

TOWN OF WARNER – ZONING BOARD OF ADJUSTMENT

Approved Meeting Minutes

May 10, 2017 7:00 PM

Warner Town Hall, Lower Level

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

Also Present: Land Use Secretary Lois Lord

1. **OPEN MEETING**

Chairman Davies opened the meeting at 7:00 p.m.

2. **ROLL CALL**

Roll call was taken with 7 members present. Chairman Davies noted Corey Giroux has been approved by the Board of Selectmen to be a full member but hasn't yet been sworn in yet. He then appointed Corey to sit in for the vacant full member seat.

3. **APPROVAL OF MEETING MINUTES**

Chairman Davies brought forth the meeting minutes of March 8, 2017 for the board's approval and mentioned the review of the minutes had been started at the April 12th meeting and is all set except for a correction on page 7. Eric Miller, Dragonfly, LLC Applicant who was in the audience on April 12th had mentioned a correction they had sent in but the Land Use Secretary was not present so they could not confirm this.

Chairman Davies stated it was an email regarding the thickness of the ballistic rubber which should be 2', not 2". Howard clarified with Chairman Davies that the mistake has been updated already. He mentioned he had talked to Lois about it and a good procedure would be once the draft minutes are complete they are in a holding pattern. If she gets emailed changes from people who have reviewed them but aren't board members, the board should review those emails when they are approving the minutes, that is the proper process. That way things don't get changed that the board saw differently. The other corrections to these minutes are summarized in the April 12th meeting minutes, item number 3 and they will also include the change to the ballistic rubber.

Vice Chair Loz made a MOTION to approve the March 8, 2017 meeting minutes as amended, MOTION seconded by Corey Giroux. There was no discussion and a voice vote was taken with all in favor 5-0-0.

Chairman Davies mentioned that back on the March 8, 2017 meetings there was a question on whether the recording should be maintained because there was a question on the writing of the decision letter. The board discussed whether the recording should be kept until the case was resolved and technically the procedure says as soon as they are approved the recording gets deleted.

Corey Giroux noted that in normal practice he has seen in other towns that its incumbent upon the person that wants the recordings kept to request a certified record of what's been recorded and sometimes that's a television video or in our instance a verbal recording. Howard Kirchner noted the question was a clarification and wasn't a very controversial point that is worth preserving the record for.

Chairman Davies said seeing a motion to preserve the recording we'll let normal procedure take place. Lois Lord stated she is going to keep those recordings until the whole thing is settled in case something comes up. Chairman Davies said that technically they are required to delete them unless the board says not to. Barb Marty said it might be prudent to keep them since this is a contentious case and Chairman Davies said it wouldn't be consistent with our procedure and that this type of debate has come up before as we used to keep the recordings forever but the RSA book says to delete them after approval.

Beverley Howe asked if the minutes aren't the approved record. Vice Chair Loz wondered if it would be prudent to ask town counsel about it. Chairman Davies noted he had asked them that and had pointed out we might keep the recording. Town counsel did not have a problem with that. Howard Kirchner asked if anyone had requested the records and Lois Lord stated that she has had a request from the lawyer representing MadgeTech. Chairman Davies said town counsel may want a copy as well and asked if someone wanted to make a MOTION to preserve the recording of the March 8, 2017 meeting minutes.

Corey Giroux made a MOTION to preserve the audio record of the March 8, 2017 meeting minutes pending resolution to the entire case. MOTION was seconded by Vice Chair Loz. A voice vote was taken with all in favor 5-0-0.

The meeting minutes of April 12, 2017 were reviewed and a few changes brought to light. Howard Kirchner made a MOTION to approve the meeting minutes of April 12, 2017 as amended. MOTION was seconded by Gordon Nolen.

Corey Giroux made a MOTION to keep the recording of the meeting minutes of April 12, 2017 until the case is resolved. MOTION seconded by Vice Chair Loz. A voice vote was taken and all were in favor 5-0-0.

4. NEW BUSINESS

ZBA Case No. 2017-01 – Typos of Notice of Decision

Chairman Davies brought this item forth for discussion and said that the copy that was sent out in the meeting packets didn't have the correct words crossed out. Chairman Davies stated he had contacted Town Counsel for his thoughts relative to this and noted there is another correction that being the year on the decision date which should be 2017 and not 2016. He continued, the counsel said that if the board reviews the minutes tonight and concludes that the decision should be edited he would send the revised notice with a cover letter to the applicant explaining what happened. Chairman Davies clarified that the two items to be clarified would be the date of the decision and under Requirements, number 2, *the board finds the use desirable to the public*.

Beverley Howe asked why desirable was scratched out and the Land Use Secretary stated that was her error in typing up the Notice of Decision corrections. Corey Giroux noted that was another item which was the numbering of the items under Requirements and that there were two number 2s. Chairman Davies said he had made the motion, had a scratched out sheet he passed over which he should have kept to update it himself and have Lois correct it per the recording.

Chairman Davies said counsel had suggested putting a footnote at the bottom of the Notice of Decision but he thought he might write a cover letter to include with the marked up document. Chairman Davies noted he would do so if the board was in agreement. Howard Kirchner and several other board members agreed that should be done. Chairman Davies said he had roughed out a cover letter which is more of an administrative item and mentioned it would be sent on to other parties involved.

Corey Giroux made a MOTION to approve the Notice of Decision of March 8, 2017 as amended and to have the chair put a cover letter together with the secretary to send out. MOTION was seconded by Howard Kirchner. A roll call vote was taken with the results of 5-0-0, a unanimous yes.

Chairman Davies suggested leaving the next item on the agenda, the review of ZBA application wording, until last on the agenda as discussion on it could be rather lengthy. The board was in agreement.

5. UNFINISHED BUSINESS

Attendance Clause for Rules of Procedure – Second Reading

Chairman Davies brought forth this item for discussion and asked if anyone felt the board needed to read the text and no one did. Chairman Davies asked if there were any comments or changes and there were none. Howard Kirchner made a MOTION to declare the Attendance Clause for Rules of Procedure Second Reading completed. MOTION was seconded by Corey Giroux. A voice vote was taken with all in favor 5-0-0.

Update of Dragonfly Holdings

Chairman Davies stated he wanted to update the status of this case; it has been appealed, has gone to superior court and is scheduled for June 26th for a hearing. Chairman Davies noted Lois has been in contact with town counsel, has gotten all of the information they requested to them over a week ago which included a copy of all of the documents and an index. Chairman Davies said he had emailed town counsel to let them know neither he nor Lois had been through this type of process before and to make sure they weren't missing out on anything. He had a brief conversation with them and they had a couple of questions which the board has already talked about on the minutes including restating the notice of decision. Chairman Davies continued that counsel had a statement of what Lois put together which included miscellaneous things that had been sent in by the public that aren't really connected to anything as they were after the hearing and before the rehearing request.

Chairman Davies said counsel is requesting one member be appointed to attend the court hearing. Oftentimes it's the chair but it doesn't have to be and Chairman Davies suggested strongly that there should be a backup member. He noted that his house is on the market and if someone makes an offer it may move quickly and he's not sure where he would be at that point. Vice Chair Loz said she is planning on going anyway because she is curious. The board discussed which members should attend and Chairman asked Corey Giroux if there is much interaction with board members at this type of hearing. Corey replied there shouldn't be any interaction and Chairman Davies said it is usually to show support and concern of the process. Vice Chair Loz said she has been to one before and the interaction is all between the lawyers and the judge. Chairman Davies said he was advised that in theory someone might be requested to be interviewed but we would know that ahead of time. Corey noted if someone did have to speak they would need to be subpoenaed, generally speaking and usually you know that well in advance.

Chairman Davies suggested that he be the primary and Vice Chair Loz be the secondary. Chairman Davies made a MOTION that he be the primary there and Vice Chair Loz will be the secondary. MOTION was seconded by Corey Giroux. A voice vote was taken with all in favor 5-0-0.

Chairman Davies noted one other item counsel was inquisitive about was why Beverley Howe had recused herself and that proper procedure when you recuse yourself is to state why and sometimes it can be that you've made your mind up and are not impartial which could cover a lot of bases.

Vice Chair Loz stated that was one of her questions she was going to ask today as the board didn't ask Beverley why and should we have. Chairman Davies said we probably should have. Vice Chair Loz asked if there was any way we can get on record her reason why now. Corey Giroux said the only question he would have before we do that is, Beverly was an alternate at that hearing but may have been elevated to a voting member. Chairman Davies said the counsel's question regarded her being a sitting member for the case and then recusing herself when we had the rehear and his understanding from a brief conversation with her was that she was concerned about her acquaintance with Mr. Carlson who is the owner of the abutting property and whether or not she could be impartial.

Beverley replied that she has had a very long and personal relationship with Mr. Carlson, almost like a brother.

Chairman Davies said it might be one of those things where a board member doesn't know for the first part of the meeting and then realizes a relative lives next door or some other situation that would make them unable to be impartial. It might not be something Beverley was aware of and Beverley agreed that was exactly right.

Vice Chair Loz stated Beverley had voted in favor of the special exception and Howard noted Mr. Carlson was not present at that meeting. Chairman Davies said the point is that we aren't going to get into the case right now but the point is what Janice brought up, what is the correct procedure. He said he had read the

procedure in the past couple of days in one of the OEP manuals.

Beverley asked if the board had asked Andrew Bodnarik why he recused himself and Vice Chair noted that Andrew had stated why he was recusing himself and Corey recalled that he said he wasn't indifferent to the outcome. Chairman Davies gave some examples of why someone might recuse themselves. Vice Chair Loz said she found language that said you generally state what the conflict could be such as financial, special knowledge or legal and then you can step down. There are two things you can do; either you can present your reason to the board and they can vote on what they think which doesn't mean you have to recuse yourself. Or you can decide yourself whether you want to recuse yourself or not. Vice Chair Loz said in reading the meeting minutes she realized they had never asked Beverly why she was recusing. Beverly noted that special knowledge would have been a reason too. Chairman Davies said the board's vote is nonbinding and strictly advisory.

Vice Chair Loz asked if the board could get copies of the petition to the superior court and it was agreed that the Land Use Office would email that to the board. The board discussed other aspects of the situation including the restraining order that was filed against the Planning Board meeting which was dismissed. Chairman Davies noted it's important that we keep our ducks in a row and this is normal process and not unusual.

Howard Kirchner asked to bring up a point from the OEP Conference regarding voting on individual points for a variance or special exception. The vote has to be recorded on each of the 4 points and it is soon to be a law. Chairman Davies said it went through legislature last year and it was decided not to vote it in and further explained that Howard is referring to a variance that has 5 questions that need to be answered that are specific to the states RSAs. The question is do you vote on the whole process or individually on each line item and each needs to be voted on and recorded.

Vice Chair Loz said she thought they recommended that we not do that. Chairman Davies said that is what they recommend as of now. Howard Kirchner clarified that this is something that is in the works and might become law in the near future.

Vice Chair Loz mentioned that another thing they said at the OEP Conference was that you can't be swayed by the majority of the public. If they feel strongly one way but the ordinance and the law says it needs to be the opposite way, you have to do what is the right thing to do and it's not always easy to be as impartial as possible. Corey Giroux stated you don't want "not in my backyard" zoning which is essentially what would happen. Chairman Davies said we have all been sworn in to uphold the process and part of that is tough decisions that are not always popular.

Discussion continued on the OEP Conference including that the Zoning Board of Adjustment can rehear decisions that Planning Boards make and that it would be strictly regarding an interpretation of the ordinance and the merits and drawbacks of an individual being on the Zoning Board of Adjustment and the Planning Board at the same time.

Chairman Davies said the question came up about what the Chair should be doing relative to preparing for meetings or getting information from legal counsel. What he has done in the past is to contact the Municipal Association if it's a pretty generic thing but if it's specific to a case it's good to get the opinion of counsel. The Chair has the right to obtain an opinion as to how to proceed with things, the board doesn't have to agree with that, but that would be without requiring approval of the board. The board can also request to contact counsel on an item and could continue a meeting to a later date after counsel opinion has been received.

Vice Chair Loz said that at the OEP Conference they mentioned reasons for going into nonpublic sessions. If you want to discuss something about counsel or something that needs to go to a lawyer you can go into nonpublic. They had 4 reasons why you would; dismissal, promotion or compensation of public employee,

hiring of a public employee, matters that if discussed in public would adversely affect the reputation of someone other than a member of the public body, consideration of a lawsuit or legal advice provided by legal counsel. Chairman Davies said the last would probably be the main one the Zoning Board of Adjustment would consider and he has heard in previous OEP or Municipal Association Conferences, to go into nonpublic as a last resort. Vice Chair Loz said one time she recalled was a meeting where the board circulated a letter from town counsel which would have been a good time to go into nonpublic. The board discussed the process for going into nonpublic, that on the agenda for the Board of Selectmen they always have it as an item with the stipulation of "if needed", that when Vice Chair was on the School Board they would reference the RSA for nonpublic, make a motion to do so and vote on it, go into nonpublic and they could not discuss anything other than the nonpublic item. It was clarified that it has to be on the agenda. Chairman Davies said he is not clear on for example, a situation where the board receives a document from town counsel at a meeting, is that now a public document?

Corey Giroux stated the essence of any privilege is that it is not shared by third parties, even for attorney-client privilege purposes, if I sat in a room with a client and you were all here I could not then claim our communications within earshot were privileged. To the extent you're in the earshot of the public whatever you've done is now a public document. The discussion continued on sealing the minutes for a nonpublic and how long the minutes are keep sealed.

Chairman Davies brought up a few Rules of Procedure items he wanted to address. The first being if a meeting has to be stopped, the Chair calls for a motion for recess which is not debatable. The second is if a motion is on the floor, and then voted down, that does not mean "no" to whatever the motion was for. It means the motion wasn't carried and you would need another motion of some type.

Chairman Davies noted for the next meeting he is looking for any suggestions for the Planning Board to change the Zoning Ordinance. He noted we had given them a letter last year which they will consider this year when they review the ordinance for changes.

Chairman Davies said he had talked to Vice Chair Loz about having all our decisions put on the town website. The decisions change the ordinance for a particular lot and a particular situation. He asked if the board was open to doing that and they were. Chairman Davies said they could be organized by year and date.

Barb Marty asked about lengthening the time for abutter notification because now we only give them 5 days. Chairman Davies and Lois Lord noted that is the state requirement and Lois stated they usually go out way before that, at least 10 days. Barb said that has been a problem with people saying they didn't receive notice in time. Chairman Davies asked what the requirement is; for how many days an application must be received prior to the ZBA meeting it will be presented at. It was clarified that is 15 days.

Chairman Davies said that in theory we could change our Rules of Procedure. Vice Chair stated we do need to take into consideration how often the Zoning Board Office is open, which is 3 days a week, and when is the last day someone can submit. Barb Marty said that becomes a problem if someone wants to look at an application before a meeting, if they get noticed and then have 1 day when the office is open and can't get there, it then creates a problem for the abutters. It seems like that 5 day notice is very short.

The discussion continued as to if the board can circumvent the 5 days and whether the town can have something more or less stringent. Land Use Secretary Lois Lord said she doesn't recall a time a notice went out 5 days before a meeting and usually a week or 10 days before a meeting because she feels 5 days is too short. She recalled times she was going on vacation and worked extra hours before that to make sure abutters notices would go out even if it was well before the meeting. Lois said as far as the Land Office is concerned, we do everything we can to get them out much earlier than 5 days.

Chairman Davies said the question is, can we put in our bylaws some date to make sure they get out or can

we require the applications to get in sooner, such as the Planning Board does at 21 days. He suggested he or Lois check with the Municipal Association to see if they can make some changes.

Review of ZBA Application Wording – The board reviewed the forms and discussed making changes to the abutters list and including all or some the Planning Boards version. Chairman Davies mentioned if there is an association such as a condo association, in certain situations everybody has to be notified. Corey Giroux asked if the notice just went to the officers and it was clarified that it did and not each individual member of an association.

Chairman Davies noted in the existing abutter notice information for the ZBA applications, it mentions noticing the Board of Selectmen if the property abuts a street or highway. He said the Board of Selectmen has standing on any decision and it would be wise to notice them which is not in the Planning Board verbiage. He suggested using the Planning Board wording and including the Board of Selectmen.

Chairman Davies asked Lois Lord if it is the requirement of the applicant to go through and get the proper abutter addresses and she replied it is and she usually checks them but it's their responsibility.

Vice Chair Loz mentioned tax maps and maybe we should recommend applicants provide those. It was noted they could include it in Section 5 of the application. Janice said they had discussed at their last meeting that it would be useful.

Corey Giroux noted the language that was underlined Section 3; *Appeal of Administrative Decision* which reads *The appeal must be made normally within 30 days of the decision, according to the Rules of Procedure of the Warner Zoning Board of Adjustment*. Vice Chair Loz stated that is not in the Rules of Procedure. The discussion continued that the appeal process is directed by statute, whether or not the ZBA has the authority for this, that the word *normally* is in there for a reason, and that it might need to be written more clearly in the Rules of Procedure. It was decided this would be revisited at a later meeting.

Vice Chair Loz asked if the last paragraph of the Planning Board version was applicable to Zoning Board applications as it says to notice the owner's agent, engineer, land surveyor, architect, etc. Chairman Davies said that might need to be done with a ZBA application; depending on the situation and that anyone affected by the outcome should be notified. He said they should look into it.

Chairman Davies stated he had a couple of items on the second page of the instructions under B and would put in something that references the Article XVII which is the Board of Adjustment section of the Zoning Ordinance. The item talks about the applicant being familiar with the Zoning Ordinance. He suggested putting a reference there. Chairman Davies then mentioned B.4 and that it includes a referral from the Board of Selectmen or the Planning Board. He asked if we should put the special exception in there as well because that would encourage them to go in for a conceptual consultation at the Planning Board level to alleviate the need for variances of special exceptions because of interpretation of things. That way the applicant wouldn't come in cold to the Zoning Board.

Corey Giroux wondered if the same holds true for a special exception under ordinary circumstances because it is much narrower. Chairman Davies said it would depend on the situation as may be as applicable. The board continued the discussion and decided it would confuse the issue and would be best to leave it as is and that it was already included in an earlier section of the application instructions.

Barb Marty asked if someone came before the Zoning Board of Adjustment before they go to the Planning Board, would this board ever suggest they do a Site Plan Review and then come back. Chairman Davies said it might be suggested that they do a conceptual and sometimes the Planning Board can't fully do their job until the Zoning Board has done theirs.

Chairman Davies noted item B.5 talks about the list of abutters which may need to be reworded so it fits

with what the wording is for the larger abutter instruction paragraph. He noted there is \$7 dollars for abutter's notices and the Planning Boards is \$15 per notice. The other fees were discussed with Howard Kirchner asking if they Zoning Board could increase the rates and Chairman Davies said it is within our power. He went on to the fact that the Planning Board did a time study 2 years ago to determine how to adjust their fees. Howard Kirchner asked how our fees to compare to other towns and Chairman Davies suggested we put that on our "to do" list.

Chairman Davies brought up whether we should track abutter notifications through the mail process as they can be tracked online. Discussion ensued with Corey Giroux stating in every other field notice given would be based on when the notice was taken to the post office and Lois asking if we knew one was not delivered, what would we do about it. Lois said in her 2 ½ years in the office there had been only one complaint that a notice was not received in time. It was decided that notifications would not be tracked.

On the variance application, Chairman Davies suggested adding another line on the top of page 5 so that there would be two places to enter the Article and Section number of the Zoning Ordinance. It was agreed to do that. He also noted on the variance application page 5, he would like to get rid of the italicized explanations that were put in 5 or 6 years ago and has always wondered if the board would get into legal trouble by having it there. This was discussed with many of the board members feeling that they don't help much and many restate the obvious and it was agreed to improve the instruction paragraph above these items and remove the italicized wording.

Chairman Davies stated that he would work with Lois Lord to revise the applications before the Zoning Board met again.

6. ADJOURN

MOTION to adjourn was made by Corey Giroux, seconded by Howard Kirchner. A voice vote was taken with all in favor 5-0-0. The meeting was adjourned at 9:00 p.m.