

TOWN OF WARNER – ZONING BOARD OF ADJUSTMENT

Approved Meeting Minutes

April 12, 2017 7:00 PM

Warner Town Hall, Lower Level

Members Present: Chairwoman Janice Loz, Vice Chair Rick Davies, Howard Kirchner, Gordon Nolen, Alternates Barb Marty, Beverley Howe, Corey Giroux

Absent: Land Use Secretary Lois Lord

1. OPEN MEETING

Chairwoman Loz opened the meeting at 7:00 p.m.

2. ROLL CALL

Roll call was taken with seven members present. Chairman Loz asked Corey Giroux to sit in as full board member.

3. APPROVAL OF MEETING MINUTES

Chairwoman Loz brought forth the Meeting Minutes of March 8, 2017 for approval. Rick Davies had some changes as follows:

- Page 2 and 4 there is reference to the SIC Code and it should be defined as Standard Industrial Classification Code.
- Page 6 in the center, there is an SEC rating which should be STC for Sound Transmission Class.

Rick asked Chairman Loz if she had kept a draft of the motion that was made at the meeting which should have gone to Lois who couldn't find it. Rick stated there are two items on the motion that he didn't actually say. Both he and Lois listened to the recording and Rick is correct in what he thinks should be there as follows:

- Item 2 under requirements on pages 15 and 16 which reads *the Board finds the use to be essential and desirable to the public convenience or welfare*. This should be changed in two places to *the Board finds the use to be ~~essential~~ and desirable to the public convenience or welfare*.

Howard Kirchner had a few typos as follows:

- Page 17 under unfinished business, *III ATTENDANCE*, there is a number three that doesn't belong there.
- Page 17, second to the bottom paragraph where it reads *The Land Use Secretary will find out who up next* should read *The Land Use Secretary will find out who is up next*.
- Page 6, first paragraph and end of second sentence which reads *The retail store I do not expect to have substantial sales for a couple of reasons*. This should be changed to *The retail store I do not expect to have substantial sales for a couple of reasons*.

Corey Giroux noted the following:

- Page 10, second to last word which reads: *More Sporting Goods* should read *Morse Sporting Goods*.

The applicant Mr. Eric Miller noted that one item he had noted was that the Land Secretary had written the ballistic rubber at the end of the building would be 2 inches thick when he had stated it would be 2 feet thick.

Rick Davies brought forth a point of order that this is not a public hearing. Chairman Loz said she understands that but if Mr. Miller said something that wasn't documented correctly... Mr. Miller said he did send an email to the Land Use Office after the draft minutes were sent to him.

Someone in the audience asked for identification of who was speaking and Mr. Miller identified himself as Eric Miller of North Sutton.

Chairman Loz said she would talk to Lois about it. Mr. Miller offered to show the email on his phone and

Chairman Loz said no because this is not a public hearing.

(Secretary's Note: The correction was made on page 7, paragraph 6 of the draft meeting minutes prior to copies being made and sent out in Zoning Board of Adjustment packets for this meeting).

The board made the decision to not approve the meeting minutes until the next meeting after talking to the Land Use Secretary and see what her communication was on this. Rick Davies said considering what we have in front of us for a case tonight, it's always good to have approved minutes so we should make sure and approve them as soon as we can.

Mr. Miller asked if it was possible the correction was made. Chairman Loz said she will discuss it with Lois.

4. NEW BUSINESS

Chairman Loz directed the board to the next item under new business which was: **Consideration of Motion to Rehear – ZBA Case No. 2017-01** Chairman Loz explained this is a Petition to Rehear that case from Warner Road Holdings, LLC.

Rick noted that from where Beverley Howe stands she gave him the impression she might want to sit out on this case. Beverley agreed and stated she would like to recuse herself. Chairman Loz said for the record Beverley Howe is recusing herself from these proceedings. She asked Corey Giroux if he had any comments. Corey said he assumed we would hear from the movant party. Chairman Loz clarified that in the past we have voted on whether or not to rehear the case and then we reschedule it for the next board meeting and tonight we are just determining whether or not to rehear it.

Corey replied that he understood that and asked if we would allow the movant to make arguments as to whether we should or should not rehear it in addition to the written arguments? Chairman Loz stated we have not done that in the past. Rick Davies said the procedures that are laid out in the Municipal Association and the outline of the OEP guide handbook don't get into a presentation, giving him the impression that's proper procedure.

Chairman Loz said that what we have always done in the past, and not just because we have done it in the past because she was told that's how it should be done, is that we would make a determination on whether we felt we erred or there was a good viable reason to rehear. Then we rehear it at the next board meeting and re notice it. We didn't notice for this meeting so we can't hear any testimony from anybody if we haven't noticed for the meeting.

Rick noted in the packet they have a clipping from the Municipal Association and on the second page, third paragraph from the bottom recaps that this is a meeting. The section Rick was referring to is from the Municipal Law Lecture Series, Procedural Basics for Planning and Zoning Boards and reads as follows:

The decision to grant or deny a rehearing must occur at a public meeting of the ZBA. This is not, however, an opportunity for a new public hearing on the case, and the board should not attempt to hear additional information from either the applicant or any other interested party. Instead, it should evaluate the information contained in the motion as received, and make its decision based upon that document. The motion should not be granted lightly, but only if a majority of the board is convinced that some error of procedure, or of law, was committed during the original consideration of the case that requires correction.

The board discussed that it is a meeting open to the public but it is not a public hearing. Rick noted that in the past Chairman Loz had given a pretty good synopsis of the process and did she want to do that again. She said she wasn't really prepared to do that but clarified that we can't hold a hearing because we haven't noticed it and are just determining whether or not we are going to rehear it. Next month we would get into testimony and hearing both sides if we vote to rehear it.

Rick Davies read the paragraph above from the Municipal Law Lecture Series, Procedural Basics for Planning and Zoning Boards. Chairman Loz said what we are doing is considering this motion for rehearing.

Corey Giroux said now it's very clear to him and Rick said this is the Municipal Associations opinion and the OEP handbook is very similar.

Chairman Loz said we have a lot of handouts and I'm not sure what to do with those. Rick asked what topic they are and Chairman Loz said they are all on this case from various parties but I think we should wait and if we rehear it include them then. Corey said if they are from the Land Use Secretary that's one thing but if there are from another party I don't think we can include them.

Chairwoman Loz noted that a couple of them are emails back and forth between the Land Use Secretary and Eric Miller from Dragonfly Ranges. Rick Davies stated if we go literally by what I just read, we're looking at this document right here. Chairman Loz said one of them is from the state. Corey said I think we should avoid all of this and Chairman Loz agreed.

Howard Kirchner asked if there was an error of procedure from the last meeting. Rick said that is his understanding. Chairman Loz stated the state has an abutting property and it was not noticed. Corey said he thinks there is some fine distinction in there that is probably worth considering. In the motion, there is a reference to RSA 676:7 which is the Administrative Enforcement Procedure ruling in a reference to a case called Hussey versus Town of Barrington.

Corey continued that he doesn't think they are properly cited for the purpose that they are offered in the motion. The State of New Hampshire, I don't think, according to the statute is an abutter. RSA 672:3 defines abutter for purpose of Planning and Zoning. The RSA reads an "*Abutter means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board.* It proceeds to give a variety of explanation as to who might be considered to be an abutter for this purpose and the state is not one of them. When considering 676:7 and the reference to noticing every abutter and then defining abutters in the relative statute, the state is not an abutter. Corey said in his estimation the notice was proper on that basis. In the case study, Hussey versus Town of Barrington, the appropriate language in the section cited says *One aspect of the consideration of the plaintiffs vested rights arguments is whether the ZBA had jurisdiction to grant a variance. A necessity to the Zoning Board of Adjustments jurisdiction to consider a request for variance is that any statutory notice procedure be satisfied.* Corey noted going further down on the same page as part of that decision, *an abutter is any person owning property adjoining the land under consideration by the ZBA.* It then references that same statute RSA 672:3 that he just read that defined what an abutter is.

Chairman Loz clarified that he is saying the state is not a person. Corey replied the state is not a person and the state is not an abutter for purposes of notice. Rick Davies said that sometimes towns are notified and Corey said he is just telling them what the statute says and it doesn't include the state as an abutter and he thinks for any reasonable instruction the state is not a person for the purposes of this statute. Corey stated his reading of those together leads him to believe that the notice with respect to who is noticed, just that limited issue, was done properly and that the state didn't require notice according to the statute.

Chairman Loz said that may be why the Land Use Secretary was told we don't notice the state. Rick said the way that was worded was that we haven't done that before and there are a few things in town we haven't done so it's not necessarily that it's right. Rick Davies said the other abutter that was in that letter that didn't receive notice until the day of, is there some type of record we have so we can verify when something was received? Howard said he heard something that it was a post office box and if a person doesn't come and pick up their mail for a week is that the towns fault? Chairwoman Loz said she doesn't know if that's true. Corey Giroux noted those things are all sent certified mail for this purpose to try and establish when things are received and what Howard is saying is entirely valid. All of the other abutters and other people noticed seemed to receive theirs in a relatively proper time period so it's hard to understand why one particular box in town wouldn't have received it in the normal amount of time. Chairman Loz said the Land use Secretary stated it was sent on the 27th of February and the meeting was on the 8th and that sometimes it takes some time for the receipts to be received back in the Land Use Office.

Rick Davies said the folder has the original receipts in it or some of them, the green ones. He noted he isn't sure how that all works and he took a glance at it when Chairman Loz got it out and noticed one didn't have a date on it as to when it had been returned. Rick said sometimes there's an electronic tracking and he has never really paid attention to it. Corey said he doesn't think there is any reason to disbelieve that notice was received when they say they received it, at the same time if they were sent on the 27th there's no question they were sent in the proper timeframe with the appropriate time of notice and there is nothing improper about how they were noticed based on that.

With Chairman Loz looking at the return receipt paperwork in the applicant's folder, Rick clarified with Chairman Loz that the notice went to Warner Road Holdings and she stated it doesn't say when it was sent that she can say but when it's received but that doesn't help us. It was received back in the Land Use Office March 21st. Chairman Loz said Warner Road Holdings said they received it March 8th. Rick asked if there was a code number on the return receipt and Chairman Loz said there is an article number on the bottom. Corey Giroux said he doesn't think that is going to tell us anything conclusive and ultimately the return receipt just tells you when someone picks it up and signs for it, it doesn't tell you when it was received in the box and when it was sent. Chairman Loz said you could go back to the Post Office with the tracking number but that won't help us tonight.

Corey said this doesn't sound like a problem that existed for more than one party that was noticed. They all originated from the same place at the same time and I don't have any reason to think that all of the other abutters received their notice well in advance of the 8th and only one other abutter did not. Corey said there are a few other arguments in the Motion to Rehear that he doesn't think are particularly persuasive. Those are that the requested uses are prohibited by state law, arguments with the proximity, and that the requested use is discharging a firearm within 300 feet of a residence. The board discussed the discharging of a firearm within 300 feet of a residence and was this discharging inside or outside. Chairman Loz said that is outside and Corey said it doesn't address anything about why our decision was unlawful or unreasonable.

Chairman Loz said the Zoning Board didn't address the fact there is a residence. Corey said he understands but the limited decision we need to make tonight is based on whether or not our decision is unlawful or wrong. I don't think the arguments made have anything to do with that but have to do with what the applicant might do later if it actually built up a facility that gets the special exception. It doesn't relate to whether or not our decision was wrong based on what we had in front of us based on the criteria for a special exception.

Corey said he doesn't know what we do with the arguments regarding whether or not the special exception will impair the integrity of the district or the health, morals and welfare. The arguments that are made here are new arguments being made that weren't raised at the hearing and so are a lot like testimony to him. Chairman Loz asked how Corey found those arguments to be new. He replied they are being made now for the first time. We heard them from other people but they are being made now for the first time by the movant party, they weren't made at the hearing. In any event, for that purpose I don't find them persuasive and I think we heard plenty of testimony from the applicant about how they were going to address the health and safety issues. We are talking about a commercial district so to me the reasons the decision was made are as sound as they were then.

Rick Davies noted that making an error would be if they neglected some of these considerations and considering it's an indoor activity, we talked about the sound and the filters and such. Chairman Loz said she feels they were very thorough on that point and took time and consideration. Corey said there was a lot of testimony from the applicant about what is going to be done to mitigate the potential problems that might be posed by placing this on that lot.

Corey said (microphone was moved at this point and recording was unintelligible)...it would be somewhat fundamentally unfair to the abutter to have had them not have the ability to present their argument at the

hearing. That being said, we don't have any real evidence that they weren't noticed properly with all the other notices. The Land Use Secretary sent us her sequence of events that seem to suggest that she did everything she would ordinarily do otherwise. It's hard to see how we made an error on that front. While I'm sympathetic that it's somewhat unfair that the abutter had to learn about it that day, that's when they actually received the notice. I'm not sure it was an error for us to proceed on that basis.

Rick Davies stated one error referred to when we're looking at the minutes was the notice of decision where the Land Use Secretary had left in the word *essential and*. It's not supposed to be there and it's in the decision so I don't know if that changes anything but it's not correct. I'm not saying it's enough to have a rehearing but in some way maybe we should send a notice out saying that's not correct.

Chairman Loz said I feel that those words could be interchangeable depending on... Rick said that wasn't the motion and Chairman Loz said she understands and that she's just saying in her mind those words are somewhat interchangeable, you could use those words one or the other either or both and I think it's a minor technicality and certainly not something that's in this motion before us. Rick said he feels one way or another we should send a revision or something out saying the original decision was not what was actually voted on. With what Chairman Loz said he would say that might be consistent but if it's an error it's not the same type of error. Chairman Loz said she feels we should make some sort of note of what the change is because not a lot of people would catch that. Rick said he would suggest redoing the notice of decision and have some type of a note saying this is a change due to a clerical error attached to it and have it signed with a different date. From a legal point of view I don't know what that means but from a listening to a tape point of view, anybody can go in and listen to the tape like I did to see what I said. Chairman Loz said she believes the intent of the motion is there even with that word there and Rick stated he believes it needs to be changed.

Corey asked if anyone had an argument as to why we should rehear the case. Rick said the only thing that would come up for argument is we're past the 30 day period and the board could say we should have worded something differently. We have a 30 day period to make a motion to reconsider our decision and we've let that go by so that's not on the board right now. That would be the only thing and sometimes when we write things the day of a decision they're not always written the way that probably would be best. I thought it was a reasonably written decision so I didn't come up with anything.

Chairman Loz asked Howard Kirchner for his thoughts and Howard replied that he cannot see that there was an error in procedure or of the law. My only real concern of what might have been improper was not notifying the state as an abutter and I think Corey shined the light on it. That was not against the law that was standard procedure as the state is not a person. Chairman Loz said that was her biggest concern as well. Corey said that is why he delved into this; it was the clearest point that might have been an error. Gordon was in agreement.

Barb Marty said having been on the short side of notice she is very sympathetic to somebody who feels like they didn't have a chance to prepare to come to a meeting but it's not technically a legal error.

Rick said there were a couple of them that mentioned during the hearing that it would have been nice because there seemed to be some concern by the party but you need to have deadlines. Howard stated he guessed the proper way of what might have been done would have been to call a halt to the hearing and rehear it the next month. Rick noted they could have continued the hearing. Chairman Loz noted that the movants son was there and they did hear from him and she felt they gave that good consideration.

Corey made a MOTION to deny the request for rehearing which was seconded by Howard Kirchner. There was no further discussion.

Norm Carlson, the owner of MadgeTech asked to be heard and Chairman Loz reiterated that this is not a public hearing.

A roll call vote was taken on the MOTION with the results of 5-0-0. Chairman Loz stated the board has decided not to rehear the case and moved the board on to the next agenda.

Rick Davies asked if Chairman Loz could go over the next step for the applicant and she asked Rick to refresh their memory. Rick stated that if there is any other party that has been aggrieved by the board's decision, it can be appealed to Superior Court within 30 days per RSA 677:4.

Election of Officers

Chairman Loz asked if there was anyone who wanted to put their hat in the ring for Chair. Rick said he and Janice had a discussion about him being the Chair. He said there are advantages to having somebody within the voting members who gets into writing things down and organizing thoughts so that the board can then take the information received, organize it and make a decision, sometimes not having the person in charge of running the meeting doing that. That said, sometimes it's nice to have a change of pace with respect to who runs meetings and everybody might run it a little different. If he was Chair he would do a lot of things very similar to what Janice does and he might lead a little bit more and ask for motions to be made which might help some of the members who don't always chime in as much as he does. Chairman Loz said she did say to Rick if he is going to be Chair he needs to not dominate the meeting and said she likes doing it but is perfectly okay with giving someone else a chance.

The discussion continued as to how many cases the ZBA has had in the past few years, that they haven't gotten a lot of experience and it is tough to learn and remember things when that is the case. Rick said he is open to being Chair even though Chairman Loz is doing a fine job.

Howard Kirchner said he did recall at one of his first meetings when Janice was first elected as Chair. Rick was asked at that point if he would be Chair and he stated he was already Chair of the Planning Board and wasn't sure about being Chair for both boards. Howard pointed out that Rick is no longer on the Planning Board.

Beverly Howe suggested making Corey Giroux Chair and it was clarified that Corey is not currently a full board member but an alternate. Discussion continued on an alternate going to full board and it was determined that is up to the Board of Selectmen whom Corey had not had a chance to meet with yet. Rick said sometimes it's good to have somebody sitting back and gathering information to help the rest of the board and if there energy is going into facilitating the meeting it's difficult.

Chairman Loz said she has found that to be one of the most frustrating things to being the Chair. You have to let go of some of the Zoning Board stuff and let the members take it on and a lot of boards don't let the Chair make motions but instead pull it out of the members. She said we need to have our other members step up and start making motions. The board continued to discuss the various roles of Chairs and members of a board.

Chairman Loz stated she would like to nominate Rick Davies as Chair of the Zoning Board. Howard seconded the nomination whereas Rick said you don't have to second a nomination which is in Roberts Rules of Order. Rick noted he wanted the board to know that he is putting his house on the market which may not mean he will be leaving town and the board discussed how long it might take for his house to sell.

The board voted on Rick Davies as Chair of the Zoning Board with a hand vote and all were in favor.

Chairman Loz stated she would like to be Vice Chair but if somebody else wants to that is all right with her. Howard said he would like to nominate Janice Loz as Vice Chair, seconded by Gordon Nolen. A hand vote was taken with all in favor. Chairman Loz noted that Rick will be the new Chair at the May Meeting.

5. UNFINISHED BUSINESS

Attendance Clause for Rules of Procedure – First Reading

Chairman Loz brought forth this item for discussion and asked if anyone felt the board needed to read the text and no one did. Chairman Loz asked if there were any comments or changes.

The first reading of the clause was done.

6. COMMUNICATION AND MISCELLANEOUS.

Chairwoman Loz reminded board members that the OEP Conference is on Saturday, April 28th at 8:00 a.m.

She asked if anyone else had anything to bring up. Rick Davies mentioned that at the last meeting the board had him send a letter to the Board of Selectmen relative to the sequencing of new appointees. They have gotten back on cycle with one of the new appointments being a one year and one a three year. Rick noted the one that's outstanding probably will be up for a year. Chairman Loz said she believes the one year is for Gordon Nolen, with his next appointment for three years.

Chairman Loz said at one point in one of the meetings she went to were general instructions for an application for an appeal to a Zoning Board of Adjustment. On it is a section on Appeal to a Decision which has a sentence that reads *the appeal must be made normally within 30 days of a decision according to the rules of procedure of the Warner Zoning Board of Adjustment*. She noted she went into the Rules of Procedure and it's not in there so she thinks it would be good this year to go through the instructions that are attached to the Appeal of a Decision form that you would fill out. She suggested going through all the applications, see if there are references to the Rules of Procedure and tighten that up.

Rick said he believes the instructions are the same for each one and they could get all the application forms stacked up behind it with the Abutters Notice instruction which isn't the same as what the Planning Board came up with a few years ago. Rick noted what Corey read tonight is what's in the book and the Planning Board took that and put it on the form. Rick said there are a couple of things like trailer parks and condominiums where there are multiple people you need to notify, not just the owner. Corey said that is spelled out in RSA 672:3 and it literally talks about who you notify for any of those sorts of things and there's no mention of (recording undecipherable as another member spoke). It was discussed that the Zoning Board could start with what the Planning Board has and perhaps embellish it and that the abutter criteria talks about an abutter *across the street* and in some cases they could be across a highway such as Route 89.

Rick gave the example of Knoxland Tractor having something come up and the trailer park would be an abutter even though it's way over there. The board discussed that it would be good to have a map included with their meeting packets showing where abutters are. Rick said if we redo the Rules of Procedure or the application form we could include that as something that's needed. He also said, he likes to have the Notice of Decision passed out at a meeting following a decision and some towns post them on the town website.

Rick brought up post office delivery and stated he had a return receipt that was delivered about a year ago and it said third try. They were almost going to send it back and it was a whole month since it was sent. There was somebody at his house all the time so he wasn't sure what the post office issue was. Corey said the return receipt is inherently unreliable; it's garbage in and garbage out. Rick wondered if there is a way to track them and a better procedure we should be doing. Corey said the certified mailing seems to be the most cost effective way to do it instead of using FedEx or UPS although it's more concrete in terms of delivery records. Beverley confirmed that recipients have to sign for certified mailing which is a record. Corey said it doesn't capture the times when folks simply aren't home. The board continued to discuss their experiences with certified mailings and packages received at home.

Barb Marty asked if we give enough time for delivery and is there a way to give them more. Beverley suggested sending things out earlier. The timing was discussed with 15 days being the procedure for when an application has to be in the office which the Planning Board this year changed from 15 to 21 days. Chairman Loz said from there we notice abutters, so we have to wait until we get the application and if we get it on the last day it cuts down the time.

Barb asked if it was in the board's purview to change that timeline. Corey said he doesn't know but suspects that it is because he doesn't know if it's something directed by the law itself. Rick said it would be something to look into because if you look at our meeting date and go backwards 15 days, it should be okay because it would be a Tuesday. Chairman Loz noted the notices were sent out on February 27th which is 9 days before the meeting.

Rick said it would be a good idea to see what other towns do. Chairman Loz said she would like to talk to the Land Use Secretary as to the mechanics of sending out meeting notices and how realistic it is. Corey said it wouldn't be the worst idea for us to get the meeting packets in advance as we get them a week before hand. That may not be time to do a diligent review particularly when we're getting meeting minutes that are 20 pages long. Rick said its two hours for every hour of testimony at a meeting and in theory when a submittal comes in, somebody goes through things and sorts them out, this is from a Planning Board point of view. From a ZBA it depends on how complex it is, for instance Cell Towers can have a ¾ inch book that comes in and 5-6 drawings and if there's something missing, the farther you have it in advance you're able to get more done. Chairman Loz made the point that the Land Use Secretary only works 2-3 days a week and it's not a fulltime position. The only thing she can think of is instead of meeting the second Wednesday of the month they would meet the third Wednesday of the month.

Corey made the point that unless you change the application submittal time it won't change anything. Barb said we can give ourselves more time which also gives people that need to be noticed more time. Rick said he was thinking about the timing and if the Planning Board informs an applicant they need a variance or special exception, by the time they get to the Zoning Board it's a month and a half. If it was the end of the month maybe there would be enough time sometimes to get it within the next three weeks. We've done it a couple of times where it's been a month and a half once initial submission is given to us, before something that's pretty clean gets to the Planning Board.

Barb Marty clarified this applicant did not go to the Planning Board first. Beverley Howe asked what happened at the meeting when they went before the Planning Board last week. Rick said he didn't see any details but it looks like it was continued till next Monday the 17th. It was clarified that the Planning Board cannot over rule the ZBA.

The board discussed what they will be working on going forward which would be the application wording in regards to references to the Rules of Procedure and the second reading of the Rules of Procedure attendance clause.

Corey asked if everyone knows how to find the NH RSAs online and noted there is a website that contains them all. He said the website is Gen Court and Rick suggested a way to google them. Corey said the trick is you can search at Gen Court if you know the number you want or you can browse which drops you into various headings. It's also gives you internal citations to other applicable laws if there are any.

7. ADJOURN

MOTION to adjourn was made by Rick, seconded by Howard Kirchner. A voice vote was taken with all in favor 5-0-0. The meeting was adjourned at 8:09 p.m.