



**TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
PO BOX 248
MADISON, NEW HAMPSHIRE 03849
planning@madison-nh.org**

Phone: 603-367-4332 x303 Fax: 603-367-4547

**ZBA MINUTES
January 18, 2023**

ATTENDANCE: Chairman Drew Gentile, Vice-Chairman Jake Martin, Doug McAllister, George Rau, Bebe Bartlett, Alternate – Marc Ohlson

EXCUSED: Mark Totman

OTHERS PRESENT: Madison TV, Kasia Scotsas, Kate Young, Land Use Boards Administrator and other members of the public

CALL TO ORDER: 6:00 PM by Gentile. Rau led the reciting of the Pledge of Allegiance.

Gentile stated there is a five-member board for the **Request for Rehearing** of Case #22-12. Gentile explained this is a public meeting, but not a public hearing and no public input will be accepted.

Young read aloud **Case #22-12 – Continued – Request for Rehearing from Rick L’Heureux** - Variances are requested by Ronald Briggs of Briggs Land Surveying as Agent for Mark S. Sherwood and Heather J. Sherwood for property located at 1589 Village Road, Tax Map 117 Lot 061, from Article IV Section 4.5C to construct a house within 12.7’ of poorly drained soil where 50’ is required and within 30.4’ of very poorly drained soil where 75’ is required; and to place a septic tank within 27.7’ of poorly drained soil where 75’ is required and within 63.0’ of a ditch where 75’ is required; and construct a leach field within 27.0’ of poorly drained soils where 75’ is required.

MEETING NOTICE: Notice is hereby given that the Madison Zoning Board of Adjustment will be holding a Public Meeting at the Madison Town Hall Meeting Room, Wednesday, January 11, 2023 at 6:00 P.M., to consider the **Request for Re-hearing** of Case #22-12 Sherwood of Map 117, Lot 061, which was posted at Town Hall, Silver Lake and Madison Post Offices on January 3, 2023 and revised notice posted on January 12, 2023.

Gentile stated the Board decided to approve the variance request for the house, septic tank and leach field on November 16, 2022. Gentile read aloud the Request for Re-hearing which was received within the 30 days and was received by Young, Land Use Boards Administrator on December 14, 2022 from Rick L’Heureux.

Gentile stated the Board needs to consider whether or not Martin needed to recuse himself, and if he did not, then he could continue to operate and they still have the five-member Board if Martin cannot.

Gentile further read aloud the official requirement of members of the Zoning Board of Adjustment and further clarified in Atherton v. Concord, 109 N.H. 164 (1968) and Gentile read this case aloud.

Gentile asked Martin what his relationship is between himself and the applicant, Mr. Sherwood? Martin stated Mr. Sherwood is the brother of his wife's stepmother and that he has no relationship with Mr. Sherwood and believes he has never been in the same room with Mr. Sherwood other than the meeting on January 11, 2023. Gentile stated he believes that the relationship between Martin and Sherwood is distant enough.

Gentile asked the Board if they had any comments. Rau replied none in this context.

Gentile explained there are two reasons why the Board may choose to rehear, one in the case of conflict of interest, if that were to be established, that would be a reason. There are two reasons they need to consider with regard to the second part of the Request for Rehearing and that is it must present new information that the Board was not aware of, or any underlying procedural issue and these are the only two conditions the Board can decide to rehear the case. He further stated that formally, the Board can assess its own procedures beyond that, but that has to be done within 30 days of the original decision and that has already passed.

Gentile explained that the Board needs to decide if they sufficiently addressed the data presented. He further stated that the exact nature of the encroachment on the Town's requirement for a setback was specified in the application as 12.7' and also listed in the Statements of Fact the Board considered in their deliberation the following: (1) that a DES permit for the septic system and leach field were both in hand already approved (2) the construction for the site the house septic system, and driveway will all be confined to portions of the lot which are not wetlands, (3) the construction plan includes additional drainage around the house and the agent worked with the state to position the septic system and house in the best location on the lot, which resulted in changes from the original building plan.

Gentile is proposing that the Board was fully aware of all the information they have and that they discussed those things and although the Board may not have been completely explicit in their wording, he believes there was no failure in process and as stated in final deliberation in the five criteria, it is mentioned that "Extensive care was taken to select the best location for safe building including special drainage and an appropriately safe septic system. There is minimal risk associated with the construction. The project fits the location and represents an improvement over past usage. There is no substantial gain to the public in denying construction of house which adds to the neighborhood with no impact on public health".

Gentile asked the Board if they felt, in reviewing the Statements of Fact, if there was an error in procedure that would warrant a rehearing. All members stated no.

Findings of fact relative to the appeal by Rick L'Heureux to the approval of variance in Case #22-12

1. The appeal was received on Dec. 14, within the 30-day appeal period of the decision, day one having been Thursday, Nov. 17, 2022.
2. The first ground for the appeal was a challenge that Jake Martin should have recused himself because his mother-in-law is the applicant's sister.
3. Jake Martin stated that Mark Sherwood is his mother-in-law's brother and further stated that he and Mark Sherwood have no relationship with each other or any contact with each other beyond living in Madison.

4. The second and final ground of the appeal is that the board erred in procedure by not gathering proper and adequate information on which to base their decision.
5. No new information was provided to the board in the appeal process other than the relationship between Jake Martin and Mark Sherwood.
6. Minutes of the meeting of November 16 were approved at the regularly scheduled ZBA meeting on Dec. 21, 2022.

Summary Notes of the board deliberation:

1. The framework for disqualification due to conflict of interest was quoted from RSA 673:14 and commented on by a further quote from Atherton v. Concord, 109 N.H. 164 (1968), noting that “interest must be ‘immediate, definite, and capable of demonstration; not remote, uncertain, contingent or speculative.’” (from Section III page 11 of the 2021 Zoning Board Handbook from the New Hampshire Office of Strategic Initiatives). Chairman Gentile further commented that familial relationships that constitute a conflict of interest are generally recognized as direct family and members of the same household, so parents, siblings, children, possibly grandparents or grandchildren.
2. The board noted that the family relationship is too distant to constitute conflict of interest, and that there is no other relationship between the two different from any other resident of Madison.
3. With respect to the accusation of procedural error, the board noted that the specific setback encroachment was properly noted in the application, that the discussion included the increase to 12.7 feet from the 10 feet on the plot plan due to adjustments by the agent after discussion with DES. The board further noted that the findings of fact for November 16, specifically points 1, 7, 8, 12, and 14 indicate that detailed information regarding the justification for the variance request was available to the board and part of the deliberation.
4. The minutes of November 16 include in the record of the discussion of the five criteria on question 3 that “Extensive care was taken to select the best location for safe building, based on the testimony of the agent that he had worked with DES to place the house and the septic system in the best location (point 14 of the findings of fact).
5. The board concluded that while they may have made a more explicit statement about how the unique characteristics of the property present unusual hardship, that sufficient information was available and considered in the decision so that there was no error in procedure.

Moved to deny the rehearing because there was no demonstrable conflict of interest for Jake Martin, there was no new information presented to the board, and the record of the decision on November 16 shows that adequate information was available to the board so there is no procedural error.

ELEVATIONS: Motion by Bartlett, seconded by McAllister to elevate Ohlson to a full member. The motion passed **unanimously**.

Motion by McAllister, seconded by Bartlett to deny the Rehearing based on the fact that Martin does not need to recuse himself and that there is no evidence that the Board had a procedural error in assessing the data.

Discussion:

Gentile stated the motion should be amended to add “and no new data was presented”.

Roll call Vote: McAllister – Aye; Rau – Aye; Gentile – Aye; Ohlson – Aye; Bartlett - Aye

The motion passed **5-0** by roll-call vote.

Gentile stated that if L’Heureux wanted to appeal further, he would have to file with the Superior Court. Ron Briggs stated the alternative is now the New Hampshire Housing Appeals Board.

Gentile read the procedures of the 30-day appeal period. Gentile closed Case #22-12.

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Case #23-01 - Gentile commented that this Board is allowed to consider this variance without prejudice, meaning that they will consider this as though it had not been constructed which is to the Derman’s advantage. The Board will consider the five criteria without prejudice but there is some risk the Board may decide otherwise and that the Board has nothing to do with the Town’s right to fine and if the variance is granted, it does not alleviate Derman from any fines.

Young read aloud **Case #23-01**– Variance is requested by Konstantin Derman and Zoya Derman, for property located at 9 Klausen Road, Map 206, Lot 02, to ask for a variance from Article V Section 5.9 of the Zoning Ordinance to permit a lower deck to be built less than 25 feet from the north side boundary line.

MEETING NOTICE: Young read the posting information: Posted at Town Hall, Silver Lake and Madison Post Offices on; January 3, 2023 and reposted on January 12, 2023 Published in the Conway Daily Sun on January 12, 2023 and Certified mailings were sent on January 3, 2023.

Gentile stated that Martin can vote on this case and Ohlson is now an alternate.

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

Waiver Request: Gentile read aloud the waiver request for a Certified Plot Plan dated December 13, 2022.

Discussion:

Gentile asked the Board if they want to accept the waiver of the Certified Plot Plan and can they accept the attached drawings in lieu of a Certified Plot Plan? McAllister stated he does not think there is an issue but the Board seems to be setting a precedent by doing this all the time and on an individual case by case situation it is not an issue but as a whole, the board should require a Certified Plot Plan.

Derman stated she is on the list with the surveyor.

Bartlett stated on the waiver request in general, the Board may want to consider if people have made due diligence to obtain the Certified Plot Plan and if they have not, then the Board can discuss it with them and if they tell the Board they are on a surveyor’s list and it could take a year or more, then the Board needs to decide if it is reasonable or unreasonable for what they are requesting.

Motion by McAllister, seconded by Bartlett to accept the Waiver of Certified Plot Plan. The motion passed **unanimously**.

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

Gentile explained the rules of procedure to the applicant.

Swearing In: Gentile sworn in Zoya Derman.

Zoya Derman stated they bought the property in February, 2022. When they visited the property, it was covered in snow, there is a tremendous view of Chocorua Mountain and a steep slope to go down. The entrance into the house is from only the deck area and the driveway is next to the septic system. To go into the house, you would have to go through the deck. There is also a nice long big hallway downstairs but nothing is built around it to actually use that hallway so it drops into the foundation. When spring came, the deck itself was in disrepair. The roof was leaking straight onto the deck. They built a new roof to protect the deck and they have a permit for that. During this process they found that it was very difficult to get the property surveyed and due to timeframes, it was also hard to find a contractor. They finally found a contractor and at that time, her husband was going to file for a permit but he forgot and the deck was mostly constructed by the time they finished with the permit and filed it and her husband thought the permit would take a really long time and it actually only took a week. This is when they got the denial for the downstairs deck. The upstairs deck is 10 feet. The difference between the upstairs deck and the downstairs deck is two feet, not five feet because both of the decks, the original one, was built 2 1/2 -3 feet longer than it should be based on the variance and based on the research her husband did, he found that it is supposed to be 20' from the property line and when they constructed the downstairs deck, they built it 20 feet from the property line. When they filed all the paperwork and still in the process of building everything and the main frame was already up, they found out they were wrong on the variance and the research they did was incorrect and it should have been 25 feet not 20 feet and ended up being 5 feet into it. They felt they had to repair the deck as they have two children and her mother uses a walker and they could not get her mother up the stairs to the upper deck and made the stairs wider so she can use her walker. They do a lot of winter sports and they set up a place to keep ski gear on the lower deck, as there is not much room on the upper deck. They misjudged on the setback requirement. They are also going to be planting spruce and pine trees between the property lines in the spring.

Martin stated the distances between the upper and lower deck listed on the application are confusing and the setback is 20 feet so the lower deck at 5 feet too close and the upper deck 3 feet too close. Derman stated the upper deck was not changed, they used the original frame. Martin stated the upper deck was in violation and do we have a variance for that. Gentile stated it has been over ten years and no one has raised any issue.

Rau asked why they went out two more feet on the lower deck than the upper deck? Derman stated they wanted more room for her mother in case her mother needs a wheelchair in the future.

Notes on Finding of Fact

1. The house was originally built in 1990.
2. The closest neighbor stated that he would not object to the variance, no other abutters commented.
3. The owner stated that the 2 foot extension of the deck to a 20 foot setback was intended to meet what they erroneously thought was the setback requirement of 20 feet.
4. The home was purchased in February of 2022 while there was significant snow cover, it was discovered later that the deck was in serious disrepair.
5. The original configuration required the use of stairs going up to the deck for access to the house, the first-floor access was down an undeveloped grade to a door that opened into the first-floor basement several feet above the floor without any stairs.
6. This overall configuration was unusable for a member of the family who uses a walker, as well as being generally unsafe.
7. The owners could not find a surveyor to do the certified plot plan and are still on a waiting list.
8. The lot is approximately ½ acre, the long axis being NE/SW. The house sits in the middle of the lot and the deck faces the long side of the lot to the northwest for a mountain view, the drive is on the SE side of the house
9. The owner stated that the reasons for the wider lower deck were to provide more space to accommodate the movements of the handicapped mother as well as provide place to stage winter sporting equipment.
10. The upper deck is 22 feet from the property line, the lower deck is 20 feet. There is an existing encroachment of the 25-foot setback requirement by the upper deck, there was no deck on the first floor, so construction of a deck of any size on the first floor would have required a variance, the owner opted for the wider deck for reasons stated above.
11. The placement of the deck on that side of the house is the only option because the southwest and northeast sides have a significant slope requiring stairs. The land to the northwest is level and the access door for the first floor is on the northwest (mountain view side) wall.
12. The construction had already taken place at the time of the variance application, the building inspector was engaged in the process. The applicant was informed that the ZBA would consider the application without prejudice, but that if the variance were granted, that would have no effect on how the town might process building without a permit.
13. The quality of the construction is a significant improvement over the original configuration.

Motion by Rau, seconded by McAllister to close the public hearing for Case #23-01. 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):
Multi-level decks are a common feature of homes in the neighborhood, the overall effect is that the home is aesthetically improved, and the property is much more accessible and usable. This is an improvement to the neighborhood. The overall safety of the property is improved, so the character of the neighborhood is enhanced and the impact on general safety is improved.
3. Substantial justice is done because

The overall effect is to allow access to the house from both the first and second stories in a manner that permits use of both decks by the mother who uses a walker. The wider lower deck provides adequate space for the walker as well as staging room for winter sports equipment or enjoying a nice view.

4. The values of surrounding properties are not diminished because
The improved aesthetics and usability of the house improve its value and thus positively affect local property value.
5. Literal enforcement would result in unnecessary hardship because
The slope on the southwest and northeast sides of the house makes it impossible to use that area for anything but stairs, and the lot on the immediate northwest side is level, making it the most reasonable place for a deck. Limiting the first-floor deck to the existing upper story deck would still have required a variance, but the extension to 12 feet on the first floor significantly enhances the usability of the property. The narrow dimensions of the lot present a challenge, the variance is a reasonable request and there would be no demonstrable benefit to the public or abutters in denying the variance.

Motion by McAllister, seconded by Rau to approve request from the applicant for the variance as submitted. The motion passed by Roll Call vote **5-0**.

Gentile read the procedures of the 30-day appeal period. Gentile closed Case #23-01.

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APPROVAL OF MINUTES: **Motion** by McAllister, seconded by Rau to approve the December 21, 2022 minutes as written. The motion passed with Gentile abstaining as he was not at the January 11, 2023 hearing.

ADMINISTRATION:

Gentile stated he had a few comments because of procedural questions with the Rehearing and stated the Board is allowed to assess its own procedures and this has to be done within the 30 days of the original decision not in the context of an appeal, unless that appeal is considered within the 30 days. He further stated if the Board wanted, for any reason, to rehear the case because the Board thought they needed to reconsider, they could call a special meeting of at least three Board members and decide to rehear the case on their own. He further stated that can take place in the context of an appeal as long as it is within 30 days.

Gentile also stated there was another discussion as to whether or not the Board could adjust the five criteria and the answer to that was that discussion was initiated in the timeframe when the Board assumed that the previous minutes had not been approved. He further stated that if those minutes had not been approved, then on the basis of the discussion the Board actually had, they could have amended the minutes to include things that actually took place during the meeting. Since those minutes were already approved by the time of the next meeting, that was off the table.

Bartlett asked if after minutes are approved, you cannot amend them? Gentile stated they can rehear the case. Bartlett asked if you can amend the whole meeting minutes? Gentile stated they go through the process of reviewing the minutes and the Board approves them and once they are approved, he does not

believe you can amend them. Rau stated that the Board did approve the November 16, 2022 minutes at the December 21, 2022 meeting. Gentile thought those had not been approved so when Gentile and Rau talked about procedure for the Rehearing, Gentile made an incorrect assumption that the minutes were not approved as this was a short meeting. Gentile stated he can go back to their attorney and ask advice and maybe the Board can revise the minutes next month.

Bartlett stated she will be out town for the February meeting and her term is up in February and tonight would be her last meeting and she is letting her term expire.

McAllister asked if Totman is and alternate. Gentile stated yes.

Bartlett stated maybe we need one full time member and two alternates.

Gentile stated as Chairman, he can post on the two Town of Madison's Facebook pages that they are looking for Zoning Board Members and he stated they need to advertise for people.

The Board thanked Bartlett for her service on the Board.

ADJOURNMENT: Motion by Rau, seconded by McAllister to adjourn the meeting. The motion passed **5-0**. Meeting adjourned at 7:35 pm.

Respectfully submitted,

Kate Young
Land Use Boards Administrator