



**TOWN OF WARNER**

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**Zoning Board of Adjustment**  
***Minutes of December 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 (Vice Chair)	✓	
Harry Seidel (Alternate)	✓	

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

**II. NEW BUSINESS**

**A. Hearing for a Variance Application to the terms of Article VIII.C.1.a**

**Case:** 2023-06

**Applicant:** Peter Smith

**Agent:** Peter Smith

**Address:** 89 Mink Hill Lane

**Map/Lot:** Map 09, Lot 11

**District:** OC-1

**Details of Request:** In preparation to subdivide Map 09, Lot 11 into two lots. One parcel will have 285+/- feet of frontage on Mink Hill Lane. Seeking a Variance for relief from the 300-foot frontage requirement in the OC-1, a discrepancy of 15+/- feet.

The Chair introduced the application and asked whether any board members had a conflict of interest with the case and if the case had regional impact implications. There were no concerns from the board.

The board checked the application for completeness. The Chair stated this application did not come with a referral from the Planning Board. The Planning Board hearing discussed road frontage and a Class VI road on the property. Janice said the Land Use office was asked to look into whether the Class VI road frontage could be used along with the Mink Lane frontage to meet the frontage requirements for the district. Janice did

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research and asked the lawyer and involved Allan Brown, a past Town Road Agent and current Select Board member. Allan conveyed to Peter Smith that Class VI frontage cannot be used when considering the frontage requirements and could not be combined with frontage on Mink Hill Lane. The lawyer's communication was in the board's packet and was considered as a referral statement to the board accompanying the Variance application.

The Chair asked about the Town not being noticed as an abutter. Janice said the applicant did not pay a postage fee for the notice, it was hand delivered to the Select Board's office. Janice confirmed that all fees have been paid.

**Jan Gugliotti made a motion to accept the application for Case 2023-06 as being complete. Lucinda McQueen seconded the motion. Discussion: None. Voice Vote Tally: 5 – 0 in favor of accepting the application as complete.**

The Chair asked the applicant to go through the application.

Peter read through the five criteria.

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

**Peter's response:** The variance just allows the subdivision off Mink Hill Lane. It does not change any features that already exist. This is a simple subdivision with three boundaries unchanged and just a simple new line at the 300-foot mark drawn to be back at the existing lines. It still leaves 26+/- acres of the parcel with its own access.

The Chair clarified the public interest portion of this criteria deals with the essential character of the locale and whether or not this variance would cause any kind of public health or safety concern.

Peter responded, "absolutely not."

The Chair said that the property already has a couple of variances for use. Peter affirmed they were being actively being used. The Chair said one of the variance's is for events. She asked about the noise and the congestion of events and parking. Peter said no one parks on the street, they park at the house and barn. The Chair asked about the frequency of the events. Peter said last year they had four or five events. The Chair asked if he still had the tent business. Peter said, "no."

Beverley had a question about the proximity of the property. Peter and the Chair referenced the map in the packet indicating where the property was located.

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

**Peter's response:** Other than the road frontage shortage the subdivision will follow all other aspects of the ordinance. All normal surveying practices will be enforced. The surveyor is already working on the road and traverse dimensions.

Jan G. asked is this going to be a house lot and will the house be visible from the road. Peter said it will be a house lot (the new lot) but, he doesn't know what he is going to do with it, he may hang on to it for a while. Jan G. had a question about density. If a house was built there, would it be in compliance. The Chair said the lot he is purposing to

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subdivide would meet all the frontage and area requirements. The Chair said the new lot is proposed to meet the 300-foot frontage and the 5-acre zone requirements.

Peter said he wants to subdivide into two lots. The new lot will still be over 5 acres. Peter said he would make the existing lot a little narrower in terms of frontage and the (new lot) to have 310-feet of frontage. Peter offered an amended map to the board. Peter distributed copies to the board. The Chair gave a copy to Janice to be made part of the record. He said at the 310-foot mark there is a pin set in the stone wall. He said it makes more sense to him to have the 310-foot frontage at the pin (for the new lot), rather than put another monument 10-feet away.

The Chair said that would make the other lot less conforming. The Chair confirmed with Peter that he was going to have the property surveyed. Peter affirmed.

Harry confirmed that the new request was for (the new lot) 310-feet of frontage, where the existing pin is. Peter affirmed and said the (existing lot) will have frontage of 275-feet instead of the requested 285-feet of frontage.

The Chair said whether the (new lot) was 300 or 310-feet of frontage would it really matter to you because you are going to have the property surveyed. Peter said, no, but since there is already a pin there it would be good.

Harry confirmed that the pin was a good mark. Derek said the 310-foot frontage is at an obvious stop. Harry confirmed that Peter would rather be at the obvious mark. Peter affirmed.

Harry said he was at the Planning Board consultation that Peter attended. There was a lot of discussion about whether or not the Class VI road was legitimate frontage. Peter said that question has been resolved. Harry said so you are not claiming that as frontage, all the frontage will be on Mink Hill Lane. Peter affirmed. Harry said the 300-feet of frontage will give you two compliant lots in terms of frontage. Peter said with the variance. The Chair said he would have a 300-foot compliant lot and a 285-foot frontage lot which is short 15 feet. In the OC-1 district the requirement is 300-feet of frontage. Harry said the purposed 275-feet of frontage would be even less compliant. Peter affirmed.

Harry said the other change is the property would be more rectangular than a trapezoid shape (new lot). Peter said the surveyor picked that point because there is a natural break in a wall.

The Chair asked if he is concerned about 5-acres of buildable land with wetlands on the property (new lot). Peter said there has 3-/12 acres so there is plenty. The Chair said when you go to the Planning Board you should have the surveyor go in and look at the wetlands, they will determine what is buildable.

Janice asked to confirm for the record that Peter is requesting the conforming lot (new lot) be 310-feet of frontage, or 300-feet of frontage. The non-conforming lot (existing lot) be 275-feet of frontage, or 285-feet of frontage respectively. Peter affirmed.

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Harry said the discussion is whether to grant a variance for either. Peter responded, yes, a variance will be for 15-feet or for 25-feet (for the existing lot), whichever the board decides.

Derek asked whether there was any plan to do any building. Peter said no, he may want a smaller house in the future. Derek asked when the variance expires. The Chair indicated two years, although as long as he subdivides, he is all set (vested).

### ***By granting the variance substantial justice is done because:***

***Peter's response:*** The variance asked for, which was recommended by a Planning Board member, an alternative to deciding the right to use the Class VI road applies as his driveway as additional frontage.

The Chair said that basically what this criteria means is the loss to the individual outweighed by the gain to the general public. The Chair said are you saying that there is really no gain to the general public whether or not you subdivide the lot. Peter said, "no."

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

***Peter's response:*** This is just a simple subdivision and only driveway permits will have to be met along with all other requirements if and when that happens. All other subdivisions on the other side of Mink Hill Lane did not diminish any values. If so, they probably would not have been allowed. Peter said on the other side of the road three lots were subdivided years ago, and he doesn't think anything was hurt by it.

The Chair asked whether there was a driveway directly across from the property? Peter said where the driveway would go is between Peter Sabin and Bidet's (verify name?). The Chair and Peter concurred that was the flattest part at the bottom of the hill for a driveway.

### ***Owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property.***

***Peter's response:*** The frontage on Mink Hill Lane is 585 +/- feet therefore with 300-feet used up by the new lot. That leaves 285 +/- feet left for the original parcel. The road frontage on the Class VI road leading up to the existing lot apparently does not count, which has ample frontage.

The Chair asked what distinguishes his property from other properties in the area? Peter said you can't see anything it is a piece of property tucked into the Mink Hills. The Chandler Reservation abuts all his property including the lower lot he wants to subdivide. A house on the smaller lot (new lot) would not be seen, either.

The Chair referenced the map of the property in the board's packet. The Chandler Reservation, which is owned by the Town and managed by the Chandler Committee and the forest service abuts Peter's property on three sides. Peter approached the board and pointed out his property and the driveway.

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The Chair asked if Map 9, Lot 12, the jagged, shaped lot next to his property, was it always part of the reservation? Peter said that was originally a brook and part of the watershed, it has artesian wells on it. The Chair confirmed that it is owned by the Town for the reservoir. Peter affirmed.

Harry asked Peter about a zig-zag property adjacent to his property. Is that property what we are discussing as being part of the Chandler Reservation? Peter said, yes.

The Chair asked Peter if he didn't get this variance what would be the hardship for him personally? The hardship would be having to figure out frontage on the Class VI road, he still maintains he could grandfather his house on that Class VI road, then the frontage on Mink Hill Lane would be a moot point. The Chair asked if there was anything else worrying about the road. The Chair suggested a response such as, potentially he wouldn't be able to subdivide. Peter said, yeah you are right, I wouldn't be able to subdivide.

The Chair opened the public hearing.

Janice asked how the property next to the existing lot, lot 10, how do they access their property? Peter said he owns both sides of the Class VI road, Zenith Henley Lane. They (the neighbors) were grandfathered a right of way to their property. They really don't have any frontage except on the right-of-way to get to their property. They have no frontage on Mink Hill Lane. The Chandler Reservation goes all the way down to his property. It was a good idea to let the Town have a right of way through that section.

The Chair said you have two right of ways across your property, correct, according to the deeds. Peter said they probably did not have anything to do with him. The Flanders have a right-of-way to the back side of my property. He said nobody ever uses it. The Chair asked if he owns that track? Peter said, yes.

Janice asked if the neighbor accesses their property from the Class VI road on your property, or Mink Hill Lane. Peter said Mink Hill Lane and they cross over the Chandler Reservation.

Sam asked where does the Chandler Reservation abut his property at the road? Harry pointed out where on a map for Sam. Peter said years ago the Heaths put in for a variance for a right-of-way and he had no problem with it. The Chair said but, it is not on your deed. Peter didn't know why.

Harry said the driveway that goes from the Class VI road, which is really your driveway. Harry asked Peter if that is a right-of-way for the abutter, the Heath's? Peter said he didn't believe so, he thinks the only right of way is a little break in the stone wall. Harry asked if the Heath's continue up Mink Hill Lane to get to their house. Peter said, yes their driveway is 200 feet passed his. Harry confirmed using the map to show Peter the break in the stone wall and asked if the Heath's use that to access their property. Peter said they could but they use Mink Hill Lane. Peter said it is a Class VI road it would have to be a Class V for them to use that.

In closing Peter said he would prefer the 310-foot frontage versus the 300-foot frontage (on the new lot). The Chair closed the public hearing and opened the board deliberations.

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Janice asked to put in the record, that the board had done individual site walks of the property prior to the hearing. The Chair said, yes, the board was afforded the opportunity to do individual site walks.

### ***Deliberations:***

The Chair prompted the board to go through the five criteria for a variance.

### ***The granting of the variance will not be contrary to the public interest:***

Jan G. said granting the variance will not be contrary to the public interest because this is a simple subdivision with three unchanged boundaries. There would be no visibility of any structure that might be put on the property. She doesn't see that it is a hindrance to wildlife or the environment in general. She does not see it as a detriment to the public interest. She asked if any other members of the board found it to be a detriment. No one responded.

The Chair said a building on the (new) lot will be closer to the road than the current residence on the (existing) lot.

Jan G. said you cannot see the existing structure (from the road). The Chair agreed the lot is completely wooded. The Chair said it would be less of a disturbance to any migrating wildlife because it is in an area where less of the population is concentrated. The Chair said also the entire 1500-acre Chandler Reservation is behind and around three sides of the property. Jan G. said the property abuts a lot of farms that have been put into conservation easements. Jan G. said the total is probably closer to 3,000 acres, the Chair said it would include the Harriman property, as well. Jan G. said it would include her farm and surrounding farms.

Harry said he agreed with Jan G. that the variance is not going to be contrary to the public interest. The property is almost at the very end of a dead-end road, with very little traffic. The area is very remote. He cannot imagine there are a lot of school buses or public traffic.

Beverley said she agreed.

Derek said he agreed and said if you didn't know, you wouldn't know the property was there.

### ***Granting the variance, the spirit of the ordinance is observed:***

The Chair said the property is zoned for agricultural forestry and limited residential. Because it is inaccessible land with steep slopes and poor drainage there is a five-acre minimum and 300 feet of frontage requirement.

Jan G. said other than a 15-foot deficit in road frontage it complies because it is surrounded by the wilderness. There are a lot of streams and wetland areas, but she assumes that would be taken care of if he decides to build on the property. He probably would need DES permission to do that. She thinks it is safeguarded against being an environmental or open land problem.

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The Chair said when they do a survey for the subdivision, they will have to do a wetlands survey, which will all go through the Planning Board.

Sam asked if the variance is granted, and the wetlands survey is done then it would determine the line has to shift if it doesn't change the frontage that is agreed to? He said the buildable acreage is resolved at that point? The Chair said, yes. Sam said so we are concerned with specifically the point that divides the two properties in terms of frontage. The Chair affirmed.

The Chair asked what the board felt about the 300 vs. 310-foot frontage measurement on the (new) lot. She continued to say, if this is granted, she would like to have the least out-of-compliance measurement. If the property is going to be surveyed it doesn't really matter what the board decides because they are going to re-pin the property border.

Jan G. said she supports having the most compliant measurement.

Sam said the difference between 300 and 310-feet is not where the driveway is going to be, it is not beneficial. It seems that going for the least amount of out-of-compliance is the best option.

Derek agreed. The 310-foot measurement on the lot (new) is convenient but, he would like to keep it as close to compliant as possible.

Beverley agreed.

Janice confirmed with the Chair if they were speaking about the 285-foot measurement for the (existing) lot.

Harry said he disagreed. Ten feet was the distance from where Harry was sitting to where the property owner Peter was sitting. They are discussing 300-feet of frontage on lots miles from nowhere. He feels that ten feet isn't going to make any difference in this particular situation.

There was a discussion between board members that one of the lots (new) would be in compliance and the other (existing lot) would not. Beverley said the non-compliant lot (the existing lot) would have a few more feet. Harry said instead of 275-feet it would be 285-feet and it is in the woods.

Jan G. said it might sound like a moot point but because there is no harm in doing it then it is better to get to what the law says as close as possible to being in compliance. She thought it was better to comply when possible, when it is not going to give anyone a hardship or a disadvantage.

Harry asked if by doing this it complies because it does not. Jan G. said she feels the more compliant is a better choice.

Harry said you don't think it matters that there is a historical marker that has been there historically. The board disagreed.

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



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Jan G. said there is a pretty good argument that it's not going to diminish the values of surrounding properties. Which is supported by the facts they have heard and there is no disagreement (made by the public or the abutters).

Sam said if there was a potential for anything other than a single-family house on the property then there might be a concern.

The Chair had a question about the (previous) variance (granted) for the event center. The variance goes with the land. The property that is further from the road holds that use variance to have parties in their house and there is plenty of parking. The Chair wondered if Peter moved to the new property and wanted to bring that use with him. Beverley said then he will come back to the board (for a use variance). The Chair said, no he will not have to come back to the board.

Sam asked if the use variance could be applied to the new lot?

Janice said, no, it would apply to the existing lot. She said there is a potential for more traffic on a property with less frontage. The new lot will have a different map and lot number than the existing lot. Also, the use was for the barn and house on the existing lot. Janice and the Chair discussed checking with the lawyer about this issue.

Sam said it would make a difference if it was a five-acre lot with events on it and brooks and wetlands. Jan G. asked if we find out the use does transfer, can the board do anything about that?

Janice said you could make a condition, although, you cannot make a condition on a property (the new lot) that is compliant. She said the board is only giving a frontage variance on the existing property which is the lot with the use variance. The Chair agreed that made sense. The board concurred. Sam said if someone purchases the existing property the new buyer would get the variance.

***By granting the variance substantial justice is done.***

The Chair said loss to the individual is not outweighed by a gain by the general public. The Chair asked the board what the general public would lose by granting this variance.

Jan G. stated that she thought the variance was recommended by the Planning Board. The Chair said the Planning Board does not make recommendations to grant a variance. They can make a referral for a variance. Derek said the Class VI road cannot count as frontage, which is why this case was referred to the Zoning Board.

The Chair said what Peter would be losing is the ability to subdivide if the variance was not granted. Is his loss outweighed by any gain to the public by denying the subdivision?

Jan G. listed items that would not be harmed by granting the variance such as, visibility, wildlife, conservation and little traffic to a remote area. Jan said she can't imagine anything here that would be a detriment to the public.

The Chair asked Lucinda what she thought. She stated that it all sounds good and that everything that Jan G. has mentioned is appropriate. She felt it wasn't going to hurt anyone, she thinks 15-feet is reasonable.



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***Owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property.***

The Chair said the property is surrounded on three sides by forests managed by the Chandler Reservation and owned by the Town. She continued to say it meets the definition of an OC-1 property. It is inaccessible with steep slopes and has poor drainage.

Harry said he thinks this situation is unusual because the applicant has chosen to answer part "B" of this criteria. He finds the arguments for that part to be less strong than the arguments for part "A." Because there are special conditions that distinguish it from other properties. Also, the use is a reasonable one. The property owner didn't use those reasons, but, Harry believes they are valid reasons. Harry went on to say, the board is supposed to judge the applicants answers to the criteria and in this case, he hasn't answered the easier ones.

The Chair said in a way he did respond under section "B," but it doesn't specifically apply to either one. It is not so specific that it wouldn't apply to both. The Chair said the questions on the application elude so many people.

Derek said the answer that he gave actually fits better under "A" than "B." The answer did not really explain why the restrictions are reasonable.

Janice said the board can answer part A for themselves and see which they feel would be a better fit.

Sam said one of the reasons for the frontage is to reduce density. The Chandler Reservation surrounds three sides of the property, the density is not going to increase by any more than one house. He wondered if it would be better to make the new lot 275-feet and the existing lot 300-feet of frontage. Because of the substantial frontage of the Chandler Reservation down the road. There is nothing to be built on the lower portion but there is already a house on the next lot up (existing lot).

The Chair said if his intention is to sell the new lot and it's going to be easier and cleaner to sell something that is in compliance. Sam said it is not like someone could put something further up the road and change that density.

The Chair clarified that under the special conditions criteria the board found the property is surrounded on three sides by the Chandler Reservation. Harry added that the remoteness of the property is a special condition of the property.

The Chair asked the board if they were ready for a motion.

**Beverley Howe made a motion to approve the request for a Variance in preparation to subdivide Map 09, Lot 11, one parcel will have 285 feet of frontage on Mink Hill Lane.**

**Discussion:** Jan G. and the Chair had a conversation clarifying the current variance for the event center will apply to the existing lot, not to the new lot with a new map and lot number. Derek asked if we are granting it for 300' of frontage & 325' at the back of the

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lot? The Chair said the variance is only for the frontage. The back line may change depending on the buildable area. Janice clarified that the board was making a motion to grant a variance for a lot with 285-feet of frontage. Jan G. said and one new lot with 300-feet of frontage. Janice said you don't have to give a variance to create a lot with 300-feet of frontage, because the new lot meets the requirement of the district.

**The Chair clarified the motion to be in the case of 2023-06, Map 9, Lot 11 in the OC-1 district that Beverley is moving to grant the motion for a variance for Peter and Denise Smith a variance from Article VIII.C.1.a., for frontage and a discrepancy of 15 feet. Jan Gugliotti seconded the motion. Discussion:** Harry as a point of order asked if they are granting a variance for a subdivision of a lot for 585 feet of frontage to create two lots. One lot for 300-feet of frontage and one for 285-feet of frontage. Because you can't grant a variance for a conforming lot. Harry felt the board needs to be talking about granting a variance to subdivide (the property) into two lots. He said they are creating a lot that is non-conforming and a lot that is conforming. Beverley said the detail of the request referenced on the agenda is exactly the motion. She read "one parcel will have 285-feet of frontage on Mink Hill Lane. Seeking a variance from relief from the 300-foot frontage requirement in the OC-1 a discrepancy of 15 feet. The board concurred.

The Chair said they should add findings of fact. She asked if any members wanted to put conditions on the variance. The consensus of the board was they didn't want to set conditions.

Janice asked the Chair if the board wanted to vote on the motion. The Chair said, no, the Findings of Fact should be added to the motion. Janice said in previous meetings the board has voted on the motion. Then the board develops the facts and findings and votes on those. The Chair said they haven't been voting on the facts and findings consistently.

The Chair asked the board if they want to vote on the motion first and then vote on facts and findings. The board affirmed.

**Roll Call Vote to approve the variance:** Beverley Howe – Yes. Derek Narducci – Yes. Jan Gugliotti – Yes. Lucinda McQueen – Yes. Barbara Marty – Yes. **Vote Tally:** 5 – 0 in favor of approving the variance.

### **Findings of Facts:**

1. The Chair said that the property is surrounded on three sides by the Chandler Reservation at the end of Mink Hill Lane. The town owns the property and is an abutter and no abutters will be inconvenienced by the granting of the variance. Which is what makes the property unique.
2. There is no additional development that can happen around this lot as it is protected on three sides by the Chandler Reservation.
3. Because of the remoteness of the property, it is not going to diminish the surrounding properties because of the spacing between each property.
4. There is no driveway directly across the street from this property and there is no inconvenience to the public.

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**Lucinda McQueen made a motion to approve the Findings of Fact. Derek Narducci seconded the motion. Discussion:** None. **Voice Vote Tally:** 5 – 0 in favor of approving the Facts and Findings.

The Chair said anyone who has standing can appeal the decision with the Land Use office within 30 days.

### **B. Motion for a Rehearing per RSA 677:2**

**Case:** 2023-05

**Applicant:** James Gaffney and Joe DeFabrizio

**Agent:** Mike Harris, Attorney at BMC Environmental & Land Law, PLLC.

**Decision being Appealed:** Variance granted to the terms of Article VII.C.1.a, to Pier D'Aprile, 115 Bible Hill Road, on November 8, 2023.

**Property Owner:** Pier D'Aprile

**Address:** 115 Bible Hill Road

**Map/Lot:** Map 12, Lot 5

**District:** R-3 and OC-1

The Chair directed the board's attention to the written appeal of the D'Aprile decision by James Gaffney and Joe DeFabrizio represented by Mike Harris of BMC Environmental & Land Law, PLLC. The Chair asked the board to consider whether or not the board has made a mistake or has done something legally wrong in the original decision.

The Chair said her biggest worry about this is that the board does not have a complete record of our deliberations at the November meeting. If the board denies this appeal and it potentially goes to court, there will be no record to give the court. Because there is no recording of the November meeting deliberations.

Beverley pointed out that a decision was made and that stands. The Chair said if we grant the rehearing the decision does not stand. Beverley said that decision was made in good faith with a lot of discussion. Beverley went on to say this is the Zoning Board of appeals and this was an appeal for something not usual and the board granted it. Beverley said she is really upset about this and cannot understand what this appeal is all about tonight. Why do we have a Zoning Board if we can make decisions that are going to be appealed.

The Chair said people have a right to appeal. Beverley said we had a meeting, people were here, we talked, and we made a decision. Beverley said to the Chair that they were on the board when a different owner came before the board previously for the same thing and the board granted it. The Chair said she remembered, and she opposed it then for many of the same reasons she opposed it this time. Beverley said and she did not (oppose it).

The Chair said this is why she wants discussion on this, because as somebody who opposed it, and because we don't have a record of the deliberations, she does not want to be the loudest voice in the room. She encouraged everyone to weigh in on the conversation. If members feel there is not enough in the appeal to grant the appeal and it goes to court, it cannot be backed up by a record. There were only certain voices picked up on the tape.

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Beverley asked who is appealing the decision and asked if they are neighbors. The Chair affirmed they were neighbors. Beverley said there were neighbors up there six years ago and they did not appeal and did not even come to the meetings.

Janice said a neighbor appealed back then and the board denied the appeal.

The Chair said we have to determine if the grounds in the appeal are sufficient or is it sufficient that we don't have a record of our deliberations. Beverley doesn't think the record should even be brought up today and didn't have to be public knowledge. Derek and the Chair believed they should have an accurate record. Derek said if it goes forward what does the board have to show the court.

Derek said he doesn't have a problem rehearing anything, he is not beyond acknowledging he might have made a mistake here and there.

Harry said he has mixed feelings about this. The fact that we don't have accurate minutes, or an accurate recording, is an issue and we may not be able to serve the Town of Warner properly because of that. He said we are the Zoning Board comprised of lay people; not lawyers, we try to do our best to judge the facts. We use the ordinances to try to come up with a judicial opinion that serves the town. What disturbs him is when we make a decision and someone goes to oppose that using legal arguments referencing case law, which is intimidating. That is an argument that is more appropriate in a court of law, and we are not able to defend the Town of Warner. The Zoning Board becomes vulnerable. That fact that we are here tonight and trying to decide whether we did something illegal or unreasonable or did we make an error in understanding the facts or the conditions of a variance. This is a decision for the Town of Warner that is on trial here tonight. It was our decision that is being told was in error. Maybe we should have Town counsel here to support us because we are not lawyers. Harry believed the board should defer to Town counsel.

Derek agreed.

The Chair said we can engage our Town counsel with questions.

Harry said he feels strongly in the same way that Bev does that we are here to try to protect the residents of Warner and their property rights. He asks can we do that when we are intimidated by a legal defense. Harry said he went through the document from Mike Harris, and he doesn't know anything about the cases referenced.

Lucinda said she agrees with Derek about the issue of not having minutes. Beverley interjected they do have written minutes. Lucinda agreed. Janice said they do have minutes, but they are incomplete.

Lucinda thanked the attorney for bringing this to an appeal and for actually quoting her. Lucinda said the tape was missing (her statements). Janice said just to clear up for the record, the tape quality was bad. Lucinda said she doesn't fault anyone; it was an unfortunate happenstance that the recording didn't come through.

Derek said he thought it was unfair to both parties.

Lucinda said as the Chair said somebody can appeal a decision, any decision we make. They are justified in coming forward and appealing it. The town could be in jeopardy if the town doesn't have a recording of the hearing. She is all for rehearing the case.

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Jan G. wishes she didn't have to agree but, she does agree with Lucinda. Without having a complete set of minutes, they probably would lose in court. Which she thinks is wrong because she thinks they made the right decision.

Sam said the meeting that we don't have the complete minutes of was only the deliberation portion of the case, not part of taking any evidence from the applicant or the abutters or public. The deliberation should be public and there should be minutes. But the deliberations were relevant only to the board members' final decisions and that vote summarized what they said. But, by the same token without minutes we are left with unanswered concerns.

The Chair said some of the things being appealed, they are saying we didn't consider in making our determination. Even though, she can remember discussing some of those things. Without an account of what was said, she doesn't feel she can respond to the particular items in the appeal.

Jan G. said it is a win if we do this. There is only one party that benefits if we don't do it and it is not the board.

Janice followed up on Sam's statement saying the board had a couple of hearings which were documented in minutes. The only part of the hearing that wasn't documented in full was the deliberations. She asked the board if they wanted to just re-open the deliberations portion of the hearing.

Derek said if they are going to rehear, they need to rehear the whole thing. There were concerns about Facts and Findings, as well. When we rehear it, we can clear some of that up. Sam said it may be a little unfair to just open the deliberations. Sam said it does matter how we got to our decision but it does matter that we consider all the points.

Janice said you can limit the scope of the rehearing, she just wanted to offer that to the board.

The Chair said when they speak with Town counsel, they can talk about the best way going ahead with the hearing. Harry said if we entertain a rehearing then we need to engage town counsel. He said when we have a rehearing each side will have counsel. It's the Town of Warner's Zoning Board which is being questioned here. It is not a question of whether the applicant or abutters think we need a rehearing. It is a question of whether our Town counsel thinks we need a rehearing.

The Chair said she will leave it open. The board always has the option of getting questions about the legality of anything answered by the lawyer. After reading the pages of the legalese, if there is something the board thinks is confusing they can send questions to the lawyer.

Beverley said, so you are going to put it in the hands of the town counsel. The Chair said, no. Jan G. said, not at all. Jan G. said she is ready to make a motion.

Beverley said we decided and now we are questioning our decision. Jan G. said they are recognizing that the next step if the rehearing is not granted, we are going to court. Then the appellants will reference the record and say where does it say you considered this or that, there is no record of it.

## APPROVED MINUTES of 12/13/2023

Harry said even though we did our best our case has issues. Because we don't have minutes. We don't have findings of fact. Which we have historically done, so now we are in a weak position. Therefore, in his opinion we need to have a rehearing.

Janice said the board can involve counsel at any time whether you rehear it or not. Beverley asked if the board is going to do that. The Chair said we will discuss it. The Chair said before what we have done is put together a list of questions. The Chair said they also have an option of having a meeting with town counsel. Beverley wondered if they could have town counsel here with all the lawyers present. Janice said, yes. Janice said the board can give the entire record to Town counsel and they advise and guide and not necessarily tell you what to do.

**Jan Gugliotti made a motion to grant a motion for a rehearing on Warner Zoning Board of Adjustment's granting of a Variance to the terms of Article VII.C.1.a, Map 12, Lot 5, 115 Bible Hill Road. Derek Narducci seconded the motion. Discussion: None. Roll Call Tally: 5 – 0 in favor of approving the motion for a rehearing. The rehearing was set for January 10, 2024 at 7pm.**

The Chair asked the board if they wanted to do findings of fact for a motion to rehear. The board didn't think that was necessary.

Harry said he cannot imagine a hearing where each advocate has an attorney, and the town doesn't have an attorney. The Chair said it would only be about process not about a position.

Janice said she thought it would be a good idea for the board to give the entire merits of the case to counsel. Have our lawyer review the questions from Gaffney's and DeFabrizio's lawyer. Janice said they will give you an idea as to how to proceed and what to look for. In the past, we have had so many times where we ended up in court. It would be nice if we could work in unison with our lawyer in a way that we are making sure we are getting everything on the record. So, the board is aware of what to get on the record, and insure that we are doing everything that we can to make a solid foundation for a case. Sometimes you can't always do that with questions that are emailed. It might be nice for a chance to meet with Town counsel. The Town pays for this, it is something that we have in our toolbox. This is a decision that the ZBA has already made. The Town will go to bat for us if this ends up in Superior Court. So, it may be a good idea for us all to be on the same page.

Jan G. said she thinks you may be on thin ice. We are here for the grey areas. She is afraid that by having an attorney tell us, don't do this or don't do that or don't use this or that. When we are really supposed to be using judgement as opposed to just saying this is what the law says.

Derek said he isn't going to get us to change our minds. He just wants to be sure we cross all our "t's" and dot all our "i's".

The Chair said he is only going to look at the legality of the process.

Lucinda said to the Chair that in a rehearing new information may come up. Our decision last time might not be the same this time.

The Chair said right, or it may be stronger. Lucinda agreed.



## APPROVED MINUTES of 12/13/2023

Derek Lick, the attorney for Pier D'Aprile asked what the board is expecting of the applicant now. Are they resubmitting an application all over again and starting from scratch, or are they supplementing what has already been provided. Or does the board want to ask counsel what should be provided.

The Chair said they will ask counsel and along with the decision they will give instruction about what will be expected.

Derek Lick asked if someone has resolved the recording problems, so they will not have that problem again. The Chair said they have two recording devices as a back-up. Derek said there are towns that do not record, they just provide minutes without recordings.

The Chair thanked everyone for coming and participating.

The Chair said the board will have questions for the attorney. She said the last time they had a rehearing they said they would incorporate all of the prior testimony. Then we only had to hear new evidence. She expects that is the advice they will get this time. Janice asked if she could send the letter that Attorney Mike Harris submitted? The Chair said she thought that would be appropriate.

Jan G. said the motion for appeal has assertions. The Chair said there were comments that issues weren't discussed ... but if they went back now and tried to recreate the minutes, they can't do that. Derek said it would look like they were making it up, that wouldn't be right. The Chair asked that her edits to the November minutes be removed, because the record should only be what was audible on the recordings.

Harry asked how we are going to proceed with Town counsel. Are we going to give them the whole case. He was concerned Town counsel does not influence the decision of the board. Sam said we could be setting the precedence that we can't make a decision without Town counsel. Derek said if for nothing else, we don't have an accurate record to show the court. That alone is why Derek voted for a rehearing. Even if nothing changes at all at least we have it on record.

Harry said if both sides read chapter and verse of law cases, we don't know how to interpret that or how to respond to it. The Chair said that can work against them too. Sam said it is their job to explain the precedence of the cases. Derek said they can recite every court case they want, and it doesn't make any difference because you are going to make your own decision. Derek said the facts of findings must be in the record. Janice said if it went to court, we would have to give the lawyer the whole record, so we might as well do it now.

### III. UNFINISHED BUSINESS

- A. Consider application additions and checklist changes. Passed over until the next meeting.

### IV. REVIEW OF MINUTES OF PREVIOUS MEETING: November 8, 2023



## APPROVED MINUTES of 12/13/2023

Jan G. made a comment that it is difficult to articulate in the moment what is necessary to say in a hearing. Is it possible to have a little more time? The Chair asked if she wanted the board to continue deliberations until a later date? Jan G. said, yes, and give us time to actually think about a case. The Chair said they can continue deliberations to a date while being mindful of the legal deadline constraints. The Chair said there are towns that go through all their public hearings for all the cases in a night, then come back on a separate night and do deliberations. Jan G. said that way we would end up with a quality product. The Chair said the deliberations are public meetings, no testimony taken. The Chair said anyone on the board can make a motion to continue a meeting for deliberation to another time.

Harry said the Select Board is coming up with a code of conduct for the boards.

**Jan G made a motion to accept the minutes of November 8, 2023 as amended. Lucy McQueen seconded the motion. Discussion:** None. **Voice Vote Tally:** 5 to 0. Summary: The minutes were approved. A note will go on the minutes recognizing the recording was faulty and incomplete.

### V. COMMUNICATIONS AND MISCELLANEOUS

- A. Derek and Janice to discuss 2023 Land Use Law Conference - ZBA Track
- B. The board was made aware of the court hearing in Concord for the Town of Warner vs. McLennand Hearing on December 14 at 10:00 AM.
- C. Legal Question about Site Walks. The board discussed site walks. Janice mentioned that the board should either do a site walk with all members or individuals. If there are two members it could run afoul of the Rules of Procedures (ROP) and ex-parte communications. The Chair said two members means that people who are uncomfortable doing a site walk individually will have company. Janice suggested something should be written into the ROP to provide guidelines for those situations. The Chair said they have already voted on the ROP and it could be addressed in a future version. Janice said the ROP provides a guide for future board members; they won't know what is allowed if it isn't stated. The Chair said what is written there now is perfectly legitimate. The Chair says it says if it is a quorum, it's a meeting and if its an individual it is not.

### VI. ADJOURNMENT

**Jan Gugliotti made a motion to adjourn the meeting. Lucinda McQueen seconded the motion.** The meeting was adjourned at 9:19 PM.

/jll