



**TOWN OF MADISON
PLANNING BOARD
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**APPROVED PLANNING BOARD MINUTES
October 6, 2021**

MEMBERS PRESENT: Marc Ohlson - Chair, Dave Cribbie, Charlie Allen, Josh Shackford, Paul Marks, and Jay Buckley. Paul Littlefield and Phil LaRoche excused

OTHERS PRESENT: Land Use Administrators Kim Cyr, Shawn Bergeron, Steve Lyons, Mr. & Mrs. Don Burnham, Dirk Landis, Nicole Nordlund, Daymond Steer, and Noreen Downs - Madison TV

CALL TO ORDER: Chairman Ohlson called the meeting to order at 7PM.

ELEVATION OF ALTERNATES: Mr. Cribbie made a **MOTION** to elevate Mr. Buckley; seconded by Mr. Marks. All approved

APPROVAL OF AGENDA: Mr. Cribbie made a **MOTION** to approve the agenda; seconded by Mr. Marks. All approved.

APPROVAL DRAFT MINUTES: Mr. Marks made a **MOTION** to approve the September 1, 2021 minutes; seconded by Mr. Cribbie. All Approved.

PUBLIC COMMENT: Mr. Steer inquired if the STR's are on hold. Mr. Ohlson responded that the subject would be discussed later in the meeting.

POSTING DATES & LOCATIONS: Notice was posted on September 23, 2021 at the Madison and Silver Lake Post Offices, in the Madison Town Hall - upper and lower levels. The meeting notice was published in the Conway Daily Sun.

ZONING DISCUSSION: The Board discussed the definitions to be presented at a public hearing on November 3, 2021. Mr. Ohlson read Atty Mahlia's letter regarding 1.3b and his updated version of Mr. Bergeron's 1.3b. The letter reads as follows:

September 28, 2021

Marc Ohlson, Chair
Madison Planning Board
P.O. Box 248
Madison, NH 03849

Re: Madison Zoning Ordinance Section

1.3B Dear Mr. Ohlson:

In October 2017, Bob Boyd, the Town's Code Enforcement Officer, issued a building permit to Mark and Teresa Richey, the owners of property located at 599 East Shore Drive (Map 144, Lot 8) in Madison. The Richey's neighbors, the Connolly's, filed an appeal of Administrative Decision to the Madison ZBA, and in 2018, the ZBA held a number of public hearings and eventually denied the Connolly's appeal and affirmed Mr. Boyd's issuance of the building permit.

The Connolly's appealed to Carroll County Superior Court, where I argued in support of the building permit and the ZBA decision together with the ZBA's lawyer, Matthew Decker. Judge Ignatius issued a decision in 2019 affirming the building permit and the ZBA decision.

The Connolly's then appealed the Superior Court decision to the New Hampshire Supreme Court (NHSC). Unfortunately, that appeal landed in the NHSC at a time when the NHSC was in a period of transition. The NHSC had to specially assign a retired Superior Court Judge to participate in this case. Once again, Attorney Decker and I argued in support of the building permit and the ZBA decision (and the Superior Court decision as well). A divided court issued a surprising decision in February of this year, overturning the Superior Court decision, and thus overturning the ZBA decision and vacating the building permit issued by Mr. Boyd.

The court was so divided that they issued the decision under "Other Final Orders," meaning that it was for informational purposes only and it has no precedential value whatsoever. Three NHSC Justices wrote a dissenting opinion strongly in favor of the Superior Court decision, the ZBA decision, and Mr. Boyd's issuance of the building permit.

I then expected the Planning Board in conjunction with the ZBA to undertake an effort to clarify 1.3B so that the language would be consistent with the thoughtful and well-reasoned decision of the Madison ZBA, which worked extremely hard on the Richey case over the course of several public hearings.

The ZBA did a great job of painstakingly breaking down and interpreting 1.3B, line by line.

I was surprised to learn that the Planning Board recently proposed eliminating Section 1.3B altogether. As I am sure you know, the suggestion that property owners in Madison can simply go to the ZBA and apply for a variance to expand a non-conforming structure is not nearly the same as having a right to a modest expansion (the so-called 50 % rule in 1.3B) that does not result in any additional setback violations. The variance hardship standard is extremely difficult to meet. Almost all towns have some version of the 50 % rule, like Madison's 1.3B. Madison just needs to clean theirs up, not get rid of it all together.

I would like to share with you some of the language used by the three dissenting New Hampshire Supreme Court Judges. They said:

•We dissent from the majority's conclusion that the Trial Court . . . erred by upholding the ZBA's interpretation of the 50 % restriction. We agree with the Trial Court (Judge Ignatius in the Carroll County Superior Court) that the ZBA's interpretation of the zoning ordinance was neither unreasonable nor unlawful and was not inconsistent with the plain language of the ordinance. We also agree with the Trial Court that applying the 50 % expansion cap on the non-conforming part of the existing building,

without restricting the conforming portion of the building, reflects a sound policy that the court will not disturb. See Peabody v. Town of Windham, 142 N.H. 488, 493(1997) (explaining that the ultimate purpose of zoning regulations is to reduce non-conforming uses to conformity as quickly as possible). Applying the 50 % restriction as interpreted by the ZBA is consistent as well with a municipality's obligation to enact or amend zoning ordinances only when doing so promotes the health, safety, or the general welfare of the community. RSA 674:16,1 (2016). Such legitimate regulatory purposes are served by allowing the expansion of a non-conforming structure that does not make the structure more non-conforming.

By contrast, in a case where the existing footprint of a one-story home is not enlarged, the majority's holding would limit the addition of a second floor to only half the first floor footprint. Such a restriction does not contribute to the health, safety or welfare of the community, is inconsistent with the owners' right to the reasonable use of their property, ignores the reference to footprint in this ordinance, and dispenses with the required evaluation of the extent to which the challenged expansion impacts the neighborhood. See Granite State Minerals v. City of Portsmouth, 134 N.H. 408, 413 (1991). We would not construe the ordinance to impose this unreasonable and arguably unconstitutional restriction. See Appeal of Public Serv. Co. of N.H., 122 N.H. 919, 922 (1982) ('A statute is to be construed to avoid a conflict with constitutional rights whenever reasonably possible').

Accordingly, because the Trial Court in this case (and the ZBA) correctly determined that the proposed project complies with the 50 % restriction, we would uphold that determination."

I would urge the Planning Board work with your counsel to make some slight changes to 1.3B to improve the language - not get rid of it altogether. In fact, I believe that the amendment to 1.3B proposed by Shawn Bergeron would be a much better option than eliminating the section altogether. Mr. Bergeron's proposal is attached. I have only added the underlined sentence at the end of the 4th bullet point, which is consistent with the Madison ZBA's extensive and thoughtful analysis of 1.3B in the Richey case.

Sincerely,



Peter J. Malia, Jr

PJM,Jr./dt

cc: Stuart Lord, Chair - Madison ZBA

Kim Cyr, Administrative Assistant, Madison Land Use Board Mark and
Teresa Richey

Matthew Decker, Esquire Shawn

Bergeron PJM/current.Richey.

ltr.Olson.09-16-21

B. 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.

Legally established structures, which do not conform to present setback requirements, may be expanded in size, provided the addition or expansion complies with current setback requirements, or:

- The setbacks to the expanded **area/s of the** structure are not less than the non-conforming setbacks to the original structure; and
- **No area of** the expanded structure is **Re** closer than the existing non-conforming structure to the high-water line; and
- The expanded structure is no taller above sea level than the highest roofline of the existing structure;
- **The footprint of any such expansion that does not fully comply with all setbacks**, shall be limited in size to a total of fifty-percent (50%) of the square foot area of the first floor footprint of the existing structure as of March 2007, not including decks, chimneys, etc. **Any such expansion refers only to horizontal (lateral at ground level) expansion (not vertical expansion) of the portions of nonconforming structures that are outside of the legal building envelope {i.e. only applies to footprint expansion within the setback}.**
- **Additions or expansions to existing non-conforming structures where the entirety of such addition or expansion fully complies with the present setback requirements as outlined within this Ordinance shall not be subject to the four requirements above, but shall comply with all other requirements of this Zoning Ordinance.**

Mr. Ohlson continued by reading the email response that he received from Atty Laura Spector-Morgan regarding 1.3b. It reads as follows:

From: Laura Spector-Morgan <laura@mitchellmunigroup.com>
Subject: RE: Letter from Atty Malia
Date: October 4, 2021 at 2:46:25 PM EDT
To: marc Ohlson <verland.ohlson@gmail.com>

Hi Marc. I did review the supreme court's decision in connection with a different project I am working on.

It is entirely up to the planning board whether to eliminate or amend section 1.3B. It's true that many towns allow the expansion of a nonconforming structure to some extent either by right or by special exception, but certainly there is no requirement that the towns allow that. In fact, the general rule of zoning is to reduce nonconformities to conformities as quickly as possible, and not allowing expansions of nonconforming structures is entirely consistent with that goal. Is there a reason the board wanted to eliminate rather than amend section 1.3B?

Should a property owner disagree with the planning board's decision on how to proceed, they could submit a petitioned warrant article to change the zoning in the manner they desire (though I hate when that happens because if both amendments pass it's a mess).

And, by the way, Peter is wrong about the number of dissenting justices. Two justices dissented on this issue—had three dissented, it wouldn't have been a dissent—it would have been the decision.

Please let me know if I can be of further assistance. Thanks!

Laura

Laura Spector-Morgan, Esquire
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And lastly, Mr. Ohlson read Mr. Bergeron's proposed version of 1.3b and that reads as follows:

B. 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.

Legally established structures, which do not conform to present setback requirements, may be expanded in size, provided the addition or expansion complies with current setback requirements, or:

- The setbacks to the expanded area/s of the structure are not less than the non-conforming setbacks to the original structure; and
- No area of the expanded structure is ~~no~~ closer than the existing non-conforming structure to the high-water line; and
- The expanded structure is no taller above sea level than the highest roofline of the existing structure;
- The footprint of any such expansion that does not fully comply with all setbacks, shall be limited in size to a total of fifty-percent (50%) of the square foot area of the first floor footprint of the existing structure as of March 2007, not including decks, chimneys, etc.
- Additions or expansions to existing non-conforming structures where the entirety of such addition or expansion fully complies with the present setback requirements as outlined within this Ordinance shall not be subject to the four requirements above, but shall comply with all other requirements of this Zoning Ordinance.

Mr. Cribbie made a **MOTION** to use the proposed language from Shawn Bergeron's 1.3b proposal; Selectman Shackford seconded. The **MOTION** was defeated 3 to 2 with Buckley, Marks, and Allen opposed.

Mr. Allen made a **MOTION** to use the following language for 1.3b: 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, seconded by Mr. Marks. The **MOTION** passed with Cribbie and Shackford opposed.

Mr. Cribbie made a **MOTION** to use the following language for the definitions as follows:

Footprint

The outermost exterior dimensions of a structure as viewed from above, including any permanent extensions such as balconies, decks (attached or unattached) steps, overhangs and chimneys. This footprint is not measured in volume.

Cooking

Equipment is supplied for the purpose of cooking food such as but not limited to a traditional stove/range/oven located anywhere within the separate and independent living space from the primary dwelling unit.

Sanitation

Equipment is supplied for the purpose of sewage removal and includes but is not limited to items such as traditional septic system, a composting toilet, and incinerator toilet, etc. Refer to State of New Hampshire Department of Environmental Services Septic Standard ENV-WQ1000.
Seconded by Mr. Buckley; All Approved.

Mr. Bergeron suggested that the Board create a definition for Short-Term Rental. Selectman Shackford explained that something needs to be put on a separate ballot at town meeting to see if the voters want to allow Short-Term Rentals to be allowed in non-commercial zones. Mr. Allen suggested that the Board define STR's, then propose a vote, and then create an ordinance. Mr. Ohlson thinks the Board should present a definition and ordinance. Mr. Buckley stated that VDOE has no commercial use allowed. Mr. Ohlson read the STR definition from the August 11, 2021 Planning Board meeting. It reads as follows:

“Short-Term Rental” means a non-owner occupied residential dwelling unit where transient lodging with sleeping accommodations for fewer than 16 occupants is provided for compensation for stays of any duration between one and 30 consecutive nights, and where the dwelling unit would normally be considered a residential living unit not associated with regulated commercial activities such as but not limited to a hotel, motel, or bed-and-breakfast.

Resident Mr. Landis spoke regarding STR's and asked for clarification about them and the regulations that are in place.

Mr. Cribbie made a **MOTION** to add a definition and language for STR as stated above; seconded by Mr. Buckley. All Approved. Mr. Marks added that we have the language reviewed by legal counsel and ask for a response quickly to have it available for the next meeting.

LEDGE POND ROAD DISCUSSION: The Board sent a letter to Mr. Coleman to request he come to tonight's meeting. Mr. Coleman did not attend. The Board discussed the next steps to pursue a course of action regarding the situation. Mr. Cribbie suggested having a non-public meeting with our attorney. Mr. Ohlson will contact Atty Laura Spector-Morgan and schedule a meeting to discuss options for the situation. Mr. Burnham inquired if the Board will have something before the next meeting in November. He is concerned that Coleman's will access 300 acres of land and material across the bridge.

CHAIRMAN'S REPORT: Mr. Ohlson had nothing to report.

SELECTMAN'S REPORT: Mr. Shackford informed the Board that the Town and the Planning Board can have the same attorney.

CORRESPONDENCE/ADMINISTRATION: Mrs. Cyr presented the lot merger for lots 6 & 8 Lakeview Drive. The lot merger was signed by Mr. Ohlson and will be executed. The Board also received the updated Letter of Credit for Norja Inc.

BUDGET: There were no expenditures. The Board reviewed the budget sheets for 2022. They increased the master plan budget line by \$100.00.

ADJOURNMENT/ MOTION: Mr. Cribbie made a **MOTION** to adjourn; Mr. Allen seconded. All Approved. The meeting adjourned at 9:08pm

Respectively Submitted:
Kim Cyr, Land Use Administrator