

**Town of Warren
Development Review Board
Minutes of Meeting
Monday, December 19, 2022**

NOTE: This meeting was conducted both in-person and electronically via Google Meet.

Members Present: Chris Behn, Megan Moffroid, Peter Monte (Chair), Jeff Schoellkopf.
Staff Present: Ruth Robbins (ZA), MRVTV, Carol Chamberlin (Recording Secretary)
Others Present: George Abad, Glenn Acker, Kelly Aremburg, Carla Bell, Rebecca Campbell, Eric Carlson, Miya Cline, Patricia Cuenin, Jonathan Draudt, Joe Dubee, Erin Elwell, Kelley Elwell, Shane Elwell, Dylan Frazer, Martha Gold, Jeannie Guardino, Sarah Kersock, Dick King, Brian LaFond, Amanda Locker, Bruce Lofgren, Hugh McGowan, Evonne Meranus, Jordan Meranus, R Nelson, Erica Nichols, Pam/Jim, Alice Peal, Christopher Perreault, Darcy Perreault-Acker, Pitrowiski, Jenn Pitt, Nick Pizzale, Melissa Purdy, , Jamal Reid, Erik Reisner, Charlotte Robinson, George Robinson, Joe Robinson, Amantha Rouleau, Jared Rouleau, , Gary Smith, Marv Theurer, Harry Wagner, Katie Westhelle, Kyla Westover, Luke Youmell

The meeting was called to order at 7:00 pm.

Appeal of Violation #2022-10-VOL issued to Shane & Kelley Elwell for an unapproved use of the property and the large addition of fill on a steep slope at property that lies between Fern/Raspberry and Rabbit Roads consisting of approximately 1.79 +/- acres in the Alpine Village Residential District and identified as parcel id# 417184-000 in the Warren Grand List.

This hearing is a continuation from November 7, 2022.

Mr. Monte explained the meaning of the term 'equitable estoppel' as a doctrine intended to prevent unfair actions by a governmental entity, noting that this may be applicable to the Elwell's appeal.

He went on the outline that the continuation was in place in part to provide an opportunity for confirmation from Miron Malbeouf, the former Zoning Administrator, of the conversations he held with the Elwells at the time of their purchase and original development of the Alpine Village property. Mr. King confirmed that for health reasons Mr. Malbeouf is not at this point capable of providing a statement for the Board.

Mr. Monte also indicated that many messages had been received by the Board/Zoning Administrator regarding this appeal, and that the Board members have been provided with each of these communications.

Ms. Elwell provided the Board with a document outlining the timeline of the interactions that she and Mr. Elwell had with Mr. Malbeouf. Mr. King offered to answer any questions related to that document. He also presented evidence related to equitable estoppel, noting that a Supreme Court decision (*Langlois*) had outlined four elements of such a defense:

He confirmed that the Zoning Administrator was knowledgeable regarding the facts related to the development of the property in 2015, as some of the details of the original structure provided to Mr. Malbeouf (door sizes, floor height, etc.) indicated that the building would be used for business purposes. Ms. Elwell also noted that Mr. Malbeouf had advised against putting closets in the space above the garage, as it was intended to be used only temporarily as living quarters. She also explained that she and Mr. Elwell had looked at properties in other towns, but decided upon the Alpine Village site based upon Mr. Malbeouf's assurances that the business they were proposing to run at that site was allowed. Other details were provided, which were included in the written summary Ms. Elwell provided.

Next, Mr. King explained that Mr. Malbeouf had intended that the Elwells were to act based upon his advice; he and Ms. Elwell outlined the actions taken at the onset of construction and for the additional construction of the commercial garage in 2017, including Mr. Malbeouf's visiting the property to ensure that property line setbacks were all being met.

Thirdly, Ms. Elwell indicated that she and Mr. Elwell had been told by Mr. Malbeouf that no permit was needed for the business operation, and that the permits issued for the structures were sufficient.

Mr. King then asked Ms. Elwell to confirm that she and Mr. Elwell had relied on this information that no permit was required, making the decision to invest the time and effort into establishing and maintaining their business at the property.

Finally, Mr. King outlined that the harm that would result to the Elwells from validating this violation would be disproportionate to the harm caused to the Town by not allowing this business to continue. He noted that zoning ordinances are enforced or not enforced in a variety of circumstances, and that it is not clear that the harm to the Town will be quantifiable, significant, or at any level equivalent to the harm the Elwells would suffer if required to abandon their business use of this property.

There was some discussion regarding the effect of the Elwells' business operations on the value of neighboring properties. Mr. Acker reported that he grieved his tax assessment, and had his property valuation reduced by 15% because of the presence of the Elwells' commercial uses and driveway construction. Other neighbors explained that the improved road conditions created by Mr. Elwell's work have improved the neighborhood's value. It was questioned why the business has been in operation for seven years at this site, but no previous complaint had been received. Mr. Acker explained that there is an increase in the amount of equipment being used and stored, and that there was originally no logging work taking place at the property. Ms. Elwell indicated that the Elwells have always had the same amount and types of equipment at the site, and that the firewood aspect of the business has been in place since its inception.

Mr. Monte explained that land use permits are associated with a specific property, not a person, and so get passed along with the property if/when it is transferred. He also noted that no documentation exists for a permit for commercial use of this property, and therefore no appeal period was available, so the issuance in error of a permit by the Zoning Administrator (otherwise relevant to preexisting, nonconforming use allowances) is not applicable in this situation. He provided an opportunity for parties to request an opportunity to present any further information to address the matter of equitable estoppel; Mr. King offered to provide a related memo, and Mr. Monte indicated this would not be necessary, as the five related points were understood, as well as the evidence regarding those points. No party requested additional time to present additional information following the hearing.

MOTION by Mr. Monte to close the evidentiary portion of the hearing for both issues raised in the Notices of Violation. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

Claimed Violation because of Driveway Construction

The matter of the recent driveway installation was discussed first. Ms. Robbins indicated that she would be able to work with the Elwells to come to a cure for that portion of the violation. Mr. Acker indicated

that his leach field might be impacted by the driveway installation; Ms. Robbins requested that he provide her with documentation related to those impacts.

MOTION by Mr. Monte to find that the driveway construction that was the subject of the Notice of Violation was “development” that required a zoning permit under Article 3 General Regulations, Section 3.4 of the Regulations, and the appellants did not apply for nor ever receive the required permit.

SECOND by Mr. Behn. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to conclude that the Notice of Violation regarding the driveway construction was well founded and the appeal should be dismissed on that claimed violation. **SECOND** by Ms. Moffroid. **VOTE:** All in favor, the motion carries.

Claimed Violation because of Commercial Use of Property

The Board then considered the Elwells’ appeal of the zoning administrator’s Notice of Violation that Elwells’ commercial use of their property was a violation of Article 2, Table 2.6 of the Regulations.

The Board agreed that under Article 2, Table 2.6 of the Regulations, the only commercial use allowed in the Alpine Village zoning district was a home occupation. The Board concluded that and that the Elwells’ commercial use did not fall within the definition of a home occupation in Article 4, Section 4.8 of the Regulations, because their commercial activities are not confined to a minor portion of a dwelling structure. Accordingly the Elwells’ commercial use is a violation of the Regulations as charged by the Zoning Administrator.

MOTION by Mr. Monte to find that the commercial operation currently being run by the Elwells on their property is a violation of Section Article 2, Table 2.6 of the Regulations. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

The Board next considered whether the doctrine of equitable estoppel should be applied to prevent the Town from enforcing this violation of the regulations.

The Board noted that there were equities on both sides of this dispute. Elwells claim that they relied on Mr. Malbouef’s assurances that they could make commercial use of the property and that it would be grossly unfair to deny them the right to continue the commercial uses they were told was allowed under the Regulations. They relied on Mr. Malbouef’s advice that no permit was required in making their decision to buy the property and have organized their entire business operations around that advice. They would incur great expense to relocate their commercial activities and the time lost to find and develop another location would severely interrupt their business activities. Certain neighbors noted that they would continue to suffer harm from the commercial activities conducted by Elwells because the neighbors’ property values were diminished, and their quiet enjoyment of their residential neighborhood was diminished, by the unpleasant noise and sights, and by the increased heavy equipment traffic that are caused by the Elwells’ commercial activities. The Board also noted that the Town would suffer harm because continuation of activities not allowed under the Regulations would (a) frustrate the Town’s policies for orderly patterns of land use and for equal enforcement that are embodied in the Regulations, and (b) the principles of separation of governmental powers would be offended by the allowance of oral advice of an administrative officer to override a Selectboard’s legislative enactment.

Mr. Monte explained that this is not a review of a permit application for a proposed new use, and so it is not possible for the Board to impose conditions on the operation of the business. He noted however, that that if the Board decides to consider application of equitable estoppel, the Board would be required to make a balance of the respective harms to all parties that would follow from allowing the continued commercial use of the property, on the one hand, compared, on the other hand, to the harms to the parties that would result from disallowing continuation of the commercial use. Because the nature and magnitude of those harms would depend in part on measuring the specific impact of the commercial uses now conducted on the property, the Board might apply equitable estoppel to allow continued use of the property only if that commercial use is confined to the limits of the activities the Elwells conduct at the site today. A change in the nature or extent of that commercial use would change the calculations of the respective harms of the parties, and thus, might change the merits for the applicability of equitable relief. For example, potential limits to the activities at the site included the number of vehicles, the amount of firewood stored/processed, and the number of employees.

The potential for the complainants and appellants reaching a possible compromise agreement was discussed. It was decided to suspend the hearing in order to provide some time for the parties to confer. Mr. Monte reiterated that these settlement discussions should apply only to the issues surrounding the commercial uses of the property rather than to the earthwork/driveway violation issues.

MOTION by Mr. Monte to table further discussion regarding this Application until the conclusion of the hearing for Application #2022-15-CU. **SECOND** by Mr. Behn. **VOTE:** All in favor, the motion carries.

The Elwell hearing resumed after the conclusion of the Meranus hearing. The parties informed the Board that they had been unable to agree on a settlement of the issues regarding commercial use of the property and they requested that the Board proceed to make a decision.

Mr. Monte referred to the five issues to be considered in determining whether to apply equitable estoppel, stating that he had little reservation about the first four, as the Elwells have provided detail regarding their conversations with Mr. Malbeouf and had reason to heavily rely upon his guidance in establishing their business at the property. He noted that the applicability of equitable relief therefore turns on a decision about where the balance falls between the neighbors and Town being denied the benefits of strict compliance with the zoning regulations compared to the Elwells suffering harm resulting from severe disruption of their life and business organization from the path they followed in reliance on the representations made to them by the former Zoning Administrator.

MOTION by Mr. Monte to find as true facts the first four of the five elements that are listed in the *Langlois* decision: 1) The Zoning Administrator knew of the Elwells' planned improvements and associated commercial use contemplated in 2015 and 2017; 2) The Zoning Administrator intended in 2015 and 2017 that the Elwells would act on his advice to purchase the property and make the improvements described; 3) The Elwells did not know independently that the zoning regulations required them to get a permit; and 4) The Elwells relied upon the Zoning Administrator's advice to their detriment by (i) purchasing the property, (ii) making significant investment in its improvement, and (iii) organizing their business around the specific plans the Zoning Administrator had verbally approved; and their activities and improvements are in accord with the advice given to them by the zoning administrator. It would take a great deal of time and would be extremely expensive in terms of

replacement costs and losses from business interruption for the Elwells to relocate their commercial operations to a different location; **SECOND** by Ms. Moffroid. **VOTE:** All in favor, the motion carries.

The Board then discussed the fifth element of the *Langlois* decision: whether injustice would result if the Town were not prevented from enforcing the Elwells' violation that arose from the Elwells' justified reliance on the advice given to them by the former Zoning Administrator.

MOTION by Mr. Monte to find that the persistence of this commercial operation would inflict hardship on the Town because it would detracted from the system of organized land use and equal enforcement policies that are promoted by the Regulations, and would imposed hardships on adjoining property owners because of reduction of property values due to being located next to a commercial operation and its attendant adverse visual, noise and traffic impacts. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to find that in its evaluation of the relative equities between the appellants, on one hand, and the Town and nearby property owners, on the other hand, the Board has considered the following attributes of the appellants' operation (called herein "Critical Operational Features") to be critical to reducing the magnitude of the harms imposed on the Town and nearby property owners by the Elwells' commercial operations:

- The business operations are limited by the number of workers, which is two, both of whom reside on the property.
- Commercial activities are confined to the garage structure on the property and ¼ acre on the north side of Fern Road as outlined in the documentation provided
- Commercial storage within that ¼ acre commercial area is limited to stockpiles of logs, firewood, and earthen materials no greater than 15 feet in height.
- Storage and maintenance of equipment, including but not limited to dump trucks, excavators, bull dozers, bucket loaders, and log skidders is limited to ten pieces of such equipment as well as three trailers and miscellaneous equipment being stored outside of the existing garage structure at any time.
- All vehicles are operational and those intended for road use are registered.
- Commercial hours of operation in the yard area include daylight hours between 8 am and 6 pm during weekdays and 10 am to 4 pm on weekends.
- The property is operated in compliance with all Performance Standards outlined in Article 3 Section 3.11 of the Warren Land Use and Development Regulations (LUDRs) as applicable.

SECOND by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Schoellkopf to find that on balance, an inappropriate injustice would be imposed upon the appellants unless the Town is estopped from enforcing the LUDRs to prevent the Elwells from continuing their commercial operations.

SECOND by Mr. Behn. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to find that the equitable bar to the Town's enforcement should apply only to the extent that the Elwells do not change or enlarge the operation beyond the Critical Operational Features described above. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Schoellkopf to apply the doctrine of equitable estoppel to deny the Town's ability to enforce the zoning violation regarding the Elwell property, so long as the business operation is not changed, enlarged or expanded beyond the Critical Operational Features. **SECOND** by Ms. Moffroid. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to grant the Elwells' appeal of the zoning violation issued because of Elwells' commercial use of their property, but only to the extent that this grant applies to the commercial use of the property, and only for so long as that commercial use aligns with the Critical Operational Features. The Town is expressly not barred from enforcing this if the Elwells or their successors in ownership shall expand, alter or enlarge the commercial operations beyond the Critical Operational Features. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

Application #2022-15-CU submitted by Evonne and Jordan Meranus, is requesting Conditional Use approval for a designated building envelope and the creation of a single family residence in the Forest Reserve District. The property is located at 362 Hillside Road consisting of 124+/- acres and identified as parcel id # 028004-8 on the Warren grand list.

This hearing is a continuation from November 7, 2022.

Mr. Monte reported on the site visit held earlier in the day, attended by himself, Mr. Schoellkopf, Ms. Moffroid, and the applicants. He noted that a revised building envelope proposal had been marked, and that the applicants are requesting unlimited clearing within the envelope, as well as the right to reserve a request for further review for viewshed cutting once the building details are more fully developed. Mr. Monte indicated that the site visit indicated that clearing in the building envelope will not create a visual impact from off site, particularly due to the proposed structure being limited to a 25' height, while the surrounding tree canopy is well above that.

Mr. Schoellkopf explained that the revised envelope has cut off a portion of the western and southern sides of the previously proposed envelope, and confirmed with Mr. Behn that, although this was not quite the location he had suggested, the ultimate goal is reduction of visual impacts. Mr. Schoellkopf and Ms. Moffroid confirmed that the visibility of a 25' tall house in the currently proposed envelope will likely not be offensive.

Mr. Pitrowiski indicated that, while an 8-10' wide swath of tree clearing will be needed for installation of a septic system, the route used can be somewhat indirect and thus avoid the removal of larger trees.

Board members reviewed Forest Reserve District standards.

MOTION by Mr. Monte to find that the Supplemental Development Standards outlined in Table 2.1 F are satisfied by the applicants' proposed extension of the roadway from the previously approved terminus to the revised building envelope, by the proposed location of the septic system and necessary installation lines, and by the proposed building envelope, including the proposed clearing of that envelope. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Schoellkopf to condition approval of this site clearing and infrastructure development on further approval being required for any additional tree clearing outside of the building envelope,

driveway corridor, and septic corridor as presented in the currently submitted application materials.

SECOND by Mr. Behn. **VOTE:** All in favor, the motion carries.

Mr. Monte noted that the Board fully expects the applicants to make a request for further tree cutting to open up some views. Because the details of the appropriate amount of cutting would be speculative until the house is fully sited, it is appropriate to defer that review.

MOTION by Mr. Schoellkopf to condition approval of this clearing on the house built being a two-story maximum with a height limitation of 30 feet, the exterior of which shall be muted natural colors.

SECOND by Mr. Monte. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to find that the General Standards outlined in Section 5.3 A are satisfied by the proposal as submitted. **SECOND** by Ms. Moffroid. **VOTE:** All in favor, the motion carries.

MOTION by Mr. Monte to approve the revised building envelope and proposed route to the septic drainage, subject to the usual conditions and those agreed upon at the hearing. **SECOND** by Ms.

Moffroid. **VOTE:** All in favor, the motion carries.

Other Business:

Board members reviewed the final plans submitted by Alta Assets for Application #2022-13-CU, noting that additional conifers were included in the landscape plan as required.

MOTION by Mr. Monte to approve the revised landscape plan submitted by Alta Assets. **SECOND** by Mr. Schoellkopf. **VOTE:** All in favor with Ms. Moffroid abstaining, the motion carries.

The minutes of the December 5, 2022 were signed, decisions and mylar were signed and the upcoming schedule was reviewed.

The meeting adjourned at 10:15 pm.

Respectfully submitted,

Carol Chamberlin, Recording Secretary

Development Review Board

Peter Monte, Chair Date

Jeff Schoellkopf Date

Chris Behn Date

Megan Moffroid Date