



TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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ZBA MINUTES

July 19, 2023

ATTENDANCE: Drew Gentile, Chairman, Jake Martin, Vice Chairman, Doug McAllister, George Rau, Marc Ohlson, Alternate – Bill Dempster, Alternate – Sharon Schilling, Alternate

EXCUSED: Shawn Bergeron

OTHERS PRESENT: Madison TV, Kasia Scontsas, Kate Young, Land Use Boards Administrator and Henry P. Moscone and Arthur Babineau

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

ELEVATION OF ALTERNATES: Gentile asked for a motion to elevate Dempster to make the Board a five-member voting Board.

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

PUBLIC HEARING:

Young read aloud **Case #23-06 – Continued - Equitable Waiver of Dimension Requirements** is requested by Henry P. Moscone, for property located at 7 Mount Washington Drive, Map 111, Lot 6, from Article V Section 5.9 of the Zoning Ordinance to permit the existing barn to remain where it was constructed.

PUBLIC NOTICE: Notification of this meeting was posted on June 29, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices.

Gentile stated this is **Case #23-06** Equitable waiver July 19, 2023 continued from June 21, 2023.

Gentile confirmed the same members from the June 21, 2023 meeting were sitting tonight and that the Board does not need to go through the Conflict of Interest and Waiver of Request for Regional Impact since this was done at the June 21, 2023 meeting.

Gentile stated the most critical points are work last done on this property was completed in 2011 which means with an application in 2023, ten years have passed and there is no record of the town citing Moscone for any violation of dimensional requirements or code violations and there are only two requirements for the questions related to whether or not the Board is allowed to grant the Equitable Waiver request.

Moscone stated again it was a mistake and he further stated the Board mentioned at the June 21, 2023 meeting he could sign something that states he could never build within so many feet. Gentile stated there are two options with one being the possibility of creating a no build easement which would require Moscone to hire an attorney to prepare the easement and then the easement would have to be reviewed by the Board's attorney and both attorneys would need to come to an agreement and the case would be continued until the attorney's agree on the finalization of the easement. At that point, the Board could grant the Equitable Waiver for the other two dimensions and the easement. Gentile stated that the easement would have to be recorded at the Carroll County Registry of Deeds.

Gentile stated the second option is to request a variance for two things, one is the town was correct when Moscone asked at the June 21, 2023 meeting if he could do a lot line adjustment but technically, he can't but under the rules of the Zoning Board of Adjustment, he can always ask for a variance because you cannot make an existing lot less conforming if it is already non-conforming. Gentile further stated that there is a possibility that the Board could consider a variance to allow the lot line adjustment even though it would make one lot less non-conforming but it solves the problem of the variance and the Board could ask for a condition of say 15 feet and this would have to be a Board decision. At this point Moscone would have to ask for a variance for that particular dimension and Moscone would have to take it to the Planning Board which requires a Preliminary Review which could happen in September as the Planning Board application deadline for August has already passed. Gentile stated that assuming the Board grants the variance, the Planning Board would review it. Gentile explained to Moscone that if the Board grants the variance, then the Planning Board would have to agree to do the lot line adjustment, which the Zoning Board has no authority over for which potentially, the Zoning Board will grant a variance and the issue for Moscone is that his abutters have not been notified and he would have to modify his application and the abutters would need to be notified. Gentile stated the Zoning Board could not actually address that question on the variance until the next meeting. Moscone stated he thought the abutters were notified already. Gentile stated the abutters were notified for the Equitable Waiver but that a variance for a lot line adjustment and a different dimension requires a variance in it of itself that abutters to notified and if the Zoning Board grants the variance, that leaves the Planning Board freedom to grant the lot line adjustment and Gentile stated that the Zoning Board cannot guarantee the Planning Board will grant this.

McAllister questioned if there is a no build easement and is there an issue with trespassing? Gentile stated that the attorneys will have to address this when drafting the easement. Gentile stated to the Board they have the right to make a condition but not the authority to write the easement, only request it.

Dempster asked if he could make another potential option by merging the two lots into one if Moscone is going to sell and then he could sell the entire 1 1/4 acres. Martin stated you cannot require Moscone sell lots 6, 7 and 16 unless he wanted to and Martin stated he thought Moscone had plans to live on the property. Rau stated Moscone wants to live in his RV on the property. Moscone confirmed he does have plans to live on the property. Moscone further stated his buyer's father is an attorney and made the proposal that the buyer would buy both properties and grant Moscone a life estate to live on the property. Moscone stated he was looking for a way not to do this as he will have nothing in the end. Gentile stated this is Moscone's decision and if he wanted to do this, this would provide a solution and offered as a potential solution but that Mr. Moscone is not interested.

Gentile asked the Board if there were any other questions?

Dempster stated there is some pertinent information as to the timelines of dates and years. Dempster further stated he went to the Carroll County Registry of Deeds and the timelines are a little off as to the registration dates and dates of events. Dempster stated he verified that the original cottage was built in 1966 and that Moscone purchased the first 100 x 100 foot lot and cottage in 1999 Moscone then purchased the second 100 x 100 foot lot in 2003 and Lots 6 and 7 were consolidated in August of 2005 and the Board had on their timeline 2003. Gentile stated the building permit for the barn was issued in 2005. Dempster stated that Moscone purchased Lot 16 in 2010 and it was at his testimony that he knew the barn was close to the property line in 2010 and Moscone also added to his testimony that he added a second story to the house and Moscone stated there was a permit for this. Dempster stated that Moscone's testimony was that the barn expansion was done in 2011 and a permit was pulled for that. Dempster stated the permits were pulled and after reviewing the file at the town hall, there was no record of a final inspection of anything. Gentile stated this is still a public hearing and the Board has the right to correct the Findings of Fact.

Dempster stated he went and did a site visit and found a constructed carport on Lot 16 and it looks awful close to the property line. Dempster further stated he did contact Bob Boyd, Code Enforcement Officer about this and Boyd is aware of the situation.

Dempster brought up a court case from 2016 that he had found about a dispute on boundaries and that this shows history from when the property was purchased to current. Dempster talked about the ten-year cycle because the town did not do anything for ten years and he contends that with the three permits that were pulled, that it is the responsibility of the person pulling the permits to contact the town at various stages for inspections and get a final inspection when work is completed and that none were done here. Dempster further stated that he brought this information to the Board and they may not feel this information is relevant but he believes it is.

Schilling asked Moscone on her site visit if he had gone back to the contractor that constructed the barn and Moscone stated the contractor was out of business. Schilling stated that on the Certificate of Compliance it stated that the homeowner was the contractor. Moscone stated he had a local contractor that lived around the corner do the work and that he was a local guy and Moscone just hired him and paid the contractor day by the day and there was no formal contract.

Dempster stated he wanted to determine when the permit for the barn was pulled in 2005 and determine how many permits were pulled and how many inspections were done. He stated he went back to the annual report and the Code Enforcement Officer had the number of permits and inspections and there were 355 permits issued and there were 1,390 building inspections done in a two-year period. Dempster does not believe the Code Enforcement Officer has the time to follow up on the building permits and if the Code Enforcement Officer is not notified as it states in the building permit that work has been completed, how can the town act if not notified.

Martin stated that at the bottom of Moscone's application dated July 18, 2011, at the very back, there is a paragraph that states "effective April 20, 1987, a Certificate of Compliance is required by the Town of Madison and to please contact the town to set up an appointment for an inspection" so this puts the burden on the applicant.

Gentile stated there are clearly significant errors in the measurements of the representation to the town but that the critical question for the Board is if the town did not ever take any action and there is nothing on record and there is a look back period of ten years from the date of application and if no one has raised a question in that time frame, then the Statute of Limitations for the provision for granting Moscone's Equitable Waiver and Gentile read aloud provision to the Board **“(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority”**. Gentile stated that this provision allows the Board to consider those kinds of issues as expired because the town is required to do something and the town did not. Gentile further stated the Board is limited to Paragraph (c) and (d) and he quoted **“(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.”** Gentile stated it is not possible for the owner of the barn to do normal maintenance without encroaching on the neighbor's property and this is one of the critical pieces and this is one of the reasons why a no build easement that would include the right of maintenance would be a potential solution. Gentile stated they are allowed to grant an Equitable Waiver with conditions.

Gentile stated the third option could be that the Board deny everything.

McAllister stated that in the future and with new owners, the Boundary Line Adjustment would be the least problematic down the road. Ohlson stated this would be the cleanest way but that the applicant does not want to sell both lots. Moscone stated he does not want to sell both lots, but that it is an option.

Gentile stated the Board will come back to correcting the record, Statement of Facts before they close the Public Hearing and Gentile wanted to clarify the Board is correct in their assumptions about their procedure if they ask Moscone to go back to the lot line adjustment, his next step would be to apply to the Planning Board for a lot line adjustment and in order to do that, Moscone will have to have a preliminary hearing with the Planning Board who will consider it in light of the Zoning Board's deliberations and then there is a public hearing on the issue and it is possible and the most reasonable thing to do is have a joint meeting in order for the Zoning Board to grant variances as required. Ohlson stated it is reasonable to do a lot line adjustment but will not be inexpensive as a surveyor will need to survey the property. Gentile stated that the Zoning Board cannot authorize where the line should be and having a joint meeting with the Planning Board at the same time would be helpful as long as both boards have a quorum.

Gentile stated the Board now needs to correct the Preliminary Findings of Fact from the June 21, 2023 minutes.

Gentile confirmed with Young that there was no code violation or citing from the town in Moscone's file. Young stated she confirmed with Bob Boyd, Code Enforcement Officer that if the Certificate of Compliance is not signed then there was no final inspection done.

Gentile stated that when it comes to the Equitable Waiver that conditions A and B do not apply and only apply conditions C and D if the Board wants to grant an Equitable Waiver. Gentile stated that condition C there is an issue of it being a private nuisance which is why the Board is looking for alternatives.

Martin stated they should include the dimensions for the setbacks for the barn.

Moscone stated the lots were 100 x 100 back then which were buildable lots and asked how can you build anything on 100 x 100 lot and have 75 feet? Gentile stated you do not and that the subdivision was done before the Zoning Ordinance. Moscone stated they were done legitimate at the time. Gentile agreed and stated that what should have happened was Moscone should have come to the Zoning Board for a variance which would have been granted, presumably, because the unique characteristic of the property has only 100 feet deep and if you want to put a 30-foot building on it you cannot do that and that is what 5.9a covers.

Revised Findings of Fact (from the Preliminary Findings of Fact dated June 21, 2023):

1. 1966 – Date of the original cottage construction on previously subdivided land
2. 1999 – Mr. Mascone purchased lot 6 with the cottage on it.
3. 2005 – Mr. Mascone purchased lot 7 and lots 6 and 7 were merged into 6.
4. 2005 – Mr. Mascone built the barn on its current location on lot 6 (formerly 6 and 7).
5. The setbacks for the barn are:
 - 44.5 feet to the centerline of Mt Washington Dr where 75 feet is required.
 - 15.4 feet to the rear property line with lot 4 where 25 feet are required; and
 - 1.4 feet between the barn and lot 16, where 25 feet are required.
 - The requirements are set in the Madison Zoning Ordinance Section 5.9 A, which was in effect in 2005.
6. 2010 – Mr. Mascone purchased lot 16.
7. 2010 – Mr. Mascone added a second story to the cottage on lot 6.
8. 2011 – A small addition was made to the Barn.
9. There is no record of the Town of Madison communicating any code or zoning infraction to Mr. Mascone and the building permits are still open.
10. The date of the Application being May 30, 2023, and the last activity on the lots being in 2011 means that more than 10 years have elapsed between the application and any zoning infringements without any record of the town citing a violation.
11. Mr. Mascone will consider merging lots 6 and 16 which will alleviate the setback problem between the barn and the lot line of lots 6 and 16.
12. There was no response from any abutter, pro or con.

Gentile asked for a motion to close the Public Hearing.

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

Motion by Dempster, seconded by Martin to reopen the Public Hearing. The motion passed **unanimously**.

Gentile stated that Moscone can dispose of his property how he chooses. Gentile stated he could combine lots by a Voluntary Merger and if he chose to do this, he would have to go to the Planning Board.

Gentile stated that the Board can set a condition the lots be combined and if not, then Moscone would need to come back for a variance or Equitable Waiver.

DELIBERATION:

Rau asked if you can combine the two lots and make it one lot? It was stated yes but it is Moscone's decision. Moscone asked what combining the lots entails? Gentile stated that would be a Planning Board issue and is effectively similar to a lot line adjustment and just combining lots which will then make them conforming as opposed to doing a Boundary Line Adjustment which requires a non-conforming lot to be made smaller. Moscone stated that he would combine the lots. Gentile stated there are minimum costs to combining the lots. Moscone stated he already had a survey done. Gentile stated he would need to have a new survey done with new pins etc., if he decided to do the lot line adjustment. Moscone stated again, he is not going to do a lot line adjustment and just combine the lots and that is the best way.

Gentile stated the Board still needs to act on the other two dimensions. Schilling stated if Moscone combines the two lots, he has the right to withdraw his application without prejudice and do what he needs to do to combine them and the Board has nothing left to do. Gentile stated that the Board already knows that there are existing dimensional issues. Gentile stated the house was grandfathered in and it was the barn that was built in 2005 and it does fall under the current Zoning Ordinance and technically needed to have a variance and what Moscone has done is applied for an Equitable Waiver and that the Board can decide to grant the Equitable Waiver and the result of this is then the next person that buys the property does not have to deal with this issue in the future. Gentile stated combining the lots does not change the dimensional issue. Gentile stated if the Board acts on the Equitable Waiver request for the two dimensions and the Board approves it, those dimensions would be on record as being approved. Schilling asked if the Board could approve just two dimensions and not the third. Gentile stated yes and the Board can set a condition that the lots are combined and if they are not, Moscone would have to return to the Board.

Deliberations on the granting of the waiver according to RSA 674:33-a

RSA 674:33-a II states:

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

This condition has been met as stated in the finding of fact, therefore the application for an equitable waiver must meet only conditions I (c) and (d).

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

With respect to condition I(c), the board finds that the setbacks of 44.5 feet to the center of Mt Washington Drive, and 15.4 feet to the rear property line with lot 4 are:

- Consistent with the neighborhood because the original subdivision predates the current zoning ordinance and lots are generally 1 acre or less, making it difficult to meet all the setback requirements of the current ordinance.
- There is no recorded complaint by any abutter.
- There will be no negative impact on the property values of the neighborhood.

However, the 1.4-foot setback to the property line with lot 16 creates a private nuisance in violation of condition I(c) because no normal maintenance activity such as mowing, painting, or roofing can be performed on the barn on lot 6 without encroaching on lot 16.

With respect to condition I(d) the board finds that

- The expense of moving or demolishing the barn is excessive and has no benefit to the public, especially since there is no location on lot 6 where the barn could be placed in conformance with the zoning ordinance or with reasonable setbacks.

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

Motion by Martin, seconded by McAllister to grant the equitable waiver for the barn setback of 44.5 feet from the center of Mt. Washington Drive and the setback of 14.5 feet to the rear property line with lot 4 with the condition that lots 6 and 16 are merged to alleviate the setback violation of 1.4 feet between the barn on lot 6 and the property line with lot 16, because the original subdivision of the lots predates the current ordinance so that the setbacks with the exception of the 1.4-foot setback between the barn and lot 16 are reasonable and consistent with the neighborhood and thus will have no negative impact on property values.

Gentile stated since the videographer shut off the recording from 7:15 pm to 7:25 pm he is going to briefly restate the arguments the Board went through as discussed above.

Gentile stated that Moscone can call Young for the Board's decision.

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 #23-06.

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Gentile opened the public hearing for Case #23-07.

Young read aloud Case #23-07 – Variance is requested by Arthur P. Babineau, for property located at 24 Interlaken Circle, Map 105, Lot 99, from Article 5.9, Sections E and F of the Zoning Ordinance to permit the construction of a garage within the setbacks.

PUBLIC NOTICE: Notification of this meeting was posted on June 29, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices. The Public Hearing Notice was published in the Conway Daily Sun on June 30, 2023. All abutters were notified by Certified Mail.

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

Swearing In: Gentile swore in Arthur P. Babineau to speak to this case.

Waiver Request: There were none presented.

Discussion: Martin questioned Babineau about the handwritten dimensions on the Certified Plot Plan. Babineau stated he did the handwritten dimensions on the Certified Plan and not the surveyor. Babineau stated he did this because Bob Boyd, Code Enforcement Officer told him he had to include dimensions when submitting his building application. Schilling stated that the dimensions of 61 feet to a stone bound, 14.6 feet to the property line and 26 feet to an IP set are all parallel and should be perpendicular to his lot line. Ohlson stated the only variance needed is for the 39-foot setback from the corner of the proposed garage to Interlaken Circle. Gentile stated the Board could accept the 14.6 feet and that the garage is 18 feet by 22 feet. Gentile stated the garage is not to scale and the garage is closer to the boundary line. Ohlson suggested that Babineau either go back to the surveyor or have it as a condition not to exceed 12 feet. McAllister stated that Babineau should remeasure as to what the Board says.

Gentile asked the Board if they were all in agreement with waiving the Waiver Request. By roll call vote they were all in agreement and Ohlson stated he does not need a Certified Plot Plan.

Waiver Request: The members agreed to waive the requirement for the Certified Plot Plan.

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

Gentile stated that the garage needs to be inside the current setback requirements for Eidelweiss and Babineau's exact dimension of setback is not clear. Schilling asked Babineau who staked out the garage and what was it based on? Babineau stated he did it himself and he came out 15 feet parallel from the proposed garage and that there are two huge trees he does not want to take down and if he takes down the trees, he could move the garage back.

Martin stated that in the application, the variance is being requested for 5.9 E and F and that E is dwelling unit and he asked Babineau if the garage was going to have bedrooms or plumbing? Babineau stated no.

Gentile stated that Babineau needs to get accurate measurements of the 39-foot measurement from the garage to the center of Interlaken Circle and the 14.6 feet from the garage to the property line as well as complete the questions on Page 8 of application and that the Board will continue the case to the August meeting.

Motion by Martin, seconded by Dempster to continue **Case #23-07** to the August 16, 2023 meeting. The motion passed **unanimously**.

APPROVAL OF MINUTES:

Discussion: Gentile stated there were two revisions to the June 21, 2003 minutes, that being on Page 3 of 4, “Gentile stated that Moscone has done nothing to the lots since May of 2013 and this application came in 2013” and should be “2023”. Also, on same page under “Preliminary Findings of Fact: Gentile stated the Board could continue this case “on legal basis.” “On legal basis” was stricken from the minutes.

Motion by Martin, seconded by McAllister to accept the June 21, 2023 minutes as amended. The motion passed **unanimously**.

ADMINISTRATION: Dempster stated that the Board may receive requests from STR owners and there are about 42 property owners and that the Board of Selectmen are starting enforcement.

ADJOURNMENT: Motion by McAllister, seconded by Dempster to adjourn the meeting at 8:10 pm. The motion passed **unanimously**.

The next meeting of the Zoning Board of Adjustment will be held on August 16, 2023 at 6:00 pm.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator