



**TOWN OF WARNER**

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**Zoning Board of Adjustment**

**Minutes of May 10, 2023**

**Town Hall in the Lower Meeting Room**

**1. The Chair opened the ZBA meeting on at 7:00 PM.**

**A. ROLL CALL**

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

**Also present:** Janice Loz, Land Use Administrator

**Public Attendance:** James McLennand, Attorney Derek D. Lick, Orr & Reno representing the applicant, Linda Dymont – via Zoom.

**1. NEW BUSINESS**

**A. Rehearing Request (NH RSA 677:2-3)**

Equitable Waiver of Dimensional Requirements

**Case:** 2023-01

**Applicant:** James McLennand

**Agent:** Derek D. Lick, Attorney, Orr and Reno

**Address:** 225 Couchtown Road

**Map/Lot:** Map 15, Lot 053-3

**District:** R-3

**Details of Request:** Request a rehearing for an Equitable Waiver. Denied by the Zoning Board of Adjustment on April 12, 2023.

**\*No Public Testimony\***

**Board Deliberation**

The Chair introduced the request for a rehearing from Derek Lick, Orr and Reno, on behalf of James McLennand for the Equitable Waiver of Dimension Requirements that was denied at the April 12, 2023 meeting.

The Chair elevated Derek Narducci to a voting member, in place of Lucinda McQueen.

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Jan G. said Attorney Lick's reasoning appeared to be that it was not done in ignorance of the law but, because something was not measured fully. She said the law referenced in the hearing, NH Statute 674:33-a, had four components, one component was not, failure to measure appropriately. At the original meeting we found that he did not meet the requirements of the state law, the one that said you cannot be ignorant of the requirements. The Chair interjected or failure to inquire. Jan G. said his new pleading seems to say that it wasn't ignorance, but rather that he didn't realize there was a slant in the (stone) wall and didn't measure the full length of the garage against the setback line. The Chair asked Jan G. if she thought that was not failure to inquire. Jan G. said she agreed with his logic, it's technical, but technically he wasn't ignorant of the requirement but, ignorant of measuring properly or to the end of the garage in order to realize it was not meeting the requirements. Jan G. said he was fine with the requirement, he understood it and wanted to comply with it, but then he measured inadequately. She thought they needed to hear it in order to ask questions like what the state law says about miss-measuring.

Harry said he doesn't disagree with that line of reasoning; he has felt from the beginning this case was handicapped by not having a site plan. It would show a building, done by a surveyor. He honestly believed the board should rehear it with a site plan in order to really know what the violation is. He was concerned the building siting was not done by a licensed surveyor with proper instruments. They used a line of site against the stone wall and believed they were square. There is a lot at stake here and there should have been a site plan that indicates where the property line is because without it we can't really make a judgment. Harry said if James McLennand knew the ordinance, he couldn't really apply it accurately because he didn't have a document that would show it. So, it came down to working in the field and trying to do it in the winter when mistakes happen.

Beverley agreed and said the Town of Warner is a wonderful place to live, where people help others. Twenty years ago she and her husband bought a small lot on the same street because they loved their neighbors. The property was too small to meet the setbacks for their home, the adjoining neighbor gave them a piece of land to give them enough room to meet the septic and water and house size requirements. That was the way Warner was and she doesn't understand what was happening now but she thinks this is kind of shameful. She said it is not as if half the garage is over the line. This is such a small thing she believes the board shouldn't have made the first decision and she certainly doesn't think they should deny it again.

Derek said he would welcome more information. The applicant has put a lot of time and trouble into this, the board at least owes him that.

The Chair said there wasn't anything in the request the board did not hear in the first hearing of the case. The board specifically asked about the builder. The Chair quoted from the ZBA minutes of April 12, the applicant was asked "when Tom Baye went out to measure did he tell you what the setbacks were and James said, yes at the time they were 40 feet. He and Tom did a rough measurement out to the stone wall and they thought it was 36 feet but after they did the actual measurement they determined it was 7 feet over that. Janice asked if the setback ever came up with the builder and James said, no." The Chair said there were no discussions of setbacks with the builder and now we are hearing the builder made a mistake or a wrong assumption. This honors the

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failure to inquire condition. The Chair said, making the wrong assumptions about the angle of the building compared to the rectangular shape of the lot doesn't merit a rehearing of the case and doesn't change the facts.

The Chair asked the board if there was any further discussion prior to the motion. There was no comment from the board.

**Jan G. made a motion that the board approve the request to rehear the hearing pertaining to the Equitable Waiver for Dimensional Request for property located at map 15, Lot 053-3. Second: None. Discussion: None. Roll Call Vote: Derek Narducci – Yes, Beverley Howe – Yes, Harry Seidel – Yes, Jan Gugliotti – Yes, Barb Marty – No. Tally: 4 to 1 in favor of a rehearing.**

The Chair said the applicant will have to come in and refile. Janice asked if it was a whole new application. The Chair said it was a new hearing. Janice asked if there was anything the board would like him to bring to the new hearing.

Harry asked if a condition of the rehearing would be to have a site plan showing the property line and the building accurately done by a licensed surveyor. Harry said they don't need to show ledge, outcroppings and trees. This was just a boundary line with the buildings. The Chair was unsure if they could make that a condition. Harry stated that was his condition and asked if the board could vote on it. Harry said it was what should have been included with the initial building permit. Janice thought the board could request it. The Chair thought it could be requested, but not a condition. Harry said he wanted to request it.

The Chair turned to Janice and said she could suggest to the applicant it would help the process and would like it worded in the strong as possible. Harry said he didn't think they could make a fair decision without it. He said he would even like to have the abutter's property on the plan. Janice said if the abutter has a survey maybe she could bring it. The Chair said the board has to stick to the property that is actually under consideration.

The Chair said if the applicant says they can't prepare a survey in time, because she thinks they would want to proceed as soon as possible. Harry said the applicant should want to have a strong case. The Chair said to strongly suggest that it would help the case is appropriate. Beverley said there should be a timeline on refiling. The Chair said the applicant can reapply when they want. Janice asked is the clock ticking from the time the decision was made and when the board has to rehear it. The Chair said, no, they have to reapply and the clock starts ticking once the application is received.

Harry asked about the difference between rehearing vs. a new hearing. Why does it have to be a new hearing? The board will have new evidence brought to the hearing that was not available at the time. Harry said conditionally that was a different situation. When there is a request for a new hearing the applicant cannot come back with the same application. However, if there's information that is being offered that is new and pertinent information that is accepted. If there is new and different information that was not available that makes a difference on the findings of fact. He concluded this should be critical new information.

The Chair asked if Harry was suggesting they only hear new information, abutters will have to be noticed for a public hearing. Harry said he was confused whether they were

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calling it a rehearing or a new hearing. Beverley said it is a rehearing and an opportunity to provide the board with additional information.

Janice said in the past it has been done a couple different ways. One way was the board would only take new information for an appeal of a decision. She said the applicant's lawyer's letter requested a rehearing. Janice said there was another time when the appeal went to court and the judge remanded the case back to the ZBA to be reheard in its entirety.

Derek said a rehearing makes a little bit more sense to him. As far as what was already heard the board will be able to go over that pretty quickly. A new hearing opens up the opportunity to ask questions that are perfect for somebody else. He has been thinking about this case and has some more questions. He can ask questions about things the board has already talked about, as well.

Jan G. said it is very important to have all the facts in one place, so we can agree on the facts and not just the changed facts. If it comes up five years from now you wouldn't be able to follow the reasoning. Beverley agreed.

Harry said he agreed with Derek, whatever it the appeal is called that delivers the information fresh and complete to the town would be best. Harry asked if the board needed to restate the motion indicating that it is a request for a new hearing.

The Chair said she thought it was still a rehearing, but they can ask the town's attorney about the correct wording. Derek thought that was a great idea. The Chair asked Janice to follow-up.

### 2. REVIEW OF MINUTES OF PREVIOUS MEETING: April 12, 2023

**Harry Seidel made a motion to approve the minutes of April 12, 2023 as amended. Jan G. seconded the motion. Discussion: None. Voice Vote Tally: 5 – 0, in favor of approving the April 12, 2023 as amended.**

### 3. MISCELLANEOUS COMMUNICATION

The Chair cautioned the board about making personal statements. She said it is a mistake to refer to someone as a good guy or to say anything personal about the participants in this application. It reflects badly on the board. Jan G. apologized for a comment she had made during the revision of the minutes and said it will not happen again.

Janice reminded the board to be mindful of consistently voting on the Facts and Findings. Then she asked the board if they would like to make an appointment with the town's attorney, before rehearing the application. The Chair said they should wait to see when the application comes in and then make an appointment. In the meantime, she asked Janice to ask about a rehearing vs. a new hearing. The Chair said she couldn't find anything that said a new hearing is different than a rehearing. Harry said he thought it was a good idea to meet with town counsel when the time comes. Beverley said maybe not, because they heard this case originally without help from the town lawyer. Janice said the lawyer can help the board with pitfalls especially since it is a rehearing and both the applicant, and the abutter have lawyers. It gives the board protection to know what you are looking for, the questions to ask, what to get on the record and potentially ensuring the decision is sound.

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Derek said the application states the agents of the town may visit the site with no further notice. He asked if that means he can actually go look at the site. In the future, he would actually like to go put eyes on what he is determining.

The Chair said there are two different kinds of site visits. When the board gets an application, everyone can do a drive-by, stop and look at the property and the character of the neighborhood. The second type is when the board physically visits the property. The board can do that as a group. If everyone can not make those visits then board members can visit the site individually, with permission from the owner. If there are three members of the board on site it is a quorum and therefore a meeting, we have to take minutes and notice the public of the time and place.

Harry said we are going to be talking about Variance application tonight. He has reviewed other town's variance applications. They are pretty much the same as our town, with different nuances. On an application from another town, after the applicant signs their name and dates it, the application says, "by signing this application you are granting the ZBA and its members and representatives' permission to walk on and inspect your land." The Chair said that doesn't mean you don't have to get permission first. Harry said the application states the board has permission. The Chair said our application states that as well.

The Chair read from one of the ZBA's application forms, "by submitting this application I/we hereby authorize and understand that agents of the town may visit the site without further notice. I/we further understand the ZBA may have at some point during the review process schedule a site visit which will be duly posted."

Janice said the board had this discussion when reviewing the Rules of Procedures, as to whether or not to allow impromptu individual site visits. The board had a discussion as to how some women are uncomfortable going on an individual site walk rather than men and that it didn't seem equitable. If one board member does a site walk and the others do not, now the board is dependent on that member giving testimony on something someone else did not see. Harry said Janice has a different take on how site walks are done, different than he has experienced in all his life. He was told that a board member is responsible for becoming familiar with the conditions at the site and do not come to a hearing having not made a site walk. He said he was given cards with his name and the board he served to give to property owner's. Harry said although you could not talk with the owner. Janice said this subject was deliberated in a previous meeting. The board had agreed on this site walk approach while amending the Rules of Procedure.

The Chair told Derek when he gets the Rules of Procedure there is a short paragraph addressing this issue. It states members should familiarize themselves with the parcel which means drive there and view it. The Chair said there are times when the board, usually when discussing a use, when the whole board will want to see the site.

#### 4. UNFINISHED BUSINESS

##### A. New plans for the Steve Shumsky project 2022-06

The Chair asked Janice if the new plans for the Shumsky property were received. Janice indicated she had not received the new plans. The Chair said board should have the new plans, it was a condition. The Chair will write a letter asking Steve Shumsky for a copy of the new plans.

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### **B. New Rules of Procedure to the Town Attorney for review**

The Chair said recent municipal training indicated the Rules of Procedure should be reviewed by the town attorney.

**Harry made a motion that they send the Rules of Procedure to the town attorney. The Chair seconded the motion. Discussion:** None. Voice Vote Tally: 5 – 0 in favor of the motion.

The Chair has a specific question about the ROP for the lawyer. In the recent ZBA training it was said that decisions need to be distributed but not necessarily published. Presently they are distributed to a mailing list that Dan Watts distributes to hundreds of people in town.

## **5. NEW BUSINESS**

### **A. Review of ZBA applications and propose updates**

The Chair worked on wording in the applicant's checklist and the Equitable Waiver conditions, she distributed copies to be reviewed at the next meeting. Everything on the checklist is the same although she put the plans separate so they would stand out more. The Chair said we are allowed to ask the applicant to provide us with copies for each board member. The changes to the Equitable Waiver conditions meets exactly with the RSA 673:33-a criteria.

Janice handed out applications from different towns with highlighted information the board may want to consider. There is a sample plot plan in some of the applications.

Harry said he didn't make copies for everyone but did a similar investigation. He looked at Hopkinton, Sutton, Newbury and New London which are towns close to Warner. He felt the 91-A statement on our applications is unusual and not stated on other town applications. He read the statement, "this application is subject to the RSA 91-A which supports the public access to government records and meetings." He would like to suggest that it be changed to read something like, "it is recommended that the applicant consult with the land use coordinator before filling out this application." He believes that would be useful. He believes the 91-A statement is almost like a political statement. Jan G. said it relates to freedom of information, why put it on something like this. Janice said doesn't that statement just warn that the information will be posted publicly. Harry said, no other town says that.

Derek said he once tried for three years trying to get a variance, he would have loved to get some help from his town. It would help to actually consult with someone here in the town.

Janice cautioned that the burden of proof is on the applicant. Also, if the application is incomplete the Land Use Administrator cannot reject the application as being incomplete that is the duty of the board. The Chair said that Janice can check "no" when something is not included in the application. Janice said applicants will have questions about the

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criteria and she has to be careful as to what she says because she doesn't want to give the impression that are going to get the appeal approved if they follow her instructions.

Harry said it is a delicate game that needs to be played. The way these towns do it is to approach it with different layers. They will have a checklist and general guidelines and describes the different types of appeals. Some towns will explain the process which makes it easy for the applicants. In the checklist on the Newbury application, it says "if any items is missing the application is considered incomplete then the ZBA will not be able to proceed with the hearing. Check each box when you have completed the request." Harry continued to say this application says "site plans should show the following buildings and proposed with roofline and overhangs shown, property lines and setbacks, septic systems, water wells, driveways, steps, retaining walls, patios, directional arrow indicating north and a landscape plan." They even require architectural plans.

The Chair said our checklist will be more descriptive. Janice said it will be so nice to make this easier for the applicant. Derek said the board should do as much as they can to help the citizens.

### 6. COMMUNICATIONS AND MISCELLANEOUS

The Chair asked Janice to communicate with the board the lawyer's response on the rehearing or new hearing issue.

The Chair said application review will be on the agenda for the next meeting.

Janice asked if the ZBA was finished with the Rules of Procedure document edit? The Chair said not until they are reviewed by the Town attorney.

### 7. ADJOURNMENT (Motion, Second, Vote)

**Jan Gugliotti made a motion to adjourn. Harry Seidel seconded the motion. Voice Vote Tally: 5 – 0.** The meeting was adjourned at 8:50 PM.

jll