



**TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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ZBA MINUTES

April 19, 2023

ATTENDANCE: Chairman Drew Gentile, Vice-Chairman Jake Martin, Doug McAllister, George Rau, Shawn Bergeron, Alternate – Bill Dempster

EXCUSED: Alternates, Marc Ohlson and Mark Totman

OTHERS PRESENT: Madison TV, Amanda Hayford, Kate Young, Land Use Boards Administrator, J.P Goodwin-Rogers; Tom Rogers, Craig Salomon, Agent for Jerome Ken Sakurai, Trustee of Tayzach Realty Trust, Mark McConkey and Jake McConkey, Agent for Samuel Shiro, Robert Nelson, Jim Rines, Agent for Eva Selstam Heilman, Trustee of The Amended and Restated Trust Agreement of Eva Selstam Heilman and Stephen S. Hill, Trustee of the Stephen S. Hill Revocable Trust (THE TRUSTS) and other members of the public.

CALL TO ORDER: Gentile called the meeting to order at 6:00 PM. Rau led the reciting of the Pledge of Allegiance.

The Board welcomed Shawn Bergeron as a new member and are happy to have him on the Board.

PUBLIC NOTICE: Notification of this meeting was posted on March 29, 2023 in the Town Hall upper and lower levels, Madison and Silver Lake Post Offices. Young also confirmed that the abutter that was not properly notified due to an incorrect mailing address was properly notified.

Young read aloud **Case #23-02 – Continued - Variance** request by Craig N. Salomon, Land Use Consultant and Ambit Engineering, Inc., as representatives for Jerome Ken Sakurai, Trustee of Tayzach Realty Trust for property located at 363 Danforth Lane, Tax Map 120, Lot 05, from Article I, Section 1.3 – A and Article V, Sections 5.7 A and B to allow a three-lot cluster subdivision with frontage on a Class VI Highway.

Gentile polled the Board:

Conflict of Interest: All members stated they had no conflict of interest in this case via roll call.

Waiver Request: There were none.

Regional Impact: All members stated they see no regional impact in this case via roll call.

Swearing In: Gentile swore in all present that were to speak to this case.

Gentile opened the public hearing.

Craig Salomon, Land Use Consultant/Agent for Tayzach Realty Trust made his presentation to the Board and referred the Board to the plan as shown on the poster board. Salomon, Agent is seeking a variance for a subdivision which the town does not allow on a Class VI road. Salomon further explained that this property was part of a larger lot and the town took back the property via Collector's Deed and the town conveyed portions of the larger lot to abutters and when in doing that, eliminated some

frontage on the Class V section of Danforth Lane and Winter Road. The results of the plan that was generated by the town, the frontage on the Class V road was lost and also, the town acquired from various abutters enough land to establish a 50' right-of-way and the town created the cul-de-sac. He further stated that in 2018 when the Planning Board considered it, there was a discussion that the Planning Board was told that at some point in the future, a future town meeting would accept this as a Class V highway. Salomon submitted the minutes from the November 7, 2018 Madison Planning Board meeting to Gentile.

Gentile for the record, read aloud a portion of the Planning Board minutes of November 7, 2018 as follows:

“The proposal is to make a boundary line adjustment on these roads with property owners Goodwin-Rogers (map 120 /lot 4), Sweeney (map120 /lot 3), Town of Madison (map120/lot 5), Osgood Realty Trust (map 120 /lot 11) and Gove (map 120 /lot 6) to create road frontage for the property owners and extend the Class V road to where the pavement ends. This Class V road would be retained by the Town as a 50' public Right-of-Way. The unpaved extension of the Danforth Lane to Winter Road would need to be accepted as a layout to a Class V road at a future Town Meeting. The Town currently maintains and plows the paved portion of Danforth Lane. It was paved approximately 9 years ago. Mr. Ohlson asked if there is a fee transaction? Mr. Smith explained that the property owners agreed to pay equal costs depending on the square footage/percentage of land which they will be receiving. The Town will retain ownership of a 7.2 acre lot and the ROW”.

Gentile stated the minutes only referenced a **“future Town Meeting”** and that there would have to be a Warrant Article and voted on and that this is not a promise. Salomon stated he understood.

Salomon stated Tayzach Realty Trust bought the property from the town and they went to the Planning Board for a three-lot cluster subdivision and to the best of Salomon’s knowledge, they met all the requirements of the Zoning Ordinance except for the fact that the required frontage was on the Class VI portion of Danforth Lane. Salomon further stated that they were not able to proceed with the Planning Board and they went to the Select Board and requested that they lay out a Class V highway from the end of the pavement down through to the cul de sac and did not ask the Select Board to lay out anything to Winter Road and he stated the Select Board declined to do this and this matter is now pending in Superior Court.

Salomon stated they are here tonight because the variance standard is different. Salomon talked about the variance standard and the most contentious is whether or not an unnecessary hardship exists and if there are any special conditions about this lot to make it different from others similarly zoned. He further stated that he believes that the special conditions are that this was created by the Town with the anticipation that at some point in the future, the width of the road and the cul de sac was laid out so at some point it could be developed and he referenced the November 7, 2018 minutes.

Salomon stated what is the public purpose of this particular ordinance provision that says you can only have one structure on a lot with frontage on a Class VI highway. He further stated that the legislature has laid out for the purposes of zoning, that among those are to lessen congestion and to provide access for fire and emergency vehicles. He stated when they went before the Select Board it came out that the Police Chief and Fire Chief indicated they had no problems getting emergency vehicles up there and this was part of the testimony and that this addressed the part of the health and safety and congestion. If this

were a Class V highway it would totally meet town zoning requirements in terms of acreage and because it is a cluster subdivision, there would be some open space left over.

Salomon stated that part of what he is proposing, and he suggested if the Zoning Board granted the Variance, that this be a condition when they go to the Planning Board, they would be required to improve the portion of the road from the end of the curb pavement through the cul de sac to Class V standards as determined by the Planning Board. He further stated that they are not trying to get out of what they had already agreed to do.

Salomon referred to hardship and is it reasonable. Salomon further stated that people at the Select Board meeting raised legitimate concerns about drainage and who will maintain it. Salomon stated they are willing to improve the road to the cul de sac and as part of those improvements they will present a drainage analysis and the Planning Board has the right to get an independent engineering review of the drainage analysis. He further stated other concerns raised was a lot of traffic coming up Winter Road and speeding and that speeding is not their responsibility but if the Planning Board and Zoning Board require it, the applicant is willing to put in speed bumps and if speeding is really a concern, they can do some other things to help address that.

Salomon stated the next part is public interest and they do not have to establish it as it is in the public interest but, they do have to establish that is it not contrary to the public interest. He further stated that the Supreme Court defines the public interest as to whether or not, the proposal, unduly and in a market degree, conflicts with the objectives of the ordinance. He went on to say what is the objective of the ordinance. He stated access for emergency vehicles and overcrowding which he addressed earlier and stated the proposed itself meets the Zoning Ordinance.

Salomon stated they have received Wetlands Permits to fill near some of the areas near the cul de sac and the state has looked at part of the drainage and he stated they intend to upgrade the road.

Salomon referred to the spirit of the ordinance which is similar to public interest and he recited that the Supreme Court states do the private rights of the public (belonging to Mr. Sakurai) outweigh the public interest. He believes in this case, upgrading the roads at their expense, will address drainage at their expense and he believes they meet the Zoning Ordinance and it would appear the private rights of Mr. Sakurai outweigh the public interest.

Salomon stated the next part is substantial justice. He stated that what they would like to do is a conforming three lot cluster subdivision and will look at improvements to the road and drainage and address speeding if that is an issue.

Gentile asked how are they going to get 200 feet of frontage on a Class VI road for each lot? Gentile further stated that is one of the requirements for subdivision and for the Zoning Ordinance and that in a subdivision it is irrelevant whether it is a cluster or conventional because in order to do a cluster, you have to show the conventional is possible and it is necessary for it to be in conformance with the Zoning Ordinance to have 200 feet of frontage on the road for each lot and he asked Salomon to explain this. Salomon stated he did not have that plan set with him but Gentile had one and gave it to Salomon. Salomon referred the Board to C2 of the Proposed Subdivision Plan.

Bergeron stated he is looking at C2 and asked Salomon if he understood the presentation correctly that Salomon stated the Class VI road would go from the area that is hatched, to the left, and extend down to the cul de sac, is that where the Class VI road presently ends? Salomon stated no, the Class VI road presently goes all the way out to Winter Road. Bergeron further stated Lot 3 there is presently no Class VI road and therefore no frontage. Salomon stated their obligation is, before they approach the Planning Board for a cluster subdivision, is they have to show a regular subdivision is feasible, which would include building the road as shown on C2 as well as another road and cul de sac. Bergeron stated that at the easterly end of the road that Salomon described to be built with another cul de sac, which would serve Lot 3, would there be 200 feet frontage? Salomon stated yes, on the cul de sac. Bergeron asked if the circumference of the cul de sac is indeed included within the frontage? Salomon stated yes.

McAllister asked if Lot 3 currently has a home on it? Salomon stated yes.

Salomon stated the last part for a variance is the diminution of value to surrounding properties. He further stated the essence of the argument on this is that currently, the home on their lot and the other home below shows a note on the assessor's card that the properties are either on a private road or Class VI which brings the property values down and by improving the road whether it becomes a Class V road or not, that should raise those property values. Salomon also stated the Board has a copy of the appraiser's letter.

Gentile opened the Public Hearing portion of the meeting for public comment.

J.P. Goodwin-Rogers of 341 Danforth Lane stated she is the largest abutter of this property. She stated she was addressing the appeal that had been previously submitted by Craig Salomon, for Tayzach Realty Trust and that there is no hardship. Goodwin-Rogers stated the applicant bought this lot long after it was subdivided and they bought exactly the lot they got, on a Class VI road with no frontage on a Class V road and that the town did not do anything after the applicant bought the lot. Goodwin-Rogers further stated she attended the auction and knows this is the lot they bought. Goodwin-Rogers further stated that no portion of this lot was ever on the Class V road, only Class VI and that no abutter acquired any portion of the lot eliminating their access to a Class V road after they bought the lot. Goodwin-Rogers further stated there exists no special conditions as the applicant bought a single family dwelling on 363 Danforth Lane has been lived in since 1996 in its present condition with an eight foot wide driveway and they have since widened the driveway that goes along her property line to within three feet of her property line without a permit and now they intend to put in a 50 foot road three feet from her property line. She further stated her concern as to whether they will get a permit for this or not and they did not get a permit when they started adding on to the existing house. Goodwin-Rogers stated the drainage has become a real problem for the whole neighborhood. Goodwin-Rogers further stated that the applicant lives at the south side at the highest point of the land when all the abutters are at the lower end. She further stated since they filled the driveway, her basement floods every time it rains and this has been going on for three years and she has complained and nothing has been done. She further stated that in the applicant's complaint it states if there are drainage issues, the town will take care of them but in the applicant's original proposal it stated the applicant would take care of them. She further stated that Danforth Lane in some places below to the north downhill is less than 15 feet wide and it is inconsistently ditched and is three quarters of a mile off a main road and dozens of people that live downhill from this property from where the applicant proposes to contain all the drainage issues. She further stated there is a small brook at the base of her property on Danforth Lane downhill that is less than two feet wide and one foot deep and it drains under Danforth Lane and under Winter Road and if

all the run off comes down into it, it will not accommodate it and these variances would allow injury to already aggrieved abutters who low lying residences along streams and in wetlands would be exacerbated and the applicant in its initial proposal did have a disclaimer saying there may be drainage problems for abutters. She further stated there is no loss to the applicant of any kind other than the fact that he thought he could do something with a lot he bought that was non-conforming and spent a lot of his own money and time trying to convince the town to change the neighborhood to accommodate him and the neighbors and not to be thrilled about that. Goodwin-Rogers went on to state there is interesting topography, wetlands, vernal pools and ledge and in order to build homes there and put in a road this would require blasting. Goodwin-Rogers further stated that after extraordinary noise, traffic, including huge cement and dump trucks, excavators, service vehicles, damage to the road, harassment both verbal and physical and threats from the person living on the property, the neighbors are tired of this whole situation. Goodwin-Rogers further stated the 150 year old stone walls, etc. will be destroyed to widen the road and this will change the neighborhood.

Goodwin-Rogers stated that some of the wetlands have been filled in without a permit.

Goodwin-Rogers stated the Zoning Ordinance in the Town of Madison in the spirit of the ordinance the guiding principle states “to promote natural beauty of the environment which provides the primary basis for the unique character of the town and its residents and encouraging uses that are in harmony, visually and aesthetically, with rural living”. Goodwin-Rogers stated she does not want to see this become a development.

Bruce Gove of 377 Winter Road stated that his property is located downhill, north of 363 Danforth Lane and that this subdivision would cause major drainage concerns and that Danforth Lane runs beside his property and gets washed out from rainstorms and he is opposed to this.

Salomon stated he has addressed hardship before and what makes the definition of hardship and what makes this different and unique from other lots similarly zoned and what makes it different is the configuration was created by the Town. Salomon stated that Goodwin-Rogers stated this property never had frontage on a Class V road and it actually did, in the portion that was conveyed to Sweeney. Salomon further stated there was frontage on Winter Road and pointed this out to the Board on the plan where the portion was conveyed to Osgood Realty Trust. Salomon further stated this whole lot was big and it did have two pieces of frontage on a Class V road. Gentile clarified this was on the original large unsubdivided piece but the subdivided pieces did not all have frontage. Salomon stated yes and in 2018 two things happened, big portions of the lot were conveyed to abutters and what makes it unique is that the town acquired from the abutters enough land to clarify the 50 foot right of way and at some point, in the future the town owned it. Gentile stated that sometime in 2018 there was a property line adjustment and he asked Salomon what impact, if any, did this adjustment and the property lines have on this case? Salomon stated the plan he has been referring to with the Board all night was the Boundary Line Adjustment Plan prepared in 2019 which shows the adjustments. Gentile asked Salomon what it looked like before the Boundary Line Adjustment and did this work to Salomon’s advantage or disadvantage? Salomon stated he believes it works to their advantage as before this, the frontage on the Class V portion on Danforth Lane came down and around and some land was conveyed to Gove and a big piece was conveyed to Osgood so there was frontage on the Class VI and then on Class V on Winter Road and what the town did is they conveyed pieces of the big piece to the abutters but at the same time, they acquired little pieces of land to establish the right of way.

Bergeron asked that previous to the town dividing this up, how much frontage did the parent lot have in total on a Class V road? Salomon stated 100.96 feet and 164.74 feet so about 265 feet of frontage total but not contiguous. Bergeron stated that no portion of the parent lot would have been conforming either at that point of time. Salomon stated that except to the extent it was big enough that road could have come in. Bergeron stated in its existing condition at that time it was also non-conforming? Salomon stated yes.

Salomon addressed that while the right of way is 50 feet wide and when they talked to the Planning Board, one of their comments, before they decided not to go forward was that they would not require pavement any wider than what currently exists and he believes it was 19 feet.

Salomon addressed the drainage complaint and yes, there have been complaints for three years, including one to the state that responded they have investigated and the state was not going to take any action. Salomon stated the second part to this in the engineering plans there is a culvert under this driveway that drains from the Goodwin-Rogers property onto the applicant's property and is an existing culvert. Salomon also stated they need to get to the Planning Board with regard to the drainage and that they have done an extensive drainage analysis and the way it works is that the Planning Board will look at it and the Planning Board has the right to hire an independent engineer at the applicant's expense to redo this and make any recommendations they want. Salomon stated that they realize there is a drainage situation there now and they realize they need to address their impact on that.

Salomon addressed the issue raised by Goodwin-Rogers of vernal pools. He further stated this was raised at the site walk and their wetlands scientist disagrees with that analysis and he is not sure if a professional has disagreed with their professional and he believes this a lay person's opinion.

Bill Dempster, Alternate member arrived for the meeting at approximately 6:45 pm and Gentile welcomed him to the Board.

Salomon next addressed the road issue raised by Goodwin-Rogers that the road could not be built without blasting. He further stated this was raised at the site walk and their engineer said no, they are going to put fill on top of the ledge and that is the design and no blasting.

Salomon addressed the comment made by Goodwin-Rogers as to threats from the person currently living at 363 Danforth Lane and Salomon stated they are unaware of those threats but if someone wants to discuss this with him, he would look into it. Gentile stated this is irrelevant to the Zoning Board portion. Salomon stated that is if this happening they want to know about it.

Salomon stated these are all of his responses and that they have way opinion about drainage, way opinion about vernal pools and way opinion about blasting and they have professionals that disagree with all of those conclusions. Salomon further stated that "at the end of the day, if we get the variance or the Superior Court lays out the road, the Planning Board will determine it".

Gentile stated that for the record, the Zoning Board have nothing to do with the actual subdivision approval or the road layout approval.

Gentile stated that per the Board's procedure they want to give the opportunity for anyone else in the audience to respond.

Gentile sworn in Tom Rogers.

Tom Rogers of 341 Danforth Lane stated he is one of the abutters and the statement was made that the drainage from his property to the applicant's property on the culvert underneath the applicant's driveway came from the Rogers property. Rogers further stated that to the best of his knowledge, water flows downhill, not up hill and the water that is on their property right now came from the applicant's wetlands area and there is a pond that is full and draining down the culvert onto the Rogers property.

Gentile stated that the Board will now collect Findings of Fact and Craig Salomon, Agent for Tayzach Realty Trust can contribute and then Gentile will close the public hearing.

Gentile asked if anyone from the public wished to speak? He then explained this is still a Public Hearing and that the Board at this time will attempt to collect Findings of Fact relative to this and they are going to proceed with this so that the public including the Agent for the applicant can contribute to correct or otherwise adjust the Board's Findings of Fact and then after they have established the Findings of Fact, the Board will close the Public Hearing and will deliberate and at that point no members of the public can no longer participate in the discussion.

J.P. Goodwin-Rogers of 341 Danforth Lane stated this history is great and everyone in the neighborhood knows the history. She stated the applicant bought the lot that they have and they did not buy a lot with frontage on any Class V road. She showed on the plan where the swamp is and stated it is under water most of the time and getting access on to Danforth Lane from this little strip of property would have been very difficult. She further stated the homeowners traded the town, they did not landlock this lot, they traded the town and the town took frontage from her property, Goves and Sweeneys and in return, the town gave them a little strip of unbuildable land to compensate for their gift to the town and the town made them pay for it. Gentile asked her if what she was referring to on the plan was the Boundary Line Adjustment and Goodwin-Rogers stated yes. Gentile stated that the road was expanded in terms of its right of way and in return Goodwin-Rogers was given a strip of land and Goodwin-Rogers stated yes, because the town took 25 feet all the way from Hidden Lane and she showed this on the plan. Goodwin-Rogers showed on the plan the town took the end of Sweeneys and she showed what they got from the town and the same with Gove's lot. Goodwin-Rogers stated that water still only flows downhill and all the abutters live downhill and now per the Agent for the applicant, they are now not going to blast but put in four feet of fill and make it four feet higher so that the water will drain faster downhill and they will be adding hot top and lawn instead of woodlands which absorb water and this is frankly terrifying.

Bergeron had a question on the application that referred to Article 1, Section 1.3. When Bergeron looked at 1.3, specifically 1.3A, near the end of the paragraph, it says **“provided however that lots whose sole frontage is upon a Class VI or private road not show on a plan approved by the planning board must first successfully complete the permit process as set forth in RSA 674:41”**. Bergeron asked if this was applicable at this point? Gentile replied yes and no and that for the record, that application was made in 1996 when the house was built as part of the record and as part of the deed and that portion was met and the point of discussion now is yes, if there is an approved variance and they build on a Class VI road then it would be a condition that all the other houses would have to meet this and the deeds would have to reflect that and the Zoning Board would not decide this. Bergeron stated he asked this question because it was in the Zoning Ordinance.

Bergeron stated that Article V, Sections 5.7A as referred to in the application does not need any consideration as it only relates to Class V, or better road, state or private roads. Bergeron further stated that they do need to look at Article 5.7B which last sentence states “**Subdivision of lots whose sole address or frontage is on a Class VI road shall not be permitted**”. Bergeron stated that he thinks the applicant is asking the Zoning Board to overturn something that says “**shall not**”. Gentile stated this is the essence of what the Zoning Board has to assess with the five criteria and whether there is sufficient grounds to grant relief from that statement. Bergeron agreed and stated a lot of the information as Gentile referenced as to drainage, etc., was outside the purview of this Board. Bergeron stated it comes down to this as being the merit of the argument. Gentile stated that is a point but what they are not discussing tonight is whether it is a good idea to develop property in Madison or whether it is a good idea to develop that property in Madison and the question is whether or not the property meets the five criteria for relief from the Zoning Ordinance and the Zoning Ordinance clearly states that subdividing on a Class VI road is not permitted so when they do their deliberation they will have to assess Salomon’s attempted reasoning for why those five criteria have been met. Gentile stated that the Board is focused solely on the question whether or not this property warrants a consideration for relief from the Zoning Ordinance.

Salomon stated he did not think he needed to respond any further but that he is aware of RSA 674:41 and that may be required of them in the future, but that is not for tonight.

Gentile stated this is still a Public Hearing and if the members of the public have anything further to say, that is ok but right now the Board is going to collect the Findings of Fact.

Findings of Fact:

1. The Madison Zoning Ordinance Article V Section 5.7 B is underpinned by RSA 674:41 which restricts the development on Class VI roads. To quote a relevant court case, "The purpose of this limitation on building on Class VI highways is to provide against such scattered or premature subdivision as would necessitate the excessive expenditure of public funds Glick v. Town of Ossipee, 130 N.H. 643 (1988).
2. The road layout which would have provided for the required 200 feet of frontage in accordance with the Zoning Ordinance Section 5.7 A and B as well as the reclassification to Class V which could have allowed a subdivision of the lot was disapproved by the Selectmen on September 22, 2022.
3. The Planning Board rejected the application without prejudice on September 7, 2022 based on the Zoning Ordinance Section 5.7 B before the selectmen had disapproved the road layout and reclassification.
4. The variance request is solely for permission to subdivide a 7.2 acre lot on a Class VI road into 3 lots, each over 2 acres which would meet the zoning requirements for lot dimensions.
5. The expense for the construction of the road improvements would be borne by the developer and future maintenance costs would be borne by the lot owners.
6. There is an existing home from 1996 on the lot which presumably met the requirements for building on a Class VI road at the time.
7. The lot was purchased in its current configuration in 2018 by the current owner after the town had made a series of boundary line adjustments to secure a 50 foot right of way for a potential cul-de-sac turn around.

8. All nine abutters are opposed to the project citing in particular issues with increased drainage onto their lower lying properties.

Salomon asked if the Public Hearing was still open? Gentile stated yes and Salomon stated just to be clear, they are seeking this variance in the context of three lot cluster subdivision proposal so if the variance were granted and it were limited to that, it would be fine with them. Gentile stated they could take that to the Planning Board.

Gentile stated that for the record, the Board does have a letter in their possession that all nine abutters signed the letter opposing the project.

Salomon clarified for the record that the Boundary Line Adjustment Plan was recorded in 2019 but it was prior to their deed. Salomon further stated the deed which they received from the town did not describe the property as it is shown on the Boundary Line Adjustment Plan and said it was 7.2 acres and the deed went on to say it was the same property taken by the town for taxes in 2014 which was the big piece and there is an internal conflict in the deed.

Bergeron stated this is outside the purview of this Board.

Salomon stated that as to #1. Notes of Findings of Fact, he wanted it to be clear that the proposal was before the Planning Board which specifically they are seeking a variance in context of that proposal is that the improvements would be at their expense and not the town expense and maintenance would be by the three homeowners unless the town takes it and if the town does take it, then the taxes generated by the new homes and the new valuation on the existing homes if it did not cover the entire cost, they would certainly subsidize it considerably.

Gentile asked for a motion to close the Public Hearing.

Motion by McAllister, seconded by Martin to close the Public Hearing. The motion passed **unanimously**.

Gentile stated the Public Hearing is closed and the Board will now deliberate on the five criteria.

Salomon left the meeting and told Gentile he would check with Young in the morning for the decision.

Findings on the five conditions for a variance:

1. The variance will not be contrary to the public interest
2. The spirit of the ordinance will be observed (answers for both 1 and 2 together):
 - The board finds that the balance of public interest does not support the variance because it would substantially change the character of the neighborhood and drainage issues could negatively impact the abutters downhill.
 - The spirit of the ordinance would not be observed because the purpose of restricting the

subdivision of lots on Class VI roads is to protect the public and future owners from unpredictable or unusual costs that can be associated with scattered, premature, or small, detached developments. In this case denying the variance creates no loss to the applicant and the gain to the public outweighs the benefit of relief from the ordinance to the owner.

3. Substantial justice is balanced against the owner because
 - The owner purchased a residential lot with a home on it. Disapproving the variance does not represent a loss to the owner, but possibly a reduction in potential financial gain. The gain to the public is the retention of the rural nature of the neighborhood and protection from the unpredictable costs of development on a Class VI road.
4. The values of surrounding properties are not diminished because
 - The development of two new homes with improved road surfaces would normally increase property values.
5. Literal enforcement would result in unnecessary hardship –
 - The board finds that there is nothing in the unique character of the property that would represent a hardship to the owner if the variance were not granted. The owner purchased a 7.2 acre lot with a home on a Class VI road which can continue to be used as a residence with no reduction in property value. The lot has no unique characteristics that would argue for its subdivision. Its elevation and distribution of wetlands has been argued to present a drainage challenge to abutters who are all lower so that the general purpose of the ordinance represents a fair and reasonable application of the provision of Section 5.7 B to the property. The purpose of the ordinance is to protect the public and future owners from the increased costs of servicing scattered or inadequately planned developments.
 - The applicant argued that the town intended to reclassify the road but did not, creating a hardship for the owner. The board finds that the minutes of the Planning Board from November 7, 2018, where there is a reference to reclassifying Danforth Lane to a Class V road is not a promise but a reference to a potential process over which the Planning Board has no final authority. Thus, the failure of the town to reclassify the road does not present an argument for hardship because the lot can continue to be used for its residential purpose without being subdivided.

Motion by Martin, seconded by McAllister to deny the variance because:

- The applicant has not shown that denying the variance would create an undue hardship because the property can be continued to be used for its original purpose as a single home lot in full compliance with zoning regulations and there are no unique characteristics of the lot which conclusively argue for the need for a subdivision on a Class VI road.
- And because subdivision would not be in the public interest because it represents scattered and unplanned development that can result in unpredictable costs to the public for the benefit of only a few people.

Roll Call Vote: Martin – Aye; Gentile – Aye; McAllister – Aye; Rau – Aye; Bergeron – Aye
The Motion passed **5-0**.

Gentile read aloud the provisions of the 30-day appeal period as follows:

“If one wishes to appeal, one must act within thirty days of the date on this notice – day one being the day after the date of Decision. The necessary first step, before any appeal may be taken to a higher Court, is to apply to the Board of Adjustment for a Rehearing. The Motion for Rehearing must set forth all the grounds on which you will base your Appeal. See New Hampshire Statutes, RSA Chapter 677 for details. Board members are advised to refrain from any discussion of the appeal with other board members and all parties to the appeal until all further appeal periods have expired”.

Gentile closed Case #23-02.

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Martin, Acting Chairman asked Young to read the case.

Young read aloud **Case #23-03 – Continued – Variance** request by Mark and Jacob McConkey, Agent for Samuel Shriro for property located at 14 Little Loop Road, Tax Map 109 Lot 121, from Article V, Section 5.9 C and 5.9 E of the zoning ordinance to permit the house to be 69.54’ from mean High-Water Mark of Pea Porridge Pond, where 75 feet is required. Also to permit the deck to be 62.79’ from the mean High-Water Mark of Pea Porridge Pond, where 75 feet is required and the house to be 55.55 feet from center line of the road way where 65 feet is required.

Young stated the one abutter from the March meeting that previously was not properly notified has now been properly notified.

Martin, Acting Chairman polled the Board:

Conflict of Interest: All members stated they had no conflict of interest in this case via roll call.

Waiver Request: There were none.

Regional Impact: All members stated they see no regional impact in this case via roll call.

Swearing In: Martin swore in all present that were there speak to this case.

Martin, Acting Chairman opened the public hearing.

Mark McConkey and Jacob McConkey, Agents for Samuel Shriro are here to present their case.

M. McConkey stated they had a Certified Plot Plan done and their plan is based on Paul King’s proposal with all the pins shown. M. McConkey stated the Shriros own two properties, being Tax Map 109, Lot 121 owned by Samuel Shriro and Tax Map 109, Lot 122 owned by Lynn Shriro. M. McConkey read out loud to the Board Members the five facts to support the variance request for Lot 121 as noted in the application. M. McConkey stated that at the time they did the application, there were four homes on Little Loop Road that are closer to the centerline than they are requesting relief from. When they went back after and shot from the centerline by laser to the fronts of the homes in this neighborhood, they

worked off of the GIS Map which they know is not a true and clear representation and what they found is that 15 homes on Little Loop Road, 11 of those homes are less than 65 feet from the centerline of the road which they are saying 73% of the existing homes do not conform with the 65 foot setback and the average distance of the nonconforming homes to the centerline is 49.35 feet and they are requesting a variance for 55.55 feet from the center of the road and this is an update to the application. M. McConkey stated they have an approved septic system that meets both the state and Eidelweiss setback requirements.

Bergeron asked when looking at the large-scale septic design plan, is the variance request specific only to the frontage from the channel and frontage from the road and the proposed two-bedroom house is in compliance with the requirements on the easterly and westerly side which are the two sidelines? M. McConkey stated that is correct. Bergeron further asked why they made a reference to a variance that was granted in 2005 and if it was the Thorne plan that was in the package? J. McConkey stated that was correct and it was for the same style residential use and granted the variance for relief to the Channel or relief to the road and he believes it was 55 feet to the road or 65 feet to the water. Bergeron asked if this variance was ever acted upon or did it expire? M. McConkey stated it was just for informational purposes.

Martin, Acting Chairman asked the Board Members if they had any questions. There were none.

Paul and Alma Rigazio of 10 Little Loop Road stated they are abutters of the property on the west side of the applicant's property. P. Rigazio stated they have owned their property for 35 years and they combined three lots into one lot for protection of the pond. P. Rigazio stated they have no objection to the house being built but that the pond is their main concern. They further stated there is quite a drop from the applicant's property to the water. They understand the lots are tiny and they are not objecting to the applicant building a house. They are not concerned about the setback from the road but the setback from the pond is their main concern. A. Rigazio stated in 2005 they had asked the town if they could add ten feet onto their deck and they were denied. They were told they could do a patio and they feel that the applicant should do a patio also and it is within the 75 feet and she feels it is not fair for the applicant to put a deck in when they were denied. P. Rigazio referred to the plan as shown on the poster board and stated there is a small triangle of the house that is within the 75-foot setback and he asked if the house could be rotated five feet back on that corner and then it would comply with the 75-foot setback from the pond? P. Rigazio also suggested the applicant put the proposed deck on the side of the house or a patio could be an alternative. A. Rigazio stated they are concerned with the foliage and asked if a lot of trees are going to be cut down. P. Rigazio also stated he wants the applicant to comply with the Zoning Ordinance that no more than 50% of the trees and brush are removed and their 25-foot setback should not be touched as far as their tree cover and he does not want the applicant's driveway to be expanded on their side. Gentile stated that for the record, that as far as the number of trees being removed, that has nothing to do with this Board and the Rigazios would need to talk with Robert Boyd, Code Enforcement Officer and Martin stated the Rigazios would need to talk to DES about the shoreline.

Bergeron asked M. McConkey if he has applied for comprehensive shoreline protection? M. McConkey stated they have not but that they were waiting until they knew what the square footage was but that the application is done and ready to go and it meets the standards.

Bergeron asked both M. McConkey and J. McConkey if they took the southeasterly corner of the proposed house and leave that in its position as planned and then rotate the house in a counterclockwise position so as to make the front of the home approximately parallel or parallel to that green setback line why is that not acceptable? J. McConkey stated as you rotate in a counterclockwise motion on the southeast corner of the house, the septic tank is close to the septic field and he is unsure if you could even rotate it a degree without infringing onto the septic field and they cannot bring the septic tank closer to the water by very much but maybe they could get a couple more degrees or rotation out of it but that it is five feet off of the house right now which is the minimum setback. He further stated that without asking for a waiver from the state, which would require a new construction approval you cannot move the septic field over any more as they are already at 10.14 feet with a 10-foot minimum and cannot elongate it either as it would then infringe on the 25-foot septic field setback in Eidelweiss and cannot move it back near the water as they are nearly 75 feet from the water.

McAllister asked if you could move the tank a few feet closer to the road, maybe top of the field? M. McConkey stated they may be able to rework it but it may be very close. M. McConkey stated they may be able to do that and it will be very close.

Gentile asked if there is there any benefit to move the house five feet? Bergeron stated in trying to protect various aspects of a property, he has a greater concern for protection to the Channel and the water then he does the road. He further stated if they consider the home as presented which is 22x30 with a 12x16 deck, there still is a variance condition no matter what the Board does.

Martin, Acting Chairman stated the Board can only deliberate on what they are presented with.

J. McConkey stated he will try to work to rotate the house and move the deck to the side

Rigazio asked if they are going to allow deck/patio within 63 feet of the water?

McConkey stated he was glad the Rigazios were present and he assured them that there has been no deliberation about cutting 50% of the trees in the basal area. He further stated that there cannot be any trees within 10 feet of the septic system and the closest they can be is 10 feet from the property line so there will be an opening of about 25 feet and cutting of trees on the applicant's property and not the Rigazios. M. McConkey stated that when they put in the Shoreline Application, the neighbors can come forward. J. McConkey stated they will try to rotate and keep the deck in front of the house. M. McConkey stated that if they try to move the deck to the side of the house, they would need a variance or they would have to move the septic system. M. McConkey assured the Rigazios the driveway is over on the other side with no plans to extend the driveway.

McConkey, Agent for Samuel Shriro requested to continue **Case #23-03** to the May meeting to adjust the proposed house and deck. He further stated he will be also asking for a variance for the deck. J. McConkey stated they will attempt to make the house facing the water to meet the 75 feet and will encroach more on the roadway but the deck will still be within the 75 feet and require a variance and they will be mindful of the abutters concerns.

Rigazio asked if the deck was going to be on the lower level? M. McConkey stated yes and it would be about 16 inches from the ground. J. McConkey stated that if the septic tank is moved, they may need a variance for that as well at next month's meeting.

Preliminary Notes on Findings of Facts:

1. A shared driveway exists, the lots are owned by husband and wife and initially used the lots together but they were not officially combined.
2. There is an expired variance for a similar dimensional requirement.
3. There is a certified plot plan for the lot, but not for the house.
4. The approval for the septic tank is in hand and it meets all the dimensional requirements.
5. The town shoreline setback is 75 feet, the state is 50 feet, the setback of 75 feet is not possible without encroaching on the roadway set back by another 12 feet, or approximately 42 feet from the centerline of the road where 65 feet is required.
6. The abutter to the south, 10 Little Loop, expressed concern about encroachment on the 75-foot setback to the water in particular.

Motion by Bergeron, seconded by McAllister to continue and reschedule **Case #23-03** to the May 17, 2023 meeting. The motion passed **unanimously**.

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MEETING NOTICE: Young reported that tonight’s Public Hearing notice was posted on March 29, 2023 in the Town Hall upper and lower levels, Madison & Silver Lake Post Offices and published on March 30, 2023 in the Conway Daily Sun. Abutters were notified by Certified Mail on March 29, 2023.

Gentile opened the Public Hearing for **Case #23-04**.

Young read aloud **Case #23-04** – Variance request by Robert Nelson for property located at 65 Madison Mountain Drive, Tax Map 116, Lot 45, from Article V, Section 5.9(A) of the Zoning Ordinance to permit construction of an addition within 25’ of side boundary line.

Conflict of Interest: All members stated they had no conflict of interest in this case via roll call.

Waiver Request: The applicant did not supply a certified plot plan. The applicant has the desire to proceed without the certified plot plan.

Motion by Martin, seconded by Rau to grant a waiver from the requirement of submission of a certified plot plan. The motion passed **unanimously**.

Regional Impact: All members stated they see no regional impact in this case via roll call.

Swearing In: Gentile swore in the applicant, Robert Nelson.

Gentile opened the public hearing.

Robert Nelson, applicant explained to the Board that he owns a ¼ acre lot and is adding a deck and an 8-foot addition to the existing house. There is no negative impact and this would increase the taxable value of his home. Nelson also stated that he did do a compass heading from the iron pins from the deed and the property has been in his family since 1965.

Gentile asked the Board if there were any further questions for the applicant. There were none.

Finding of Facts:

1. The house (1965) predates the Zoning Ordinance of 1987.
2. The house is approximately 25 feet from the north property line and approximately 70 feet from the centerline of Davis Lake Drive where the setback is now 75 feet.
3. The variance request is to extend the north wall approximately 8 feet to accommodate a small deck and entrance to allow minor renovations to the kitchen.
4. The board waived the requirement for a certified plot plan because the precision provided by a survey was deemed not worth the cost and time involved for this situation.

Motion by McAllister, seconded by Martin to close the Public Hearing. The motion passed **unanimously**.

Findings on the five conditions for a variance:

1. The variance will not be contrary to the public interest
2. The spirit of the ordinance will be observed (answers for both 1 and 2 together):
For the variance to be contrary to the public interest, and for it to violate the spirit of the ordinance, it must unduly and to a marked degree violate the basic objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public?
 This small addition will have no effect on the neighborhood and poses no threat to public health, safety or welfare.
3. Substantial justice is done because:
Any loss to the individual which is not outweighed by a gain to the public is an injustice.
 In this case where the homes were built on small lots well before the zoning ordinance took effect, it is common to have encroachment on current setback requirements, or to need such encroachments for minor renovations. This is such a case where a small addition cannot be made without encroaching current setback requirements, the strict enforcement of which in this case would provide no gain to the public but a restriction to the owner.
4. The values of surrounding properties are not diminished because
 Regular improvements and renovations to homes support property values
5. Literal enforcement would result in unnecessary hardship because owing to the special conditions of the property:
There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property because:
 The location of the house directly on the current setback predates the ordinance and it is a small lot in a neighborhood where such inconsistencies with the current setbacks are common. This renovation poses no particular imposition on the next property.
The proposed use is a reasonable one because:
 It is a modest and practical extension to a home which enhances the usability of the kitchen and rear exit.

Gentile asked the Board if they feel there is a reason the criteria is not met. The Board agreed that there is no reason.

Motion by McAllister, seconded by Rau to grant the variance because denying it would hinder the owner's reasonable use of the property in a neighborhood laid out well before the current setback

requirements were established and this minor renovation poses no threat to the public or abutters' welfare or change the character of the neighborhood. The motion passed **unanimously**.

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #23-04**.

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Bergeron stated he needed to recuse himself from **Case #23-05** as Bergeron's company and Jim Rines company have work going on between each other as well as in the past.

Gentile asked Bergeron to please take a seat in the audience.

Motion by Martin, seconded by McAllister to elevate Bill Dempster to a full voting member. The motion passed **unanimously**.

MEETING NOTICE: Young reported that tonight's Public Hearing notice was posted on March 29, 2023 in the Town Hall upper and lower levels, Madison & Silver Lake Post Offices and published on March 30, 2023 in the Conway Daily Sun. Abutters were notified by Certified Mail on March 29, 2023.

Young read aloud **Case #23-05 – Variance** request by James F. Rines, Horizons Engineering, Inc., WMS&E Division, Agent for Eva Selstam Heilman, Trustee of The Amended and Restated Trust Agreement of Eva Selstam Heilman and Stephen S. Hill, Trustee of the Stephen S. Hill Revocable Trust (THE TRUSTS) for property located at 87 Shieling Road, Tax Map 120, Lot 028, from Article IV, Section 4.5 (C) and Article V, Section 5.9 (C) of the Zoning Ordinance to permit the replacement of an existing nonconforming cabin that is 9.4' from the shoreline with a more nearly conforming cabin that is proposed to be 24.9' from the shoreline.

Conflict of Interest: All members stated they had no conflict of interest in this case via roll call.

Waiver Request: There are no waivers requested by the applicant.

Regional Impact: All members stated they see no regional impact in this case via roll call.

Swearing In: Gentile swore in Jim Rines, Agent for the applicant.

James Rines, from Horizons Engineering, WMS&E Division, Agent for the Stephen S. Hill Revocable Trust and The Amended and Restated Trust Agreement of Eva Selstam Heilman (THE TRUSTS) and stated they are asking for a variance from Article IV, Section 4.5 (C) and Article V, Section 5.9 (C) to permit the construction of a more nearly conforming cabin replacing an existing cabin. Rines stated the applicants came before the Board in 2020 for a variance for a 60-foot setback from Silver Lake. This variance was granted and at that time, there was discussion about replacing the cabin in its current location. Rines further stated that after consulting with the Shoreland Protection section of DES and talking with the town, it was decided they would remove the existing cabin and build a slightly smaller footprint being 16 square feet smaller which would be 24.9 feet from the water. Rines also stated they will be filing for a Shoreland Impact Permit for this replacement. They will have no sewer or water, just electricity.

Finding of Facts:

1. The legal basis for allowing a reconstruction:
Article 1 Section 1.3 B. of the Zoning Ordinance (in part)
Any structure existing at the time of the original passage of this Ordinance, March 1987, which does not conform to the maximum height limitations and /or minimum setbacks, shall have the right to continue indefinitely or may be demolished and reconstructed within one (1) year.
2. This application is for a reconstruction of an existing cabin which predates the ordinance.
3. The footprint is being reduced by approximately 16 square feet.
4. NHDES disapproved the reconstruction at the current location because it was not at least 20 feet from the shoreline, and worked with the engineer to approve a location which meets their standard and which is less non-conforming than the current cabin.
5. The existing cabin is in poor condition and needs to be demolished and rebuilt if it were to be used.

Rines stated they have not applied with NHDES but have consulted with them. Gentile stated the Board will make it a condition that they apply with NHDES and that the Board cannot require they have this in advance of getting the variance but the Board can require it as a condition.

Gentile asked if the Board if there were any questions and if not, asked for a motion to close the Public Hearing.

Motion by McAllister, seconded by Rau to close the Public Hearing. The motion passed **unanimously**.

Gentile directed the Board to the five criteria as contained in the application.

Findings on the five conditions for a variance:

1. **The variance will not be contrary to the public interest because:**
By this test, the requested variance will not alter the essential character of the neighborhood. The requested variance will not alter the essential character of the neighborhood because the proposed cabin will be more nearly conforming to the shoreline setback. The existing nonconforming cabin is 9.4 feet from the shoreline, while the proposed cabin will be 24.9 feet from the reference line.
2. **The spirit of the zoning ordinance will be observed because:**
It is our opinion that, based on these two tests that the courts have used in rendering a decision upon whether the spirit of the ordinance is observed, the essential character of the neighborhood will not be altered as expressed in the paragraph 1, above, nor will the granting of the variance threaten the public health, safety or welfare or the public. In fact, by moving the structure further from the shoreline, there is an argument to be made that it will enhance the public health, safety or welfare of the public. In fact, by moving the structure further from the shoreline, there is an argument to be made that it will

enhance the public health, safety and welfare by making improvements to water quality, which everyone benefits from.

3. Granting the variance would do substantial justice because:

Granting the requested variance will allow the applicant to replace the existing nonconforming cabin with a more nearly conforming cabin, further from the shoreline. The structure is considered an accessory structure and is required to be setback at least 20' from the reference line per NHDES rules.

Losing the ability to construct the more nearly conforming cabin as depicted on this plan in while increasing the waterfront setback, would be a greater loss to the property owners than any gain to the general public. In fact, there is an argument that denial of the variance would harm both the applicant and the public by preventing greater setback from the shoreline with the proposed structure.

4. The values of the surrounding properties will not be diminished because:

New construction which is consistent with development patterns in the neighborhood has been found to have a neutral or positive impact in property values and that would be the case in this instance. It certainly would not have a negative impact on surrounding property values.

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

(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

There are special circumstances of this lot that distinguish it from other properties similarly zoned which include the unique configuration of the lot and the location of the existing non-conforming structure that was built prior to the adoption of the Zoning Ordinance. Also, a traveled way runs through the middle of the property which serves as access to abutting properties. It is these unique circumstances which distinguish it from other parcels similarly zoned. When the setback regulations containing in the Zoning Ordinance, which were designed for vacant, newly created lots which comply with geometric lot sizing and shape of the Zoning Ordinance are applied to this uniquely configured parcel with an existing nonconforming structure, it creates the unnecessary hardship in the land that distinguishes it from other similarly zoned.

Based on our reading of the Zoning Ordinance General Purpose, it is our position that granting the requested variance from the shoreline setback would not alter the character of the neighborhood or jeopardize the health, safety, or general welfare of the inhabitants of the Town of Madison. Nor would it frustrate the purpose of the Zoning Ordinance or advance the purpose of the Ordinance in a fair and substantial way due to the special circumstances of the property articulated above. This is because of the "special circumstances" of this property identified above.

This is because we are not altering the use since we are exchanging one nonconforming cabin with a more nearly conforming cabin. We are increasing the setback to the lake by more than

100% of the existing condition, and complying with the NHDES Shoreland Water Quality Protection Act by providing stormwater mitigation where none presently exists, thereby enhancing the health, safety, and general welfare of the public by improving water quality.

Therefore, it is our position that we satisfy these criteria required for the granting of the requested relief.

AND

(b)The Proposed use is a reasonable one because:

Because a residential use is allowed in the zone.

(b) If the criteria in (a) and (b) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property.

Not applicable.

Gentile stated the Board has adopted the Findings on the five conditions for a variance as written in the application.

Gentile asked the Board for a motion to grant the variance based on the arguments presented for these five criteria?

Motion by McAllister, seconded by Martin to grant the variance because the request does not unduly and to a marked degree, violate the purpose of the ordinance since a DES permit for a 24.9 setback assures that the requirement to provide for public health, safety, and welfare is met, the improved cabin enhances the neighborhood, is less non-conforming, and public right of way through the property makes it impossible to meet the town's 75-foot setback requirement.

Roll Call Vote: Martin - Aye; Gentile - Aye; McAllister - Aye; Rau - Aye; Dempster - Aye
The motion passed **5-0** by roll call vote.

Gentile read the provisions of the 30-day appeal period. Gentile closed **Case #23-05**.

APPROVAL OF DRAFT MINUTES - Motion by McAllister, seconded by Rau to accept the March 15, 2023 minutes as amended. The motion passed **unanimously**.

ELECTION OF CHAIRMAN AND VICE:

Gentile asked the Board Members for nominations for Chairman and Vice Chairman.

Motion by McAllister, seconded by Rau to nominate Gentile as Chairman and Martin as Vice Chairman for the upcoming term. The motion passed **unanimously**.

ADMINISTRATION: Each Board Member introduced themselves and recited their work background to the Board Members.

ADJOURNMENT: Motion by McAllister, seconded by Rau to adjourn. The motion passed **6-0** and the meeting adjourned at 9:35 PM.

The next meeting of the Zoning Board of Adjustment will be held on May 17, 2023 at 6:00 pm.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator