation that could not be heard. Janice asked if they could speak up. James said Beverley was asking if he could cut the corner of the garage off. James said structurally he could not because it is two stories. The Chair said they cannot recommend remedies. Harry asked for clarification on the notification timeline. James said it was a letter of notification of a violation. He said it was submitted with the application. Harry noted it was dated January 27.

Derek noted James had given building estimates and asked if he had any kind of estimate as to demo of the building? James indicated he did not because he hoped he didn't have to do that.

Janice asked the Chair if she could ask a question. The Chair clarified she would speak as a member of the public. The Chair explained that even though Janice sat at the board table she is a member of the public. Janice clarified that she does not vote.

Janice asked James when Tom Baye came out to do the measurement did he tell you what the setbacks were? James said yeah at that time he said it was 40 feet. He and Tom did a rough measurement out to the stone wall. They thought it was 36 feet, but after they did actual measurements, they determined it was 7 feet over that. Janice asked if the setback ever came up with his builder? James said, no.

Harry asked what was the date that Tom came and told you. James said he was not sure what the actual date was. James clarified January 6 was when Tom came out for the measurement. When he came out James' contractor was there and he asked about it, Tom took the measurement and stated he would report back to the town. That was all that Tom Baye had said.

Jan G. asked for clarification, that January 6 was the date that Tom Baye said it was okay. James said, no, they measured from the corner and then Tom said he would have to report back to the town. Then the 27th was when he received the letter that was when he knew it had gotten to point where it was a nonconformity and they had stopped at the point. Jan G. said so you were acting on an assumption that the town hadn't found anything for 20 odd days. James said he had just said he had to report back to the town, he didn't say stop or anything. Jan G. said it was 21 days when it could have gone your way. Jan G. asked James if he expected there was an issue, you would have known right away. James said he would hope so. If Tom had wanted him to stop, he would have said, hey you need to stop this. That was never stated to him.

Attorney McQuarrie stated he had said the first time Tom had come out he made him aware of the setbacks and that he had stopped building immediately. She has that comment in her notes and now he says he wasn't sure. James said, no he stopped as soon as he got the notice. He had not stopped when Tom had come.

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Jan G. said it seems that item b is the thing that is the bullet on failure to investigate. But, there is also something that says as an exception for applicability made by a municipal official in the process of issuing something. Janice put the RSA back up on the video screen for the board's reference. Jan G. wondered if item b may be applicable as basically as failure to inquire. The Chair said Tom isn't interpreting the ordinance. Jan G. said he wasn't interpreting it but it was pretty straightforward that it was 40 feet and in fact it was less than 40 feet and he didn't tell James for 21 days.

The Chair interjected and said Tom was sent at the request of the Select Board to make the measurement. The Chair said she didn't know if it was his responsibility at that point. To tell them they were 33 feet from the boundary. In the Building Application it states that it is a 40-foot setback. The Chair said they were not in deliberation, yet, so they will get to that point.

Jan G. said the failure to inquire is governing. The Chair agreed and said it is paramount.

Janice tried to ask a question. The Chair stopped her and asked if this was a point of order. Janice said, no, it is a question for the board. Janice asked if it would be helpful for the board to speak to the Building Department or the Building Inspector as a part of the process?

Beverley said the only report they have from Tom Baye is this one and she held a piece of paper. The Chair said she thinks they have all the communications. Beverley commented they had all that was sent. Beverley said this paper is from the 9th of November. She said it is the only one in the whole packet. Beverley asked so did he go again and make another report? The Chair said he went to the property at the Select Board's request after there was an inquiry about the property. He went and took a measurement and reported back to the Select Board. Beverley asked if the board had that report? The Chair said they had the letter that was sent to James, by the Select Board. The letter told him to cease and desist, which the applicant said he did. Beverley stated that was on January 27.

The Chair asked if there were any more questions for the applicant or the abutter. No further questions. The Chair asked James if he had a last statement? James said, no. Attorney McQuarrie interjected about an error in interpretation of applicability. She said a person involved in the process of issuing a building permit was mistaken about the actual ordinance or the law and whether it applied as it relates to Mr. McLennand is not what was suggested earlier. The Chair asked if there were any last questions from the board. There were none and no questions on Zoom.

The Chair closed the public hearing and opened the board's deliberation.

Harry and the Chair had a conversation about the RSA 674:33-a. Stating that the town does not have equitable waiver language in the ordinances, and the conditions outlined in the Equitable Waiver application don't exactly line up with the RSA. To avoid confusion the Chair suggested they use the conditions outlined in the application.

**Item 1. Does the request involve a dimensional requirement, not a use restriction?
Yes or No.**

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Harry said let's start with item 1. The Chair said in response to Harry it is a dimensional waiver.

Item 2.a. Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the town.

Harry referenced number 2 explain how the violation existed for 10 years or more. He concluded 2 doesn't apply. The Chair said, right.

Item 2.b. Explain how the nonconformity was discovered after the structure was substantially complete or after a vacant lot in violation has been transferred to a bona fide purchaser.

Harry moved on to b when the nonconformity was discovered after the structure was substantially complete, or after a vacant lot in violation had been transferred to a bona fide purchaser. The Chair said yes, because this also applies when people do subdivisions. Harry said, right.

Item 2.c. Explain how the violation was not an outcome of ignorance of the law or bad faith but resulted from a legitimate mistake.

The Chair said on the Building Application itself are the setback requirements. She said page 5 of the Building Application has a graph with the setback requirements for each zone. She said setback requirements are different in different towns. It is not something that is hidden. When the person applying for the building application signs it, they are signing that they will abide by all of the zoning ordinances.

Harry said they can make a mistake, misread or they can overlook something. It's human, none of us can guarantee that we will never make a mistake, right? The Chair said, right.

Harry referenced the Building Permit for October 26th. Forty-one days later on January 6, 2023, Tom visited the site. Beverley noted that was Tom's second visit. Harry said that is the visit where he says there is a potential violation. Harry questioned whether he said anything in the first visit. Beverley said, no. Harry said so Tom does a site visit in winter on January 6 and says there may be a problem and reports back to the Select Board. Beverley said remember he does not measure when he goes there, and it is not up to Tom to measure. Harry said, no, but he measured on the 6th, forty-one days after the building permit was issued. Harry said then twenty-one days later comes the letter saying he has a problem. Beverley added the letter was from the Select Board. Harry said in that time they built the structure. Beverley said it was already built. Harry said he is aware of how quickly a building process happens in the winter and understands how this could have happened.

Beverley said it says right here in b (referencing the applicant's response on the application), due to the complaint upon arrival of the inspector for the complaint the foundation and main structure had been completed on the January 6th. Harry concurred.

Harry said he is asking these questions to try and wrap his head around the nonconformity being discovered and the building being substantially complete.

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Jan G. said the statute puts the responsibility on the property owner or his agent. The municipal official whether it is the town or the Selectmen or the Land Use board it is not their responsibility to have found out that it was within a 40-setback. Jan G. said she was sorry, but, she doesn't think there is any way out of this one.

Harry said a mistake was made, by the builder. Ultimately the owner is responsible for the builder. Harry said that is why this relief exists for when this particular mistake has been made.

Jan G. said our ability to have relief is constrained by the RSA, which states they have to meet the four criteria and they fail on item b. Harry said he hasn't determined all the criteria, yet, he is just trying to get through item b. Jan G. said b is the killer, she thinks they can wiggle their way out of a, c and d.

Beverley said she doesn't think it was an outcome of ignorance of the law or bad faith, she doesn't think he did this on purpose. The Chair asked Beverley if she thought it was ignorance? The Chair and Jan G. said he didn't seek the information. The Chair said failure to inquire is the way the ordinance is written. She read the RSA in part, "that the violation is not the outcome of ignorance of the law or ordinance or failure to inquire."

The Chair said for her, you don't have to inquire because the building permit tells you that it is a 40-foot setback. Beverley asked what building permit? The Chair said the Warner Building Permit, page 5. Harry said that is true, however, this applicant went through a process of getting a building permit and he was never asked to show a plot plan. If someone had asked him to do that the mistake that he made would have been corrected.

Jan G. said if you are trying to make it the responsibility of a Warner official, a town employee, there is nothing that says they have to do that. That is not their job. It would have been a nice neighborly thing if they had done that, but it is not their job, and you cannot hold them responsible. You have to hold the owner responsible, for failure to inquire.

The Chair said if they sign the building application they are saying they will abide by all the ordinances of the Town of Warner. Beverley said she understood.

Derek said this was a tough one. He agreed with Harry in a sense that it's the point of the board. He does not see this as bad faith. He sees this as a mistake. He went through something similar when he needed a variance (in another town) for a garage five feet closer to the street, which took him 3 years to get that done. It's really tough.

The Chair said it was horrible to have to suggest to people that they are going to be under a huge financial burden to correct something. Jan G. said it was not their ordinance, it's the state's ordinance. The Chair corrected by saying it's the state's RSA. Jan G. said the town has to follow what the state says. The state says if they don't look it up, which wasn't all that hard, and it turns out you are wrong, you lose. The Chair said you would think if you were making such a huge financial commitment, you get out the tape measurer and measure from your abutter's property line to your building. You would be sure that you were within the ordinances.

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Harry said, yes, but consider this is a violation of 56 square feet, which is one third of a car's parking space. He believes the homeowner was not trying to pull one over on the town. The Chair, agreed. Harry said he does not believe this is a bad thing. He honestly believes a mistake was made.

Jan G. asked Harry if he believed this was failure to inquire? Harry said he was not granting that. Jan G. said that is all you have to do. Harry viewed it as a mistake and a violation of 56 square feet. If the building was compliant, he honestly doesn't think it would make any difference to the view. Jan G. agreed. He said it is 56 square feet, it's not a straight line, it is nicking the corner of the building. The property line was on an angle, things happen when you are doing construction not all the lines are straight. He honestly finds it to be a mistake. He does not share the feeling that the owner was in bad faith trying to get away with something. It was just a mistake.

Jan G. said she shares the sorrow that it came out this way, but you have to follow the law. She said her mother used to talk about when she was learning how to sew and she would only be off by a quarter inch. So, how would you like a quarter inch off the end of your nose. If the law says 40 feet, it is not 40 feet minus a half inch or 7 feet. In the end, if we were to vote anything other than no, the town would be in court.

The Chair said she understood what Harry is saying about the dimension. Physically the dimension may not constitute a nuisance in his mind. In terms of an outcome of ignorance of the law, the applicant has said they didn't know, it was a mistake. But it's their responsibility to know. The Chair said the board has to find all four of these, not one or two, or most of one and not so much of another. Jan G. said it's a bad law, but it is the law.

Harry said yes there is a law and a setback. That is why you have an equitable waiver when there has been a problem, when the law has been broken and then you ask yourself we have four criteria here. Hinging it on that it is somehow bad faith or that it was ignorance. Jan G. said failure to look it up. Harry said, okay. The Chair said no one was saying bad faith and no one is saying obfuscation or that they are purposely trying to get away with something. Jan G. said they answer to a higher power and that higher power is the supreme court.

Harry said Jan G. keeps pointing to that law up on the video screen (RSA 674:33-a). Jan G. said because that is the law. Harry said he is trying to talk about a real-life situation where somebody has made a mistake. He commented that he makes mistakes all the time, this could have very easily been him. We make mistakes we are human. Jan G. said but, if you make a mistake that hurts someone else...Harry interjected he honestly doesn't think this non-conformity is causing a nuisance or diminishes the value, this 56 square-foot violation. Also, there is a forest between the two properties. Harry said he doesn't know how the argument could be made that the cost of correction is going to outweigh any public benefit. So, there is no public benefit here. This mistake was not a mistake that was going to cause a safety issue or anything that will impact the public. This was simply an abutter who doesn't like a big building that appears to be too close. Jan G. said that is her right.

Lucinda stated why isn't that important? Lucinda said the neighbor has built something while being oblivious to the specifics of the setback. Lucinda said its not bad faith, its not

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a mistake, he just didn't pay attention. But if it bothers the abutter and it is against the ordinance then the abutter has a case to say this Zoning Board should not grant this.

Beverley said she has a big problem with it also. She has been on this board longer than anybody. Beverley referenced a case the board heard in the past, when she and Janice were on the board. Beverley said at a certain point, she cannot imagine telling this man to take this down. She was sorry, but she just can't. The Chair said she feels her pain, she feels awful about this. But, the violation was the outcome of ignorance and failure to inquire, she cannot get past that.

The Chair said the board has to find all four conditions, to grant the waiver. Which would mean the miscalculation would have been a misinterpretation or mistake by a municipal official and that was not the case. The applicant isn't even arguing that was the case. They are saying they didn't realize until Tom Baye came out and until the complaint was filed then he measured and noticed the violation.

Harry asked the Chair if she understood the applicant to say that he didn't read the ordinance? The Chair said, no. Harry said there are a lot of setbacks, right and I don't know that he said he didn't read the ordinance. I can understand somebody wouldn't know the ordinance but not be able to apply it because he didn't have a drawing which showed it. Measuring isn't necessarily easy in winter. The Chair said there is a 40-foot tape measurer, it would have been so easy and to put a stake at the property line and measure 40 feet, to make sure he was in compliance.

Harry said he was 48 feet on one side of the building. But what he didn't realize was that one property line is on an angle. The Chair agreed, he said he didn't realize his property line was on an angle. Harry said he thought it was a legitimate mistake. Even if he knew it was a slight angle, he could have still figured that he was okay or that he was 8 feet to the good. He was off by 7 feet, a violation of 56 square feet, which Harry said was equal to two of the meeting room tables.

The Chair said she can understand that if applying this to the nuisance part of the conditions. Also, to the fact that the investment made out of ignorance of the facts that constituting a violation of the cost of correction is going to outweigh the public good. The cost of correction is going to be hideous.

Jan G. said none of us want to turn this down, but they don't have a choice. Harry said, yes, they did. Jan G. said you can vote against it, and we can end up in court. Harry said he is not intimidated by an attorney saying they are going to be in court. Jan G. clarified that she said that, not the attorney.

Harry said he thought they did a good job at examining all these issues and fairly reviewing all the facts. He can see where there is a possibility of a legitimate mistake here. He sees it as a legitimate mistake in the winter when you are looking at a property line that is a little bit skewed and you didn't have a drawing. Maybe you could say its his mistake but, there are a lot of people out there building without drawings and we have had a few come here. The Zoning Board has the power to grant relief if we feel it is fair. Beverley stated that is within our power.

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The Chair said if the conditions of the requirement have been met. She said there was a signature on here twice saying they will comply by the ordinances. Harry said and that a mistake was made. The Chair said and a mistake was made. But it was not a mistake because of a municipal official and it wasn't a mistake caused by a calculation because of some bad measurement. It's a mistake because measurements were not taken. Harry thought that was okay. Beverley said that was the builder's mistake. Harry said the homeowner made a mistake, 56 square feet on a huge building. Also, the applicant was willing to comply with the addition of a shed on the side by cutting it back to be compliant.

Jan G. said if he was willing to cut off that triangle corner of the building wouldn't he be in compliance. Harry said no you can't do that. Jan G. said she doesn't know if he can or cannot, but he would have an avenue that doesn't say he would have to throw away the whole thing, or potentially \$150,000. Beverley said if the choice is to cut off a piece or take the building down. Jan G. said we are not asking him to take the building down. Beverley said if we say no, he has to tear the building down. Jan G. said if it were in compliance they wouldn't be here. The Chair agreed. Jan G. said it seems to her that he has an opportunity to make it compliant, they are not telling him to pull the whole thing down. He has to cut 57 square feet off one edge. The Chair said they don't give advice on a remedy; they just find whether or not they have met the requirements.

Jan G. made a motion for Map 15, Lot 053-3, a request for an Equitable Waiver for a structure that is nonconforming to the setbacks be denied based on NH State statute RSA 674:33-A. Lucinda seconded the motion. Discussion: Harry asked for the motion to be read. The motion was not written down. Harry read what he thought the motion said, "I make a motion to deny the Equitable Waiver of the Dimensional requirements of the terms of Article 6, section C, 1.b., for Map 15, Lot 053-3." Jan G. said that sounds great. The Chair said and as per 674:33-A. The Chair asked for further discussion and called the vote. **Roll Call Vote:** Beverley Howe – No. Harry Seidel – No. Jan Gugliotti – Yes. Lucinda McQueen – Yes. Barbara Marty – Yes. **Vote tally:** 3 – 2. The Equitable Waiver for Dimensional Requirements for relief from the abutter's setbacks for Map 15, Lot 053-3 was denied.

The Chair stated there is 30 days to appeal the denial. If they decide to appeal come back to Janice and she will help you with that.

Janice asked the Chair if the Select Board is the entity that will enforce whatever remedy is determined? The Chair said, yes.

The Chair asked the abutter and her attorney to email a copy of the pictures they circulated to the board, for the record.

Determination of Findings of Facts

The Board addressed criteria B. The violation was not noticed or discovered by any owner or owner agent or representative or municipal official until after the structure in violation had been substantially complete.

The Chair said noticing the violation was in contention because the abutter said she had a picture from January 3, which showed that it was still sticks with no roof and no sides.

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They (the owner) said they were not notified until they got the letter on January 27. So, by the time they got the notice from the Select Board it was substantially complete.

The Chair said if they are using the January Select Board letter as the pin in the timeframe. Derek said it was the official notification of the cease and desist. The Chair said she didn't think it was a cease and desist.

Harry said he thought Tom Baye, Building Inspector visited the site on January 6 at that point it had already been framed. The Chair said framed but not shuttered. Harry said it was substantially complete by the sixth because the roof was done.

Harry continued to say the letter did not come for another 21 more days. But, it was substantially done on the sixth of January. The Chair said that was something the abutter was contesting. The Chair said she asked the abutter's attorney to send the Land Use office a copy of the pictures, where it showed a stick frame on January 3, not sheathed. Harry and the Chair agreed a stick frame was substantial.

The board reference criteria 2.C. on the application.

Harry said this was the item the board was in dispute about. The Chair said the applicant wasn't in dispute on this point. They say until they received notice from the town they didn't know they were inside the setbacks. Jan G. said they stated that they believed it was 30 feet because other towns were similar.

Harry said then the finding of facts are the applicant was ignorant of the law. The Chair agreed saying and they failed to inquire. Harry said should we end it there. The Chair said the RSA says ignorance of the law and failure to inquire.

The Chair read criteria D, "whether or not the dimensional violation constitutes a public or private nuisance."

Harry said they did not make that argument. The nonconformity would not constitute a nuisance or diminish the value or interfere with the future use of the other property.

The Chair said the abutter said they could see it from their bedroom. Derek said if they took that 7-feet off they would still see it. He said according to the abutter anything there at all is going to be a nuisance.

The Chair said they could go on but, they only have to find that one of the criteria has not been met. Derek said he thought they have found that one.

Finding of Fact: The Chair said the violation was an outcome or ignorance of the law and failure to inquire and for that reason the board denied the application.

Bev Howe left the meeting.

B. Welcome to the new member, Derek Narducci

Derek introduced himself to the board, he has lived in Warner for 2 years and three months. He has a vested interest to make sure the town takes care of their own. He wanted to make sure everyone was treated fairly. Harry thanked him for stepping forward, it was great to have an alternate on the board. Derek said he has been in the

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trades for 35 years, now his job is more technical. He can read plans and architectural plans. He has done carpentry and woodworking since he was young.

C. Election of Officers – Chair and Vice Chair

Harry nominated Barb Marty to be the Chair. Lucinda seconded the nomination. Barb accepted the nomination. Vote was unanimous.

Barb asked Harry Seidel if it would be a conflict if he would like to be Vice Chair? Harry said he would be delighted to serve. Lucinda seconded the nomination. Vote was unanimous.

3. REVIEW OF MINUTES OF PREVIOUS MEETING: March 8, 2023

Harry Seidel made a motion to accept the minutes of March 8, 2023 as amended. Jan Gugliotti seconded the motion. Discussion: None. Voice Vote Tally: 4 – 0.

4. UNFINISHED BUSINESS

A. Rules of Procedure Document – Final Vote

Harry Seidel made a motion to accept the Rules of Procedure as amended. Jan Gugliotti seconded the motion. Discussion: None. Voice Vote Tally: 4 – 0.

B. Discussion on procedure for reviewing Applications and Checklist

The Chair said that she and Harry started collecting information on other town's zoning applications. The Chair asked whether the board would like them to come back with some suggestions.

Janice was concerned about that process. She thought all conversations should happen in a board meeting so everyone could be part of the process. She didn't want the board to get into a situation similar to when working on the ROP document. The Chair and Harry were working together and other members separately. She would like everyone to have the conversation in a board meeting, in real time, together and not separately.

The Chair asked Janice to email a copy of the current applications and checklists for members to make notes. Since she and Harry have the benefit of seeing other town's applications maybe they will have more notes and suggestions.

Janice said the tricky part will be getting the site plan/plot plan requirements straight.

5. COMMUNICATIONS AND MISCELLANEOUS

Janice mentioned the OPD spring training, which is virtual and free, this year. The Chair said there will be video of the training after it happens. Janice said she will circulate the link to members when available.

6. ADJOURNMENT (Motion, Second, Vote)

Harry Seidel made a motion to adjourn. Jan Gugliotti seconded the motion. The meeting was adjourned at 9:23 PM.

/jll