



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 AGENDA

Wednesday, January 10, 2024
Town Hall Lower Meeting Room
7:00 PM

Join Zoom Meeting: <https://us02web.zoom.us/j/84102051310> Meeting ID: 841 0205 1310 Passcode: 1234

I. OPEN MEETING and ROLL CALL

II. NEW BUSINESS

A. 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

III. UNFINISHED BUSINESS

A. Consider application additions and checklist changes.

IV. REVIEW OF MINUTES OF PREVIOUS MEETING - December 13, 2023

V. COMMUNICATIONS AND MISCELLANEOUS

VI. ADJOURNMENT (Motion, Second, Vote)

Note: Zoning Board meetings will end no later than 10:00 P.M. Items remaining on the agenda will be heard at the next scheduled monthly meeting.

All interested parties are invited to attend. Correspondence must be received by Noon on the day of the meeting.



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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 comments 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 research and asked the lawyer and involved Allan Brown, Select Board member. Allan conveyed to Peter that Class VI frontage cannot be used when considering the frontage requirements

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28 and could not be combined with frontage on Mink Hill Lane. The lawyer's communication
29 was in the board's packet and was considered as a referral statement to the board
30 accompanying the Variance application.

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

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

37 The Chair asked the applicant to go through the application.

38 Peter read through the five criteria.

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

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

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

47 Peter responded, "absolutely not."

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

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

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

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

60 Jan G. asked is this going to be a house lot and will the house be visible from the road.
61 Peter said it will be a house lot (the new lot) but, he doesn't know what he is going to do
62 with it, he may hang on to it for a while. Jan G. had a question about density. If a house
63 was built there, would it be in compliance. The Chair said the lot he is purposing to
64 subdivide would meet all the frontage and area requirements. The Chair said the new lot
65 is proposed to meet the 300-foot frontage and the 5-acre zone requirements.

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

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

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

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

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

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

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

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

99 Janice asked to confirm for the record that Peter is requesting the conforming lot (new lot)
100 be 310-feet of frontage, or 300-feet of frontage. The non-conforming lot (existing lot) be
101 275-feet of frontage, or 285-feet of frontage respectively. Peter affirmed.

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

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

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

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

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

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

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

122 The Chair asked whether there was no driveway directly across from the property? Peter
123 said where the driveway would go is between Peter Sabin and Bidet's (verify name?). The
124 Chair and Peter concurred that was the flattest part at the bottom of the hill for a driveway.

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

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

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

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

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

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

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

153 The Chair opened the public hearing.

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

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

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

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

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

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

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

184 ***Deliberations:***

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

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

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

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

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

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

205 Beverley said she agreed.

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

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

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

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

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

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

224 The Chair asked what the board felt about the 300 vs. 310-foot frontage measurement on
225 the (new) lot. She continued to say, if this is granted, she would like to have the least out-

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226 of-compliance measurement. If the property is going to be surveyed it doesn't really matter
227 what the board decides because they are going to re-pin the property border.

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

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

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

234 Beverley agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

273 Janice said you could make a condition, although, you cannot make a condition on a
274 property (the new lot) that is compliant. She said the board is only giving a frontage
275 variance on the existing property which is the lot with the use variance. The Chair agreed
276 that made sense. The board concurred.

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

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

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

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

286 Jan G. listed items that would not be harmed by granting the variance such as, visibility,
287 wildlife, conservation and little traffic to a remote area.

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

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

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

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

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

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

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

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

318 The Chair said she thought his intention was to sell the new lot and it’s going to be easier
319 and cleaner to sell something that is in compliance. Sam said it is not like someone could
320 put something further up the road and change that density.

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

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

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

328 **Discussion:** Jan G. and the Chair had a conversation clarifying the current variance for
329 the event center will apply to the existing lot, not to the new lot with a new map and lot
330 number. Janice clarified that the board was making a motion to grant a variance for a lot
331 with 285-feet of frontage. Jan G. said and one new lot with 300-feet of frontage. Janice
332 said you don’t have to give a variance to create a lot with 300-feet of frontage, because
333 the new lot meets the requirement of the district.

334 **The Chair clarified the motion to be in the case of 2023-06, Map 9, Lot 11 in the OC-**
335 **1 district that Beverley is moving to grant the motion for a variance for Peter and**
336 **Denise Smith a variance from Article VIII.C.1.a., for frontage and a discrepancy of**
337 **15 feet. Jan Gugliotti seconded the motion. Discussion:** Harry as a point of order
338 asked if they are granting a variance for a subdivision of a lot for 585 feet of frontage to
339 create two lots. One lot for 300-feet of frontage and one for 285-feet of frontage. Because
340 you can’t grant a variance for a conforming lot. Harry felt the board needs to be talking
341 about granting a variance to subdivide (the property) into two lots. He said they are
342 creating a lot that is non-conforming and a lot that is conforming. Beverley said the detail
343 of the request referenced on the agenda is exactly the motion. She read “one parcel will
344 have 285-feet of frontage on Mink Hill Lane. Seeking a variance from relief from the 300-
345 foot frontage requirement in the OC-1 a discrepancy of 15 feet. The board concurred.

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

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

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

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

358 **Findings of Facts:**

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

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

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

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

375 **Case:** 2023-05

376 **Applicant:** James Gaffney and Joe DeFabrizio

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

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

380 **Property Owner:** Pier D'Aprile

381 **Address:** 115 Bible Hill Road

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

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

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

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

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

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

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

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

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

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

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

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

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434 Derek agreed.

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

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

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

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

447 Derek said he thought it was unfair to both parties.

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

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

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

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

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

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

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

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

476 The Chair said when they speak with Town counsel, they can talk about the best way
477 going ahead with the hearing. Harry said if we entertain a rehearing then we need to

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478 engage town counsel. He said when we have a rehearing each side will have counsel. It's
479 the Town of Warner's Zoning Board which is being questioned here. It is not a question of
480 whether the applicant or abutters think we need a rehearing. It is a question of whether
481 our Town counsel thinks we need a rehearing.

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

486 Beverley said, so you are going to put it in the hands of the town counsel. The Chair said,
487 no. Jan G. said, not at all.

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

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

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

502 **Jan Gugliotti made a motion to grant a motion for a rehearing on Warner Zoning**
503 **Board of Adjustment's granting of a Variance to the terms of Article VII.C.1.a, Map**
504 **12, Lot 5, 115 Bible Hill Road. Derek Narducci seconded the motion. Discussion:**
505 **None. Voice Vote Tally: 5 – 0 in favor of approving the motion for a rehearing.**

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

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

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

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

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

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

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

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

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

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

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

542 The Chair thanked everyone for coming and participating.

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

548 Jan G. said the letter has assertions. The Chair said there were comments that issues
549 weren't discussed and in her memory those things. . . but if they went back now and tried
550 to recreate the minutes, they can't do that. Derek said it would look like they were making
551 it up, that wouldn't be right.

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

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

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565 III. UNFINISHED BUSINESS

566 A. Consider application additions and checklist changes. None.

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

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

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

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

582 V. COMMUNICATIONS AND MISCELLANEOUS

583 A. Derek and Janice to discuss 2023 Land Use Law Conference - ZBA Track

584 None.

585 B. The board was made aware of the court hearing in Concord for the Town of Warner vs.
586 McLennand Hearing on December 14 at 10:00 AM.

587 C. Legal Question about Site Walks. The board discussed site walks. Janice mentioned that
588 the board should either do a site walk with all members or individuals. If there are two
589 members it could run afoul of the Rules of Procedures (ROP) and ex-parte
590 communications. The Chair said two members means that people who are uncomfortable
591 doing a site walk individually will have company. Janice suggested something should be
592 written into the ROP to provide guidelines for those situations. The Chair said they have
593 already voted on the ROP and it could be addressed in a future version. Janice said the
594 ROP provides a guide for future board members; they won't know what is allowed if it isn't
595 stated. The Chair said what is written there now is perfectly legitimate. The Chair says it
596 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