



# TOWN OF WARNER

P.O. Box 265, 5 East Main Street  
Warner, New Hampshire 03278-0059  
Land Use Office: (603)456-2298 ex. 7  
Email: landuse@warnernh.gov

## Zoning Board of Adjustment Minutes of May 22, 2024

### I. The Chair opened the ZBA meeting at 7:03 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)	✓	
James Zablocki (Alternate)	✓	

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

### II. NEW BUSINESS

#### A. An Appeal of Administrative Decision – Motion for Rehearing

**Applicant:** Linda Dymont

**Agent:** Ariana McQuarrie, Alfano Law, PLLC.

**Details of Request:** Pursuant to RSA 677:2-3, the abutter is petitioning for the Zoning Board of Adjustment to rehear Case No. 2024-03. This case relates to the granting of a variance on April 10, 2024 for Case 2024-03, 225 Couchtown Road, Map 15, Lot 053-3, in the R3 district. Property owner: James McLennand.

**\*No Public Testimony\***

#### Board Deliberation

The Chair confirmed that James Zablocki (new alternate) had read the minutes and is current on the case. James confirmed that he had read the minutes. The Chair said the alternates are welcome to participate up until the point that a motion is made.

The Chair said they have a motion for a rehearing before the board tonight. It is the only agenda item. The board will be looking to see if there is any information in the request for the rehearing that illustrates that the board has made a mistake or has done something illegal.

## APPROVED Minutes of 05/22/2024

Jan G. started the deliberations by saying that she had been thinking about nothing but this for two weeks. She really wanted to create a decent argument, and then she saw the lawyer responses to Land Use/board questions and she was even more convinced of her position.

The Chair reminded the board the legal responses that were sent to all members were confidential and to be used as a reference.

Jan G. said she read through the minutes of the last meeting and concluded that almost everything that the complainants or petitioners said was either irrelevant or insinuated malice on the part of Mr. McLennand. For example, the insinuation part was the timetable which showed the property owner didn't do something, when he knew or didn't know. Or whether the Building Inspector said stop all work or waterproofing, etc. Also, how the garage is going to look as a whole and if it's going to be close to the abutter's hot tub. She didn't see any convincing arguments from the abutters. But, she thought the bigger question was that they did not measure. She thought the board could agree that was the case.

Jan G. said this grabs at her heartstrings. Everybody has made mistakes in their life and she knows she has. The problem is in this case the proportionality of the hurt or the harm to Mr. McLennand is so out of whack with his mistake for not measuring. If this were a \$500 doghouse with a \$2,000 fence, she probably would feel differently. Yeah, he should have measured it. But, given the magnitude of his loss and other arguments about is it really like other properties. She just doesn't buy that. So to her, if the board did grant this rehearing and something were to happen in the end and Mr. McLennand didn't get it. It's kind of like handing out a 30-year sentence for jaywalking. The Zoning Board of Adjustment exists in the gray area between what's black and what's white. She hopes that the board has charity in their heart to see when something is really going to be a disproportionate negative outcome. So, in her opinion, no, she doesn't think we should grant the rehearing.

The Chair asked Jan G. if she was speaking about substantial justice. Jan G. said she was speaking about substantial justice and proportional justice. She said the fact that the abutters' major complaint can't be blamed on a mistake that is equivalent to the size of a small bathroom.

Derek said picking up on what Jan said, he read the petition and there's not a lot of new stuff in there. The board has been dealing with this for quite a while now. One of the new things that he saw was the laser measurement that the encroachment might be more than 7 feet. He said that depends on what angle was used. He uses laser measurements all the time to hang cabinets and you can change that dimension on any angle that you want. He doesn't think that's justification in saying that it is new information. He doesn't see a lot of new information or new evidence that has come to light that the board hasn't already talked over, in his opinion. He is in agreement with Jan G., he doesn't see it as grounds to rehash the same information and doesn't see anything new in order to grant a rehearing.

The Chair said the only information that seemed to be different than what was brought up at the hearing, was they are saying the fill put in to create the area where the new garage sits was brought in by the owner.

## APPROVED Minutes of 05/22/2024

Derek said he gets that. But you really can't build a building on no ground. The fill was put there obviously to sustain the building. He feels the substantial justice thing is relevant.

Beverley said if that was a big deal, then that should have been brought up the first time the applicant was here, not now. Not after the board has had about three meetings. She also agreed with what Jan G. said.

The Chair said there was a point that the petitioner's calculation showed the encroachment is likely greater than the 7 feet. That's a whole different appeal of the Selectboard, because the variance was granted for seven feet. If the overhang of the roof is greater than 7 feet from the property line, then they're not within the variance that was granted. That is a whole different issue.

Lucinda said she had been bothered from the beginning with this case because she didn't think it met the hardship because it was self-imposed by the property owner. Because they should have been able to measure and if there was any doubt, they shouldn't have made the building as large.

The Chair said right, which goes back to the Waiver for Dimensional Requirements. Which as the board knows was denied and that was upheld in the court. The variance is a different animal and its different criteria. So, their point that it shouldn't be granted because it didn't meet the lower court's requirement really doesn't hold, because this is a different application with different requirements and conditions, to be viewed on its own merits.

Sam referenced Lucinda's comments about hardship. He thinks in part the hardship was made more by continuing to build. He was not sure what effect that really had on the overall cost incurred. Because a substantial amount of it was in the foundation, the framing and the sheathing and the finishes that were put in that may have cost more. But it's not the cost of fixing it. He thinks that adding that cost on to the hardship makes it more likely to gain the variance and sympathy of the board for the cost of that hardship. But because it's something that's comes after the fact, it shouldn't be part of the determination.

Sam said but on the other hand, the (NH Municipal) training from a couple of weeks ago illustrated the balance between the policing action and the property rights. He thought that goes back to what Jan G. had said about substantial justice. The harm for the oversight and the need to get the variance after the fact, he thinks the penalty would be much greater than the mistake would warrant. He thought the overall effect is the building would still be there even if it was within compliance, it would still be there. It would still be visible.

Derek said Sam's is correct. If you took a laser and cut that corner off that barn it is still going to be there, legally, because they have the right to put a barn on their property.

James said this is an appeal the board is discussing. The whole purpose for an appeal is for new evidence. He said the board is discussing old things right now that have already been decided. The point of the appeal is for new evidence that wasn't available the first time it was presented.

## APPROVED Minutes of 05/22/2024

Sam said it could also be the board may have made a mistake in the facts, not just that there's new facts to add to it, but whether the board had misinterpreted something.

James said the only thing he noticed in terms of new evidence is on item E #69, "If a rehearing is granted, the Board could consider additional evidence from the Petitioner that water trespass and erosion are concerns given the buildup of the foundation that has changed over the years, and upon information and belief, given that both the Applicant and Petitioner's parcels natural drainage flows into Frazier Brook and the Warner River."

The Chair said that is supposition, and she is not sure what proof they have because they didn't show any proof in this document about the fill. So those two things seem to be the crux of this and the fact that the runoff was never brought up and this is the third hearing on this property. The runoff into Fraser Brook was never brought up.

James said that is why he is bringing this up. Because, when referencing Google Earth, and looking at the building and where Fraser Brook is, it's approximately 200 feet to 350 feet. He said he knows quite well about riparian buffers. Usually there is something between 50 feet and maybe 100 feet to a waterway and wetland. Here there is an excess of 250 feet so they are not even close. So there is a very good and healthy riparian buffer that would collect any potential drainage from the property.

Sam said he is not an expert in topography. He would believe what James said lines up with what Sam saw on the site. Sam didn't believe the topography had changed that much to affect the erosion and drainage to the Fraser Brook or to the petitioner's property because of the stone wall and the property line. Sam said from his experience he would say the claim is not necessarily valid.

James said from a background standpoint he is certified in the state of Maryland for water management and nutrient runoff for the Chesapeake Bay. He did a lot of work with various businesses and took a six-month class on understanding this sort of concept.

The Chair said it is nice to have James' expertise. She said another point that they brought up was the application checklist that this didn't come as a referral. The Chair said the checklist is just our checklist and has no legal standing.

The Chair asked the board if there were any other points that were made that the board thinks need to be consider. She sensed that at least a majority of the board has not seen a reason for rehearing. She said those board members who voted against this at the various hearings still probably feel the same way about whether or not they met the criteria for the variance. But that is not what the board is hearing tonight. It's just whether or not the board feels that the abutter has given enough reason to re-open this case for a rehearing.

The Chair asked if anyone had any other points to bring up or discuss?

Beverley and Jan G. said they thought everyone had said what they needed a couple of times. There were no further comments made by the board.

The Chair said she just wanted to be sure. She added that the drawing Harry was making on the dry erase board reference in number 36 in the petition, was in no way attesting to the distance, and was more about how measurements are made.

## APPROVED Minutes of 05/22/2024

**Jan Gugliotti made a motion to deny the rehearing request related to the April 10, 2024 decision of the ZBA case 2024-03 James McClelland, 225 Couchtown Road, Map 15 Lot 53-3. Beverley Howe seconded the motion. Discussion:** The Chair said basically the board was saying there was nothing in the request for rehearing that we felt was new. Beverley said nothing in the petition warrants going over the case again. Derek said this is treated as a separate case from what we did before, this is only on the merits of this petition. The Chair said the board should have a reason beyond that everybody feels there is nothing new to compel them to want to rehear the case. Janice asked if they wanted to do the motion first then come up with facts and findings. The Chair said the criteria could be general. The Chair introduced the motion for a vote. **Roll Call Vote:** Beverley Howe – Yes. Jan Gugliotti – Yes. Lucinda McQueen – Yes. Derek Narducci – Yes. Barbara Marty – Yes. The vote was unanimously passed to deny the request for a rehearing.

Janice asked if there were any further reasons to add to the decision.

The Chair said there was no new evidence and nothing compelling in the request for the rehearing. The point about the runoff into the Frazier Brook is not relevant. Even though it's possibly new information.

Harry said the board also needs to state whether or not they made a mistake in the facts of the law. He does not think the board made a mistake in the original decision.

The board determined the information in points 68 and 69 in their petition was new information but, not compelling and probably not even relevant to the property.

The board discussed that the build-up of material prior to building the garage was new information but not compelling enough to justify a new hearing.

Harry said the Notice of Decision on the variance was very accurate.

**Jan Gugliotti made a motion to adjourn the meeting. Lucinda McQueen seconded the motion.** The meeting was adjourned at 7:30 PM.

/jll