



TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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ZBA MINUTES
August 16, 2023

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

EXCUSED: Shawn Bergeron & George Rau

OTHERS PRESENT: Madison TV, Aysia Morency, Kate Young, Land Use Boards Administrator and Henry P. Moscone and Arthur Babineau and Jim Floyd - Hancock White Mt. LLC

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

ELEVATION OF ALTERNATES: Gentile asked for a motion to elevate Schilling and Dempster to full voting members.

Motion by Martin, seconded by McAllister to elevate Schilling and Dempster to full voting members. The Motion passed **unanimously**.

Gentile stated that Schilling and Dempster now make a five-member board.

Gentile stated the first order of business is the **Appeal of Case #23-06** and that Appeal consists of a Request to Rehear the case and Gentile explained that this is a public meeting and not a public hearing and no public input will be accepted.

PUBLIC MEETING NOTICE: Notification of this public meeting was posted on August 1, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices.

Gentile explained to the Board that if the Request to Rehear is granted, the Board will rehear the case and it will continue under the same case number. Gentile further stated that if the Board does not grant the case, then in this case, there is what is basically called a material change in the circumstances of the case and Moscone would be able to reapply for the case. Gentile stated he personally thinks if the Board considers the material change in circumstances in this case that the condition will not be met to grant the requested equitable waivers and that would give Moscone the grounds for reapplying because the application would be sufficiently different from the original one if that second application is permitted. Gentile stated to the Board that he personally feels that because there is a material change in the case and the circumstances of the case, the Board can consider the new information and it would be administratively easier to continue the case under the same case number. Gentile stated if the Board

agrees with this and for the record, the Board can decide to rehear a case generally under two circumstances with one being that the Board recognize or identify procedural error or secondly, new information. Gentile suggested that the material change in the circumstances of the case is effectively new information for the Board and he asked what the Board's pleasure was.

Dempster asked if the decision with conditions the Board made at the last meeting will essentially become null and void because of the rehearing and the new information. Gentile explained that officially, the procedure is a rehearing and basically starts the case all over again, however, the Board does have a record and they are allowed to bring that record into the deliberation next time and that the deliberation next time will be entirely new but can be based on the previous arguments and anything new that comes into the case could change the outcome. McAllister and Martin agreed with Gentile keeping the same case number would save time and effort.

Martin asked what the material change is. Gentile stated the material change in the circumstances of the case is that Moscone withdrew his application for the Merger which means that the equitable waiver for the other two dimensions is null and void which means that there is no solution for the situation and it makes sense to continue the discussion. Gentile also stated if the Board feels the more appropriate method is to close this case by denying it, then Moscone has the option to refile a new case with a new case number instead of asking for three equitable dimensions, presumably, Moscone would ask for two equitable waivers for the front and back dimensions and then request the no build zone which is what Moscone indicated. Gentile stated the application that is before the Board is sufficiently different from the original application and that there is no reason for the Board to reject it.

Schilling stated this will not get solved tonight and moving forward with the material change and rehearing to the next meeting does not change anything but elevates the burden for Moscone not to have to refile a whole lot of new paperwork and he can add to his application when the Board rehears the case and he does not have to refile the application and notices to the abutters. Gentile corrected her and stated abutters would have to be noticed.

Martin stated he did not want to speak for the appellant but his guess is that all material presented and all the information, the Board essentially be the same and that it is just the change in what Moscone is asking for equitable waiver from. Schilling stated Moscone would not be asking for an equitable waiver. Gentile stated yes on two dimensions and on the third dimension instead of an equitable waiver of the no build zone and that was what was indicated but of course, if we grant the rehearing, technically, we start from zero and Moscone makes his presentation next month and that was Moscone's indication.

Gentile polled the Board for any further questions and for a motion.

Motion by Martin, seconded by Schilling to rehear Case #23-06 based upon the new information being that the applicant withdrew his application to merge the lots which was the condition of the approval. The motion passed **unanimously**.

Gentile stated the Board will rehear Case #23-06 in September.

Young asked for clarification that abutters need to be noticed and that Moscone would pay just the Certified Return Receipt mailing fees but no filing fee. Gentile stated yes.

Case #23-07 – Continued from July 19, 2023 - 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 August 1, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices.

Gentile stated that **Case #23-07** was continued from last month and that there is a slightly different Board this month and Gentile stated he is going to go back and check for Conflict of Interest. Gentile asked Young if this was re-noticed? Young stated that since the last meeting a notice came back unable to deliver as addressed and she contacted Babineau and he gave her corrected labels and the \$10.00 fee and she had plenty of time to get notice out before this meeting and that all abutters have been properly notified.

Gentile confirmed with Young that since this was a continued case the public was notified and all abutters were notified. Young confirmed that notification of this meeting was posted on August 1, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices. Young also confirmed that an abutter not correctly noticed due to a wrong mailing address was in fact re-noticed by mailing on August 4, 2023.

Gentile polled the Board for the following since there is a slightly different Board:

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

Waiver Request: Gentile stated the Board continued the case to clarify the dimensional request so the dimensions were measured correctly and the Board now has a diagram with those dimensions on it. Gentile further stated that because the dimensions were technically done by Babineau and not a surveyor, Babineau is requesting a Waiver Request and he asked Young to clarify. Young stated there is a Certified Plot plan done by a surveyor, Andrew Fisher with the corrected dimensions. Gentile stated there is no Waiver Request.

Regional Impact: Gentile stated that the Board had previously determined that this case has no regional impact.

Gentile opened Public Comment:

Gentile asked Babineau, the applicant, to restate his case. Babineau explained that he is building an 18' x 22' garage to store his snow tractor and that he needs more space for storage and this will look better than the tent he had.

Gentile stated that Babineau is requesting for a minimum setback of 13.8 feet wherein 20 feet is required in Eidelweiss and 40.2 feet wherein 65 feet is required in Eidelweiss.

Gentile stated the Board is now going to compile their Findings of Fact and that this is still a Public Hearing and if Babineau hears any errors to let the Board know.

Notes on Finding of Fact:

1. The relevant paragraph for the setback dimensions of an accessory structure in the Village District of Eidelweiss is Article 5.9 F of the Zoning Ordinance.
2. The distance to the south property line from the garage is 13.8 feet where 20 feet is required.
3. The distance to the center line of Interlaken Circle from the garage to the west is 40.2 feet where 65 feet is required.
4. The lot is .29 acres with no available space in the building envelope.
5. The septic system is north of the house in what is indicated as the building envelope.
6. The existing driveway accesses the south side of the house where the main entrance is.
7. The distance of 13 feet between garage and house is determined by the width of the snow removal equipment required to keep the front access to the house clear in winter.
8. The house dates from 1988.

Gentile asked the Board if they had any further questions for Babineau. There were none so Gentile asked for a motion to close the Public Hearing.

Motion by McAllister, seconded by Dempster 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.

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?
 - The use of a garage on small lots in the Eidelweiss Village District is common so the addition of a garage, especially one that replaces a temporary tent, is consistent with the neighborhood.
 - The addition of the garage in the requested location poses no threat to public health 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.
 - There is no gain to the public in denying the variance which would result in there being no garage. Since the garage adds aesthetically pleasing storage, it is a gain to both the applicant and the public.
4. The values of surrounding properties are not diminished because

- The improved appearance of the lot with the added usefulness of the garage will add to the property value of this lot with a positive impact on other property values.
5. Literal enforcement would result in unnecessary hardship because owing to the special conditions of the property (1):

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:

- This lot is small, predating the current setback requirements, making it impossible to build a garage inside the currently required building envelope. A literal enforcement of the ordinance would prevent providing shelter for vehicles and normal equipment on the lot.

The proposed use is a reasonable one because:

- It provides a practical and aesthetically pleasing storage location for vehicles and normal snow and lawn care equipment and would thus be an improvement to the neighborhood.

Motion by McAllister, seconded by Martin to grant the variance because it is consistent with the neighborhood, is placed in the most appropriate location on the property, is a reasonable use of the land and thus is consistent with the spirit of the ordinance. The motion passed **unanimously**.

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #23-06**.

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Gentile asked the Board Members if anyone wanted to preside over this case and for the record, the Board does this for experience purposes. No one offered so Gentile presided over the case.

Gentile stated **Case #23-08** is a request for a waiver of sign dimensions on Route 41 for the Madison Lumber Mill and he asked Young to read the case.

Young read aloud **Case #23-08 – Variance** is requested by Randal Moore, Applicant/Agent for Hancock White Mt. LLC for property located at 71 Marcella Drive, Map 262, Lot 5 from Article 5, Section 5.1 of the Zoning Ordinance to permit a sign to be constructed totaling 50 square feet.

PUBLIC NOTICE: Notification of this meeting was posted on in the Town Hall upper and lower levels, Madison and Silver Lake Post Offices and posted in the Conway Daily Sun on August 1, 2023. Young confirmed abutters have been notified.

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:

Discussion: Schilling stated that the sign is on the Tamworth/Madison town line and she

believes the Tamworth residents are also abutters as they are across the street on Cross Road. Martin stated he does not feel there is Regional Impact as other businesses with signs have not notified us. Schilling stated those other businesses on Route 41 are not sitting on the town border and McAllister agreed. Gentile asked if the Board wanted to inform Tamworth? Gentile stated if the Board grants a variance, it might make a difference and if the Board does not grant the Variance, then the Regional Impact is moot. Ohlson questioned what the impact would be and stated it is not air quality and there is no impact. Schilling stated there is and it is sign blight. Dempster stated it is an aesthetic issue. Gentile polled the Board if Tamworth should be notified, Schilling, Dempster and McAllister were in favor it does and Martin and Gentile were not in favor and it is three out of five members agree so there is Regional Impact. Gentile stated the nature of Regional Impact is an aesthetic impact on residents near the sign in Tamworth. Ohlson asked if the Board could deliberate without notifying? Gentile stated in their deliberation that the Board can decide how to address the question of the impact of having identified some Regional Impact and stated this will be dealt with later. McAllister stated we should get a legal opinion. Dempster stated that Tamworth has no zoning. Schilling stated that was incorrect and Tamworth has minimal zoning and they do have a Zoning Ordinance. Martin stated it is specific to two things. Dempster asked if Tamworth does due to signage? Schilling stated no. Gentile stated we need to clarify that if we say it has potential Regional Impact which makes sense in the theoretical sense but as Ohlson raised the question, what is the nature of the impact and if it does not actually impact the specific regulation that Tamworth has and that the Board provisionally said they want to consider Tamworth and when the Board does their deliberation, they can determine that then. Martin stated that if the Board is concerned with Regional Impact, do the abutters on the Tamworth side need to be notified even though they abut in a different town? McAllister stated we should get a legal opinion. Gentile asked Young to clarify this with the Board's attorney.

Gentile explained the Rules of Procedure for this case to the applicant and public. Ohlson stated procedurally if you are going call this Regional Impact and the Tamworth residents need to be notified, then you cannot proceed if you made those two decisions and Ohlson stated he disagrees with both of those decisions. Martin read to the Board the definition of an abutter and it is specific to New Hampshire as follows:

“An abutter is anyone who can demonstrate that their land will be directly affected by the case before the Board.”

McAllister stated it does not say the abutter has to be in the same town or the same state. Martin stated yes it states you have to be in New Hampshire. Ohlson stated that he would not have standing to appeal as an abutter to appeal unless he was an abutter. Martin stated you would have standing if you can demonstrate that you are affected by it.

Schilling read aloud to the Board the definition of Abutter RSA 672:3.

Gentile stated the abutters have not been properly notified who are legitimately abutters. Gentile stated that Regional Impact led the Board into this discussion and that this is no longer a question of Regional

Impact but a question of the Board's legal obligation to notify abutters. Gentile stated Tamworth may need to be notified because of Regional Impact because this request involves abutters in their town and

that is the next level up and that is Regional Impact. McAllister stated once you start sending notices to people in Tamworth the town administration needs to be notified.

Schilling asked if it is just Tamworth because this property sits between Tamworth, Madison and Ossipee and Freedom she believes. Martin stated that based upon what was just read **“directly across a street or stream”**. Schilling stated from the property not the sign. Martin stated the property does touch Ossipee and Freedom. Dempster stated that the abutter in Freedom, he believes, is The Nature Conservancy. Young stated they were notified. Gentile stated the Board cannot continue with the Public Hearing until the clarification of abutters has been made. Gentile stated that the Board needs to agree that there are abutters in Ossipee, Tamworth and maybe additional abutters in Madison that have not been notified and in Freedom. Gentile instructed Young to clarify the abutters, notify them and pick this case back up in September.

Motion by Schilling, seconded by McAllister to postpone Case #23-08 in order to clarify and notify abutters to the property. The Motion passed **unanimously**.

APPROVAL OF MINUTES:

Motion by Schilling, seconded by McAllister to accept the July 19, 2023 minutes as amended to include:

1. Page 2, Paragraph 3, Line 18 read “in of its self” and corrected to now read “in it of itself.”
2. Page 2, Paragraph 3, Line 20 read “guaranty” and corrected to now read “guarantee.”
3. Page 4, Paragraph 2, changes as follows:
 - Line 1, read “clear” and corrected to “clearly.”
 - Line 4, read “Statue” and corrected to “Statute.”
 - Line 11 read “has” and corrected to “as.”
 - Line 11 read “in the Board’s question as to whether (c) and (d)” and corrected to “to Paragraph (c) and (d).”
4. Page 6, Paragraph 3, line 2 read “Gentile stated he could combine the lots by a lot line adjustment.” Gentile stated he should have said “Gentile stated he could combine lots by a Voluntary Merger.”
5. Page 6, Paragraph 5, line 3 “combing” is corrected to “combining.”
6. Page 7, Paragraph 7, line 4 removed extra blank line.
7. Page 8, Paragraph 7, line 5 read “and 26 feet to and IP” and corrected to “and 26 feet to an IP.”

The motion passed **unanimously**.

ADMINISTRATION: Gentile stated the Town of Madison received a Summons on Tuesday, August 15, 2023 for Tayzach Realty Trust (Case #23-02). Gentile also stated Young will pull together the entire Certified Record to get to our attorney. Gentile advised the Board that now that Case #23-02 is in litigation, the Board cannot discuss the case.

Gentile stated an application came in for next month’s meeting from Mark McConkey as the Agent requesting a variance.

ADJOURNMENT: **Motion** by Martin, seconded by Dempster to adjourn the meeting at 7:26 pm. The motion passed **unanimously**.

The next meeting of the Zoning Board of Adjustment will be held on September 20, 2023 at 6:00 pm.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator