



**TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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**ZBA APPROVED MINUTES
JANUARY 17, 2018**

CALL TO ORDER

Chairman Lucy called the meeting to order in the Town Hall meeting room at 6:04pm.

PLEDGE OF ALLEGIANCE

Mr. Hughes led those in attendance in the Pledge of Allegiance.

ATTENDANCE

Mrs. King called the roll:

Mark Lucy, Chair - Present.

Stuart Lord, Vice-Chair - Present.

Ken Hughes - Present.

Henry Anderson - Present

Mark Totman - Present.

Melissa Arias, Alternate - Excused/Recused

Bebe Bartlett, Alternate - Excused

Kevin O'Neil, Alternate - Excused

OTHERS PRESENT

Colleen King - Land Use Administrator, Bob Boyd - Madison Code Enforcement Officer, Amy Boyd - Madison TV, Attorney Christopher Meier, Chris Connolly, Ken Connolly, Attorney Peter Malia, Mark and Teresa Richey, Wesley Smith, Steve Larson,

APPROVAL OF DECEMBER 20, 2017 MINUTES

The Draft Minutes were reviewed and edits made.

Mr. Lucy made a **Motion** to approve the minutes as amended; seconded by Mr. Totman.

All approved.

ZBA CASE # 17-06 (Continued from December 20, 2017)

Mr. Lucy reconvened and reviewed Case # 17-06 as being continued from the December 20, 2017 meeting. This is an Appeal of an Administrative Decision by Attorney Christopher Meier, agent for applicants R. Kevin, Christopher, and Kelly E. Connolly, 585 East Shore Drive, Tax Map 135/ Lot 7, pursuant to the Madison Zoning Ordinance 1.3B and relating to a Building Permit issued on property owned by Mark and Teresa Richey and located at 599 East Shore Drive, Tax Map 135/ Lot 8.

HEARING NOTICE

Mr. Lucy asked if this continued Case had been re-noticed. Mrs. King stated that this Case was not re-noticed; however, it was reposted at Madison and Silver Lake Post Offices and the upper and lower levels of Town Hall. The same 5 Board members are present for tonight's hearing as were for the previous meeting.

In the interest of full disclosure, at the December meeting, Mr. Hughes requested that the Board consult with their Attorney and obtain guidance on the Madison Zoning Ordinance Section 1.3B.

Mr. Lucy stated that all such correspondence is protected under the Attorney-Client privilege rule and shall remain confidential. In addition, the Board has been served with a 91-A Request for Information. There were 11 items requested. There was a meeting with the Vice-Chair Lord, Chair Lucy and Mrs. King to review digital and hard copies dating back to 2007 in an effort to be sure that everything was captured that was requested. Before this meeting began, Mr. Lucy reviewed RSA 91-A, and determined that this was not a meeting; it was procedural. It was the Board's intent to acknowledge the 91-A Request within the required 5 business days. The previous Board Administrator was contacted in an effort to be thorough in our disclosure.

RULES OF PROCEDURE

Mr. Lucy swore-in anyone in the audience who may wish to speak tonight on this Appeal and who was not sworn-in at the last meeting. Mr. Steven Larsen, Mr. Wesley Smith and Mr. Ken Connolly were sworn-in.

Mr. Lucy stated that those who are in support of the Appeal can speak first, followed by any rebuttal of those opposed to the Appeal. Those in support of the Appeal may rebut the rebuttal. Those opposed to the Appeal will then have a chance for a final rebuttal.

PUBLIC COMMENT

As a preliminary matter, Attorney Meier referenced March 2015 emails between the previous ZBA Administrative Assistant Chris Young and the Richey's which were submitted by Attorney Malia at the last meeting. These emails referenced the generic discussions between Mr. Young and Mr. Lucy on the scope of Zoning Ordinance Section 1.3B.

Attorney Meier requested that Mr. Lucy recuse himself on the possibility of negligent representation and that Mr. Lucy may possibly have a personal stake in the outcome of this case, as he was the ZBA Chair when this property was granted a Variance in 2009 for roof height expansion.

REBUTTAL

Mr. Lucy asked the opposing counsel Atty. Malia if he had any concerns regarding Atty. Meier's request for Mr. Lucy's recusal.

Attorney Malia stated that Mr. Young's conversation with Mr. Lucy was generic in nature and did not reference any address or property owner. The discussion was only on the scope of the Zoning Ordinance Section 1.3B. Atty Malia stated that there is no need for recusal and that Mr. Lucy has always been fair and ethical.

Mr. Lucy stated for the record that his discussions with Mr. Young were of a generic nature only, with no reference to any property owner or any address and that he has absolutely no personal stake in the outcome of this case.

Mr. Lucy asked if anyone believed that there was any negligence on his part and/or if he should recuse himself.

Mr. Richey, the property owner, stated that the first time he had any interaction with Mr. Lucy was at the ZBA hearing on December 20, 2017. Prior to that December 20, 2017 ZBA Hearing, Mr. Richey had only interacted with Mr. Young and Mr. Boyd.

Mr. Lucy stated that when any former or current ZBA Administrative Assistant consults with him, it is always on a general zoning question and never specific to a property or owner. Mr. Lucy stated that it is the Board's decision if he should recuse himself.

Mr. Anderson, a Board member with Mr. Lucy for 24 years, stated that Mr. Lucy has always recused himself if ever there was even a hint on conflict and he does not believe that Mr. Lucy should recuse himself now.

Mr. Lord made a **Motion** that Mr. Lucy should not recuse himself; Mr. Anderson seconded.

There was no discussion. All other Board members were polled on the vote of the Motion:

Mr. Lord, Mr. Hughes, Mr. Totman and Mr. Anderson agree that Mr. Lucy that should not recuse himself. Mr. Lucy abstained. The **Motion was approved** and the hearing continued.

IN SUPPORT OF THE APPEAL OF ADMINISTRATIVE DECISION

Atty Meier noted his objections and presented their Appeal. He felt that this case was already decided in August 2009. Mr. Lucy objected to that statement.

Atty Meier reviewed his memorandum with the maximum expansion granted in the 2009 Variance.

Mr. Anderson, Board member, asked how does the 2009 decision pertain to this appeal this evening?

Atty Meier stated that it is the rule of the law for this property.

Mr. Anderson disagreed and stated the 2009 decision was based on the upward expansion and height of an existing building and tonight's case is for the tearing down of a building and starting from scratch.

Atty. Meier continued discussion of the 2009 decision, stating that Mr. Lucy interpreted the ordinance for the Board. Mr. Lucy objected, and stated that he did not interpret the ordinance; he reviewed the ordinance, which states that the footprint equals the first floor living space.

Atty. Meier agreed that the 2009 decision was for an upward expansion on an existing structure.

Mr. Lord asked for clarification on whether the 992sf expansion limitation which was granted in 2009, was entirely in an upward expansion with no change to the footprint?

Atty. Meier clarified that the variance relief was only for a height restriction. The variance was never acted upon and no building permit was applied for.

Atty. Meier showed photos of the proposed expansion compared to the existing structure.

Mr. Totman stated that existing height of the garage is higher than the proposed height of the house on the conforming portion of the lot. Mr. Lucy was hesitant to interpret what the photos intend to show without the property owner's input.

Atty Meier concluded that he does not agree that a property owner can do whatever they want on the conforming portion of the structure. He stated that the Richey's inappropriately went around the Board to the Chair to get his opinion on the Zoning Ordinance and that the Board should not allow that 'end-run'.

Mr. Totman commented that Atty Meier's use of words such as 'inappropriate' are his judgment. Atty Meier agreed that it was his opinion.

Mr. Lucy took umbrage with the suggestion that he might have done anything inappropriate. Starting with the 2015 email, which the Richey's presented last month, Mr. Young asked Mr. Lucy generic questions and Mr. Lucy was never included in any emails between Mr. Young and Mr. Richey. The first time Mr. Lucy was aware of or saw that email was at the December, 20, 2017 meeting and there was never any 'end-run' to anyone through him. Mr. Lucy was stunned that it would even be hinted at or suggested. Mr. Lucy requested that the email be read aloud into the record by Mrs. King.

The email thread was between Mr. Young, Mr. Richey and Mr. Boyd and dated March 11 and 25, 2015. Mrs. King confirmed that no ZBA members were copied on those emails. Mr. Lucy stated that he could testify if necessary, that when Mr. Young called him at his office, the questions were generic in nature and the phone call was 6 years after the 2009 ZBA case. Mr. Lucy stated that once a case is closed, he puts it out of his mind, so as not to cloud his judgment on similar cases.

Mr. Lucy asked Atty Meier if he had ever served on a land use board; he had. As a board member, had he ever had any correspondence with the Land Use Board's Administrative Assistant outside of the posted meetings? Atty Meier hesitated and stated that his experience is not relevant. Mr. Lucy asked that this be noted in the record.

Mr. Lucy stated that whenever the ZBA Administrative Assistant contacts him, he is responsive.

IN OPPOSITION TO THIS APPEAL

Atty Malia, representing the Richey's, addressed the recusal request by Atty Meier and stated that he has appeared before Mr. Lucy many times and found him to be fair and completely ethical. He is appalled that Mr. Lucy's character was called into question. Mr. Lucy was not copied on any emails from Mr. Young or Mr. Richey and did not know what project Mr. Young was talking about. The email was solely used to determine the square footage allowances in the design of the new house. Atty Malia stated that it was unfortunate that his client's integrity was called into question with a suggestion that he made an 'end-run' around the ZBA, by going to the Land Use Board's Administrator with questions, which seems to be the logical place to go. His clients spent many hours planning his design to meet all zoning regulations.

Mr. Smith of Thorne Surveys stated that as a professional engineer and dealing with many towns, he very often consults with the Code Enforcement Officers as to what is allowed.

He reviewed the exhibits and measurements requested from the December meeting:

1. The non-conforming area of the structure w/in the 75' setback of the lake:

Existing square footage	1491 sf
Proposed square footage	1523 sf
Overlapping square footage	826 sf

2. The entire footprint of the proposed non-conforming structure is within or further away from any of the setback than the existing non-conforming structure.

3. A color overlap of the entire site was shown.

- None of the side setbacks all the way to the lake are impacted.
- The proposed structure is further away from the lake and from the side setbacks.
- The proposed structure is less non-conforming than the existing structure.
- The square footage is measured in length by width dimensions, with the total impact of the structure in relation to the setbacks.

Mr. Richey, property owner, presented his designs and addressed comments made by Atty Meier.

- 50% of 6000sf in the proposed structure is in the basement.
- Atty Meier did not calculate the sf in the existing basement, which has a basement roughly the same size as the existing structure.
- There is no impact on the existing septic system as the existing and proposed structures each have 3 bedrooms; however, a new septic system has been approved by DES.
- Atty. Meier characterized the existing house as a cottage and that the Richey's are proposing to build a 'McMansion'. The previous owners, who received the 2009 variance, lived there full time for 55 years and there is no 'use change' here as they are planning to retire and live there full time.
- The design of the house has a height that is below what is allowed by zoning and is set further back from the lake. The only part of the structure that is two-stories is over the garage and is the furthest back from the lake. The rest of the house is single story to keep a low impact along the lake.

Mr. Lord asked about the two-story portion of the structure and the side, road and lake setbacks.

Mr. Richey showed that the only two-story area is over the new garage and is under the 992 sf limitation. The proposed structure will be further away from the side and the lake setbacks.

Mr. Lucy asked about the road setback. Mr. Richey showed the natural woodland buffer and that they meet the road setback.

Mr. Richey stated that they consulted with Mr. Boyd four times for guidance before they embarked on a substantial design process.

Atty Malia reviewed measurements requested:

- sf of existing house 1984 sf
- sf of existing garage. 326 sf
- total combined sf 2310 sf

The Madison Zoning Ordinance allows 50% sf expansion = 1155sf

2310 sf (existing)
+ 1155 (50% allowed)
3465 sf (Total allowed 1st floor footprint of the new house per Madison Zoning)

The sf of proposed new structure is 3364, which is 101 sf less than the Zoning permits.

Atty Malia objected to the comment made by Atty Meier that the expansion is 3500sf over what is allowed. This comment should be rejected and is inaccurate, as it appears that Atty Meier may be using a cubic foot analysis and the Madison Zoning does not require a volume or cubic foot analysis. The Madison Ordinance refers to a horizontal analysis, as previously stated by Mr. Smith. Madison Zoning addresses the footprint.

Mr. Lucy asked Atty. Malia to review the elevation measurements:

The elevation of the existing structure - 494.92'

The elevation permitted by the 2009 variance - 503.80'.

The elevation of the proposed structure is 503.625'.

The elevation of the garage roof – 503' 7 ½”.

The elevation of roof on the lake side – 498’.

The allowed elevation is 503’ 9 5/8”.

Mr. Lucy confirmed with Atty Malia that the Richey's are relying on the August 19, 2009 variance and they have a copy of the Notice of Decision which states the 3 conditions of approval:

1. Permissible upward expansion of 992sf.
2. Roofline not to exceed 513.92' *
3. Existing footprint shall not expand laterally.

* When Thorne surveyed in 2009, the roofline height of 513.92' was not measured using NADD88 to measure the lake. In 2017, the current proposal was surveyed by Thorne applying NADD88 and when the two survey elevations are adjusted, the current height limitation is 503.8' which is 10.12' less than the 2009 elevation.

The proposed structure meets these conditions:

1. The proposed upward expansion is 733sf.
 2. The proposed roofline is 503.625'.
 3. The proposed footprint is further away from all setbacks than the existing structure.
- All expansion is compliant within the setbacks.

IN REBUTTAL TO OPPOSITION OF THE APPEAL

Mr. Lucy asked if anyone wanted to speak in opposition.

Atty Meier stated that Atty Malia was using the numbers in the 2015 email from Mr. Young and the applicants received guidance from the Planning department and the CEO. Atty Meier addressed why he did not include the existing basement. Although he has not seen the basement, it appears that it may not be living space. Atty Meier stated that it all comes down to the interpretation of the last sentence of Zoning Ordinance Section 1.3B, and whether the expansion includes just the first floor footprint or the entire expansion on all floors.

REBUTTAL

Atty Malia stated that volume of a structure is not addressed in the Zoning Ordinance Section 1.3B and all conditions in the 2009 Notice of Decision met:

- The garage is attached and therefore included in the sf calculation according to Mr. Boyd.
- The words 'upward expansion' in the 2009 Notice of Decision are meaningful and they meet those 2009 limitations, 992sf vs. 733sf.
- The proposed roofline is lower, 503.8' vs. 503.625'.
- Lateral expansion is interpreted as expansion within the setbacks. In 2009, there was a sketch showing the existing footprint and the proposed footprint, which is different and therefore, it was never expected that the 2009 expansion only be within the existing footprint.

Mr. Larson, the builder, stated that the proposed structure was always intended to meet the limitations of the Zoning Ordinance. Mr. Richey drove his architect from Boston up to meet with Town officials and understand the limitations in designing the structure. Mr. Larson stated that any insinuation that the Richey's were trying to do a 'work around' the Town is false. A portion of the house is non-conforming and the Richey's proposal will make the house less non-conforming in 2 ways. All setbacks will be met; it is a buildable area and within their property rights to do so.

CLOSE OF PUBLIC PORTION OF MEETING

Mr. Lucy moved that the public portion of the hearing be closed and move in to deliberation; seconded by Mr. Lord. All approved.

BOARD DELIBERATION

Mr. Lucy suggested that the Board closely review and discuss the enlarged copy of Section 1.3B on the wall. Mr. Lord suggested going through each sentence, phrase, noting the punctuation, and discuss its implication.

Mrs. King read each phrase from the Section 1.3B Ordinance followed by member discussion:

1. *'Any tear down must be reconstruction within one year'*

The Board agreed that this phrase stands alone.

2. *'Legally established non-conforming structures may be expanded in size, provided the expansion complies with the current setback requirements, or:'*

Mr. Lord interpreted this as if there is a building that is inside the non-conforming setback area, expansion is allowed.

Mr. Lucy highlighted on Mr. Richey's plan, the area of the proposed expansion that is within the setback requirements.

Mr. Lord stated that if there is a building with some non-conformance, there can be expansion as long as the expansion conforms with the setback requirements.

Mr. Lucy clarified that any homeowner can expand within the legal building envelope by right as long as the height restrictions are met and a building permit could be issue as such.

Mr. Lord stated that after a colon, normally a list follows.

3. *'The setbacks to the expanded structure are not less than the non-conforming setbacks of the original structure; and'*

Mr. Lord explained this phrase as you cannot get less non-conforming than the structure already is and this deals with the road setbacks and the sideline setbacks.

Mr. Anderson pointed out that this proposed structure will be further back from the lake and the sideline setbacks.

Mr. Lucy stated that this proposal is less non-conforming.

4. *'The expanded structure is no closer than existing non-conforming structure to the high water line; and'*

Mr. Lord stated that this phrase addresses the lake setbacks.

Mr. Lucy pointed out that the word 'and' in phrase 3 and 4 connects them and that phrase 1 and 2 stand separately.

Mr. Hughes stated that it makes sense the way they are reading the ordinance that this protects the lake with the high waterline.

5. *' the expanded structure is no taller above sea-level than the highest roofline of the existing structure;'*

Mr. Lucy identified the building envelope as the building area of height, width, and depth.

Mr. Totman confirmed that this also addresses the non-conforming area.

Mr. Lucy pointed out that phrase 5 ends with a semi-colon but does not have the word 'and' following it.

Mrs. King confirmed this.

Mr. Lord stated that importance of the words 'or' & 'and'.

Phrases 3, 4 & 5 deal with the non-conforming area and is one thought.

Mr. Anderson confirmed that the garage height cannot exceed 36'.

Mr. Lord pointed out that phrases 1 and 2 deal with expansion within the building envelope. The remainder of section deals with what is required outside of the setbacks, the non-conforming expansion.

Mr. Lord addressed each point of this case and matching it to each phrase of the Section 1.3B, using the colored plan on the easel.

FINDING OF FACTS

Mr. Lucy polled each Board member on the following facts:

1. The area within the legal building envelope can be expanded without restriction as long as the current setback and height requirements are met. All agreed.

2. There is no area in the non-conforming space that is more non-conforming than the existing structure. All agreed.

3. The expanded structure is further away from the high waterline, as shown on the Thorne survey. All agreed.

4. The expanded structure is no higher above sea level than the highest roofline of the existing structure. The conforming part of the structure height is only limited by the 36' requirement and not limited by the 2009 variance. All agreed.

5. The proposed non-conforming roofline is lower than the height restriction in the 2009 variance and is allowable. All agreed.

6. Any such expansion is referring to the non-conforming expansion only. The proposed expansion of the non-conforming part of the structure is 32' is less than allowed. Mr. Lord explained that the existing non-conformance is 1491sf and then add 50% more non-conforming sf, as long as it is not more non-conforming. $1491 + 746 = 2236.5$ sf is the allowable non-conforming expansion with the 50% rule applied. Mr. Anderson stated that the proposed non-conforming expansion is 1523sf and is under the allowable amount. All agreed.

7. Mr. Lucy summarized that the Board's interpretation of Section 1.3B only applies to that part of the structure that is non-conforming. All agreed.

MOTION

Based on the finding of fact, Mr. Lord made a **Motion to DENY** the Appeal of Administrative Decision. Mr. Anderson seconded.

DISCUSSION

Mr. Lord asked that the lateral expansion conditions of the 2009 variance be addressed. Mr. Lucy stated that this proposal does not require the conditions of the 2009 variance. The non-conforming proposed height cannot be taller than the non-conforming existing height. Mr. Hughes sat on the 2009 case and remembers that the board just made a statement of fact that the proposal was for an upward expansion and that lateral expansion is not a condition, but a statement. Mr. Totman stated that if the structure is viewed from the lake, the proposed structure is narrower than the existing structure and there is no lateral expansion, but a lateral compression.

Mr. Lord reviewed that the present proposal meets all the conditions of the 2009 variance. The building permit meets all the ordinance requirements as well as meets all the conditions of the 2009 variance.

VOTE

Board members unanimously voted to **DENY** the appeal and uphold the issuance of the building permit. Mr. Lucy reviewed the vote and the 30-day appeal period. Case closed.

ADMINISTRATION

Mrs. King reviewed the 2018 ZBA meeting schedule and that the November meeting is the night before Thanksgiving. The decision was made to move the November 21st meeting to November 28, 2018.

Mrs. King distributed the approved ZBA documents which were approved at the December 2017 Public Hearing.

ADJOURNMENT

Mr. Lucy motioned to adjourn; seconded by Mr. Lord. All in favor; meeting adjourned at 8:58pm.

Respectfully submitted,
Colleen King
Land Use Administrator

These minutes were APPROVED at the March 6, 2018 ZBA meeting.