



TOWN OF WARNER

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**Zoning Board of Adjustment
Minutes of March 16, 2022
Town Hall in the Lower Meeting Room**

- 1. The Chair opened the ZBA meeting on March 16, 2022 at 7:03 PM.

A. ROLL CALL

Board Member	Present	Absent
Barbara Marty (Chair)	✓	
Howard Kirchner (Vice Chair)	✓	
Sam Bower		✓
Beverley Howe	✓	
Harry Seidel	✓	
Elizabeth Labbe (Alternate)	✓	
Lucinda McQueen (Alternate)	✓	

Also: Janice Loz, Land Use Administrator

- B. The Chair elevated Lucinda McQueen as a voting member.

2. UNFINISHED BUSINESS (Continuation of Board Deliberations)

Application for a Variance. Case: 2022-01

Applicant: Daniel Violette, Paula Brown and Marc Violette
Agent: Suzanne Brunelle, Esq. Devine, Millimet & Branch, PA
Address: 302 and 296 Kearsarge Mountain Road, Warner, NH
Map/Lot: Map 14, Lot 36-1
District: R-2
Description: Subdivide the property into two lots, which will allow the residential home on the property to be separated from the commercial cell tower.

The Chair noted that one of the ZBA members had an interaction with one of the abutters of the property and she wanted to voice the concern and share that there was nothing inappropriate discussed and they didn't talk about the case. The ZBA member feels that they can fairly discuss and vote on this variance. Chair Marty commented that in a town the size of Warner, it is difficult to not

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have these kinds of interactions. She said that if everyone is OK with the ZBA member continuing as a voting member of the board that evening, they would proceed. No comment was made.

The Chair said the information for the case had been previously provided and all the board's questions had been answered. She suggested going through the conditions one at a time.

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

The Chair noted the applicants answered that the variance will not alter or change the current structure or land activities, nature of the landscape, or tax revenue. She thought some of the abutters would disagree with that; they are worried about expanded use, cutting trees, making changes, etc. She asked how the board felt about this issue.

Howard said nothing will really change for the abutters in the present situation. He understands there are concerns about 10 years from now. He feels there really isn't any imposition upon the neighborhood. Beverley asked about the tax implication; the application said that the taxes wouldn't change. The Chair agreed and said that the taxes would change for this property. It wasn't clear, as the tower is taxed separately because it is commercial. There will also be a residential tax bill.

Harry said he tends to agree with Howard; he didn't think the tax implications matter at all in this case. Howard said these implications may come into play in the final condition, but for this condition, they do not.

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

Harry didn't think there would be any health or safety impact if the variance is granted. The Chair said this variance creates a nonconforming lot so it depends on how you interpret the spirit of the ordinance. Beverley agreed with the Chair. The Chair asked Lucy if she felt by granting the variance the spirit of the ordinance is observed? Lucy said she doesn't like the idea of creating nonconforming lots and that is what is being requested. Elizabeth said if they are talking about a nonconforming lot, they are also talking about a right of way and an easement for lack of road frontage. She feels this is contrary to the second condition. This could create a problem.

3. In granting the variance, substantial justice is done because:

Harry said whenever he is considering a variance, he tries to figure out if the difference is going to create a situation which will be bad for the public; where the public is giving something up to give someone a private right. He doesn't think the separation of this property is going to do anything to the public; it's the same house and the same cell tower. It will create another lot, but it is substantial justice if they can allow a property owner some flexibility and relief and it doesn't hurt the public.

The Chair said the applicant's notation that without this variance, they won't be able to obtain financing is a sticking point with her. Otherwise, why wouldn't other property owners be able to create nonconforming lots to generate revenue. Howard said this is a grandfathered situation and was approved in the 1980's. With regards to the financing situation, with a cell tower on a property, there are a lot of insurance situations that come into play. The owners want that piece separate so they can keep it separate from their lot. To get a mortgage, they need to get insurance on the property due to the cell tower. The Chair said the tower owners carry all the insurance for the tower; the homeowner isn't responsible for any of that.

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The Chair said they need to determine if the tower is a secondary use of the property or if the subdivision is necessary to separate it from the owner's lot. Harry said if the property was to be changed, further ordinances would need to be complied. The Chair said that a site plan review would have to be done, and has actually been done in 2004, for any changes to the tower.

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

The Chair said they did hear concern from abutters due to the landscaping, tree buffers, etc. This isn't something the town can impose because those conditions weren't written into the regulations when the tower first went up. There can be no changes to those elements.

Howard said he can't see any way this would diminish the value of surrounding properties just by subdividing the properties. Nothing will change for the present. Whatever values the properties are now, will not change due to this.

Harry said one letter received by an abutter said that if a variance was created, it would create a commercially zoned property. This is not true. It will still be a residentially zoned property. Another letter referred to screening. This, however, was not a condition of the original approval. Another owner was concerned that the lot may be used for other purposes in the future. Harry said he can see that if the lot is a cell tower lot now, and the cell tower is taken down, it will be a lot that can be built on, per the town's regulations. Beverley said this is less than 2 acres; can a home be built to meet all the setbacks? Harry said that is the part he has trouble with. As a cell tower lot, the property operates OK. But if it becomes a lot to build on, this will pose an issue with the neighbors. The Chair said this lot has no frontage at all and they require 50' of frontage to build a home. Howard said not every lot of record is a building lot. Harry said they don't have buildable lots in Warner; they have lots of records and "buildable areas." If they create a variance for this lot, it becomes a lot of record and thus could possibly create an issue in the future. Howard thought these issues could be addressed with conditions of approval.

There was discussion of nonconforming lots and a past instance where a home fit into a nonconforming lot due to its small size. Janice said that a home can be built on a nonconforming lot without frontage if it was legally created, with a variance for the frontage and size and deeded easement. She has heard this from both the town's lawyer and Ben Frost (Chair of Planning Board). This is true as long as it was lawfully created and is a lot of record. Harry suggested sending a note to the Planning Board to change this at the next town meeting. If the 50' of frontage is required in the ordinance, it should apply to all properties.

Elizabeth said in the Planning Board minutes they refer to the RSA (674:41) for right of way and driveways and road frontage. Do they address this or is this just the Planning Board's purview? Howard said that a right of way isn't always a deeded easement; it just has to be 50' wide. The ZBA could make this a condition of approval. Harry said that if the ZBA approves the variance, the Planning Board will deal with these issues. The Chair agreed; the RSA noted above puts this burden on the Planning Board. Any changes in the site would also need to go through the Planning Board.

5. Literal enforcement of the ordinance will put undue hardship on the applicant:

The Chair said they are back to the question of financing. Elizabeth wondered how many mortgage companies were consulted. Having documentation from those companies would be useful to understand the hardship. The Chair agreed that the burden is upon the applicant to

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provide the information necessary to illustrate their position. She recalled that the applicant's lawyer had said she had been in real estate in the past, and another mortgage lender had told the applicant that it would be easier to get financing without the tower being part of the lot. She wondered if the hardship of not getting a normal mortgage was on the ZBA. They have only heard that it would be difficult, not impossible to do. She doesn't feel that the applicant has proven that they can't get a mortgage. Howard said that they may be able to get a high-rate mortgage; the value of the land underneath the cell tower is high. He said he owns a property with a cell tower on it. The value of his 1-acre property was \$30,000 and then went up to \$100,000 once the tower was put upon it. The cell tower company reimburses him for the taxes he pays for this property. He felt it would be a tax benefit to the town if the 1.3-acre property is broken off from the rest of the property. The Chair wasn't sure how the split lot would create a higher tax rate than if the tower continues to reside on the larger lot.

Harry said that this property is unique; it is a residential lot with a cell tower on it. To him, that is a textbook example of a unique property. Chair Marty said given these special conditions, can they use the residence as a residence? Harry said that probably not, as the owner wouldn't be able to afford it. Chair Marty said there are lease-to-own and other options available. The benefit sought is to own the property and then sell the property. They can't base the variance on a particular person, but rather on the land and the use.

Howard said that a financial hardship is being claimed. The Chair agreed. Harry said that it isn't supposed to be a hardship in zoning. It has to be a hardship with the land and the use. Howard agreed and said the hardship relates to the characteristics of the property. However, he felt that it is a hardship for anyone who wants to purchase this residential house. There could be conditions put on the variance to address this. The Chair asked Howard if he felt the applicant should have provided more detail about their specific hardship in this case? Howard said yes, it would have been helpful, but he feels that the family wanted to separate the property and give them a nice, clean deed without the cell tower on their land.

Harry thought that conditions should be addressed. He understands the concerns of the abutters and what may happen in the future. He said that his suggested conditions are contrary to the advice the board has been given from the Town's attorney. For example, he suggested making a condition that the small lot can only hold a cell tower. The Chair said this condition could not work as a condition can't be put on the use of the property. Howard said the lot can be anything as it is a lot of record; it doesn't have to be a buildable lot. Harry said that in the event that the cell tower comes down, it could be made available to an abutting property owner. The Chair said she was told this wasn't allowed. Howard said there are three abutters who may be interested in purchasing the property. Howard proposed a condition that said any future building on the lot must be approved by Town land use boards. The Chair said the applicants would need to do this anyway because it's a nonconforming lot.

Janice said the board should be careful putting any conditions on a variance that is not legally defensible by the Town.

Elizabeth asked for confirmation that the board is reviewing this case for two variances: road frontage and size of the lot. If the second is approved, they will need to go for a third variance? The Chair agreed and said the third variance would address the setbacks of the property. She wasn't exactly sure why the applicant was asking for a variance from the road frontage. Harry said that it is because the lot is nonconforming in both areas.

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Harry said he has a problem with this case because the advice the Town has received from the Town attorney is difficult to understand. He has read the information several times and he doesn't understand it. He proposed a question to the attorney and it has been a week and a half and has not received an answer yet. The Chair thought the answers were very concise with explanations. If the board wished to speak more on the attorney's advice, they would need to go into nonpublic session. Howard was asked if he would continue with this case, following his resignation from the board. Howard said he didn't feel he would want to do this at the rate this case was going; it has been drawn out a long time.

Howard said he would be in favor of granting a variance and throwing it back to the Planning Board to hash out the details. He felt the applicant deserved an answer on this. He doesn't know the family and wasn't in favor of the idea to begin with. Now that the applicant has had the property surveyed and taken that step, as well as updated their application, he feels they deserve an answer. If approved, it would go to the Planning Board. He disagrees with what had been said earlier in the meeting that if the ZBA grants a variance and the lot isn't subdivided due to the Planning Board's refusal, the variance still exists. The variance would no longer apply. The Chair said that she didn't believe if the variance was granted, that the Planning Board wouldn't subdivide the lot. Harry agreed with this thought.

Elizabeth asked if a variance could be granted for the lot size but not for the frontage? Howard said he didn't know. Harry thought that both needed to be granted to go forward with the subdivision. He felt that the Planning Board would approve this because they sent it to the ZBA to do the variance.

Harry suggested that a condition that the lawyer would approve would be this lot have a deeded easement to access the property from an abutting property. He wondered why they couldn't say the condition of the variance would be that the land must only be used as a cell tower lot. Noting that he and the lawyer disagree about that condition. Harry discussed the abutters concerns about maintaining screening. The Chair said most of what they want to subdivide into the other lot contains almost all of the 200-feet of the screening.

Harry said what if both lots were legal lots in term of acreage. The Chair said that is not what we are voting on tonight.

It was moved by Harry Seidel that the criteria, having been met in the case of Violette from Article 6, Section C, 1a, to grant both to allow subdivision into two lots creating Lot 36-1 Map 14 of 2.9 acres, and Lot 36-2 Map 14 of 1.39 acres with two conditions: 1) legal and deeded easement traversing Lot 36-1 to Kearsarge Mountain Road to Lot 36-2. 2) the only use of Lot 36-2, Map 14 will be to support the existing cell tower.

Howard said what about 40 years in the future when cell towers may not be utilized? Howard said we could put in something that says sale to an abutter of the lot would be permissible. The Chair didn't think the condition of use is legal. The legal and deeded easement is a given. Harry suggested saying "to support the existing use." Chair Marty said this is saying the same thing. Harry said the screening on that lot doesn't really screen the view of the tower.

Howard said for the present, the new lot would be the property of the estate. There is nothing that will be broken off and sold at this time.

The Chair called for a second on the motion. **The motion was seconded by Howard.**

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The Chair didn't think that a use could have a condition on it. She didn't think all five criteria were supported. Beverley and Lucinda agreed with the Chair that the hardship wasn't proven and that there aren't other options other than creating a subdivision to use this property in the manner in which they want to use it. Beverley said there are four acres total, so they could break it off into two, two-acre lots. Howard said that this would be another case, but they cannot suggest this to the applicant. This would be up to the applicant. The Chair said if the applicant has new information and wants to appeal the decision of the board, they can do so within 30 days.

Harry thought Howard's idea of making the property available to the abutters, should the property go up for sale, was a good one. The Chair said one never knows if they would be interested, or if someone would want it for a building lot.

A roll call vote on the motion: Lucinda McQueen - No, Beverley Howe - No, Harry Seidel - Yes, Howard Kirchner - Yes, Barbara Marty – No. Vote Tally: 2-Approve and 3-Deny.

The motion failed.

Beverley asked Harry why would you make a motion with something you know is not allowed? If you can't put those conditions on, why would you make a motion to approve something with conditions. The Chair said there are some legal conditions, that are acceptable. Beverley said making a condition of only using the lot as a cell tower is not allowable. Harry said he disagrees with the legal opinion that we can't put on that condition. When the board was discussing another motion, the Chair said that a variance denial must have a detailed reason why.

Lucy said her concern was making a nonconforming lot in a residential area. She also did not think a hardship had been proven. It was intimated that a mortgage could not be found. But, there was no substantial evidence presented to the board, to be read or looked at.

It was moved by Lucinda McQueen and seconded by Beverley Howe to deny the application for the variances on case 2022-01 because Condition #5, hardship, was not suitably addressed and proven by the applicant.

The Chair asked if the members felt the other criteria had been met for the variance. Lucinda recalled that the abutters were very concerned about there being a different use of the lot in the future if a nonconforming lot was created. This had to do with diminishing the value of the surrounding properties. She did not feel that these criteria were met by the applicant.

Howard didn't see how the variance would affect the value of the surrounding properties. Harry agreed but added that the applicant did a good job explaining the unique property and why there is a hardship because of it. Hardship 1 talks about a fair and substantial relationship between the ordinance and the specific application on the property. He doesn't find that there is a public purpose that is being lost. The Chair asked then why do this at all; if they can't prove any financial hardship. Harry said the applicant is claiming that they cannot achieve financing without the subdivision. They have proven that it is a unique property. He thinks that a substantial relationship exists between the purpose of the ordinance and its relation to this property. If it has just a cell tower on it at present, that is what they need to consider; not what may happen in the future.

Hardship 2 talks about it being reasonable. In this case, this isn't a change from what is already existing on the property. Harry said he doesn't like this property to be anything other than a cell tower, as it always has been. It is relatively benign, sitting back in the woods. The Chair said then why is the variance needed, other than they can't get financing, although there is no proof that this is so.

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The Chair called for a vote on the motion, which had been seconded. **A roll call vote was taken: Lucinda McQueen - Yes, Beverley Howe - Yes, Harry Seidel - Yes, Howard Kirchner - No, Barbara Marty – Yes.** The motion passed. **Vote Tally:** 4-approve and 1-deny.

The variance was denied.

Chair Marty said that the applicant has 30 days to appeal this decision. The notice will be placed on file for public records with the ZBA.

3. APPROVAL OF THE MINUTES OF February 9, 2022

Howard Kirchner made a motion to approve the minutes. Lucinda McQueen seconded the motion. Discussion: None. **Voice Vote Tally:** 5 – 0. The minutes were approved as amended.

Page 1: 1st paragraph, 2nd line take out “the” and keep “three.” The third line needs a comma after “convenience.” Chair Marty asked if Sam Bower needed to be designated a selectman. It was determined to take off his designation. It was noted that he isn’t the selectman’s representative, but he is still a selectman. The Town’s lawyer approved him sitting on both boards.

Page 2: In the large paragraph, two up from the bottom, “Beverley asked if it would be easier but not impossible” should say “not easier but not impossible.” Beverley said this was correct; she re-stated what the applicant was saying.

Page 4: 2nd paragraph from the bottom: a comma is needed after the word “answer.”

Page 6: 4th paragraph down, second sentence: “were” should be “was.”

Page 8: There is no mention to two times where Chair Marty asked for comments before closing the public hearing. She asked that the two spots where she asked if there were questions or comments to be inserted so the record shows that no one was cut off. Prior to Mark’s comments there should be a mention of this ask from the chair.

4. NEW BUSINESS

Howard was thanked for his time served on the Zoning Board. Howard suggested finding more members and alternates. They also needed to determine who will be elevated to the Select Board.

5. OLD BUSINESS - None

6. COMMUNICATIONS – None

7. ADJOURN

Beverley Howe made a motion to adjourn. Howard Kirchner seconded the motion. The meeting was adjourned at 9:36 PM. Voice Vote Tally: 5 – 0.

Respectfully submitted,

Kristy Heath, Recording Secretary
Town of Warner