APPROVED MINUTES of 09/13/2023

TOWN OF WARNER
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Zoning Board of Adjustment

Minutes of September 13, 2023

I. The Chair opened the ZBA meeting at 7:00 PM.

A. ROLL CALL

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

Also present: Janice Loz, Land Use Administrator

The Chair elevated Derek Narducci to a voting member in Beverley Howe's absence.

II. **NEW BUSINESS**

A. An Appeal of Administrative Decision

Case: **2023-04**
Applicant: **Karen Coyne and William Hanson**
Agent: Mike Harris, Timothy Kopczynski, BCM Environmental & Land Law
Address: 112 Willaby Colby Lane
Map/Lot: Map 13, Lot 19-1
District: R2

Details of Request: Relating to the interpretation and enforcement of the provisions of the Article IV.F, and Article VI.C., of the Warner Zoning Ordinances and of RSA 676:5. An appeal of an administrative decision to issue a Permit to Build No. 2023-51 on property located along the Warner River on Willaby Colby Lane.

The Chair asked board members if anyone had a conflict of interest. Harry said he thought he had a conflict of interest. He is on the Select Board and signed the Building Permit application. After careful review he believes he has to recuse himself. Harry recused himself from the board table. The Chair thanked him and elevated Sam Carr to voting member in place of Harry Seidel.

The Chair explained that the applicant will present their case, then the landowner, then abutters followed by public responses. The Chair noted the applicant wasn't being represented by Amy Manzelli.

Mike Harris of BCM Environmental & Land Law was representing Karen Coyne and William Hanson (applicants). Mike Harris, Attorney introduced himself and Timothy Kopczyski both of BCM. Mike said he was there to appeal the Building Permit that was issued for construction involving 112 Willaby Colby Lane, owned by Mr. and Mrs. Leo Storch (property owners). They are asking for the permit to be set aside because as the property is currently situated it doesn't comply with the town's zoning ordinances. No variance for those conflicting ordinances has been sought by the landowners.

The Chair said there are two things that we are considering tonight. The first is if the appeal was filed within a reasonable time and the second is if the Building Permit should be vacated. So as the board is listening to the presentation, they are considering both of those items.

The Chair directed the board to review the application as being complete.

Jan Gugliotti made a motion to accept the application as complete. Lucinda McQueen seconded the motion. Discussion: None. **Voice Vote Tally:** 5 to 0 in favor of the motion.

Attorney Harris addressed the timeliness of the application. He referenced Supreme Court hearing MacNamara vs. Hersch in 2008. The case says with respect to timeliness the applicable state statute is RSA 676:5 L. which says the appeal shall be taken within a reasonable time as provided by the rules of the board. The ZBA does have Rules of Procedure which they have thoroughly examined. There isn't a definition of a deadline for appeals of administrative decisions or of Building Permits appeals. There is no interpretation of what a reasonable time would be. There is a funny little thing in the application which stands out as applicable. The provision says an application for an Administrative Appeals should normally be filed within 30 days as set by the rules of the board. Which is sort of circular, because the Rules of Procedure do not have any provisions on this point.

Attorney Harris said he is not even sure what "normally within 30 days" means, unless there is a reasonable reason for it not to be, that is not clear. More importantly we do not know where that provision comes from, the application itself is not a rule of the board. The application was probably prepared by staff at some point. We do not know if that language was part of some other rules that are no longer applicable and that got left behind. We do not know if it was cribbed from another jurisdiction or if the language was provided by some municipal league or something like that. There is no clear reason why that is and the rules of the board don't seem to clarify what a reasonable time is, or limit it in any way.

Attorney Harris said the counsel for the Storch's submitted their own interpretation on September 11th. They are arguing that Article XXI of the Zoning Ordinance which states that any person aggrieved by a decision of the Board of Selectmen made under this ordinance may appeal such decision to the ZBA in accordance with RSA 677:1-4. He said they have done a lot of historical research including the ordinance document itself which will be heard tonight. But this provision, Article XXI has been in the ordinances for

more than 35 years exactly as worded, he has a copy of the 1986 zoning ordinance document and will provide it to the board, if needed.

Attorney Harris continued to say RSA 677 has gone through a lot of revisions in the last 35 years at the state level. So, we don't know that what the RSA said in 1986 matches exactly what it says today. But, what it does say today makes no sense in this context. RSA 677:1-4 basically applies to appeals to the Superior Court of decisions of the ZBA or the local legislative body after a motion for rehearing. That provision is not really applicable and there was no motion for a rehearing. In fact, the Select Board never held any hearing on this (Building Permit), it was on a consent agenda. This is problematic, it implies the decisions of the local legislative body. The Select Board is not a legislative body. RSA 672:8 defines what a legislative body is and for Warner it is the Town Meeting. The Select Board actually says on the town website that it is an executive managerial administrative body, not a legislative body. With all due respect to that interpretation and trying to utilize Article XXI does not apply here at all.

Attorney Harris said this is a question of whether they met the reasonable time. He thinks that is a factual question for the board and they should listen to evidence on that. They submitted a letter to the board in response to this issue. Which states that his clients, the applicants, first became aware that there may be some construction earlier in the spring when surveyors showed up and started to make markings for utilities and other things. After they went to the May 16th Select Board meeting and inquired about whether or not there was a Building Permit application, or an issued Building Permit. Attorney Harris said the board could look at the minutes or view the tape of the Select Board meeting. The Select Board incredibly said, "no." The Select Board reassured his clients that if there was a building application, they would anticipate that they could view it. The applicant asked to be notified by the Select Board when that occurs. It was reflected in the minutes that, yes, they would notify the applicant if a building application was made.

The applicants walked away from the May 16th meeting thinking that whatever was happening there it wasn't related to a Building Permit situation. Attorney Harris said, we all know now that wasn't accurate. Although, he said maybe the Select Board didn't know and he wasn't suggesting they did anything wrong here. But, we know that there was an application dated March 24th, 2023. That application came back to the Select Board later on June 20th on the Consent Agenda.

In the letter from the Attorney's for the property owner on Monday, they talked about the fact that the Building Permit was noticed on the agenda. Attorney Harris said that was not correct. Building Permits are part of the Consent Agenda and they don't list those out. He has a copy of the June 20th Select Board agenda, which he could provide for the board and counsel. There is nothing about any property Building Permit, let alone this particular property.

The Chair said when you listened to the tape did the Select Board actually tell the applicant they would notify them if a Building Permit came in? Can you hear that on the tape? Because when the Chair looked at the minutes it just said they would do their due diligence. Attorney Harris responded, "it's on the tape."

Attorney Harris said the applicants walked away from the May 16 meeting feeling assured that there wasn't a Building Permit application and if at some point there was one they would learn about it.

Attorney Harris said it came onto the Consent Agenda on June 20th. Things can be taken off the Consent Agenda if there is a question or something needs discussion. There was a comment on the tape of one of the board members saying did we notify Karen Coyne and that discussion didn't go anywhere and the Consent Agenda went forward.

Attorney Harris said then on July 17th almost a month after the June 20 meeting, more equipment showed up on the property. At that point, the applicant reached out to his law office. They spoke about going down to the town office immediately to see what was going on. They came to Warner that very day, July 17 and was given all the application material and the permit as well. They took pictures of that and sent it over and immediately started thinking about how to have the appeal done within a reasonable time. They reviewed the state statute and the ROP and went forward from that. The application was hand-delivered on July 24, 2023 which was the deadline for the August 8th ZBA meeting. Although, it doesn't really matter if they had filed that on July 17 or July 20th because the Zoning Board wouldn't put it on the agenda until August 8th.

Attorney Harris continued to say it was hand-delivered with a check and it went missing and he understands things happen. They did not know it was missing. On August 7, they noticed they weren't on the ZBA agenda. They reached out to the Land Use office and asked Janice if she had seen it and she had not. We immediately sent her a copy and a full explanation of hand-delivering it. The bottom line is they have been diligent here and given the whole set of circumstances they certainly think that would be a reasonable time. These circumstances weren't normal.

Janice asked Attorney Harris for a copy of the June 20th Select Board agenda for the record. Janice said when Mike Harris emailed her office and inquired about the application, she did not have it. Janice went upstairs to ask the Select Board Secretary if she remembered receiving it, and she did remember receiving the envelope. So, it just got lost in the shuffle.

Attorney Harris said he hasn't seen any assertion, at least for the purposes of determining timeliness, that the July 24th date isn't the date that it was going to be looked at.

Next Attorney Harris addressed the merits of the appeal. The entire argument starts with the May 20, 1989 subdivision map approval by the Planning Board. There are notes attached to application for the larger Lot 19. There are conditions which essentially provide for a 30-foot setback from the public right-of-way and 50-foot setback from the river. The problem is even assuming for a moment the Planning Board lawfully acted. It's a strained interpretation of the law that the Planning Board could somehow freeze those conditions in perpetuity. It's been more than 30 years. At some point, it's just part and parcel of land use planning and town zoning that after so many decades you have to start to decide when you are going to apply current zoning.

Attorney Harris said zoning is about expectations. The original subdividers, and even the Storch's when they purchased the property in 1993, could make an argument that they had an expectation that this was approved and filed. But a lot has happened in 30 years. There has been more development in there, there are more abutters, additional

subdivisions. There have been zoning ordinance changes. Since 2010, for more than 12 years the Tax Assessor has treated that property as not buildable. They have provided all the tax cards since 2010 along with the application.

The Storch's never appealed that assessment, saying that they had a right to build or objected to the status of the property. He said his client's expectations when they moved here shouldn't be short lived either. They saw a vacant property that doesn't conform to the current zoning ordinance. There are tax cards that say not buildable. They certainly had a fair claim to say they didn't expect that property to be the subject of Building Permit in 2023.

Attorney Harris said he is not saying the Storch's expectations are dead or that his clients' expectations are built in stone. But that needs to be resolved through the variance process. Not through the issuance of a Building Permit 33 years after the plan was approved and additional amendments made to the ordinances. Having the process through the consent approval on a Building Permit. It should be through some type of variance application process.

Attorney Harris discussed the zoning changes since 1989. In their appeal they offer two alternative arguments. One is the Planning Board itself issued a variance to alter the setback requirements. They didn't have the power to do that. The second argument that even if the Planning Board was correct there is no longer a grandfather claim. Attorney Harris said since filing the application they have got their hands on the old zoning ordinances. Those documents are really hard to find. They didn't have them despite going to the library here and at the Capitol. Even their office in Keene has every zoning ordinance document in the state. Attorney Harris passed out copies to the board and had copies for opposing counsel. They have the 1986 and the 1990 Zoning Ordinance documents.

Attorney Harris said in 1986 the setback from the right-of-way was 30 feet. In 1990 the setback from the right-of-way was 40 feet. The property was incompliance (in 1989), but it changed in 1990. In 1986, there is no setback for a residence from the Warner River. In 1990, a 75-foot setback (from the Warner River) was enacted.

Attorney Harris said the third aspect they argue is the issue of buildable area. That is not in either document, that occurred sometime between 1990 and more recently. That is the minimum total area for a lot and a minimum buildable area for a lot which excludes steep slopes, sandy soils, water bodies and the FEMA flood plain.

Attorney Harris said all three aspects happened after the Planning Board acted and that is relevant because it goes back to the idea of trying to freeze these conditions in perpetuity. At some point, these conditions need to apply. In this regard, they talk about RSA 674:39 in their appeal application. That is the provision of state law that gives the property owner, after either a site plan approval or a subdivision, a 5-year window to be free of any changes (in the ordinances). Two of the changes happened within the 5-year envelope. The building did not. The statute says you can take advantage of that 5-year exemption window if you start construction. The statute says you can start building within two years although the Planning Board can alter that and you have to be substantially complete within 5 years in order to be vested. That didn't happen here, it has been 30 years since they took possession of the property.

Attorney Harris said at some point the Town of Warner enacted these additional setbacks and buildable area for legitimate public health and safety reasons. Flooding which is obviously a big deal, and they have a map showing the flood zone along that property. At this point there is no bona fide argument that could be made that would hinge the issuance of the Building Permit on the 1989 subdivision approval. Even if conditions were valid at the time of approval.

The Chair commented that they had a reference in the application that was submitted about essential services. She said that is really covered in our Use Table under Community Facilities. She asked if they are dropping that reference?

Attorney Harris said he didn't think it was the most significant concern here. It is their understanding that essential services are allowed use within the R2 district but you have to have a special exception.

The Chair didn't think that was true. She thought number 13 under Public Utilities in the Use Table indicates they are permitted in all zones.

Attorney Harris said they interpreted it to be actual public utilities substations and other types of infrastructure that were needed generally opposed to the directional polls on private properties for delivery of those services.

The Chair said they have never received a special exception for those kinds of things.

Karen Coyne said their first visit to the Select Board was March 7, 2023 and it is in the meeting minutes and on the Zoom. They had started to see things happening at that time and Chairman Bowers of the Select Board said that there was no Building Permit. He also committed to notifying us if anything was to come to the Select Board. They were told two different times that they would be notified if a Building Permit came before the Select Board.

The Chair said since this is for a Building Permit that was issued by the town. She wanted to ask if either the Building Inspector or anybody from the town wants to speak? No comments were made.

The Chair asked the landowners' attorney to speak.

Attorney Ariana McQuarrie, from Alfano Law approached the table, she was representing Janice and Leo Storch the property owners. The Chair asked Attorney McQuarrie to address the reasonable time issue first.

Attorney McQuarrie said she understood that there was no rehearing requested. She was making the argument essentially that pursuant to the Warner Zoning Ordinance any decision made by the Board of Selectmen needs to be appealed within 30 days. This was clearly not appealed within 30 days. She submitted that in terms of reasonableness the board should find this appeal was filed unreasonably and untimely in the circumstances. Given all the balances, tests and factors that the board has given us to weigh these types of decisions.

Attorney McQuarrie wants to draw the board's attention to the statutory language in RSA 676:5, which says reasonable time as provided by the rules of the board. The court does give deference to determine what time is reasonable. It's clear the Town of Warner considers 30 days a reasonable time period. Not only is 30 days outlined for decisions of issuance by the Board of Selectmen under that provision of the Warner Zoning

Ordinance, but also as referenced as a note about helping people who are applying for these types of things. These normally have to be filed within 30 days. She suggested that there are really no special circumstances here as to why they shouldn't be following a reasonable time period when looking at all of the circumstances together.

Attorney McQuarrie said she doesn't know really when this was filed, she is not saying that anybody was making any misrepresentations. But, there are three things in that appeal packet. There is the date of July 21 that was dated with Ms. Coyne's signature. There is a date which ironically would have been 30 days from the issuance of the permit. There is the date of the 24th which we've heard evidence about and the town record shows the town received this on August 7. She believes that was when the check was collected as well. She would suggest that the time of payment, is when the application is finalized, is on August 7. In determining what is reasonable under RSA 676:5 the Supreme Court has said that it is really a balance of interest of the party benefiting of the administration decision of the town's actions against the interest of the party aggrieved.

Attorney McQuarrie continued to say some of the factors the court gave are who the parties are, the conduct of the parties of interest and the possibility of prejudice toward any of the parties. She would like to address those separately. Who the parties are, she would suggest that Ms. Coyne is a member of the town and has knowledge of the happenings that she would suggest that an ordinary citizen may not have. There's a correspondence that I've received a 91:A request and she believed a tax card was changed sometime on July 24th or sometime in that period of time. She knew about that immediately and there was a thread of emails about that. Her clients are just residents of Pelham, NH, trying to finally exercise their permitted rights after 30 years and trying to settle down in Warner. The content of the parties is also something that the board can take into consideration. The property owners here have dotted all "i's" and crossed all "t's" to ensure that they are compliant with what their project needs to be compliant with. She suggests that they have done everything from following directions from the NHDES and have addressed concerns from the Warner River Local Advisory Committee. They have gone above and beyond to make sure they have done what they needed to do. They are not ignorant of the process.

Attorney McQuarrie said, however, the applicant has been acting egregiously though this. She has had actual notice that this project was up and coming since February. Attorney McQuarrie has received certified receipts of letters that were sent by the Civil Engineer Mark Moser about notices that they (the property owners) were applying to the shoreline impact permitting and getting the subsurface water, as well. Attorney McQuarrie suggested that since February the applicant has had actual notice of, and moreover, she (the applicant) has been in attendance regarding various discussions in March with the WRLAC. At that meeting it was discussed that an application for a new home was received. She believes that was actually the day after builder Dennis Hamilton on behalf of the property owners submitted their application for the Building Permit.

Attorney McQuarrie said the conduct of the parties that she believed was relevant is that just tonight she was made aware that there was a complaint filed with the DES. Made when the property owners were working with the WRLAC, Mr. Mark Moser and the civil engineer to try to assure the committee the compliance with this project. Also, sometime during May 8, 2023, there was a complaint submitted to the water division of NHDES

that was basically a false allegation, saying that property owner had started construction, they were dredging the wetlands, impacting the bed of a water body. These are all complaints without merit. She has letters that at first the NHDES did send the property owners a letter to cease and desist, then literally the next day they were actually granted the wetland impact permit. She has copies for the board and for opposing counsel.

Attorney McQuarrie addressed the interest of the parties, which is another factor in determining the reasonableness of the time period. The property owner's, it is clear, have been reliant on the Town's ascertains about the buildability of the property since they've purchased it. They have done their due diligence to ensure that it is buildable and the town did issue a Building Permit to the predecessor back in 1991. This lot was always buildable until sometime randomly in 2010. There was a note on the tax card which has changed and the Tax Assessor did look into that information and conferred with other town officials and town counsel. The decision was made to remove that unbuildable note on the property tax card because there was nothing in the town's record to suggest that it was not buildable. The applicant could rely on tax cards because we all know how unreliable tax cards are. If the applicant had done their due diligence and was so concerned about this property across the street remaining vacant there has been a subdivision plan recorded in the Merrimack Registry since November 1989. So, there is constructive notice that there is a subdivision plan that contemplates a building there (on the property). Moreover, there was no easement that would relate directly to any interest anyone would have in this project.

Attorney McQuarrie said the property owners have been working since early February in 2023 to bring this project to fruition. They have invested a lot of time and interest as a factor in the timeliness standard here and now we are in the Fall months and may expect snow anytime soon. Mr. Dennis Hamilton is a reputable builder in town and they really want to make sure they move forward with him and his schedule. Now we are running against a timeline with the state permit where they have just four years from that issuance to begin our project and secure the conditions that we've been able to secure.

Attorney McQuarrie said another factor here is the possibility of prejudice to the parties which is a factor that the board can use to determine the timeliness or lack thereof. She suggests that some of the factors stated such as, time, money and the efforts the property owners have undertaken in the past year to get their Building Permit issued. The factors are all in their favor here when they are balancing an interest rate against the aggrieved applicant. It would be well within the board's decision to deny this application as untimely because it has been unreasonably filed given the circumstances of the parties in the case.

Attorney McQuarrie addressed the merits of the case. The property owners are not required to get a special exception in these circumstances. She agrees with the Chair's assessment that it is not required to get a special exception to run utilities to the property in these circumstances per the Warner Zoning Ordinances.

Attorney McQuarrie addressed the FEMA floodplain argument. That argument is completely without merit. She passed around documents she wanted the board to consider, opposing counsel had been supplied with the same documents. These are the plans as submitted by Mark Moser the Civil Engineer to the NHDES to get the shoreland impact permit and for the subsurface permit for the septic tank. Attorney McQuarrie referenced sheet one which showed the existing conditions as the property is today and

as accepted by the state. She brought attention to the dotted red line at the top which designates the 1% ADP elevation level of 424.3 feet. That is the designation of where FEMA flood plain actually is. So, it is a misrepresentation to say the FEMA flood plain is just anywhere on this grey map. It actually shows topography and elevation. Attorney McQuarrie was made aware by Mr. Moser that when they went to see if this is out of the floodplain they have a procedure where they take a straight line and tie to make sure it is actually above the elevation level. So, none of this project is within the FEMA flood plain. Attorney McQuarrie referenced the middle of the sheet where their level is between 430 and 432 feet which is 6-to-8 feet above the flood plain level. So, there is nothing that reduces the buildability of this lot, from the findings of Mr. Moser.

Attorney McQuarrie addressed the buildability in terms of wetlands. The property owners in an effort to do their due diligence and address concerns of the WRLAC relative to suggestions of the applicant at the WRLAC meeting. The property owners hired Audry Klum, a NH Certified Wetland Scientist who went out to visit and delineate wetlands on the property. The Wetland Scientist observed no wetlands in the vicinity of the proposed project other than what was already marked and delegated. Janice asked that she please make copies available for the record. Attorney McQuarrie confirmed that the copies she was circulating could be kept for the record.

Attorney McQuarrie addressed the issues related to the zoning. One of the arguments raised in the appeal was that and essentially whether or not a zoning compliance certificate was sought prior to issuance of a permit. She suggests that essentially it was in a letter from Jean McAllister, who was the Zoning Compliance Officer in March 18, 1991. (Submitted and made part of the public record).

Attorney McQuarrie said that letter was submitted and accepted by the board in the issuance of the permit as the zoning compliant. Additionally, there were a number of other documents including the letter from Bristol and Sweet Assoc. She said the previously referenced letter dated March 1991 was because the previous owner was issued a Building Permit for the vested setbacks. So, when her clients purchased the property in 1993 they employed Mr. Sweet to look into the project. Some of the pertinent findings were summarized by Select Board member Mr. Seidel in the issuance of the Building Permit on the June 20th agenda. Essentially, Mr. Sweet the surveyor had actually talked to Jean McAllister who stated that the town was on noticed of the irregular shape of the lot and they had visited the lot. They had decided after checking with counsel, Don Gartrell that the setbacks stated as shown on the plans governed the lot. She would argue that is essentially a grandfathering of these types of conditions. This is incorporated by Mrs. McAllister's letter from March 19, 1993. It also stated that this lot would be exempt from future setbacks but not from NH state setbacks.

The Chair asked where Attorney McQuarrie had come across that letter. Attorney McQuarrie said her client gave it to her. It was part of what was submitted as part of the application for the permit. She also has prior approval for construction for the prior owner, Mr. McGuire, which she shared with the board.

Attorney McQuarrie followed up on the provision of the buildable area of at least 2 acres. Removing the FEMA floodplain argument and arguing whether any of the wetlands can impact this project, she would suggest that there is a buildable envelope of at least 2 acres for this project.

Attorney McQuarrie said today they are really talking about an appeal of administrative decision of the issuance of a permit. Not the decisions 30 years ago by the Planning Board. In the June 20, 2023 meeting minutes when members reviewed the property owners application for the Building Permit and reviewed all the aforementioned documents they found to be credible. Then the Board of Selectmen moved to approve that permit. Then more than a month after the issuance of the permit is an unreasonable time to appeal the decision and her clients are actively being harmed.

Attorney McQuarrie made comment in reference to equity. Essentially going back to the balancing of the interest between the party benefiting from the administrative decision or the town's actions as weighed against the interest of an aggrieved party, the applicant. Attorney McQuarrie suggested that the property owners have done everything in their power to act appropriately under the zoning ordinances and laws to achieve their permit. They have acted appropriately with NHDES to secure the safety and make sure they do not impact others around the Warner River and their neighbors. As early as February 2023, Mr. Mark Moser worked to attain shoreline and other permits and both were approved. The applicant did try to disrupt those efforts by filing false claims and allegations with the NHDES that were not founded and were essentially dismissed and the permits were issued. The WRLAC really should be the party that has the concerns. She submitted for the record correspondences between Craig Day, the Shoreline Specialist in NH, dated March 24, 2023. In that letter, they bring the WRLAC comments and recommendations to the NHDES' attention. Afterward her clients received word from the NHDES and then hired Audrey Plum to go through and delineate the wetlands and make sure those concerns were mediated. Also, in an April 25, 2023 letter to Craig Day from Mr. Moser he goes line by line to satisfy all of the concerns of the WRLAC. On May 20, 2023, an alleged violation was filed by the applicant. Then two days after they basically said to disregard that because they had received everything they needed to issue the appropriate permits.

Attorney McQuarrie asked the board under the circumstances and weighing these interests of the parties and taking into consideration what has happened thoughout the duration of this matter. Weighing all those factors who the parties are, the conduct of the parties, the interest of the parties the possibility of prejudice to the parties, all of those are in line with the property owners being actively harmed and their interests being pushed aside. Because this Building Permit appeal is really just couching something that actually took place 30 years ago to challenge those decisions. Her clients' ask that the board, finds that the appeal was filed untimely under RSA 676:5. Also because it wasn't filed within 30 days per the Warner Zoning Ordinances for both of those reasons the appeal was untimely. Also, for all the reasons that they have stated both in law and in equity that the board deny the application as stated by the applicant and do not vacate the Building Permit.

The Chair asked the board if they had any questions.

Jan G. had a question for the property owners' attorney. It seems like when the applicant got an official town revelation that there was a Building Permit was sometime in June or July? Jan G. said to Attorney McQuarrie that she seemed to be stating that because the applicant is on "boards" that she must have heard about it or should have been aware without having documentation from the town. Is that correct, is that what you are arguing?

Attorney McQuarrie stated that was part of the argument. She raised that argument as it relates to the factors that are considered in the reasonableness for time period. So, who the parties are is a relevant factor, is the argument she was making. She doesn't have any evidence to support that she (the applicant) did know. She has made a request to the town related to certain notices and has not heard back yet. She cannot say whether notice was actually issued. Attorney McQuarrie was arguing that the applicant was on constructive notice and actual notice in other ways from Mr. Moser's letter and being at the WRLAC that it had been submitted. She doesn't have much information as to what the actual knowledge of when the Building Permit was granted and what her (the applicant's) notice was at that point.

Jan G. commented that constructive notice isn't official but there were meetings or something else and they were discussing it so that would have prompt her to do an appeal. Even though, it (the permit) hadn't been issued by the town or acknowledged by the town.

Attorney McQuarrie said it is part of her knowledge of this going on and coming to fruition. There is a case that happened in Plainville that talks about constructive notice. In that case a party had purchased a parcel of land from an owner and they would have had constructive notice. That person due to a zoning board decision that some ordinance or conditions of the acceptance of that subdivision had conditions of the acceptance of that subdivision had clauses about a bed and breakfast potentially being built on that property. The court said that if they use that constructive notice that it was a recorded document to and it was a relevant factor in determining. So, she is not saying just constructive notice is okay. But she can't speak to what the actual notice has been here.

The Chair commented that Attorney McQuarrie mentioned the WRLAC meeting was the day after the Building Permit was issued. She asked if that came up at that meeting?

Attorney McQuarrie said not that it was issued, it was her understanding that Mr. Hamilton submitted his application on March 21st and the committee was talking about the new application for the permit on the day after, not the Building Permit but the issuance itself. She is making the argument that she was aware that the application was filed and then this was ongoing. The Chair asked not that a permit had been issued? Attorney McQuarrie said, not that a permit had been issued.

Derek commented that Attorney McQuarrie had said the property owners had done their due diligence. Did they check with the town to see what zoning laws may have changed in 30 years. Are there any documents about that?

Attorney McQuarrie commented that she doesn't have documents about that. The property owners did do a 91-A request and ask for documents that were on file with the town. Hence, they were given what she presented today.

The Chair asked if Attorney McQuarrie was saying that RSA 674:39 that 5-year exemption for filed plats does not apply in this case? The Chair continued to ask if she was saying that these setbacks are vested in perpetuity? Attorney McQuarrie said she is making the argument that they are grandfathered per the letter from Jean McAllister and the acceptance of that subdivision.

Sam asked Attorney McQuarrie about the floodplain that was mapped out with a red line indicating that there was a buildable lot of two acres. Attorney McQuarrie said that is her understanding from conversations with Mr. Moser and other people that it is a buildable lot and that building was not an issue.

Attorney Harris representing the applicant made his rebuttal. He thinks this was conflating this actual notice that something was happening on the property and that there may be a permit in the works with what the law focuses on, which is did you have actual or constructive knowledge of the permit being issued. There is a conflation that the applicant should have known the permit was happening and that the building application was approved. They would have been laughed away if they had filed an appeal without knowing there was a building application filed. There was no constructive notice or actual notice that the Building Permit was issued on June 21st until they actually went down and got it themselves on July 17th.

Attorney Harris said with all due respect the floodplain is a red herring. The floodplain is a decision for the Town of Warner to make if there is sufficient buildable area. An analysis has never been done. What defines the floodplain for the purposes of how Warner Zoning Ordinances versus what the state considers are separate things. There has never been a buildable area analysis for this property. It's a small property it's a jagged property. But the assertion is that it must have two acres. There is nothing to show that.

Attorney Harris finally said in terms of the vested language, vesting is a matter of law. The law is RSA 674:39. What a Planning Board Chair thinks is vested is not the law. The approval of the subdivision doesn't say that. It says that it does not supersede local ordinances or regulations. That is in the record that they submitted to the board. Vesting is not a matter of what you give an opinion of from someone on the Planning Board. Janice showed Attorney Harris the letter written by Jean McAllister, Zoning Compliance Officer in 1991.

Bill Hanson, applicant, said a single Planning Board member can't act as a single board member and grant authority to build anywhere. It has to be voted on (by the board). Bil clarified that he was the one who attended the WRLAC meetings and nothing about a Building Permit was discussed. The thing discussed was the NHDES looking at the purposed build site. He said he would have loved to file an appeal earlier. He tried, he went to the town and the Select Board. At a Select Board meeting they said they couldn't even discuss anything with him because there is no permit, when there is a permit they said they would let him know and would discuss it with him. That never happened. If he hadn't gone down there on July 17 on his own accord and asked the Building Department if there was a Building Permit, which the response was "yes" and that the town had it since March. How can he file an appeal if he was told they can't by the Select Board.

Karen Coyne, applicant, in the letter Mr. Sweet wrote he said in his opinion it was exempt from future zoning. The actual approval for the subdivision to Kenneth Anderson specifically says this approval does not supersede local ordinances or regulations. Also, there was a conversation that the Select Board had a discussion about the merits of the building and they made a decision to sign it. If you listen to the Zoom recording one Select Board member commented that they really like Mr. Sweet and that he is a "stand-up guy and that he trusts him." The second board member said they didn't really

understand all of this and so they would trust the first board member and the third board member refused to sign. So, the fact that opposing counsel is saying there was a big discussion by the Select Board on the merits of the case is absolutely false. She has the Zoom recording she can give you the timing (on the recording) of when that discussion took place.

Abutter, Michael Dorrington said his frustration is akin to why he left the federal government as an ecologist and retired as soon as he could. There are too many obstacles in sound long-term environmental planning. A lot that was drawn up based on environmental laws and legislation that has been surpassed over the years. It's a shame that regional and local planners did not catch the parcel which is a disaster from a biological standpoint. It's such a bad planning decision. He thinks the owners of the land are owed money by the town who collect taxes on a parcel that should never be developed.

Abutter, Bob Stiles, he is not familiar with the plan. His concern is the beauty of the river. He is concerned about protecting the watershed and that whatever rules are followed are followed. The creek is flowing all the time to the property at the end and that whole area is wet which needs to be protected.

Tom Stiles served nine years vice chair of the zoning board of adjustment. He worked under Jean McAllister directly. He said she taught him everything there was to know about zoning. The question is, and he hasn't been able to derive this from anybody, whether the setback requirements could be adhered to or that extra 10 feet cannot be adhered to for the setback requirement from the road. Because the setback requirement does have to be adhered. When a town votes to change a zoning ordinance that means the new zoning ordinance is the ordinance, that is the way it works. The setback requirements of 40 feet and 100 feet have to stay put, those are the setback requirements. All the zoning he has worked on applies the here and now and not something from 30 years ago. So, if I want to apply for something to do with my property, I have to adhere to the current zoning ordinances and not something that existed 30 years ago. Are the setbacks adhered to in the current Building application? Are the setback requirements there that are necessary in order to build any house on that property?

The Chair responded it depends on whether you think the 30 foot and 50 foot setbacks are in fact vested, as Mrs. McAllister said in her letter. Or, that you believe according to RSA 674:39 that those setbacks expired after 5 years when no building was performed on that site and the current setbacks should now apply. Tom said the current setbacks should now apply because that is the current zoning for that particular piece of property. He has not seen maps or plot plans to determine whether or not those setback requirements are being adhered to. He believes that Jean McAllister wrote that letter with the understanding that the building was going to take place at that time, and grandfathered at that time, not 30 years later.

Tom was sent a certified letter stating that the use permit under Article IV reads "no permit for the erection of no exterior alteration or moving or repair of the building shall be issued until the application has been made with the certificate of zoning compliance." He said that would pertain to something that would be a nonconforming use not a permitted building. In this particular case it is dimensional not use because they are using it for

residential purposes and it's a permitted use under the ordinance under the Use Table. He wants to get clarification as to why that is there?

Attorney Harris said they were trying to assert that the setback was not communicated to the property owner. Tom asked if the setbacks can be adhered to according to current setbacks. Attorney Harris said, no. The Chair said not and build the building that they are proposing. The Chair told Tom he was welcome to see a map. Tom approached the table and reviewed the map. The Chair said the property was designed with a 30-foot setback from the right of way and something like 59 feet from the river. Harry also reviewed the map with Tom. The Chair said what the building configuration will look like isn't what we will be determining here tonight. Tom said at the time that they submitted the Building Permit application the due diligence would have been to determine whether or not the setback requirements were being met. The Chair said, correct.

Tom said, so what transpired where all of a sudden the dimensional requirements were not being met. The Chair said she believes that the Select Board member who signed the Building Permit assumed that the 30-foot and 50-foot setbacks were vested. Tom said because of a subdivision by Ken Anderson. The Chair said, yes in 1989. Tom said there are 300 odd feet there and somehow the request could be manipulated in order to be able to adhere to the standard. The Chair said that is not what we are determining tonight, she didn't want to end up in a discussion about a future building.

Public Comment

James Gaffney said the Planning Board does not approve anything that exceeds or exists beyond what is in the zoning ordinance that is in effect and the RSA's that are duly passed by the state. What was approved for this site 30 something years ago is consistent with that. It does not have any mention of some magical time period that they can hold these setbacks to some time in the future. No action was taken on this property, for decades. The point is that one member of the Planning Board, at that point in time, issued allegedly a personal opinion that manifested in some letter not pertinent to what is in the folder for this property, right? That was some extra Planning Board comment. One person's comment is not a decision of the Planning Board. The Planning Board as a whole has to meet and make a vote on a decision for it to be binding in any way, shape or form. So, whatever that person said is at best hearsay. What you need to decide is, must this property conform with our current zoning or not. He thinks the answer is clear, yes it has to comply. Anything done on that property must absolutely comply with our current zoning ordinance. Otherwise, anyone who owns a property and the boundaries were created prior to Warner setting and adopting zoning ordinances can do whatever they want.

The Chair asked for final comments from the Attorney's, abutters and public.

Attorney Harris said he thought that was right, what happened 99 years ago and not disparaging anything what they are saying there was only one way to vest and that was through building it. That didn't occur. In respect to timeliness he thinks this is a real stretch that there is any hard and fast deadline here. He would ask the board to carefully look at RSA 677:1-4. It is so clear that it doesn't apply here. It is probably a good idea that people try to submit an application within 30 days. But, it is not a binding deadline and given the full set of circumstances and quite honestly we got (the application)

submitted as fast as we could. We did not wait until we were ready to do it. We were ready as soon as they found out about the Building Permit being issued.

Attorney McQuarrie said that the board with its equitable powers under the circumstances for the consideration of under the statute the outlines the timeliness for reasonableness all of the factors that she has already stated for the board to consider. Also, the interest of the property owners weighed against the interest of the applicant who have no easement to this property. The safety of the river, the safety of the shoreland have been addressed by the property owners. She submits that with all the factors in consideration of the parties that it was unreasonably filed and untimely.

Janice asked if she could speak. The Chair said Janice is not a member of the board and doesn't vote, she is speaking as a member of the public. Janice said she is raising this point as the Land Use Administrator. The only thing she wants to bring to the board's attention is the Appeal of an Administrative Decision application says "the appeal must normally be made within 30 days" of a decision. She thinks what the board needs to pick at is that word "normally." Our counsel said that is the word you have to consider when thinking about whether or not it met the 30 days requirement. She questioned whether it meant normally with exceptional exceptions. Whatever the word "normally" means she will leave that up to the board.

The Chair closed the public hearing.

Board Deliberations

The Chair said they had two questions that they need to answer. The Chair directed the board to deal with the timeliness of the submission of the application issue.

Jan G. said she was ready to make a motion. She thinks it is very clear that this was not a normal situation. The applicant was promised they would be noticed and they weren't. The applicant sent a check in, and it was lost. She believes it is common sense that they should be granted the right to have the appeal heard.

Derek said that this case fits the "normally 30 days" caveat due to circumstances. Just because the applicant is part of a board in town, doesn't mean she would be notified. Derek said he is part of a board, and he probably wouldn't be notified either. The term 'normally" was made for this case, it was over 30 days. There was a lot of research put into this, it is a very important case.

Sam said the two things that he would say that normally would apply to the decision of the Zoning Board itself, not necessarily an appeal of the Building Permit. Since it is an appeal of the Building Permit, he would side with the 30-day making sense. Since there was considerable effort made to get information in beforehand and not really met (by the Town) is another circumstance.

Jan G. said you cannot appeal a nothing.

Lucinda said she agreed totally. She thought it was, although she hates to say it, a comedy of errors. The applicant did everything she possibly could to keep informed about what was happening. Lucinda said her theme song is abutters have considerable due diligence to make sure that their area is taken care of, and everything fell by the wayside. She was very glad that Janice spoke about the word "normally" because the

situation was totally abnormal. She believes the 30-day question is moot and shouldn't be applicable. She thinks they should be given more time to make their appeal.

The Chair said if Karen had been promised that she would be notified if a Building Permit was filed, then she would absolutely expect that promise would be adhered to.

The board concurred that on May 16th she was promised by the Select Board she would be told.

The Chair said under normal circumstances she would be diligent about the 30-day notice. But, to be promised that you would be notified, she thinks relaxes you from going back and trying to go to Town Hall and bothering the Select Board secretary every day to find out if a Building Permit had been filed. The applicant was promised that they would be notified.

Jan Gugliotti made a motion that the board accepts the appeal was made in a timely fashion. Derek Narducci seconded the motion. Discussion: The Chair asked if they could change the word "fashion" to "manner". **Roll Call Vote:** Sam Carr – yes. Derek Narducci – yes. Jan Gugliotti – yes. Lucinda McQueen – yes. Barbara Marty – yes. Summary: 5 – 0 in favor of accepting the appeal was made in a timely manner.

Facts and Findings:

The word "normally" and that the applicant made considerable effort to be informed and the Select Board promised they would be notified and did not follow through on that process.

The Chair addressed the second item, as to whether the Building Permit should be vacated.

Jan G. said she is convinced that it should be vacated based on noncompliance with the current zoning standards. Specifically, related to the setbacks and the so called vested 1989 setbacks ran out of applicability after 5 years.

Lucinda said she concurred.

Derek said recently they had someone come in who didn't even know they needed a variance. That applicant came in and stated what they were going to do and the board told them they didn't need relief. The property owner did his due diligence. He just doesn't think this was checked. It certainly couldn't have hurt to put in for a variance and if he found he didn't need it because it wasn't grandfathered then that is the decision. But that was never done. A letter from one board member does not make a ruling. Even at that time if there was any question back in 1991 they could've put in for an appeal and asked if they could have this in perpetuity but that was never done. He feels they should vacate the permit and an appeal for variance could go forward. He thinks that process was skipped over.

Jan G. said it strikes her as disingenuous, even if it was an accident, that they wouldn't have challenged the tax card which said this property was a non-buildable property and they potentially paid less taxes on it.

Sam said he concurs with everything that has been said. He thinks it is a good case to apply for a variance. Originally to reconcile the subdivision discussion requirements.

The Chair concurred. She thinks the comments that were made in some of the attachments that they received were within that 5-year exemption period. So, when people said these things they were true at the time. But she thinks after that 5-year period which RSA 674:39 spells out very clearly when there was still no building on that lot. Those waivers or conditions have expired. After that point, they needed to comply with the current zoning. She thinks for those reasons the permit should be vacated. The Building Inspector and the Select Board, whoever is responsible for making sure that setbacks and buildable areas are confirmed, should have meaningful discussions about those things so the people know its being considered when these types of applications come before them. There was a lot of discussion before this came to the Select Board for a permit. She doesn't see anything on record where they had meaningful discussions about any of these issues.

Derek said he agrees. By the town not sending someone out to take a look at the property, the town is not doing its due diligence. At least someone should have taken a look at it seeing that it has been 30 years and we failed to do that, we failed the public. In this case, anyway.

Jan Gugliotti made a motion to vacate the Building Permit issued on Map 13 Lot 19-1 District R2, case 2023-04. Lucinda McQueen seconded the motion. Discussion: Janice said they may want to say "grant" or "deny" the appeal in the motion. The board decided to add the words "grant the appeal to vacate" to the motion. Jan G. restated her motion to "grant the appeal to vacate the Building Permit." Derek said the property owner could do an appeal for a variance. Janice said there is a path forward, they would have to get a denial of a Building Permit to use as a referral to the ZBA for a variance. The Chair said they could take this right to the court, as well. The Chair said they have different ways they could proceed, and she was sure they would be advised by their attorney about their options. **Roll Call Vote:** Sam Carr – yes. Derek Narducci – yes. Jan Gugliotti – yes. Lucinda McQueen – yes. Summary: 5 – 0 in favor of granting the appeal to vacate the Building Permit issued on Map 13, Lot 19-1 District R2, case 2023-04.

Findings of fact:

Prior waivers or conditions given to Map 13, Lot 19-2 had expired as stated in RSA 674-39 and therefore the current zoning ordinances should apply to this project.

The Chair called on Bill Hanson who asked to comment. He asked if there is a process where Building Permits should at least be posted. Janice said he should run that by the Select Board.

B. Application for a Variance

Case: **2023-05**
Applicant: **Pier D'Aprile**
Agent: Pier D'Aprile
Address: 115 Bible Hill Road
Map/Lot: Map 12, Lot 5
District: R-3 and OC-1

Details of Request: Preparing for a minor subdivision for two houses. The newly created lot will not have adequate frontage for the district.

Pier D'Aprile said he had an engineer who was unable to attend. Pier would be representing himself.

The Chair asked if board members had any conflict of interest. No comments were made. The Chair said Sam would go back to being an Alternate member. Harry Seidel would resume his role as a voting member on this case.

The board reviewed the application for completeness. The Chair noted the same application came before the board for this property submitted by the previous property owner in 2017. Pier said he has owned the property since 2020. The board reviewed the full list of abutters.

Harry Seidel made a motion to accept the application as complete. Jan Gugliotti seconded the motion. Discussion: None. **Voice Vote Tally:** 5 to 0 in favor of the motion.

Pier introduced the application saying it is a 48 ½ acre lot, the home is a 225 year old house built in 1798. His goal is to build a minor subdivision for two houses. He will need a variance for the road frontage requirement. Although he has 48 ½ acres there is only 330 feet (of frontage) on Bible Hill Road. His proposal is to take 250 feet for the existing house and barn (of frontage) and 3 ½ acres so it is totally compliant in the R3 district. The other house will have 80 feet (of frontage) which would just be a driveway up to the new location. That location is (setback) 1,000 linear feet off Bible Hill Road. It also climbs about 100 feet of elevation. The situation would not be visible from Bible Hill Road, and it won't be near any other home. It will meet all the setbacks, other than the driveway variance.

The prior owners had gone through the same proposal. The Zoning Board actually did a site review as well and in January 2018 approved the variance. Unfortunately, the previous owners did not know there was a two-year limitation on the variance. He is asking for a similar variance to what was approved by the board previously.

Pier reviewed the map. The proposed subdivision is similar. The driveway has moved a little bit. Harry asked if he is moving the driveway to the right, Pier confirmed. Pier approached the board and pointed out details on the map. The driveway will merge with the existing logging road to create a new driveway.

The Chair asked Pier to go through the application and add anything he would like.

Pier said the home he has right now is historic, over 225 years old. The upstairs is not completely adequate because of the sloped roof. An option would be to change the roof and put on an addition. He thinks that would be a mistake because the house is original as built 225 years ago.

The Chair said he just bought the house recently why not just modify the existing house? Pier said the stairway is at the very end of the house, when you go upstairs it really is one big room. The roof is really low, so you can't use much of the upstairs. So really it is a one bedroom house. It is a center chimney cape. Downstairs there is a front to back family room. On the other side is the kitchen and that is it. It is a very simple house and very charming and he would hate to change it. He would have to rip the entire roof off and raise it which he felt would do a miss-service to the house. He believes it is better the leave it as it is.

He addressed the location for the other house saying there was a clearing already there and it has westerly views which creates a natural site for the house.

The Chair asked Pier to read through the criteria.

Granting the variance will not be contrary to the public interest because:

Pier said the proposed subdivision for Map 12 Lot 5 into two lots will not be contrary to the public interest or injure the property rights of others because the proposed use and lot sizes are consistent with the neighborhood and surrounding area. The road frontage variance would allow the subdivision and construction of a new residence using the existing logging road for access. The existing logging road is commonly used by many residents, delivery vehicles, and emergency vehicles as a turnaround. He would continue to allow this and build the finished driveway according to town regulations.

The Chair said so you are using part of the existing logging road. He said yes it is just that entrance which is less than 200 feet. It will be shifted over a little bit, the rest he is not going to change. The only change will be the pitch is 12½% grade, he will have to make sure it meets emergency vehicle regulations and that there is a turn around at the top.

By granting the variance, the spirit of the ordinance is observed because:

The site plan proposes a new single-family residence being created on 44.5 acres +/- within the R3 and OC-1 districts in the town of Warner. The use is permitted in both districts. It is understood the road frontage requirement is intended to reduce over-development and crowding of houses in rural areas. In this site plan, the new residence will be located more than 1,000 linear feet from Bible Hill Road and the existing residence. The plan will also preserve the values and charm of the area by keeping the existing historic house built in 1798.

The Chair asked if he would sell the other property. Pier said he may keep it and rent it. He is not sure what he will do with it.

Jan G. asked what was across the street, was it residential or was it open land. Pier said there are abutters on either side. The other side of the road is Bradford and there is a house there, said James Gaffney, from the audience. Pier said the (existing) house is built very close to the road.

By granting the variance substantial justice is done because:

The general public will not be negatively affected because the plan is consistent with the character of the surrounding area and the existing informal turnaround will be maintained as a resource for the neighborhood. This application is an updated request of a January 10, 2018 Notice of Decision granting this Variance that was not implemented by the previous owners and has expired.

Granting the variance will not diminish the values of surrounding properties because:

The variance will allow the development of a single residence on a large lot that will unlikely be visible from Bible Hill Road and the surrounding houses in the area. The use is consistent with the surrounding area and poses no threat to property values.

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship:

The unique characteristic of this property compared to those surrounding it is the shape. The long "L" shape lot consists of 48 acres+/· with only 330 linear feet of road frontage. The bulk of the land exists more than 2,000 linear feet from Bible Hill Road. Based on the zoning regulations for R3 and OC-1, the lot size is large enough to easily support the development of an additional single-family residence but the road frontage prevents me from doing so. I would agree that a Major Subdivision for multiple homes on the bulk on the lot would be an unacceptable proposal for a variance. I am proposing that a Minor Subdivision of only two houses on this lot is a reasonable request for a variance of road frontage while not altering the characteristics of the area and still honoring the spirit of the ordinance. Lastly, the existing historic house will be fully compliant with the R3 and OC-1 regulations as the proposed plan creates a 3.5 acre +/· lot with 250 feet of road frontage on Bible Hill Road.

The Chair asked the board if they had questions for the applicant.

Harry asked if this plan was basically the same plan that came before the board in 2018. The Chair said, no, the house was much higher up the hill on the property. The Chair asked Pier if the new house would be near the crest of the hill. Pier said, no. He said you would climb up the hill about 100 feet and then it levels off with a westerly view towards Bible Hill Road.

Harry commented that this was an approximate proposed house site. Pier said, yes. Harry asked if it could move or has this been identified as exactly where the house was to be. Pier said no, that is proposed. If it moves it will not be that far up. He is under contract with the engineer, that would be phase two with the septic system and to address the road.

The Chair opened the public hearing to abutter comments.

Robert DeLuca said the last time it was granted, he believed it was for two non-conforming lots. The Chair said she believed the other lot (existing house) was going to be made conforming. The Zoning Board at the time, in 2018, had the applicant make one lot conforming.

James Gaffney said in reference to the original variance that was granted, the Chair is aware the board failed to consider the 5 criteria required to grant the variance. He said the Chair voted against that application in part because of that failure. When the variance expired there were conversations with the two previous owners and the Town. They were informed that they would have to come back and go through the whole process again. James said it was dubious whether or not the ZBA would in its current configuration would approve that. The ZBA at the time failed utterly and completely with regard to the law and the issuance of the variance. So, they chose to move rather than to have that fight. It is a legitimate argument the Town screwed up.

James said this application has a lot of problems. This will absolutely diminish the value of the abutters. The proposed road, he doesn't think there is 40 feet of distance between the current septic system and the property line, that would have to be determined. The other issue is it is not an intermittent stream, it flows year-round, except in the driest of dry months. It also handles all the runoff for the hill.

James said the proposed road takes an odd s-turn up a very steep hill. If you look at Google Maps you can see the road washes. He has seen Pier constantly up there with his tractor rebuilding the road. There is only one place to put the road. If you are coming out of the proposed property it is going to come over the rise and then as the car turns when the lights are on it is going to sweep to the back of the existing house with lights. It is going to sweep and shine lights into the house across the street, which is a Town of Bradford residence. Then it will come down the grade of the hill and sweep the back of James' house. When there are leaves on the tree it will mostly block that (light) but when there aren't it will shine right through the back of his house.

James said all the houses on the road with a few exceptions are old historic homes which are really close to the road. That is the nature of Bible Hill Road its an historic community. Part of his concern is they are not talking about changing the nature of the community by putting houses behind houses. This is a conforming lot with a conforming use on it. He is having a hard time biting down on the hardship on this. It absolutely the value of abutter's properties.

James said the creek on that property runs behind his house and makes a left hand turn at a 90-degree angle and then under Bible Hill Road. When it rains hard the drainage is maxed out. It has almost come across the road numerous times. If another house is put up there with more impermeable surfaces. There will be more problems.

James said the house itself sits if not in, near a wetland. Just like the creek it is wet with wildlife visiting it all months of the year. So, there are NHDES issues, as well. He does not think this is necessary. James said he understands the property owner wants to develop it. It is his right as a property owner to use his property within the law. The Town of Warner's laws require frontage in order for development. He does not see how this satisfies the five criteria that no harm to abutting properties and their values. It certainly doesn't satisfy that some substantial good would come out of it. You would be throwing another 4-or-$500,000 house behind another equally valued house in a rural zone.

Joe DeFabrizio said he agrees with everything that James has stated. Joe is directly across the street from this proposed property. He said that even now the driving up and down that road is constantly shining headlights into his home. When he and his wife started a family 3 years ago what drew them to the area was how pristine the land was. The passion that the residents on the hill and how the Bradford and Warner towns are committed to preserving the land. Because of the passion for adhering to the laws. Bradfords mission plan is all about keeping the land open and free. In addition, the proposed lot doesn't meet Warner zoning laws. The extremely steep driveway causes headlights to constantly shine into our home.

Even if it is moved, its still a nuisance. If a house is built there it is going to be a constant nuisance. His home is historic and it was built in 1823. When he moved to this home, they fled a town with constant exceptions made to zoning laws and ordinances. It left them wondering why these laws even existed if they are making constant exceptions. He hopes the board follows the law and he appreciated the board listening to his concerns.

Pier said he would like to address the comments made by the abutters. Although he thought the comments were passionate their comments were not true. Pier already has had the property inspected by an environmental scientist. There is no wetland in the area where the house is being surveyed. Any issues regarding the washout area of the

road will be addressed as part of the Building Permit. The Chair asked about the protection of the stream. Pier said the stream comes from his neighbor's property, the driveway pitch up the hill is hundreds of feet from the stream. There is no runoff to that stream from the pitch of the road. Also, this will be addressed in phase two. He would like to point out that the 12 ½ percent grade over a lengthy pitch is not as steep as Bible Hill Road. He thinks we need to stick to facts and not just opinions.

Pier would like to address the comments made about the ZBA acting inappropriately. The zoning board already approved this request, he would like to see documentation of inappropriate actions of the board and not just accusations.

Pier said comments made by abutters in regard to headlights being a constant problem because he does not drive up there, or live up there (discussing the logging road). On a rare occasion he may go up there with a tractor at night with lights. He would love to hear feedback from his neighbors and said they will work it out. Whether adding vegetation to prevent problems he said they will work it out. He does welcome the abutter's opinions. But he will not stand for wild accusations that are not fact based.

Linda Donovan, abutter, said she would like to see the lot lines. Pier reviewed the plot plan with her. She asked him how many homes he was planning on building. Pier said, just one.

James said in the meeting minutes of the meeting that transpired as part of the original approval, the ZBA at that time failed to consider the five criteria required to grant the variance. He appealed the decision which was ignored. He said the Chair was the only person to rate it properly at the time. It is a matter of fact they have seen and continue to see lights going up and down the road. He said the applicant has been a really great quiet neighbor, as he himself has been. It was his understanding the applicant does not intend on staying in the area and that he has already bid on houses out of the state. He is concerned about the granting of the variance, the applicant moving and he having to work with some unknown person. The fact is that the abutter's property rights and the values have been diminished by this.

Piers said he does not know where the abutter is getting his information but, even if he did have interest in properties outside the state it would be irregardless of this discussion. He agreed with his abutter they have been quiet and respectful neighbors to each other.

Piers said the 5 questions (criteria) were read through tonight as part of the application.

The Chair closed the public hearing. They will deliberate on all five points.

The Chair addressed the first criteria, the granting of the variance will not be contrary to the public interest. They have heard the applicant's response. She said public interest of course deals with health and safety. Public interest, she thinks is also open space that is maintained by the current configuration of the property would be somewhat lost. There will be a new building pushed further up the hill. We don't know if that creates a public health and safety issue, or a wetland or an issue with the stream. Will that be addressed if there is a subdivision plan.

Harry said his view was it is a residential use and is a 48-acre lot. The house will be a long distance away from the public road. So, there really isn't much impact that this property will have on the public. It won't be seen from the road because of the elevation

and the fact that it is over the crest. So, he doesn't see that it is actually contrary to the public interest. It is not going to create a density issue. The driveway that is servicing the house will be built in a way that will be stable. He thinks it will be helpful if a property owner can use his property.

The Chair's comment was that when you buy a piece of property it has enough frontage to support what is there currently. If you look at Map 12 there are a lot of properties that don't have enough frontage to subdivide. Nothing close to the acreage this piece represents. On Collins Road and Newmarket Road there are quite a number of pieces of properties that have frontage that is sufficient but not enough to subdivide. Her concern is the level to which this rises would preclude everyone making the same hardship plea that they should be afforded a non-conforming lot to put a second house on their property. Because they have additional acreage at the back of their property.

Derek asked if they had seen the property. The Chair said they actually did a site walk on the property at the prior hearing. Derek said he would really like to see what he is looking at. As far as putting a driveway there and that it isn't bad for the public in general he believes that is true. But the abutters are part of the public as well. He would like to take a look at the property before making a decision. Otherwise, he would have to abstain his vote, because otherwise he would actually need to look at the property.

Lucinda said she feels that if someone buys a property with an antique house on it on 48 acres and configured the way it is she doesn't see it as a hardship to not be able to develop back land. She doesn't think that just because they want to develop the back land that they should be granted access to it with a variance. The Chair asked if Lucinda's comments addressed the hardship question. Lucinda agreed. The Chair said they would go through the rest of the criteria.

The Chair circled back to Derek comment about needing to see the property. They could vote to continue the application until after a site walk. Derek said he doesn't know if it is a detriment to either party until he actually takes a look at the property. Jan G. said she would agree to see the property. She is also concerned that Mr. D'Aprile or whoever buys the property later raze the historic house and puts a big mansion, she believes that would be a hardship.

The Chair said the board would have no control over that if that property goes out of his possession. Jan G. said she would actually like to be there and see what it looks like. The Chair noted that Lucinda and Sam were both agreeable to a site walk. The Chair said the board has determined that in order to make a decision the board feels they need to visit the property. The Chair said they would continue the application to October. The board and the applicant determined the site walk would be Sunday, September 24th at 11:00 AM.

Derek made a motion to continue the hearing for the D'Aprile variance hearing to October 11 at 7:00 PM. Harry Seidel seconded the motion. Discussion: None. **Voice Vote Tally:** 5- 0 in favor of the motion.

III. REVIEW OF AUGUST 9 2023 MINUTES

Jan Gugliotti made a motion to approve the August 9, 2023 minutes as amended. Derek Narducci seconded the motion. Discussion: None. **Voice Vote Tally:** 5 – 0 in favor of the motion.

IV. **UNFINISHED BUSINESS**

A. Discuss Rules of Procedure (ROP) addition suggested by the town's Attorney.

The board decided to review the ROP's at the next meeting.

V. COMMUNICATIONS

Harry said he felt it was a good idea for him to step down as Vice Chair of the board. Harry said he could be an Alternate member. Sam asked if there is a requirement that there is a Select Board Chair on the board? The Chair said, no, not on the Zoning Board. The Chair elicited volunteers for Vice Chair. Derek and Jan G. said they would both like to be considered. Jan G. said she would defer to Derek. The Chair said that Derek is an alternate and he can not be voted in as a Vice Chair. Harry said he could become an alternate and he thought Derek would be good as a replacement. Janice said the Select Board has to appoint Derek as a regular voting member and Harry as an Alternate. The Chair will write a correspondence requesting the change be made by the Select Board.

Janice told the board they are in court with the McLennand case, and she is putting together a certified record for the case. She has asked the lawyer to keep her in the loop so she can let members of the board know if they want to view the court case.

Janice is also working on a 91-A request for the Attorney McQuarrie.

VI. ADJOURN

Harry Seidel made a motion to adjourn the meeting at 9:51 PM. Lucinda McQueen seconded the motion. Voice Vote Tally: 5 – 0 in favor of the motion.

/jll