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, May 8, 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. ANNUAL VOTING OF OFFICERS

A. Chair – Members state their desire to be Chair. Nomination(s). Second(s). Voice Vote. Tally.
B. Vice Chair – Members state their desire to be Vice Chair. Nomination(s). Second(s). Voice Vote. Tally.

III. UNFINISHED BUSINESS

A. Consider application additions and checklist changes. Variance, Special Exception, Equitable Waiver, Appeal from an Administrative Decision.

IV. REVIEW OF MINUTES OF PREVIOUS MEETING – April 10, 2024

V. COMMUNICATIONS AND MISCELLANEOUS

A. Training in May: NH Office of Planning and Development (OPD) Spring 2024 Planning & Zoning Conference. Saturday, May 11, 2024 8:30 AM - 4:00 PM – online only

B. Spreadsheet of training, helpful?

C. Review the process for the minutes, length, volume. Do they have to be verbatim? (For example: A three-hour meeting with lawyers attending takes 20 hours to transcribe a 25 page document, and another 8-to-10 hours to format and edit).

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.

UNAPPROVED – APRIL 10, 2024

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Minutes of April 10, 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)	✓	

Also present: Janice Loz, Land Use Administrator

The Chair elevated Sam Carr to vote in the absence of Lucinda McQueen.

II. NEW BUSINESS

A. Application for a Variance

Case: **2024-03**
Applicant: **James McLennand**
Agent: Derek D. Lick, Attorney, Orr & Reno
Address: **225 Couchtown Road**
Map/Lot: Map 15, Lot 053-3
District: R-3

Details of Request: Requesting a Variance from Article VII,C,1,b, to allow the setback encroachment of 7 feet into the 40-foot setback.

The Chair introduced the variance application for Map 15, Lot 053-3. She said this property has been involved in a prior application for Equitable Waiver of Dimensional Requirement. The board will hold a hearing on a variance for different criteria in tonight's hearing. The Chair asked the board to clear their minds and open them for this hearing. She asked if any board member had a conflict of interest in this case. No member voiced a conflict of interest. The Chair asked the board if this application should be considered for regional impact. Members indicated they did not believe this case had regional impact.

The Chair asked the board to consider the application for completeness. **Beverley Howe made a motion to accept the application as complete. Jan Gugliotti seconded the motion. Discussion:** None. **Voice Vote Tally**: 5 – 0. The application was accepted by the board as being complete.

The Chair invited the applicant and their representative to approach the table.

Attorney Derek Lick, of Orr & Reno, introduced himself as the representative for James McLennand (applicant). He stated the board has been here previously on a different type of application, this evening for your review is a variance.

Attorney Lick said what we've submitted with our application was a brief explanation as to where the project currently stands. For those that may not recall, this involves an attached garage and mud room to the applicant's home. The foundation was poured and most of the building was constructed. A neighbor (abutter) said they were concerned about the garage being visible from their property. At which point, the Building Inspector (Tom Baye) came back to the property and undertook the measurement, and it was discovered that the far back corner of the garage, the farthest away from the home, encroached on the 40-foot setback. Attorney Lick said he believes that is 56 square feet total and a 7-foot encroachment (into the setback).

Attorney Lick said they are asking for a variance to allow the structure to remain standing despite the encroachment into that 40-foot setback. The applicant is asking for a variance to allow the building to remain essentially within 33 feet of the property line. Instead of 40 feet at its closest point to that property line.

Derek Narducci (Derek) verified they are basically asking for a 7-foot variance.

Attorney Lick agreed the applicant is asking for a 7-foot variance for the far corner of the structure. He directed the board's attention to the packet saying they have provided a narrative for the board, and they believe they have met the five part criteria for the variance. Also, the applicant has included the other required attachments. The most important part would be the site plan which shows the property in general and how large it is with five acres. They have presented two different versions of the plan zoomed in where you can see the location of the garage and in relation to the setback area. One is a sort of larger and further away view where the board can see where it is in relation to the overall property and what the encroachment is and then they zoom in so the board can see the measurements and where it is.

Attorney Lick also took a look at Google Earth, Google Maps and wanted to take a look at where this sit in relation to the abutter's property, how far away things are. He thinks the board will see this is a rough measurement. The photograph does not include the garage as constructed. The satellite image was taken before (it was constructed). But he has drawn a distance from the back portion of the abutter's home to where he believes the back portion of that garage is located and you get roughly 180 feet (between structures). This was done to get a sense of where the structures are located.

Attorney Lick said the primary issue is why is the variance required based on the conditions of the lot that make it unique as compared to other lots. He said what he thinks the board will focus on is the topography of the lot. For those of you that went out to the last site visit, and he understands that one other person may have come to take a look (at the property). What the board may recall is that you enter the driveway from Couchtown Road. There is a sort of slight incline and then the driver proceeds up a hill to the home which is actually located sort of on top of a knoll.

Attorney Lick said behind the home is a steep drop off that goes down to the property line. One of the issues with the property line measurement was how the garage and the home sit up high on a knoll and the property line is way down below. But in any event, this is what makes the property unique is where the home is located up on that knoll. Surrounding that knoll, you have drop offs on all sides.

Attorney Lick said with respect to the garage, the issue is allowing enough room in the front of the lot to allow cars to properly maneuver in order to get into the garage and allow for some parking in front for some maneuverability. If the garage were to move 7 feet forward, away from the back or side property line and closer to the where the driveway comes up to the home, you would have a very small area in the front portion where it would be very difficult for cars to maneuver. He said the applicant has had instances presently where he has had to pull delivery drivers out because they tried to come up and then go back. They do a multi-point turn to come back down the driveway going too far and the applicant has towed them out.

Attorney Lick said the applicant is trying to allow the garage to be connected to the home, as an attached garage while also allowing for sufficient maneuverability in the front of the garage and to allow for reasonable use. He said if you push that garage 7 feet forward you take away from that space. He said he was recently at the property and when you pull up the drive you pull up right in front of the garage then you are immediately right down the incline again. It's already tight, but it would be even tighter and frankly, it might be impossible to have a turnaround where you're not backing all the way down the driveway from out of the garage. He said the unique topography of having to come up a knoll that should justify a minimal encroachment. He said when the board is weighing the benefits and disadvantages, they believe having a 7-foot encroachment on the backside of the lot is in fact a reasonable approach here, for the reasons articulated in the narrative. Again, to remind everyone, there is roughly 150-to-175 feet of mature woods between the back end of the garage and the neighboring home.

Attorney Lick said in addition to that the applicant's property has a very steep embankment that drops off the back behind the garage. This basically is a natural buffer as it exists today where the 40 feet does come into play. But even if the 40 feet weren't there the applicant couldn't get much closer to the property line anyway, because of the way that the structure would be sitting off the backside of that knoll, it would not be structurally sound.

Attorney Lick said he would be happy to approach it any way the board would like. Although, he didn't want to repeat the narrative (submitted in the application) that was provided to the board. If the board walks through each of the tests and looks at the purpose of the ordinance, the purpose of the buffer is to allow for sufficient breathing room between buildings and structures so folks are not impaired or encumbered or otherwise disadvantaged when structures are right next to each other on a property line. Here there is a natural buffer because of the steep drop off behind the garage and the naturally wooded area.

Attorney Lick said when considering the test for property values, there is concern about being able to view the garage from the abutter's property. He would suggest the board consider whether or not that 7-foot encroachment impacts the view or whether or not the view is going to be materially the same regardless of whether that 7-foot encroachment. In the application narrative if you chopped off the corner of that garage, the 7 feet that encroaches, would it materially change the view from the neighbors. He said the applicant suggests that it would not, it would have zero impact.

Attorney Lick said Mr. McLennand, the applicant, could today build the same garage that is two stories and the same size; the only issue is that 7-foot part.

Attorney Lick said he would be happy to answer questions or run through more of the application, but their view is that this is a reasonable use. Given the unique nature of the property and its topography, if you want to have an attached garage to this home. This is a location that works and provides the best safety for allowing the cars to maneuver and for delivery vehicles. He said it is a small price to pay to allow for that maneuverability and use to have the minor encroachment in the back where you already have a sufficient buffer.

In terms of the size of the garage there's nothing that is unusual or outstanding for the neighborhood. He said driving from the Town Hall to the applicant's property he counted 14 barns or garages that are of the same or similar size or much larger. He said in our rural community it is not unusual to have large secondary structure such as a barn and a garage that house tractors, plow trucks, this is nothing unusual. If you walk in the village, in a very tight knit area, and go down by the post office and back and you will see a handful of the same kind of attached barns on buildings that are larger. There is nothing that stands out here as outside the norm. Nothing that stands out as being unreasonable given the unique nature of the property. The application of the 40 foot buffer to this unique property and this unique circumstance doesn't meet the desired goals of the ordinance and the applicant should be granted a variance for that reason.

The Chair asked for questions from the board.

The Chair said that Attorney Lick had said in a previous hearing that it was a mistake. She said the applicant had assumed that because of the configuration of the house that the garage was not encroaching on the setbacks. If that measurement had been taken would there have been a way to either turn or modify the barn to have made it fit within the setbacks.

Attorney Lick said that the issue is you can either move it forward, where you run into problems with maneuverability because of the incline to get up to the garage, or, you change the angle to move that corner and further twist it outside of the area. Now when you come up the driveway, you are no longer going into the garage. You would have to veer off to right and make a sharp left hand turn into the garage so it just wouldn't be feasible to build the garage that doesn't encroach and actually works for the property. Because of the incline you're coming up a hill. He said if you had more space and if there's a broad open area in front of the house you could configure or turn it away or move the driveway more to the right, as you're coming up the hill and then you can turn in. But that would require some significant moving of the driveway and frankly he didn't think it would work because there isn't enough of a flat plateau area in front in order to make that work.

The Chair asked if the knoll was man-made?

The applicant, James McLennand, responded that it was natural. He said when they dug out for the foundation, the amount of rocks that were there…there were large boulders.

Sam asked if it would have been practical to make the garage 7 feet smaller?

Attorney Lick said no not for the applicant's purposes. The issue is, and part of the reason for this is, they need to have a snowplow and vehicles as the primary motivating factor. It comes down to the size of the garage, something that's (not) unusual or odd, given the character of the neighborhood or the character of the town. If the applicant was building the Taj Mahal garage that stood out, people would think that was a large garage for the area. Then you should talk about changing the size of the garage, but here we think it's

consistent with what's otherwise in town and reasonable. As indicated, by the historic homes, otherwise that have them. He said if you go down from here (the Town Hall) and you pass by the farms and there are couple of farms on Couchtown Road that have big barns attached to their structures. Nothing unusual here for the size.

Jan G. asked about the 175 feet of trees and if they were cut down how much worse would it be if those trees were down in terms of the view?

Attorney Lick supposed the visual impact would be more significant on the abutter. But it's the abutter's trees, not the applicant's. The applicant can't cut down those trees they are on the abutter's property. When you focus specifically on the corner of the garage the question is, is it the variance request that causes the visual impact or just the fact that the garage is being built. It's not the encroachment on the setback that's causing a visual difference. It wouldn't be different if you could rotate it or push it forward, you will get the same view.

Derek said on the original drawings of the garage the applicant was going to put in a secondary room. Would the secondary part of the garage encroach even further.

James McLennand (the applicant) said it would. They are going to leave that off, or just go up to the line (setback).

Attorney Lick said when discussing the Equitable Waiver challenge in court, the Town's Attorney basically invited us by saying look you got another option. It was stated that the applicant can go ask for a variance. The applicant is taking advantage of that invitation. He just hopes the board will consider it. It is, in their view, a reasonable and alternative approach. It was initially suggested to the applicant by the Town to apply for an Equitable Waiver. Attorney Lick said that was a perfectly reasonable suggestion. But having said that, he thinks the variance also applies and would be an equally reasonable approach.

The Chair said generally the board would get a variance request prior to a building going up. So, it is quite unusual to get a variance after the fact.

Attorney Lick said it happens, but it is unusual.

The Chair said if the applicant had known that he was encroaching on the setbacks, the garage could have been manipulated in some way to fit on the lot. It's not like you wouldn't have built the garage knowing where the setbacks are.

Attorney Lick said what would have happened, if this was discovered before the foundation was poured and the structure went up, is they would have been before the board. They would be asking for it in advance as opposed to after the fact. The applicant could have presented what worked given where it is on the lot and asked how do I go about it? Then somebody would have said go get a variance. They would be looking at plans instead of photographs of an existing building.

Harry said 88% of the structure is conforming and 12% is non-conforming. He finds it hard to imagine how moving it or turning it would make it less visible. It's on top of the hill, it's much higher if you move 7 feet of it, it's still going to be visible.

The Chair said in the applicant's narrative, it says 82.5%.

Attorney Lick stated in that context, he was looking at what percentage of the setback is still allowed.

Harry commented that he was calculating the square footage of the overall building.

Attorney Lick said that seems large to him. There is only 56 square feet of the garage (out of compliance).

Harry thought only 56 square feet was very different.

Sam said he is not sure it's relevant how much of it is okay versus how much of it is not. The setbacks still are not maintained. If the applicant's building was all the way to the stone wall that would be more egregious.

Harry said 95% of the building is conforming.

The Chair thanked the Attorney Lick and the applicant for their comments and asked the abutter and her attorney to approach the table.

Attorney Ariana McQuarrie, Alfano Law, representing abutter, Linda Dyment. Attorney McQuarrie brought documents which she gave to the board for their consideration. She had forwarded those documents to Attorney Lick, prior to the hearing. She hoped the board would use them to follow along with her presentation. She wanted to create a chronology of events not just for the unnecessary hardship element but the other elements, as well.

Janice asked Attorney McQuarrie if she could please slow down the cadence of her voice, it is very hard when transcribing to keep up with her. Attorney McQuarrie concurred.

Attorney McQuarrie said the abutter is asking the board to deny Mr. McLennand's application for a variance because the evidence before the board is going to suggest that he's unable to meet the burden as required by RSA 674:33.

Attorney McQuarrie made general comments about the assertion that was made by the Town of Warner's attorney in court. She suggested it is a bit misleading. It's almost like it was presented to the board in the sense of a predetermined decision. Although, it was like the applicant doesn't meet the Equitable Waiver of Dimensional Requirements, and there is an option for a variance.

Attorney McQuarrie said a lot of the information that she anticipates presenting tonight was not relevant for the purpose of the Equitable Waiver. They were not privy to that information and she wanted to make that clear. Additionally, because the Equitable Waiver statute postdates the variance statute, it is the legislature's intent that for structures that are already built and are alleged to be non-conforming dimensionally, the proper avenue for relief is an Equitable Waiver of Dimensional Requirements. She would suggest that he should be precluded from being considered for a variance. Because what we are dealing with here is an Equitable Waiver of dimensions for a structure and non-conformance.

Attorney McQuarrie directed the board to the chronology in front of them. She said it's important for the purpose of what happened on certain dates in order to determine whether or not there is an unnecessary hardship overall. First and foremost, as it relates to the first and second prong that the Supreme Court has said are viewed together. She said the variance will not be contrary to the public interest and the spirit of the ordinance is observed. She argued this was a low-density residential district. The purpose of the low-density residential district is that structures are not on top of each other and are very private in nature, very rural. She said the lots are very large and heavily wooded to provide privacy and natural buffers between properties.

Attorney McQuarrie said the spirit of the ordinance is not observed in this instance and would be contrary to the public interest if the board was to allow this variance. It would tend to create a trend that would alter the essential characteristics of the neighborhood. Essentially the applicant was made aware that they were encroaching on the setbacks on a certain date. The applicant then continued to rush to build the structure making it more substantially complete so that he could come before this board for a "woops." She said variances used to be viewed by the Supreme Court more harshly. It was harder for

applicants to obtain relief when they were seeking a variance. There still are rigid elements and the applicant has to meet the burden of proof.

Attorney McQuarrie said her clients have been at their property for 38 years. This is a very remote area of Warner. If all properties were allowed to overcrowd like this it would be a concern. Additionally, it's not only a concern about the view, but there is a privacy element. The structure is closer to her clients' pool deck and their hot tub area than to the actual home. They measured it to be about 116 feet from the pool and about 160 feet from the hot tub.

Attorney McQuarrie shared photos relevant for the purposes of the view. She said it was a hard to see, due to the print quality. Visible in the first photo the board can see the structure from the pool deck through a not very heavily wooded area depicted in an aerial photograph. The aerial photograph is not recent, it is depicting the prior garage that was already in place. She then directed the board to look at the print of the view from the hot tub which is not as heavily wooded as the aerial photo would suggest. Due to the thick brush that photograph was clearly taken in the summer.

Attorney McQuarrie moved on to the next element which was whether substantial justice is done. The test there is whether the gain to the general public as a result of the ordinance provision outweighs the burden placed on the individual property owner. She suggested there is no evidence of any credible burden as to what the applicant's actual damages are, both now and at the time that the encroachment was discovered. Those are two separate things because he continued to work on the garage after he realized there was an encroachment when Tom Baye came out on January 6th.

Attorney McQuarrie reference the cost of the projects stated in the application says the applicant would be at a loss of $100,000. Again, there's no evidence before the board of when these specific costs were incurred, whether that was before or after he knew of the problem. She suggested that the applicant had a duty to mitigate those damages once he realized there was a problem. The applicant should have stopped constructing the building instead of accumulating more money damages which essentially created his own hardship.

Attorney McQuarrie said an existing garage sat on the property for years prior to the applicant demolishing it. In fact, there was a garage prior to building this one. That garage was 840 square feet, and a permit was obtained prior to having it remodeled into a bigger garage. The reasoning that was given at the hearing in April (2023) was that he wanted a larger garage because he was a mechanic. There was no mention at that hearing about maneuverability or concern for delivery or maintenance vehicles. The applicant should have considered, if he had measured, that he didn't have the room for that new construction of the mud room in the garage. Given the fact that, the property is situated in a way that might make that preferred construction allowable.

Attorney McQuarrie said the current garage is 1,500 square feet. Although there are clearly properties in Warner with large garages for agricultural purposes and things of that nature. She said it is a large garage. Relating to the values of the surrounding properties not being diminished, a lot of the focus has been on the view. She said her clients have been there for 38 years. Her clients informed her that trees were removed in the construction of the project. Privacy of her clients' lot is a selling point for them. Before all the trees were taken down on that side it created a more natural buffer between that garage. She said no matter where the garage is situated her client did not have to worry about being seen in their backyard. That was a selling point for their property.

Attorney McQuarrie suggested the focus for why the applicant does not meet the elements of securing the variance is that the literal enforcement of the provisions of the ordinance would result in unnecessary hardship. She said the factors relevant to that prong and the applicant's actions through this kind of chronology of events is why he cannot meet that.

Attorney McQuarrie said essentially, as defined in RSA 674:33, in the unnecessary hardship provision is that no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property and that the proposed use is reasonable.

Attorney McQuarrie offered for the board's consideration she would like to walk through the chronology of events. The first permit to build was obtained in January 2022 which she submitted to the board as part of the record. That building permit was issued for the purpose of converting the existing 28-by-30 square foot garage to a living space to include a master bedroom suite and a "LR." She was not sure if "LR" is a laundry room or a living room, but he did have a garage and it was converted to another use when arguably he didn't have to do that. On November 9th, the permit was issued which is kind of at issue here. This November 9th, 2022, permit was sought that same year as the demolition of that existing garage to create the 120-square-foot mud room and a two-car 1,500-square-foot attached garage. Her reason for showing this was for the purpose of the reasonable use. For the application of this ordinance, there would be no public purpose of the ordinance and the specific application of that provision to the applicant's property. The applicant had a garage that was conforming it was demolished and a decision made to make a bigger non-conforming garage and mud room.

Attorney McQuarrie said on January 2, 2023 her client first informed the Town via e-mail. Her client also received a lot of the correspondence via 91-a request. But essentially the first e-mail that Attorney McQuarrie was able to find was on January 2, 2023. That was when the first complaint arose when her client had noticed a large building being built and was concerned it was close to the property line. The following day on January 3, 2023, her client was able to document a photo of the building. Attorney McQuarrie circulated a photo for the board to look at the status of the building, at that time. She commented that in the photo the building was partially incomplete. The green tape that went under the siding was not apparent on half of the building. There were no windows in place on the substantially incomplete building on January 3rd.

Attorney McQuarrie asked the board to take note of what the status was on January 3rd, 2023. Then on January 6th, 2023, the Town's Building Inspector Tom Baye came to the property and that was when we learned, the applicant had learned, that the measurement was taken and that the building was encroaching.

Attorney McQuarrie said at that point the applicant had a duty to stop building when he knew that the building was encroaching. She said the evidence is going to demonstrate that the applicant didn't stop building. She said he tried to substantially complete it to essentially force the board's hand to rubber stamp a variance. She said that is documented in the photo.

Attorney McQuarrie then circulated a photograph from July 9, 2023 that shows the building had been substantially worked on since that January 3rd photograph and as evidenced by her clients' assertions they observed the applicant continuing to work on the garage.

The Chair clarified that on the January 3rd, when the photo was taken, the Town had already been notified that there was suspicion that the structure was encroaching on the setbacks. Attorney McQuarrie confirmed that was accurate.

Attorney McQuarrie drew the board's attention to the January 9th photo, pointing out the two top windows in the garage. There is only one window that's out, in that photo. The point is windows were placed and green tape was put up between January 3rd and January 9th.

Attorney McQuarrie said on January 9th her client (the abutter's) again reached out to the Land Use office and indicated they were continuing to build despite the Building Inspector visiting the site. The January 9th photo shows clearly there is construction still going on because there's an excavator and machinery outside the building while the applicant is continuing to build.

Attorney McQuarrie said at that time she noticed that work really started to pick up. It appeared that more people were working on the building and things were getting done quickly in an effort to try to make this more substantially complete before they were before the board.

Attorney McQuarrie said on January 10th, after having received no response from the Town, her client let them know that he was continuing to build. That following day she got her first response, stating that Tom Baye was handling the matter. Subsequent to that, at the end of January, was when the official letter of non-compliance went out and again on March 14th, as well. The most recent photo she has was, she thinks, on April 8th. Compared to the January 9th photograph the top window is now in, so more work is being done. She was not sure exactly when the window went in, but it was placed after January 9th.

Attorney McQuarrie said the applicant continued to build and create his own hardship after knowing there was a problem with the encroachment. There isn't an unnecessary hardship when the applicant had the original use and then demolished it to create something bigger and better for your own purposes. That really goes to the reasonableness factor, the use, and whether that use is reasonable. She would love to have a 5,000 square foot home on her property, but she doesn't have a lot for that. She suggested the two prior permits and the kind of extension of the use is not a reasonable use of the property. The applicant created his own hardship.

Attorney McQuarrie said as it relates to the uniqueness of these properties being on a knoll. She drew the board's attention to a couple of documents that she obtained from the New Hampshire Stonewall Mapper. The University of New Hampshire has a tracking system using Lidar imaging. For those who are not familiar with Lidar it's a laser type of imaging that determines what is underneath the structure and whether it's rock. It determines topography and it's helpful. She was able to pull off of that Lidar website two documents. The first one is the aerial photograph that was submitted with the application (by the applicant) and this overlay of the property line delineation from that Stonewall Mapper website that tracks property lines. She circulated the documents to the board and for submission into the public record.

Attorney McQuarrie said the board could use this reference to line up with the tax map. She referenced the photo and the line down the middle of the Lidar image which was Couchtown Road. She referenced an upside down "L"-shaped parcel which was her client's parcel. Right above that is the applicant's parcel and the board can see how these parcels and their shapes match up with that Lidar imaging.

Attorney McQuarrie held up another photo and noted in the Lidar image how the applicant's property is not unique because it's on a knoll. Essentially the darker imaging shown in the Stonewall Mapper are the crevices of the earth and the lighter imaging shows how the topography comes up to a plateau and create mountainous areas. She circled

the printed image in red pen, for the record, where roughly the applicant's home is constructed. The board can see that there are a number of other properties that fall along this knoll, including her clients' property.

Attorney McQuarrie said it is not necessarily the property itself that is causing the necessity to have the variance. It's that the applicant could have built a smaller garage. He could have made the angle different. It could not have been attached to the home. She passed that around to show the topography of the surrounding areas that a number of properties are situated on the knoll.

Attorney McQuarrie said today the board is hearing that it's for sufficient maneuverability for parking. But the original assertion was around why the garage was necessary for the applicant. At the first hearing it was because he is a mechanic and he wanted a larger garage.

Attorney McQuarrie said it is not the unique topography that created this hardship, it's the type of garage that he decided to build and the mud room. If your property lines do not allow for that then you should take a measurement before you build to ensure that structure actually can accommodate your property. But what we are really here before the board is, is this an unnecessary hardship.

The Chair asked Attorney McQuarrie to pause so the board could review the Lidar photos that were distributed.

Harry said it is hard to see the knoll in the last photo.

Beverley asked what was the relevance of the photos?

Attorney McQuarrie said one of the factors is the unnecessary hardship provision. It is relevant if somebody has a unique situation going on with their property, whether it's a unique lot size that doesn't accommodate frontage or a unique shape. That is why the photos are relevant. The property can't share characteristics with surrounding properties. It has to be unique characteristics of that property and the application of the ordinance to that specific property that needs to necessitate the variance. A lot of these properties in the area are situated on that knoll, including her clients and a couple of others, as seen in the crevices of the Lidar image. That doesn't preclude somebody from having a garage, it is the type of garage, the building structure, that creates the issue, not necessarily the applicant's property.

Attorney McQuarrie said the main element that the applicant can meet that is substantial... really is what the literal importance of the variance is that unnecessary hardship. As seen from the evidence before the board, the applicant continued to build after knowing that there was a problem. The evidence is that he rushed to complete it in an effort to have the board have some sympathy for his situation and rubber stamp his request for a variance.

Attorney McQuarrie said that is not what the variance is for, that is not the uniqueness of the property, it's that the applicant wanted a specific design for the garage. It could have been on a different corner (of the lot). It could not have been attached to the house; it could not have had a mud room. The applicant already had a garage and demolished it and created a new larger one. The applicant created his own hardship and the board doesn't have any information about what the damages were prior to continuing to build the garage. The applicant cannot meet the elements of the variance. She asked the board to deny the request (for a variance).

Jan G. asked Attorney McQuarrie if she was arguing that the applicant purposely built something that he knew would be illegal? Then when it was discovered that maybe it was illegal, the applicant then went ahead and that was the only motivation for accelerating the

building, at that point. Not the fact that he had a half down structure and it was January and weather was an issue.

Attorney McQuarrie said she doesn't know what the applicant's other motivations were. But, in part those were the motivations from prior meetings in front of the board of Selectman discussing the site visit. Her clients informed her that there was a prior comment that the applicant would get a variance anyway and that was prior to this. She said she does think it was the motivation. The evidence suggests that it was the motivation. More builders were coming out than previously there, even though it was early January. After Tom Baye came there were more workers coming out and substantially rushing to complete it.

Jan G. asked if those contractors were on site before or after Tom Baye issued an official letter saying, this was wrong?

Attorney McQuarrie said Tom Baye came out on January 6th and the contractors were there. He told the applicant about the encroachment at that time. Then after the encroachment was discovered and the applicant was informed on January 6, he continued to build.

Derek asked, but wasn't the official notification delivered on January 27, 2023.

Attorney McQuarrie said, yes (a letter) from the Land Use coordinator came on March 14th and then another one for non-compliance came on January 27th, the official letter. She said by the applicant's own admission he knew on January 6, 2023.

Jan G. said but it could be read either way that the applicant didn't receive it. The applicant didn't expect to receive it, expected that it would be a variance, or exempted, or whatever. Having a partial building in the middle of January, is not something you want to have happen. Jan G. said you could read it either way.

Attorney McQuarrie said she thought it could be read either way if the applicant didn't already admit that he knew on January 6th at a prior hearing, and she has the meeting minutes, that he knew there was an encroachment issue. She suggested that the purpose for a variance isn't so that you can complete it as much as possible and then go ask for it (a variance). It's once you realize there's an issue and that you're in violation of an ordinance…it's a terrible situation, but you should not continue to create more hardship for yourself, financially or otherwise.

The Chair said so you are saying the owner because he continued to build has to take responsibility for the building that continued after being notified that the building was out of compliance.

Attorney McQuarrie concurred and said the applicant had actual knowledge that the garage was out of compliance on January 6th, but continued to make it a worse.

Mr. Dyment, the abutter and client said they had the land surveyed and made sure they knew exactly where the boundary locations were. Beverley asked what date was that? Mrs. Dyment said January 17. Mr. Dyment said the surveyor said it was definitely out of compliance. He said there was supposed to be a notice sent out within a day, it took 11 days for the Town and the Selectboard to get the notice out.

Attorney McQuarrie said regardless of what the Town action was, the applicant knew on January 6th.

Mr. Dyment said he went to the one of the Selectboard meetings and asked why didn't abutters notices go out? Something this substantial and close to the property. Mr. Dyment

was told it wasn't required and was also told don't worry about it, they are going to get the variance anyway. He said this was said by a Town employee.

Attorney McQuarrie said aside from the fact that the onus is on the applicant, he was aware of the encroachment and continued to build despite knowing there was an issue with the Town.

Sam asked if a Building Permit does not require an abutter notification, but it's the variance that requires it. Beverley concurred.

The Chair said in the Building Permit the landowner signs that they will be in compliance of all the ordinances.

Beverley said they usually do the best they can.

Mr. Dyment said it's just infuriating that someone would say don't worry about it, we're getting a variance anyway.

The Chair said nobody should assume that they are going to get a variance.

Attorney McQuarrie said that of all the evidence the most relevant evidence is the actual knowledge and the continuing on with the project despite the decision or the motivation for doing so. She thinks that given all of what was presented to the board with evidence of the non-uniqueness, for lack of better terms of the property and everything else depicted and represented in the photographs. Also, the kind of documenting of how this was transpiring via electronic communication from her client and the town that the applicant has not met his burden to obtain that variance and we'd ask the board to deny it.

The Chair asked the board if they had further questions. The board made no comments. The Chair noted there was no other abutters or public present. She gave the applicant and Attorney Lick a chance for rebuttal. There were no responses from attendees on Zoom. Attorney McQuarrie and her client left the table and Attorney Lick and the applicant approached the table.

Attorney Lick said he wanted to make three points in his response to provide clarity. He started with the discussion about continuing the work on construction. When Tom Baye came out and talked with the applicant about the encroachment sometime around January 6 or 7th. The applicant specifically asked Tom Baye what was the situation and if he needed to stop. The answer (from Tom Baye) was I have to talk to the Town and will get back to you (the applicant). Admittedly the applicant continued to do work during that time, and buttoned up for the winter months. Attorney Lick said, if the board had gone to see the property, the applicant did stop. There are no shingles on the roof. He's getting water damage because this has set for the last year and a half, or so, half constructed. The applicant cannot do additional work while this all winds its way through. There was no intent to sort of build up the property in a way that would hopefully affect the decision of the board. When the applicant got the letter saying stop, he stopped.

Attorney Lick said, the important point to be made was the applicant wasn't really at any disadvantage or didn't have any detriment to him as a result of this. Attorney Lick would ask if that's the case then look at what was done as of January 6th. Even if you want to give the abutter the benefit of the doubt, there still was significant work done, the foundation was laid and three-quarters was done instead of maybe $100,000, maybe it was $90,000, but the building was up. The button up did occur in the last couple of weeks during the winter months. Their view was there was still a significant detriment regardless of whether it's the building as it looks now or the building as it looked when not quite as complete. It was still significantly constructed. Everything was up it is two stories, and the abutters were complaining about the view at that point.

Attorney Lick said the second issue is about the property not being unique. He said the board has been to the property and witnessed what the property is like. If the house was not built on the knoll and not attaching it or trying to put it in location near the house, then they would have a different analysis for the board. But that's not the case. The applicant was dealing with what he had at the time. What the applicant had was a house on the knoll and he was trying to connect it and a reasonable garage. Attorney Lick and his client think that's fair and appropriate. When the board looks at that last element as to whether or not what he's trying to do is a reasonable thing. The applicant suggests the garage that is proposed, an attached garage with two bays, allows for storage of the plow truck and adequate (room) in the front which is perfectly reasonable for the area. There is nothing unusual or out of the ordinary that would stand out in the Town of Warner. Where somebody could say, wow, this is so out of the norm, that it should be reduced and he should be relegated to a one car older garage that is in bad shape. Instead the applicant should not be permitted to do what everybody else in town does within reason, of course.

Attorney Lick said those were the points he wanted to make. He really wants the board to understand that when presented with this situation, the applicant did not try to quickly get it all done and hope (the Town) will just let him go forward. When the applicant received the notice to stop, he stopped and he's suffering today because of that. Because what he has constructed is getting damaged with significant problems. It will probably require some replacement of a lot of the sheathing, when and if, the board votes to allow the applicant to proceed.

Mr. McLennand, the applicant and client, said there were no trees on his property that were removed during construction. There were some limbs that were knocked off one of the trees, but that was it. There were no trees in between his property and the abutter's that were taken out. There were none there to begin with.

The Chair asked if there were any questions. The board asked no questions. Attorney McQuarrie asked if she could respond. Attorney Lick and the applicant left the table. Attorney McQuarrie approached the table.

Beverley asked what does the abutters want, do they want them to remove the garage? She said there has to be a reason for Attorney McQuarrie and her client (the abutters) to be here? The Chair said it is not going to be up to this board to determine what happens, that will be up to the Selectboard. They are the enforcing body. Beverley said, okay, so from this board it goes to the Selectboard. The Chair said, well it depends. The Chair said the original case is still proceeding through the courts. Attorney Lick concurred with the Chair. Attorney Lick said if this variance is granted depending, they would probably stay the other case. If the variance is granted, we don't need to get both (the Equitable Waiver and the Variance). The original case for the denial of the Equitable Waiver is still proceeding through the courts.

Attorney McQuarrie said relative to the issue of no work being done. That is a direct discrepancy from what the applicant originally said on April 12, 2023. The applicant said he didn't do any work after Tom Baye informed him of the encroachment, which is not what the board is hearing today. Beverley asked if she had proof of that. Attorney McQuarrie said they are in the April 12th meeting minutes. She doesn't have those printed she believes they were on line 81. Mrs. Dyment got up to retrieve a copy of the minutes.

Attorney McQuarrie said she would keep talking while (Mrs. Dyment looked for the minutes). She said as it relates to the property not being unique, just as Attorney Lick said, if it (the garage) wasn't attached to the house it wouldn't be the case. Attorney McQuarrie was saying that it does make an impact of how the design of the garage was contemplated and where it was placed. There might be other areas to put a garage, but the applicant

did have a garage prior to this, and it was demolished. But as it relates to issues about credibility and when there are assertions to the contrary, as there are now.

Attorney McQuarrie referenced the board meeting minutes from April 12, 2023 on page 4 starting at line 122. She read, “he submitted them and received the permit and started construction. He became aware of the problem when Tom Baye, the Building Inspector, told him a complaint had been filed against them. Since then he has not done any work on the garage.”

Jan G. asked does that mean officially occurring? Derek said it all depends on what he was told that day or whether the applicant considered it on (January) the 6th or whether he considered (January) the 27th as official notification.

Attorney McQuarrie said that based on his statements the applicant considered official notice on January 6th because that's when he made the assertion that he stopped work after that. She suggested it would probably be different today given the conflicting statements.

The Chair asked if anyone had any other questions? Attorney McQuarrie said she had no further comment. The minutes of April 2024 were passed around for the board to review.

Janice, Land Use Administrator, said Attorney McQuarrie how she would approach the fair and equal balance for the public interest criteria. In terms of weighing in the public interest versus the property owner’s interest. She directed the question for both the abutter and the applicant/property owner.

Attorney McQuarrie said for the public interest, they tried to touch on that a little bit about the trends that it would create She said the applicant did know on January 6th that he was not in compliance. Her said if everyone did what the applicant did, it would have the accumulative effect of disregarding the ordinance. It is in the public interest not to retroactively seek relief for known errors. Also, given that the board doesn’t have evidence about what the actual detriment to the applicant was at the time of his learning of the encroachment, the board only has what he has put into it thus far. It's really hard to weigh what his damages would be. If everyone were allowed to move along as they wished with projects despite the knowledge that they are not in compliance with ordinances it would have an accumulative effect that would be contrary to public interest.

Janice said, right, she gets her on that. Her follow-up question is, it's already done, and we've already known that there were mistakes made and steps that shouldn't have happened. So now looking at the case as it is today. As it stands, with the seven-foot encroachment, what would be a fair and equal balance for both property owners?

Attorney McQuarrie said she thinks a fair and equal balance requires the board to determine all of the elements of the variance and not just this one in isolation about substantial justice being done. It really is a balance of all of the elements at once to determine whether or not he's met his burden of proof, which she is suggesting that he hasn't because of all of the reasons that (she has stated).

Attorney McQuarrie and her client left the table.

Attorney Lick asked if he could respond and approached the table. He said when the board looks at his submission, the balancing tests is part of that (narrative). The board is supposed to weigh what the determent is imposed upon the applicant versus the public benefit, and which one outweighs the other. What he presented in the package was to look at what benefit is there to the public if the variance is not granted. What public benefit has incurred. He believes that the public benefit is practically nothing. In other words, if the public benefit is to ensure the best visibility for abutters. Regardless, whether this

variance is granted or not, the visibility would be exactly the same except for that 7-foot (encroachment).

Attorney Lick said so what is gained by saying no and denying the variance. Nothing is gained for the public. The only person that's impacted is the neighbor. He views the neighbor's expressed concern is they are now able to see it (the garage). This variance has zero impact on that detriment to the neighbor. Therefore the public benefit is not served.

Attorney Lick said now let's turn to the detriment. We talked about what detriment would be imposed upon the applicant. His out-of-pocket expenses are roughly $100,000 in expenses for the garage. At best in their view it's not quite $100,000, only two stories were built, some windows weren't in, there weren't some certain parts of sheathing up. He said let's call it $90,000 if you give them the benefit of the doubt, and by the way the applicant disagrees with that.

Attorney Lick said Tom Baye told him he could proceed. He said the Town will tell you, (what to do). When the Town told him he stopped, but let's leave that all aside. Attorney Lick said, let's assume he didn't. You still have a two-story structure, a foundation of months of work in place and all the materials in place. If the applicant stopped it as of January 6th, the detriment would still be significant, not only in the cost incurred to him, but what would happen is he would not be allowed to have a reasonable typical type of garage that other people in the community would have. That is the detriment that would be imposed upon him. I weigh the detriment, the expense and him essentially being limited to not being able to have what other people in Town have versus the detriment to the public of a 7-feet buffer encroachment. It is in the middle of nowhere that no one would have any idea about, including Tom Baye, when he was there the first time around. If it was such a big deal and had such an impact you would have thought somebody like Tom Baye would have at least noticed, even though he doesn't have an obligation to go do measurements. But if this was a real problem you would have thought somebody would have noticed it before two stories of the building were up.

Attorney Lick said so that's how he would weigh them as basically no public benefit to applying the ordinance in this case versus a significant detriment to the applicant if it is enforced.

Harry spoke to Attorney Lick, and said if he has this right the applicant and your position is that you do not dispute that there is a violation correct. Attorney Lick said, correct, they wouldn't be there if there wasn't a violation.

Harry said we have spent a lot of time going through a long calendar of how the violation was wrong and it continued. But he is trying to understand in the context of the variance, the applicant is not disputing that there was violation. They are asking for a variance based on the condition that the violation will require a variance and they are not disputing that there was a violation.

Attorney Lick said the board may or may not seen these after the fact variance (applications) before. He said they do happen but are not typical. They do happen in situations like this. As a matter of fact, I've seen them done where boards can offer an alternative and say either get an Equitable Waiver or a Variance and it is combined. Here that wasn't what happened. But in any event Attorney Lick said Harry was correct, given that a violation has occurred there is no dispute about it.

Harry said in regard to the public benefit issue, the flip side of that is there's no detriment to the public safety or morals or health or anything if this was granted. Attorney Lick said

that's correct. Harry said no public benefit but, there's no public detriment. Attorney Lick agreed.

Attorney Lick said if they were seeking a variance to build a four-story garage where a two-story one was allowed. He would have a very difficult time explaining how there is no public metric given the neighbor would say I now have a much greater view than I otherwise would if he was limited to two stories. The sole question is, does this 7-foot encroachment in the corner have a negative impact. That is what the board is looking at, not the two-story garage itself, the seven-foot encroachment and does it have a negative impact.

Derek asked the abutter, Mr. Dyment, did you have a surveyor, it wasn't an appraiser? There wasn't any property value loss, or anything?

Mr. Dyment said a surveyor came in and put in flags. Mrs. Dyment said she can't find the before pictures and the applicant is saying that she has a wooded area of 150 feet. She thinks she measured it and it's just about 100 feet. There are a lot of hemlocks and if anybody knows about hemlocks the bugs will kill the hemlocks. So, in the future she is going to be able to see the building more. It is not as much of a wooded area as they have been saying. She said she didn't complain earlier because she was sick in bed. Then she heard all this noise and she thought "wow what are they building." She didn't know what they were building because at first, she thought it was a shed. She thought if it was something bigger she would have got an abutter's notice from (the Town)…they kept building and when she saw it she was shocked because it's just so big. She is just so uncomfortable in her yard now. When she is sitting in her pool with her family, it's just uncomfortable. She was really shocked when she saw it and just felt like maybe the Town should have notified abutters about what was going. So, they could see what the neighbor's plans were.

The Chair said certainly you would think they would come for a variance prior to construction. If the applicant wanted to build this size shed or this size garage on that exact piece of property, there would have been a public hearing because there would need to have been a variance for that.

The Chair said, but because the building had a (building) permit which doesn't require the Town to make those measurements, it's up to the property owner to make those measurements. That's why it ended up where it is. Janice clarified there is no abutters notice for a Building Permit. The Chair said, correct. She said only if they had come for a variance prior to building. Which is the usual sequence of events if somebody knows that they are building within the setbacks.

Attorney McQuarrie briefly followed up on a point that Mr. (Harry) Seidel made about the chronology of events. The chronology of events is important because it demonstrates that of course there is a violation. That's why we are here today. It demonstrates that he had actual knowledge on a certain day and continued to build, after that. So, in the findings of fact, they would recommend or ask that the board make specific findings of fact as it relates to how this would meet an unnecessary hardship provision, if it's granted. Given that he continued to build after he knew that he was in violation.

Derek addressed Attorney McQuarrie saying he knew she was not an expert, and neither was he. But with the lay of the land, the way it is right now. Would that detriment be lessened if there was a stockade fence or something. Is it up high enough that if you could put a fence there.

Mr. Dyment said it is too high (meaning the garage). They brought in Pelletieri Landscaping and another landscaping business to look at planting trees. Mrs. Dyment said because of

their septic (location) they couldn't. She said they couldn't get the trees or the fence in there because it would just be too heavy. Attorney McQuarrie said because their property is uniquely situated in this area too, they couldn't get back there because of the topography of their lot.

Beverley said so, what do you want then?

Attorney McQuarrie and the Chair said they thought that question was not appropriate. The Chair said because it is not going to be up to them to remedy this.

The Chair closed the public hearing and went into deliberation after hearing no more comments from the Attorneys or questions from the board.

Derek commented that the board needed to go through the criteria.

BOARD DELIBERATIONS

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

Beverley said the board just heard it described that it isn't (contrary to the public interest).

The Chair said well, and that it is, this is a low density residential area and that the abutter feels that it is contrary to the public interest.

Beverley said but the owner thinks that it is not.

Jan G. said it seems that the issue is not over the 7-foot encroachment. It's over having a building there at all. Beverley said, exactly.

The Chair disagreed. The variance is for the encroachment into the setbacks. That's what the board is hearing.

Jan G. said she doesn't think in terms of detriment to the public it is 7 feet. If you look at the picture, here is the garage and here is this little thing that sticks out. She doesn't think the public is injured by the intrusion on the setback. She just doesn't buy it, it is too insignificant. If it was the case of, do you build this thing or not? That would be different. She guesses if there was a view issue that would pertain to the whole structure, it doesn't do anything. It doesn't pertain at all to this little tiny fingernail that sticks out within his own property, but still a few feet too close within the setback area.

Derek said if it was an issue, he doesn't think the original problem would have been that it was that detrimental.

Jan G. said what she and Derek are saying is that the property owner was within his rights to build and increase his living space. He is allowed to do that and he was allowed to put up a larger garage. All he wasn't allowed to do was have 7 feet in the intrusion area, and if someone tells me that is a material significance for anything except the greatest of round off of impact. It's not the intrusion, it's the thing that he was allowed to do in the first place (that is the problem).

Beverley agreed.

The Chair said we are not arguing the use, building a garage on your own property is certainly everybody's right. But that right only extends to the edge of the setback.

Beverley said it certainly will not be contrary to the public interest. She said, tell me how it is then.

Harry said they should be focusing on the public interest.

Jan G. said she has been listening to a book by Stephen Breyer called “Reading or Read The Constitution” and it talks about functionalism or what does the statute say versus pragmatism and practicality and what was the intent. He had a funny example of snails in a basket on a train in France and the upshot of it was there's no right answer. It's always going to be coming from our gut. Her gut tells her this is not where the board should correctly be looking at the letter of the law, but rather that it be consistent with the spirit of the ordinance as referenced by Chester, Rod and Gun Club versus the Town of Chester. So, she would look at this through pragmatic lenses and not through the originalism of what the statute said word-for-word.

Beverley said the the last paragraph (of the applicants response) says everything. She read, “Nor will granting this variance threaten public health, safety or welfare. This is a minor encroachment, and the property is well screened and there is nothing to suggest that the public health, safety and welfare will be impacted at all.” She agreed with that statement. Jan G. agreed, as well.

Derek said it is not detrimental to the public. But, the public in general being everyone in town, he doesn’t see how that affects everyone.

Jan G. said she doesn’t see how even the abutters can claim a public nuisance for the intrusion as opposed to the building itself.

The Chair said the thing is even if there wasn't an abutter complaint, even in the absence of opposition, our duty is to defend the ordinances so we can’t, and we shouldn't be picking at what the abutter’s view is. She said the ordinance are the ordinances.

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

The Chair said the spirit of the ordinance goes beyond the literal ordinance and that everyone observes the same set of ordinances. Normally people look at the ordinances prior and they do measure the property. They do go through the necessary steps. The Chair said she looked at the Building Permits and was surprised to see how nicely all the drawings were done. Yet, there were no measurements to the abutter.

Beverley asked but now, we're changing it, are we not?

The Chair said she didn't know but we do require (that they measure). Beverley said now we do. The Chair said I think we did then. Beverley stated if we did then, then who accepted those plans. The Chair said she didn’t know but those plans were for the Building Permit. Again, it was the owner’s obligation to make those measurements. They didn't end up in the Building Permit. It’s the owner’s obligation to see that those measurements are made. Beverley asked if we always get everything written out with all the dimensions. The Chair clarified that Beverley was talking about (submissions) to the Zoning Board of Adjustment. Beverley concurred. The Chair clarified that she was talking about Building Permit (submissions) not for this board.

Harry said the Building Permit does not require a licensed surveyor to identify where the property lines and the setback are. He said our ordinance does not protect the perspective applicant in that sense. Sam said it is their job to protect themselves. Harry said we just simply say they can do a sketch and do the best they can.

The Chair commented that it was up to them. But it is up to them when signing the Building Permit that they will abide by the ordinances. It makes the assumption that they are doing the required measurements in each district as part of that Building Permit. So, there is no ambiguity.

Harry said but the problem is that our ordinance doesn't specifically demand they do that rigor. In a case like this where there's a setback and there's a drop off and it looks pretty far, but actually it's not. If you measure horizontally and it's not there it is seven feet short. If you stand there and look at it, it's tricky. He is humbled very often by his own inability to judge distance and he does it all the time. Sometimes it's difficult. It's why we should have a surveyor to change a Building Permit as much as we can.

The Chair said she knows the Building Permit applications are being altered. She said, but if someone was putting in a foundation, she would bet they use a tape measure. Take a tape measure and go from the property line to where you think the building is going to be.

Harry discussed the challenges of measuring to the property line given the property slopes because of the knoll. The Chair commented that it should have been done. Sam commenting there was a stone wall. Harry showed on the white board how difficult measuring would have been giving the slopes of the property.

Janice mentioned to the board that they have already deliberated on the measurement issue on the property and that issue is already baked into this application. She said the board already knows that mistakes were made and now the board has to determine whether or not giving relief for the 7-foot encroachment is worthy of a variance. The Chair agreed.

Derek said all that information is a very good point, but now the board needs to address the spirit of the ordinance.

Jan G. said she thought the spirit of the ordinance is not to have crowding. Also, they should have come before they did the foundation. But she doesn't think that the spirit of the ordinance would punish them for making a mistake in a measurement for something that they would have probably gotten if they hadn't made that mistake. If they hadn't poured the concrete…she really does buy the idea that the property is such that they would have a difficult time getting into and out of the garage and would have delivery drivers falling over the ledge in their driveway. That is a hazard that is not unique to that area but also unique to that property. She said everyone who lives in New Hampshire and lives on a hill has problems with part of their property that you can fall off. She thinks given where the house was and where they wanted the garage they probably made what they thought was the best place to put it and they didn't realize they should probably have measured it.

The Chair said that is a really big problem for her, they absolutely should have measured it.

Jan G. said they should have measured it, but they didn't.

The Chair said she understood what Jan G. was saying that the property because it's on a knoll, that would mean that things had to be configured in a particular way for making turnarounds and depending on what kind of traffic they have coming to the house. Jan G. said given whether it mud season, or ice season. The Chair said, right, but those things should be considered when you were designing whatever the building is that has to fit on that on that unique piece of property.

Jan G. said she is pretty sure she would have granted the variance (prior to building). She said so in terms of the spirit she thinks that suggests that board should grant it now, even though they made a mistake in measurement.

The Chair said she is 100% on the other side of that, she thinks if they had come to the board prior to building and said we want to put this 24-by-46 garage on this property and that's going to require us to go into the setbacks. I think this board would have said, no.

Derek said he agreed with that, but the problem is, you don't know you made a mistake until the mistake is made. He didn't think the property owner maliciously went 7 feet into someone else's property (setback). He said they can debate whether he should have come first or not but you don't know if you made a mistake until you have already made that mistake.

The Chair said again backing into a variance, in terms of getting into the spirit of the ordinance. The spirit is, that everybody's in the same boat with observing the setbacks.

Sam said that leads him to the next point of substantial justice is done. The argument is principally about cost incurred. But if he had come before the board to get the variance beforehand how would that equate to the same substantial justice done? Because that kind of tells you whether you could consider it as retroactive variance. If that cost hadn't incurred, what would your decision be? Would we have granted it beforehand if there was no cost?

The Chair said, right, and she absolutely thinks she wouldn't.

Derek said he agrees they probably wouldn't have. But he didn't know there was a problem until it was already made.

The Chair said she would have gone back to the Building Permit and before a single shovel went into the ground and that building permit was signed. It was signed off that they would observe the setbacks. They didn't do that.

Derek said that was what Harry said, obviously something happened, and the applicant wouldn't be here if not.

The Chair said right, so how is that substantial justice? You know, it's not an injustice that's being forced on them.

Harry said how is it substantial justice in the sense that the board is looking at 56 square feet of an encroachment. He said it is 56 square feet, a small car parking space is 190 square feet. The board is talking about one-third of a small car parking space. Is it substantial justice that somebody has to remove a building because of that. The encroachment is 33 feet at the worst part you come in a foot or two and it is less than that. It gets less and less when approaching the other corner. He said 33 feet is only the worst case. It is only 56 square feet of setback.

The Chair asked then, do you think it would have been reasonable for substantial justice to say you need to make this building a little bit smaller, so that the applicant is not encroaching on the setback.

Harry said the situation is that it is already done. He said they are not disputing the violation. His point is, is it substantial justice, when the town has a very large setback. He said 40 feet is actually very large, comparatively. The infraction is 56 square which is very small and it still leaves 33 feet and a100 feet of forest. Harry said the 33 feet remaining setback is reasonable.

Janice asked if they could balance the harm to the public versus the harm to the property owner.

Derek said he doesn't see a harm to the general public, but he does see a major harm to Mr. McLennand as far as chopping that corner off (of the garage). Or, whatever would have to occur to bring it into that (into compliance).

Janice asked why does the board see no harm to the general public?

Derek said it doesn't really affect the town at large.

Sam said you could argue that about every piece of property that it doesn't impact the town at large.

The Chair said, right, but as long as they are observing the ordinances it doesn't matter.

Sam said even when they don't it doesn't effect the town at large.

The Chair said it is going to affect the abutter's more than anyone else.

3. By granting the variance substantial justice is done because:

Beverley said this is a very rural property. So how could it possibly change the value of surrounding properties. They are not diminished because he has garage that is into the setbacks.

Jan G. said it is still on his property.

Derek said he sees where the privacy is a selling point of a property. He is not a realtor or an appraiser and in light of not having something in front of him to say that the property value is diminished he can't (verify that).

The Chair said the abutter does have a pool back there and their privacy is being impacted. She said the builder would argue it doesn't make that big of a difference.

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

Derek said it is the seven feet they are not talking about the whole garage, just one back corner. Derek said if he took a big chain saw and cut that section off the barn (garage), the (garage) is still there and the abutters would still see it. The removal of that seven feet one way or the other isn't going to make a bit of difference to the property line. If the property value is diminished it would be because the barn is there at all, not just that seven feet.

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

- ***A. Meaning that owing to special conditions of the property that distinguish it from other properties in the area:***
  - ***i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision on the property; and***
  - ***ii. The proposed use is a reasonable one.*** *[Explain what is unique about the property that makes the specific zoning restriction unfair and unrelated to the purpose of the provision, and that it is a reasonable use]*

The Chair said she agrees with the abutter's attorney, that this is a self-created hardship they just didn't measure. They just didn't take the precautions necessary to prevent this very real hardship. She is not arguing that this isn't a hardship to whatever remedy the Selectboard or the courts will come up with. It's horrible to be in this situation. But this is not because of the constitution of the property. It's not that different from other properties. It is on a knoll, no doubt. But because of the lack of attention to detail by the builder or the owner, either one the board has heard that both were negligent, that created this hardship and I just don't think that it meets the hardship standard for receiving a variance.

Harry said he disagrees because he has been up to that property and it's very much a very limited area rising up out of the swamp. Basically, it's a very low area all around. When driving up there and there was a couple of cars parked there. He said it was very difficult for him to get his car out of there, even before he had his new truck. It's just very difficult to turn around. The existing house was in the prime spot and there just isn't a lot of buildable space.

The Chair said then wouldn't you limit how big you build your buildings?

Harry said the applicant thought they were okay. They thought they were compliant. Honestly, they did. He doesn't in his heart believe that they saw an opportunity and went for it. They tried to line it up with the house and have the garage and have enough space to get to the top and just stand there without sliding off and be able to get in and turn around. He honestly believes they tried to site it with the back of the house and keep it on top of the hill.

Jan G. said they made a mistake. She doesn't think that it is important to the loss they would incur If they were not granted the variance. The Chair said but do you think that they created their own hardship by not measuring? Jan G. said to her the hardship is the fact that they have a tiny lot on top of an ant hill with a swamp underneath. They thought they had locked out the size that they wanted. I don't believe that they sat down and said no one was going to notice. Let's just roll the dice and see if they can get away with it.

The Chair said she doesn't see malice.

Sam said he thinks the hardship would be resolved with a garage that's seven feet smaller. So, in a way it is self-created. If they had measured and knew where the 40-foot setback was they would have been forced to make a decision that might have resulted in a smaller garage.

The Chair said they could have either come to this board for a variance. Which they may or may not have been granted. She thinks not, but that's her opinion and we will never know. Or, they would have had to modify the building to fit the property.

Beverley said what we are asking now is will literal enforcement of the provisions of the ordinance result in an unnecessary hardship. She said, "of course it will." The Chair agreed. Beverley said the board is discussing something that has already happened.

The Chair said it is important that the hardship is related to the property and to special conditions of the property, or if it's been self-created.

Beverley said but it doesn't say that.

Janice said what Beverly is reading, is section "i.", which says "a fairly substantial relationship exists between the provisions of the ordinance placed on this property and as it applies to this property."

The Chair asked to hear from voting members on criteria 5 and the hardship question.

Jan G. said she believed that it's a hardship and the fact that it was self-inflicted, we still have to use morality, she still thinks it's the right thing to do to grant the variance, at this point. Primarily, because they have a difficult lot and they did what they thought was right. They didn't measure it, they didn't get an exemption. But she would have given them the variance. She would have said seven feet isn't really going to hurt anybody. If they needed this to have a car and a plow and a couple of bicycles that they would not have otherwise had. Then you are not going to let them enjoy the fruits of their property ownership.

Sam said he came into the meeting thinking about whether it would be if the variance was applied for beforehand and how he would consider it. He thinks that if that was what applied for the hardship would be considered self-imposed by the needs of that particular sized garage. He thinks it is a small encroachment and a huge hardship that it's already done and there are already costs incurred. He thinks it does not meet that fifth requirement for literal enforcement. He thinks it is a self-created hardship. In some ways it's almost worse than it is because of the cost that is incurred. To bring it to a formal moral question, if the cost hadn't been incurred, he thinks the decision would be less about the individual person's hardship and more about whether the requirements for the variance were met or not.

Beverly asked what are we answering here? She said that literally enforcement of the provisions of the ordinance would result in an unnecessary hardship and to who? The Chair said to the applicant, they are one's answering the question. Beverley said, then she thinks it would result in an unnecessary hardship. It would be financial, emotional. She thinks it would be unfair to the applicant.

Derek said he was just looking at the RSA. He doesn't see anything here about self-imposed. He is not in disagreement with it being self-imposed. He thinks financially and what that is going to take for corrective measures far outweighs the mistake. He can't disagree that obviously, he built the building. It is self-imposed. But he just doesn't think that 7 feet is enough to outweigh the hardship that it's going to take to remedy that.

Beverley agreed.

Jan G. made a motion regarding Map 15 Lot 053-3 applicant James McLennand that we grant a variance from Article VII,c,1,d, to allow the existing 7-foot encroachment into the 40 foot setback. Beverley seconded the motion. Discussion: None. Roll Call Vote: Beverley Howe – yes. Derek Narducci – yes. Jan Gugliotti – yes. Sam Carr – no. Barbara Marty – no. **Vote Tally:** 3 to 2. The variance was approved.

The Chair informed the applicant the variance was approved. She informed the abutter that they had 30 days to appeal the decision.

The board took a short five-minute break.

III. UNFINISHED BUSINESS

A. Consider application additions and checklist changes. Variance, Special Exception, Equitable Waiver, Appeal from an Administrative Decision.

Review of the board applications was tabled.

B. REVIEW OF MINUTES OF PREVIOUS MEETING – January 10, 2024, February 14, 2024

The board reviewed the minutes of January 10, 2024. The Chair asked Janice if photographs or charts were included with the minutes. Janice said, no, but we could. Everything that is submitted for the record is in the Land Use property file.

ZBA Minutes of January 10, 2024

Sam Carr made a motion to accept the minutes as amended with Lucinda McQueen's edits noted. Beverley Howe seconded the motion. Discussion: None. **Voice Vote Tally:** 5 – 0. The minutes were approved.

ZBA Minutes of February 14, 2024

Jan Gugliotti made a motion to accept the minutes as amended. Beverley Howe seconded the minutes. Discussion: None. **Voice Vote Tally:** 5 – 0. The minutes were approved.

IV. COMMUNICATIONS AND MISCELLANEOUS

Jan G. is it a hardship for some people to draw a plot plan to scale. The library might be able to get like a Visio and a template and have you know, someone in the aggregator to help people create it from field area or whatever, but some applications that can map there properly.

The Chair said any tool that the library could offer would be a plus.

Jan G. is on the library trustee board.

Janice reminded the board there is Spring training from Central Regional NH Planning on May 11th. The Chair said they are very good. It's all online this year.

Janice said the Planning Board seems to be having trouble with doing referrals. They don't seem to understand the reason for it and sometimes have trouble narrowing down a use that the Zoning Board does or doesn't agree with. The need for a referral is in the ZBA application checklist. It is not actually a requirement of the Planning Board. The Land Use office has a lot of resources at their disposal and can figure out what type of application is necessary.

The Chair felt it was important for the process to remain with applicants going for a referral from the Planning Board in the form of a consultation.

Harry thought maybe Janice should come to the Selectboard and have this discussion.

The Chair thought there could be some liability for the Land Use office, if it were to change.

V. ADJOURNMENT

Beverley Howe made a motion to adjourn the meeting. Jan Gugliotti seconded. The meeting was adjourned at 10:24 PM.

/jll