



**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

May 21, 2025

ATTENDANCE: Drew Gentile, Chairman, Sharon Schilling, Vice Chairman, George Rau, Doug McAllister, Marc Ohlson, Alternate and Jennifer Skaife, Alternate

EXCUSED: None

OTHERS PRESENT: Madison TV, Aysia Wellinghurst, Kate Young, Land Use Boards Administrator, Attorney Jonathan Springer, Attorney Timothy Sullivan, Attorney Matthew Johnson, as well as members of the public.

CALL TO ORDER: Chairman Gentile called the meeting to order at 6:00 pm.

PLEDGE OF ALLEGIANCE/ROLL CALL: McAllister led the reciting of the Pledge of Allegiance. Chairman Gentile stated the board members present were identified, with all regular members in attendance. A roll call was conducted, confirming the presence of a five-member board.

Public Hearing: Case #24-08 – Continued from March 19, 2025 and April 16, 2025 - GMR Holdings of NH, LLC

Case #24-08 - Variance request from Jonathan Springer, Esquire of Springer Law Office, authorized agent for authorized agent for GMR Holdings of NH, LLC, to install, operate and maintain a personal wireless service facility Off King Pine Road, Tax Map 249, Lot 1, from the Madison Zoning Ordinance for the following Articles/Sections:

1. A variance from Article VI, Section 6.5.A of the Ordinance, which provides that towers shall not exceed ten feet (10') over the average tree canopy height.
2. A variance from Article VI, Section 6.5.E of the Ordinance, which provides that there be a fall zone equal to tower height from all property lines.
3. A variance from Article VI, Section 6.6.M of the Ordinance, which provides that "all ground mounts shall be of a mast type mount."
4. To the extent necessary, a variance from Article VI, Section 6.6.K (2) of the Ordinance, which provides that a telecommunication facility "shall not be visible above the ridge line from public roads."
5. To the extent necessary, a variance from Article VI, Section 6.6.M (1) of the Ordinance, which provides that "any antenna array placed upon...a proposed ground mount...shall have a diameter of no more than four (4) feet exclusive of the diameter of the mount... "

PUBLIC MEETING NOTICE: Notification of the May 21, 2025 meeting was posted on May 7, 2025 at the Madison Post Office, Silver Lake Post Office and upper and lower levels of the Madison Town Hall.

Chairman Gentile stated this meeting is for the conclusion on the cell tower and he was limiting public participation tonight.

Attorney Springer stated that he had submitted a detailed response to three of the letters from Attorney Berg in addition to the letter from Kent Chamberlain and the University of Alabama study. He further stated that in his opinion, Attorney Berg does not understand that we do not need a use variance which is extremely important. He further argued that there have been many meetings and have heard from many people who argue that you cannot grant variances from the ordinance because the ordinance is the will of the voters and what the town has decreed, but on the other hand, people question why they are putting the tower here and it is a terrible place for the tower. Attorney Springer stated the reason they are seeking to put a tower here. He stated that this is a permitted use under the Zoning Ordinance on this site and he does not believe people understand this.

Attorney Springer also stated that several meetings ago, the Chairman stated, and Attorney Springer paraphrased, "that the board is not meeting to discuss whether or not a tower can go on this property." Attorney Springer stated this 100 percent correct. Attorney Springer stated the variance they are seeking, to the extent that people are saying that the tower is going to devalue our property, is not the issue before the board and he further stated that they can put a tower there and to the extent that people do not like that, that decision was made back when the ordinance was adopted. He stated they were seeking dimensional variances for a monopole instead of a mast, etc., and these variances, in their opinion, are not going to affect property values.

Attorney Springer also addressed the University of Alabama study mentioned previously, and he believes that Attorney Berg agrees that this is not a real estate appraisal, but an academic paper designed to test a hypothesis and the study is in an urban setting and they had many issues in this study that had no relevance, in his opinion, to Madison. He expressed difficulty understanding large portions of the study due to its technical nature and suggested it should not be considered in terms of whether there is going to be a diminution of property values based on the variances they are seeking.

Chairman Gentile questioned the canopy height measurement and asked Attorney Springer if he could clarify the height of the tower. Attorney Springer stated they are seeking 130 feet. Attorney Springer apologized for not submitting the information earlier and presented a photograph of the area, noting trees between 103 and 109 feet high with not many at that height and he believes that the canopy is below that. He clarified that based on the average tree height as defined in the Zoning Ordinance, the average of trees over 20 feet high within the fall zone area and this is what they are seeking a variance for.

Chairman Gentile questioned Attorney Springer calculated that if the canopy height was 100 feet and the tower height requested was 130 feet, the variance would be a minimum of 20 feet beyond what the ordinance allows. Chairman Gentile agreed with this assessment.

For clarification purposes, Chairman Gentile stated that the lowest number is 103 feet and the canopy is slightly below that and if we went 100 feet for the canopy height, which is high, and Attorney Springer is asking for a tower height of 130 feet, then Attorney Springer is asking for a variance of a minimum of 20 feet beyond what the ordinance is. Attorney Springer agreed. Chairman Gentile reiterated the variance is a minimum of 20 feet and the height is going to be lower than that and if calculated, it would be 75 or 80 feet, then we are looking for somewhere between the minimum of 30 feet plus 20, something between 20 and 40 feet for the variance. Chairman Gentile stated that this is beyond the 10 feet, which is allowed and that is assuming going from 100 feet or 80 feet without a precise measurement.

Chairman Gentile also asked if Attorney Springer they assessed the effect on the coverage by lowering the tower and will it affect coverage on Route 153 at all? Attorney Springer stated that at 130 feet, they believe the coverage will reach the road from 130 feet and he does not have coverage plots for the reduced height.

Chairman Gentile stated that Attorney Springer previously mentioned four carriers and one was Verizon and asked if he has received any letters of interest from any carriers? Attorney Springer stated not at this time and structurally at 130 feet, to still support four carriers, you need 10 feet of separation between centerline and centerline, so if the centerline at the top is at 125 feet, then you are talking 115, 105 and the bottom slot is 95, that is not very high and coverage could be compromised at that level. Attorney Springer stated he believes this will be of interest to carriers.

Schilling asked if there is any room on the tower for town or state 911 communications in addition to this or would that be one of the carriers? Attorney Springer stated that he believes they committed to providing a slot to emergency responders for a whip antenna that can be put at the top of the tower, providing that the town allows it and further iterated that this would not be one of the four slots that we are currently talking about.

Chairman Gentile asked the board if they had any questions. There were none.

Chairman Gentile asked for a motion to close the public hearing.

Motion by Schilling, seconded by McAllister to close the public hearing.

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

ELEVATION OF ALTERNATE: Chairman Gentile was reminded by Skaife that she is an alternate and even though she has sat on this board formerly before, he is going to elevate her tonight so they have a five-member board.

Chairman Gentile stated the board is not going to take any public testimony tonight as there have been three meetings where there has been plenty of opportunity to have public testimony but also stated that people are more than welcome to stay and listen.

Chairman Gentile stated the board is now going to review the Findings of Fact which are as follows:

Chairman Gentile then instructed the board they need to compile the Preliminary Findings of Fact which are as follows:

Preliminary Findings of Fact:

1. GMR submitted a report on April 14, 2025 from C Squared Systems that demonstrates that the peak radiation emitted from the tower when all four providers' arrays are simultaneously broadcasting at full power is just less than 14% of the Maximum Permissible Exposure (MPE) Level allowed by the FCC for the general public, and this occurs at approximately 850 feet from the tower in the direction of the strongest beams and drops off exponentially to less than 2% of the MPE at 2500 feet from the tower and beyond. This was confirmed by our independent consultant, IDK.
2. The coverage gap in existing cell phone service extends approximately 7 miles along Route 153 from the bend in Route 153 approximately 1000 feet south of Burnt Meadows Stables through Madison and Eaton to southern Conway as verified by IDK, an independent consultant. While no specific standard to assess coverage need has been submitted to the ZBA, this board will consider cell phone coverage at approximately -95db along state Route 153 to be a functional measure of assessing necessary coverage.
3. The proposed GMR tower would provide cell phone coverage for about 3.25 miles along Route 153 from northern Freedom at the bend in Route 153 about 1000 feet south of Burnt Meadows Stables through Madison for 3.25 miles falling short of Paul Hill Road in Eaton by approximately 2000 feet according to the verified coverage map provided by IDK.

4. The proposed Vertex tower in Freedom would provide cell phone coverage for 7 miles along Route 153 from Route 25 in Freedom and extend approximately 3000 feet beyond the GMR service on the north end of its coverage and overlap with the service from their proposed tower in Eaton as verified by IDK, so that the two Vertex towers would provide continuous coverage from Route 25 in Freedom, completely covering the 11 mile gap in service that currently exists south of Conway, whereas the GMR tower would overlap only 3.25 miles of the coverage of the Freedom tower.
5. GMR has voluntarily offered to lower the height of the tower from 150 to 130 feet.
6. The canopy height has been estimated to be at 80 to 100 feet which means the tower would be between 30 and 50 feet above the estimated canopy height requiring a variance for 20 to 40 feet beyond the allowed 10 feet above the canopy.
7. The Madison Zoning Ordinance requires that the Planning Board reviews whether this site is the only feasible location to provide the needed coverage, which has not yet been done.
8. Dr. Kent Chamberlin from UNH, professor emeritus of electrical engineering and former chair of the department has extensive experience in the design and assessment of RF towers and personal knowledge of King Pine area as well, stated in a letter to the ZBA dated March 17, 2025 that “the proposed tower does not make sense in terms of providing the desired coverage given the topography of the region.”
9. Robert Benson, a Madison resident, suggested a different property to offer similar coverage with less impact on the neighborhoods in the vicinity of King Pine and the proposed site.
10. Colton Dow and Kent Chamberlain, PhD. submitted material suggesting that there are existing structures that could be used to provide the needed coverage without the use of the tower.
11. GMR has a certification from the FAA that the proposed tower without lights poses no impediment to aircraft navigation.
12. A balloon test was performed on February 25, 2025, by Dewberry and a report submitted with the result that Dewberry and GMR considered the visibility of the tower to be quite acceptable within the guidelines of the variance request whereas numerous residents disagree. The top of the balloon at 150 feet, 130 and 170 feet was visible from several locations including Route 153 which substantiates the need for a variance.
13. The applicant submitted data from the manufacturers of the backup generators demonstrating that sound levels at 25 feet from the generators were approximately that of normal conversation (around 70dB) so that noise levels would not be excessively obtrusive during power outages.
14. The applicant submitted material showing that property values in two specific neighborhoods, Fryeburg, ME, and Londonderry, NH, were not observably decreased by the presence of cell phone towers, based on the observations of real estate agents on price per square foot in recent sales. This suggests the same would be true in Madison. These reports came from Mr. Andrew LeMay of Real Estate Consultants of New Hampshire, and Mr. Mark Correnti of FairMarket Advisors, LLC.
15. Residents (David Garbacz and Dawn Petersen) have submitted material suggesting that a decrease in home values is to be expected. They brought to the ZBA’s attention that The National Association of Realtors sites one study from the University of Southern Alabama which demonstrated that for homes within 2400 feet of a tower, the decrease in home values averaged 2.46% and ranged up to 9.78% for homes also within sight of a tower. (Affuso, E., Reid Cummings, J. & Le, H. Wireless Towers and Home Values: An Alternative Valuation Approach Using a Spatial Econometric Analysis. *J Real Estate Finan Econ* 56, 653–676 (2018). <https://doi.org/10.1007/s11146-017-9600-9>)
16. Most of the homes along Fox Road and all along King Pine Road are within the 2400-foot distance to the tower identified as the range in which a reduction in property values can be expected, some of them are also within site of the tower which could yield additional loss of value.

Chairman Gentile asked the board if they had anything further to add to the Preliminary Findings of Fact.

McAllister asked if it has been determined if it was going to be 5G coverage? Chairman Gentile stated there was a distinction between the frequencies that were used and 5G favored one of those. McAllister asked if it was

digital coverage rather than just simple cell service? Chairman Gentile stated that digital is not limited to 5G. Chairman Gentile stated that for the record, the indication on IDK report was that they went in sections from -95db and higher as acceptable and that is the basis IDK used as a comparison and this was for digital coverage and IDK did not specify whether it was all 5G or LTE or anything like that.

Chairman Gentile stated they have five variance requests and that the board needs to look at the individual variances and determine whether any or all of them are necessary.

Chairman Gentile stated that **variance #1** is for the height for a variance and the board determined that based on the estimates, that they are allowed 10 feet and if we go from a minimum canopy height of 80 feet to 130 feet, that means they need 40 feet of variance or 50% more than the canopy.

Chairman Gentile stated that **variance #2** is for the fall zone requirement for a variance. There is a property line which is the Eaton property line and even though the owner is the same owner, he believes we are safer going with granting a variance or denying a variance on this point and the board will consider this variance.

Chairman Gentile stated that **variance #3** is for the monopole v. mast. This is based upon the technology that a monopole, which is what has been applied for, has external antennas which allows for a more concentrated series of providers and can have four antennas whereas, the mast antenna has the arrays mounted vertically which means they can support half the number of providers. He further stated that since the applicant asked for the monopole, and because there is a difference, and not just semantically, but in the technology, then that variance is also needed and that the board may consider whether they want to change the Zoning Ordinance later to represent modern technology, but for the moment, that variance request is a valid request.

Chairman Gentile stated that **variance #4** is for visibility above the ridgeline from a public road. This is basically from Route 153 and other locations and the board would need to agree and one way to interpret this is, that you are at the same level as the ridgeline and if you are looking out level, does the tower stick above the ridgeline and per Chairman Gentile's reading, it does not appear that way and he believes it reads that, if you are standing on the road and you are looking at the tower that the ridgeline is below it and that is what we saw in the balloon test and that it was visible above the ridgeline from the road. Chairman Gentile asked the board if they agreed. The board agreed that they would entertain this variance request.

Chairman Gentile stated that **variance #5** is for the antenna diameter. He asked the board how they felt about this one. Skaife stated she believes we lack clarity on this as the array is not a diameter and on the plan, they have a three-sided equilateral triangle on the array and then vertical as well as a series of vertical panels, so there are no diameters. She further stated that we know they are 10 foot to center and Attorney Springer clarified that, but we really do not know how long the side of the equilateral triangle is, the array, being multiple panels. Chairman Gentile asked the board if they are focusing on whether or not the variance request is something the board needs to consider or whether they dismiss it as unnecessary. McAllister stated he believes the wording makes it clear that it is talking about old technology when talking about the diameter, which is the old round antennas and today, the wording would be the width of the array, rather than the diameter and he believes it is not relevant in this case.

Chairman Gentile asked the board if they wanted to dismiss **variance #5** request because it represents an earlier technology and therefore, is not applicable? Chairman Gentile stated the arrays are 18 inches each and approximately five feet tall and four of them across etc., and we can estimate it easily but the point is, it is bigger than four feet. Chairman Gentile asked the board if they wanted to consider granting the variance or consider the wording of the Zoning Ordinance irrelevant to this application? Schilling stated that she does not believe the wording is irrelevant but she believes the wording in the Zoning Ordinance is attempting to regulate to a certain extent, how large an array can be and that our wording is ambiguous, with regard to today and it

was probably very relevant when it was written, but in today's standards, she believes what our Zoning Ordinance was trying to say was that it needed to be reasonably sized for the size of the pole or mast. She further stated that she believes the board can look at this and distinguish, based on discussion, whether we believe that the current array, as it would sit on this pole, is within normal and reasonable size and shape for the type of mast that this currently is. She further stated that if this is the case, then a variance would not be necessary. She further stated that if we decide that this is overly large for today's masts then yes, a variance from the Zoning Ordinance would be necessary based on the ambiguity of our Zoning Ordinance. Chairman Gentile confirmed that what Schilling is trying to say, is that we read the Zoning Ordinance to say that the antenna needs to match the current technology in reasonable size and then we can determine whether or not this antenna is a reasonable size.

Chairman Gentile stated we will need a motion to decide whether we wish to dismiss the variance request and we will need to word that because this array meets today's technological standard and is not outside the technological standard of today, therefore, it meets the requirements of the spirit of the ordinance and no variance is required.

Schilling stated if you look at our current Zoning Ordinance, it talks about the size of the array outside of the diameter mount and we are not considering the diameter amount of the pole and the rest of the ordinance talks about, and she read aloud "*that it shall have no diameter of more than four feet*" and she believes that was a reasonable accommodation and that we can use some of that wording and she read aloud from the Zoning Ordinance "*any array placed upon an existing or proposed ground mount or transmission line*" ... *shall have any size and shape exclusive of the mount itself.*" Chairman Gentile stated that we cannot rewrite the Zoning Ordinance here but we can justify why we are dismissing the variance, if that is what we are doing. Chairman Gentile stated he was trying to write up the language for a motion as follows "that since the Zoning Ordinance wording reflects an earlier technology and the antenna array presented in this application is in line with current practice, therefore, no variance is required."

Variance #5 – To the extent necessary, a variance from Article VI, Section 6.6.K (2) of the Ordinance, which provides that a telecommunication facility "shall not be visible above the ridge line from public roads."

Motion by Gentile, seconded by Schilling that since the Zoning Ordinance wording reflects earlier technology, the antenna array presented in the application is in line with current practice and therefore, no variance is required.

Roll Call Vote: McAllister - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; Gentile –Aye.

The Motion passed 5-0.

Chairman Gentile stated that the board has dismissed the fifth request for a variance from the applicant's application and will now proceed with the four other variances according to the five criteria.

Chairman Gentile explained that for informational purposes for the public, that the board has a requirement to access all variances consistently across five specific criteria and in the process, the board may add Findings of Fact that they feel are relevant and that the Findings of Fact are the basis for the board's assessment and in order for a variance to be granted, it must meet all five criteria.

Chairman Gentile stated as a matter of process, he is suggesting there be one pro and one con because the board is starting out in neutral positions and he is suggesting wording that goes each way and then as a board they will argue, based on the Findings of Fact, which way the board falls out on this and he further stated, that we are not voting as a board on each individual criteria and as we have that discussion, board members may

disagree with one another on the interpretation of that but he asked the board members to determine in their own minds, whether or not they think this meets the criteria and if at the end of the discussion of the five criteria, a member finds that they have met all five criteria, then a member can vote yes on the motion to grant the variance and to vote no on the motion to deny the variance.

Variance Request #1 - A variance from Article VI, Section 6.5.A of the Ordinance, which provides that towers shall not exceed ten feet (10') over the average tree canopy height.

Chairman Gentile stated that the next variance request is on the tower height and the applicant has asked for 40 feet of variance which is 50% more than the canopy height as they want to go to 130 feet that is 50 feet above the canopy. Chairman Gentile stated that the first criteria of the variance, they count the first two together, that being one and two of the Findings on the Five Conditions for a Variance and he read aloud the following:

- 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).**

Chairman Gentile asked Schilling to read aloud from the Zoning Ordinance 1.1 Purpose as follows:

1.1 Purpose.

This ordinance and its regulations as herein set forth are for the purpose of promoting public health, safety, general welfare, and the natural beauty of the environment which provides the primary basis for the unique character of the Town area and its residents. It also regulates the conservation of natural resources, stabilizing the value of the land and its improvements within the Town, and encouraging uses that are in harmony, visually and aesthetically, with rural living, in accordance with the provisions of RSA Chapter 674, 16-21. This zoning ordinance, by application and provision of State Law, seeks to protect existing property owners against a new use nearby which may be incompatible or undesirable and also damaging to existing owner's present property by lowering its desirability and value. All present uses may continue.

Chairman Gentile gave a suggested wording as follows:

"In order to violate this standard, it must violate it to a noticeable degree so we will go either with the volume and clarity of public testimony on these two points which substantiates the fact that the changes to the neighborhood would be significant because of rural remote ambiance is the defining characteristic of the neighborhood this would be markedly impacted by the presence of the cell phone tower or, the volume and clarity of the public testimony does not substantiate that there is a marked change in the character of the neighborhood because the visibility of the tower is reasonably limited, traffic loading is only a few trips per month and sound levels outside the enclosure would be less than voice levels during generator operation."

Chairman Gentile asked the board what they wanted to do and that they are free to change the above noted wording entirely. Chairman Gentile clarified that this is just to the variance on height but that we do have to respect the fact, that variance requests are specific to a location and the arguments may apply to the other variances we well.

Skaife stated that the height has dropped to 130 feet but as Attorney Springer confirmed, there is 20 feet that can be added to this tower, per NH law. She further stated it is possible that this tower is going to be 20 feet taller than the 130 feet in the application and she stated that this affects her opinion. Chairman Gentile then

asked Skaife if they are leaning towards it substantiates the fact that this is a market impact on the neighborhood? Skaife stated yes, that is her opinion.

McAllister stated that in his opinion, you put a cell tower there, you can see it for the first two weeks and then you drive by it and you do not know it is there. He further stated unless you are looking for it, you will not see it and in his opinion, it will not make a substantial effect on the area. Schilling stated that to a certain degree, she agreed with McAllister from a distance standpoint and stated that she drives up and down the highways and around town and does not notice cell towers but she does not live right next to one and she believes those individuals who will live within 2,000 feet of this cell tower will see it from their bedroom window every day and they will have to, to a certain extent, live with that affect every day from what they currently have. She further stated that they may not see a lot of the tower and she is not sure how many trees will be taken down to get heavy equipment into this place to put this tower up. She also understands there is going to be an eight-foot fence around the tower as well as shrubs on the outside of the fence, so the bottom, eight to ten feet of it, may be visually camouflaged but the rest of it will not be and the rest of it will be there and they will see it. She also stated that she is unsure of the impact this would have over a period of time on that area, as she does not live within 2,000 feet of a cell tower and she believes that it will have an impact on that area.

Chairman Gentile stated that the question on this criteria point is, does it have a significant impact on the character of the neighborhood and the implication is that, if the character of this neighborhood is that it is remote, rural, wooded and disconnected from technology, to a visible extent than putting a cell tower in the middle of it would have a market impact. Chairman Gentile further stated "that the spirit of ordinance will be observed, the variance will be contrary to 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." He further stated does it alter the essential character of the neighborhood or threaten the health, safety and general welfare of the general public but it does not threaten the health, safety and general welfare of the general public by any standard which we have been provided, but for the moment, we should at least consider it does have an affect the character of the neighborhood.

Chairman Gentile directed the board to criteria #3. Schilling asked to go back to criteria #1. Schilling stated that there is, however, a significant piece of public interest where providing a necessary communication set for that area is important, whether it be 911 communications or just regular cell coverage for communication purposes. She further stated there is that part of public interest which would be served if the tower were erected and put in that place. She further stated, is this the best place for it to be positioned in order to serve that public interest and we have no evidence to show one way or the other. Chairman Gentile stated either there is evidence that this location is absolutely needed in order to provide that public service, or there are other options available to us. He further stated that the public testimony has been first, from the expert, Kent Chamberlain "*that this location makes no sense.*" Secondly, testimony from two residents with alternative suggestions. He further stated that the board has not been given a definitive answer and in one sense, Schilling is technically correct and on the other hand, we also have looked at the coverage maps that had been provided to us by both C Squared Systems and verified by IDK that shows that, without this tower, the public interests which, of course, we were given no standard by which to assess this but if I suggest that, that standard would be, that there is continuous coverage on Route 153 which provides a significant safety coverage for the residents there. He further stated there was a significant overlap in other sections in Madison as well by the other two towers, so one could argue either there is evidence that this location is not absolutely necessary and is the only feasible means of providing this public support or this location really uniquely provides public safety for residents of Madison and he believes the weight of the argument here, since there are two other towers, that provide continuous coverage on Route 153 for 11 miles, seven miles of which have no coverage and this tower only provides 3.25 miles of coverage, that the board could say that it is not absolutely necessary for the public interest.

Chairman Gentile read the following aloud:

3. Substantial justice is done because:

Any loss to the individual which is not outweighed by a gain to the public is an injustice.

Chairman Gentile stated that this overlaps the previous argument:

- Since this location is not the only feasible location for desired service, then there is no gain to the public by the use of this location in comparison to others, but the loss of the uniquely rural and remote character of the neighborhood violates the spirit of the Zoning Ordinance.
- or**
- The benefit to the public by use of this location for a cell tower provides enhanced public safety which outweighs the inconvenience of a nearby cell tower for the residents of East Madison.

Chairman Gentile stated that to do the first bullet point, we would have to be satisfied that there was adequate coverage and to do the second bullet point, we would have to be satisfied that it provided coverage that was not otherwise available for a significant portion of the public. Chairman Gentile asked the board for their input. McAllister asked if this specifies public safety? Chairman Gentile stated this one does not specifically, per se, and is a loss to the individual which is not outweighed by a gain to the public. McAllister stated, in his opinion, and he may be wrong, but by putting this tower there it gives the police and fire a better location for their communications which is safety for everyone in the area, regardless of the fact, that there is cell service or not. Skaife stated that she agreed with McAllister's statement, however, if health and safety, police coverage and emergency services are critical, in her opinion, that does not require a 150-foot tower with Verizon, T-Mobile and all the others on it and there are ways of creating coverage for emergency services only. She believes emergency services can be covered with a different solution and she does not know what that is as she is not an engineer.

Chairman Gentile asked the board members if they wanted to continue the discussion or make their own minds up on this one, but we can move on to discussion for criteria #4 as follows:

Chairman Gentile read the following aloud:

4. The values of surrounding properties are diminished because

- The Affuso study convincingly demonstrates that homes with 2400 feet of the cell tower would sustain a loss in value of approximately 2 to 9 percent. This study focused on the effect on price based on distance from a cell tower using more than 23,000 sales over a 17-year period in Mobile County, Alabama, which includes rural as well as urban areas as conducted by the University of Southern Alabama, a disinterested third party, and so is more comprehensive and mathematically rigorous than the studies submitted for two New England towns which compared on the order of 10 sales each or 100 sales each and included opinion surveys of appraisers.
- or**
- The Affuso study, though, more rigorous and complete does not reflect New England and so, the two reports submitted for New England towns appear to reflect local reality much more accurately and they indicate that cell towers do not affect property values.

Chairman Gentile stated that this one is worth some discussion, as we have two entirely different approaches to the study of property values. One, by a group of professional appraisers by two different professional

appraisers, and one by a disinterested party, which is in fact, mathematically much, much more rigorous. To summarize the difference, the one study is local and looks at recent sales and each study poll is a slightly different group of people but professionals who are observing sales and comparing on price per square foot but are relatively recent sales. The other study looks at a 17-year period during which cell towers were being constructed and analyzes the effect of the distance specifically to a cell phone tower. He further stated that 23,000 sales over 17 years is a pretty good indication. Chairman Gentile stated that he personally leans toward this one and he asked the board for their input.

McAllister asked about the study that Chairman Gentile referred to about the 23,000 sales over a 17-year period that is in rural Alabama and rural Alabama does not equal rural in New Hampshire. He further stated he does not believe they have 130-foot trees in Alabama like we do in New Hampshire and he suggested that the two studies are not equal and that we should look at the local study much more rigorously than we would from the study from 1,500 miles away.

Rau stated he is concerned with Eaton and Freedom having towers that are doing the same thing, in part, and here, we are going to put our tower right in the middle of one of our really nice neighborhoods. He believes more information needs to be looked at in putting the tower in the area of King Pine without harming or disturbing the residential part of East Madison.

Schilling stated having been a real estate agent in a prior state, her opinion is that she cannot imagine that this would not impact some ones decision to buy a home. She further stated that the aesthetics of this may outweigh some one's decision to buy, but that would be an individual's decision. She further stated that she has studies as well and the studies vary but the studies uniformly indicate that there is a significant impact on residential property values from installation of cell phone towers and this is a report and analysis from David Burgoyne who is certified general real estate appraiser and this was a report he made to the FCC. She believes this is going to affect property values to some degree.

Chairman Gentile stated that the comparison of the two studies is difficult because in one sense, it is apples and oranges because you are dealing with real estate appraisers who are accessing their recent experience and in the course of these particular studies, they get paid whether or not the outcome, so the impact on the study itself, may be minimal from the perspective of a researcher and they make their money in the area of real estate so anything that supports property values is, from a researchers perspective, a potential for bias.

Chairman Gentile referred to McAllister's point about Mobile Alabama County does reflect both rural and urban and it also reflects, if you look into the details, distances to the cell phone tower as far as 45 miles and this not exactly a completely urban environment. He further stated it is also an environment where cell phones were desirable and it is one of the nation's busiest port cities and the cell phone usage is high and it is not viewed negatively and there are no reasons to suspect that it is a back water that does not use cell phones and therefore they would not want a cell phone tower because who wants a cell phone tower anyway, well that actually was not the case, so the question is whether the unique mathematical rigorousness of this particular study is convincing or not. He believes it is because it looks very specifically at the distance to cell phone tower over time. In comparison, the New England studies which looked at recent sales and a small number of sales in comparison to a study that looks at 23,000 or more sales over a period of 17 years. Chairman Gentile stated that all members will need to make up their minds as whether they feel property values are affected by the cell phone tower or not.

Chairman Gentile referred the board criteria #5. Chairman Gentile stated hardship is unique in the case of a cell phone tower and he read the following aloud:

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:

Chairman Gentile stated that in this case, the applicant does not own the property. He stated that a hardship for a cell phone application as defined by Daniels v. Town of Londonderry in 2008. He further stated that in order to establish hardship, in this kind of case, the location of the property for the provision of the desired service would need to be so uniquely appropriate for this purpose that denying the variance, even if it is not the only feasible location, would represent a hardship to the applicant in their quest to provide the service, is not because it is the only feasible location but because it is uniquely suitable. Chairman Gentile stated that that if we are convinced that this location is so uniquely suitable, then not putting a cell phone tower here would be a detriment to the applicant and the public, then we would think that they meet the condition of hardship, or if we think that there is nothing particularly unique about this location that makes it especially desirable, then hardship is not established. He further stated if these two conditions are not met, in hardship then we have to go down to the next level which he read aloud as follows:

(2) If the criteria in subparagraph (1) 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 it.

Chairman Gentile stated that in this case, it effectively defaults to the conditions to Telecommunications Act of 1996 which would mean if it is the only feasible location, then that in of itself does in fact establish a hardship if the others do not. Chairman Gentile asked the board if they believe hardship is established in this case by the uniquely suitable location of this cell tower application or that it is absolutely unnecessary.

Schilling stated that if the cell tower were not to be there, and the board voted no to the cell tower, what hardship would they create for the people who are in that surrounding area. She further stated there is the gap of coverage and there is the inability to have cell phone coverage but as we are aware, and she believes we cannot disregard, the applications in the Eaton and Freedom towns of those towers, which she believes, have both been approved and cover that gap and provide adequate coverage for the gap. She further stated that it would not provide us, the Town of Madison, an opportunity to put a whip antenna or 911 comms antenna on Eaton's and Freedom's towers unless we negotiated something different. She further stated there would be a hardship created for the town and not necessarily the applicant in that we might be missing some 911 comms. Chairman Gentile asked if we have any evidence that the town has stated that they want this tower for their whip antenna? Schilling stated that she is just presuming that as a town, you are going to want to do everything you possibly can to have adequate coverage across the entire town for 911 coverage and that we have heard testimony at the very early portion of this case that there are gaps in areas because of the ridgeline and they do not always have fluent communication as you lose your cell phone coverage on that road quite a bit. She also stated that when the other towers are in place, will that go away as they provide the coverage and this is not a unique situation where without that tower, we would not have coverage. She stated she does not think it is and she thinks if that tower was here or not there, we would still end up with coverage from the other towers.

Chairman Gentile asked the board for any other comments. McAllister asked that if we deny this tower going on top of King Pine, will the Eaton and Freedom towers cover the back side of King Pine, which is not covered, at the moment, which this tower will cover it? Chairman Gentile stated that in the IDK report there is some coverage that is provided by other towers. Chairman Gentile stated there is a small gap in coverage in Madison that would not be covered if this tower were not there, but how much of that, for example, is it all of East Madison Road, or the back woods portion. McAllister stated that we had testimony that says, that there is a

seven-mile gap in coverage on East Madison Road. Chairman Gentile stated no, that is on Route 153. McAllister reiterated that it is East Madison Road and there was a gentleman at a meeting, that said he can lose his signal at the top of the hill and not regain it until he is way down below. Chairman Gentile stated that was from Fox Road down to Route 153 and up Route 153 towards Conway. McAllister stated he was mistaken and thought it was seven miles on East Madison Road.

Chairman Gentile wanted to clarify that the board is not voting on whether or not to have a cell phone tower and we are voting on whether or not the cell phone tower is entitled to have these variances and the implication of that is, if we deny the variances, then they will have to decide whether they have other alternatives in terms of technology, locations and whatever else, so we do not have the authority to tell GMR that they cannot have the cell phone tower and we are simply saying that if we deny the variances, that they have to meet the ordinance demands and/or find another location or if, strictly, theoretically in the future, there is a material change to the circumstance because technology changes or it is determined that because another tower collapsed and that this in fact, the only unique location. He further stated that they could come back for a variance for another location if there is a material change but that is theoretical.

Chairman Gentile stated that the board needs to decide if they want to formulate a motion, primarily to deny or primarily to grant. Chairman Gentile stated that the board needs to decide individually on each of the five criteria. If a member concludes that the applicant meets all five criteria, then you only vote once for each variance but not for each of the five criteria. He further clarified that each variance must meet all five criteria to grant the variance.

Variance #1 - A variance from Article VI, Section 6.5.A of the Ordinance, which provides that towers shall not exceed ten feet (10') over the average tree canopy height.

Motion by Gentile, seconded by Schilling to **DENY** the variance request for a 130-foot tower which is 50 feet above the canopy and 40 feet beyond the ordinance standard because:

1. The property values are negatively affected.
2. The character of the neighborhood will be marketedly impacted.
3. The location is not required to provide service on the seven-mile gap on Route 153.

**Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Nay.
The Motion passed 4-1.**

Variance Request #2 - A variance from Article VI, Section 6.5.E of the Ordinance, which provides that there be a fall zone equal to tower height from all property lines.

Chairman Gentile stated the only reason for this variance is because, the town line of Eaton passes through where the fall zone is. He further explained that we can grant or deny this variance but part of the issue here is, that all variances are tied to the location and granting this variance would mean GMR would have an opportunity if they wanted to operate on this location with a totally different technology and if the fall zone was an issue, then they would not have to come back and ask us for a variance for a fall zone for two years. If we deny it, it would be consistent with the other things which makes it more difficult to operate on this location.

McAllister stated that we have had testimony that the fall zone is not the height of the tower and that the tower is designed to break some place in the middle so the fall zone becomes much less than the height of the tower. Chairman Gentile stated that is a practical reality, an engineering technical reality and legally, the fall zone must be the height of the tower and we must grant a variance if that fall zone crosses a property line.

Skaife asked since we just denied variance #1 on the height, so now the fall zone is relative to the height that is being applied for which is 130 feet to 150 feet and she wants clarification on this that this variance is about the height, assuming 130-foot tower, regardless of what we just voted on.

Schilling asked now does the tower fall inside because we have taken 20 feet off and does the tower from the full height of it, which we must consider, does that now fall inside that town line and by how much was it over? Chairman Gentile stated because we denied the height variance, then it would be simply consistent to deny the variance for the fall zone. Schilling disagreed. She believes the fall zone is a completely independent construct and the fall zone is something that regardless of what we did with the first variance, we denied the height and that does not mean there could not now be another tower there and we still have to consider that even at 130 feet, if this tower fell, we all know the whole 130 feet is not going to go and probably more like 65 feet or 70 feet is going to be what would snap off and she believes you still have to consider this independently of the other variances. She further stated that some of the criteria the board talked about as to value, detrimental to public health and safety and all the other criteria, some of the same arguments can be used but she believes the variance itself, is separate from the height. Chairman Gentile stated the variance is also tied to the specific location and the fall zone, for example, the board determined on the last variance that one of the reasons why, was because property values are affected and that the character of the neighborhood is significantly impacted. He further stated that anything that is high enough to require the variance from the fall zone is going to have the same affect. He asked Schilling if she thought there would be a different effect on the property value or the character of the neighborhood? Schilling stated what we really are considering is whether or not, with regard to the fall zone, that it is appropriate for it to fall outside of the property line and would we give them a variance for it to fall outside of the property line, wherever that property line is, and in this case, it is away from all the other homes and it is toward a non-inhabited portion of that area. Chairman Gentile asked Schilling if she wanted to formulate a motion so we can consider that and go through the five criteria.

Skaife stated that it is also owned by the same owner and it is not actually the property line, but the town line and she reiterated the property is owned by the same owner and it is not a different property owner. Chairman Gentile stated that the board needs to now evaluate this on the five criteria and if we are leaning toward the idea that we would write the variance to grant. Schilling stated that if this cell tower did not need any variances, other than this particular one, we know that based on law and based on our ordinances, that the applicant can put a cell tower there, and no one is debating that part of it and what we are all debating is, whether or not we are going to give them a variance. She further stated that if they had a cell tower that met all criteria, with exception of the fall zone, then she believes they need to look at that independently. Chairman Gentile agreed.

Chairman Gentile read aloud one and two of the criteria as follows:

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 spirit of the ordinance is defined in its purpose statement: "This zoning ordinance, by application and provision of State Law, seeks to protect existing property owners against a new use nearby which may be incompatible or undesirable and also damaging to existing owner's present property by lowering its desirability and value." This must be to a marked degree.

Chairman Gentile stated that one would argue in the opposite direction from what Schilling previously said granting the variance for a fall zone would be implying that the cell phone tower itself is not impacting the value of the property and not impacting the neighborhood. Skaife stated that it is in the interest of the public safety to have a fall zone and it is not opposed in the interest of public safety to have a fall zone and we are not voting on whether there is going to be a tower or not and that they are voting on should there be a tower. Chairman Gentile stated it is not only the fall zone but the fact that the fall zone crosses a formal property line and whether that has any impact on property values or anything else.

Chairman Gentile stated that the criteria is that a variance for the fall zone crossing the property line would change the character of the neighborhood, impact it negatively or would it reduce property values. Rau asked if it would affect the fall zone, the fact the nature of the new tower just crinkles down and it is protective of the various sidelines. Chairman Gentile agreed but stated we are still dealing with the formality that we have for a fall zone that crosses a public road. Schilling asked if the variance for a fall zone is granted, is there then harm to the public interest because we have crossed town lines? She believes that Eaton would want to know that we would allow a tower to fall on their property, but then again, the property is owned by the same individual and that is the only area where that requires the variance and if it were not across that town line, they would not require a variance for this.

Chairman Gentile stated they were going to walk through the five criteria, then we will make a motion and vote on this. Chairman Gentile stated they talked about it is not contrary to the public interest to have this fall zone cross the public road, the spirit of the ordinance will be observed by not affecting the character of the neighborhood in any marked degree or threaten the health, safety or general welfare of the public, and of course, the fall zone is designed in order to create a safe zone.

Chairman Gentile read the following aloud:

3. Substantial justice is done because:
Any loss to the individual which is not outweighed by a gain to the public is an injustice.

Chairman Gentile stated that if we deny the variance, what is the loss to the individual which is not outweighed by the public gain and we are talking about the variance criteria that affects a formal situation so this is a hard one to evaluate.

Chairman Gentile read the following aloud:

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

Chairman Gentile read the following aloud:

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:

Chairman Gentile stated that in this case, if the property is not uniquely suited for the purpose for which it is being applied for, then they do not establish hardship on this application for this point. He further stated that if it is not uniquely suitable, particularly optimal or required for the purposes, then there is no reason to grant the variance. Chairman Gentile stated that hardship is usually the one that causes one to stumble at the end of this. He further stated that he personally fails to see how hardship is established by not granting this variance.

Skaife stated that where she is struggling with this is if there is a tower, it cannot exist without a fall zone and that there must to be a fall zone. Chairman Gentile agreed, but the question is, in this case, the fall zone requires a variance and in order for it to be qualified for a variance, it must to meet the five criteria. He further stated that the board has argued very quickly, and relatively superficially, the four criteria are relatively easy to meet but is there a hardship that meets the criteria. Skaife stated is it not somewhat punitive to say you cannot have a fall zone in this context because you need one and you cannot build a tower without a fall zone. Schilling stated you can build a tower and if the property line is only 50 feet from the where you want to put the tower, then your tower could not be more than 50 feet because the fall zone and it would still have to fall within that fall zone. Chairman Gentile stated or have a variance. Schilling stated that the question is, are we okay as a board with that fall zone crossing the town line, even though the property owner is the same. Chairman Gentile stated that is not are we okay with it, but does it meet the five criteria and that is the question and that it must meet all five criteria and can someone argue that it creates a hardship. Schilling stated that in looking at The Zoning Board of Adjustment Handbook, For Local Officials, one of the things they talk about for unnecessary hardship is that, and she read aloud, *“the restrictions on one parcel are balanced by similar restrictions on other parcels in the same zone. By its basic purpose, a zoning ordinance imposes some hardship on all property by setting dimensions, allowable uses, etc. When the hardship, so imposed, shall share equally by all property owners, no grounds for a variance exists only when some characteristics of the particular land in question makes it different from others, can unnecessary hardship be claimed.”* Schilling stated that because that property line for the town is so close on the one side, she believes that that is the characteristic of the particular land in question which makes it different from the others around it. She further stated, is it such a large characteristic or a significant characteristic that it then says, that the hardship would be imposed on that particular parcel and not on others and therefore then, that hardship exists because it is not equally shared by the other property owners. Chairman Gentile stated that made sense and would be an argument for it. Gentile stated that the question here is the hardship established by the fact that the unique characteristics of the land which creates this need and Schilling has argued that this property line is that unique characteristic that creates the need for a variance and applying to this property would therefore justify granting them a hardship

Chairman Gentile asked if Schilling would like to formulate a motion. Schilling stated that we should work with a motion to approve the fall zone variance. Schilling asked if we know how much? Chairman Gentile stated it was about a 1/3 distance which was based on a 150-foot tower and was maybe 50 feet over the line and it would be about 30 feet over the line.

Variance #2 - A variance from Article VI, Section 6.5.E of the Ordinance, which provides that there be a fall zone equal to tower height from all property lines.

Motion by Schilling, seconded by Rau to **GRANT** the variance request of the fall zone to cross the town line between Madison and Eaton because:

- 1. It is still on the owners property and the spirit of the Zoning Ordinance is observed and property values would not be diminished due to a fall zone within one owner’s property and literal enforcement would create an unnecessary hardship because of the unique characteristics of a town line going through the property.

**Roll Call Vote: Gentile - Nay; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.
The Motion passed 4-1.**

Variance #3 – A variance from Article VI, Section 6.6.M of the Ordinance, which provides that “all ground mounts shall be of a mast type mount.”

Chairman Gentile stated the monopole is slightly larger in diameter and enables the arrays to be mounted on the exterior and this is consistent with today's technology, although masts are also consistent with today's technology, which means that they would mount the arrays inside the mast vertically so that there are fewer carriers. He further stated that the effect of the variance is that it increases the number of carriers they can have and slightly increases the visibility of the mast as opposed to the monopole which increases visibility and increases the number of carriers. The mast is less visible. McAllister stated that masts, as he understands, usually need to be guyed, which means you have cables running for support. Chairman Gentile stated that he did not want to open the public hearing at this point and wanted to continue with their discussion and if need be, they will open the public hearing. Schilling stated to McAllister's point, there is difference between mast and the monopole and the footprint of which for the mast, providing the internet is correct, which is McAllister researched his information, is much larger if you go from point to end point of the guys for the mast. She further stated for the monopole footprint, in the center of the fenced in area, is much smaller for the purposes of structural integrity affixing it to the ground so it is a completely different structure. She then stated so for requesting a variance, they could be erecting something that is much better because it has that smaller footprint and base and there are no wires coming down from it to go out to the sides of it to keep it steady. Schilling stated that they should believe McAllister in the research that he found on the internet, but the question is whether the board accepts the research he found. McAllister stated he found a new search on the internet by AI and read aloud *"a monopole tower is a single, free-standing pole often made of steel while a mast is a pole that is often supported by guy wires or stays."* Chairman Gentile stated he thought the masts they were talking about were not supported by guy wires. McAllister continued reading from the internet aloud *"monopoles have a smaller footprint than masts and are less visually intrusive making them suitable for urban areas or locations with limited space. Masts on the other hand can be taller and support larger loads making them suitable for applications for height and stability are crucial. Monopole towers, a single vertical pole tapered in size are self-supporting, smaller footprint, less visually intrusive and typically easier and faster to install and common in telecommunications for mounting antennas and communications equipment. Masts on the other hand, is a pole that is often supported by guys, wires or stays and requires guys, wires or stays for support, larger footprint than monopoles, more visually intrusive than monopoles, can be more complex to install than monopoles, used in various applications including radio broadcasting, power transmission and support for wind turbines."* Chairman Gentile stated that he is not sure if a mast at 150 feet tall would require guying and he did not recall anything in the testimony that we discussed the issue of mast v. monopole. He further stated that no matter what definition of a mast v. a monopole is that the question we have is a technical question that they have asked for a monopole when a mast is required by the ordinance. Schilling stated that we are in an area where technology has been updated or construction methods have been updated and perhaps our Zoning Ordinance has not been in that particular paragraph but that the intent is to make sure the structure is significant enough and sturdy enough to hold the arrays and whether it is a mast or a monopole, she is having a hard time seeing it is a significant issue that we would have a difficult time going through the five criteria. She further stated that there would be no issue if they said it is a mast and they did not call it a monopole and it is still a singular pole and not a series of four or five poles and it is just the one pole, whether it is a monopole or a mast. She further stated it feels sort of moot to her.

Rau stated that we are now talking about a ground mount and he feels it is a more modern way of providing these facilities but we are working with a rather old variance in terms of mast type and he believes today, probably more of these structures are the monopoles. He further stated that a lot of cities use a monopole as it can be structured in such a way, that they can put it in churches and it really functions a lot more fluently in both cities and areas like ours.

Skaife stated she thinks this is a moot issue as to whether it is a monopole or a mast because the only thing you would do in 2025 is a monopole.

Chairman Gentile stated that one approach is to look through this and grant the variance and another approach is to look through it and decide this variance is irrelevant and that it meets the criteria and therefore we dismiss the need for the variance and the other alternative is to look at it and say this variance is tied to this location and if the existence of a mast or a monopole, either one in this particular location violates the conditions of the request for a variance, then we deny the variance and these are our three options.

Motion by McAllister that we move to determine that this irrelevant because of current technology and we need to determine that the variance is not required.

Chairman Gentile stated that the board should address the questions of the variance.

Chairman Gentile stated the variance on the table is monopole v. mast and he asked the board if they felt they need to clarify the technical question with the applicant? The board decided no. He further stated that the board needs to now proceed with evaluating the variance with the five criteria and Chairman Gentile read the following aloud:

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 spirit of the ordinance is defined in its purpose statement: "This zoning ordinance, by application and provision of State Law, seeks to protect existing property owners against a new use nearby which may be incompatible or undesirable and also damaging to existing owner's present property by lowering its desirability and value." This must be to a marked degree.

Chairman Gentile asked that if putting a monopole here instead of a mast, does that alter the character of neighborhood or threaten the health, safety, or general welfare of the public. He further stated that fundamentally, the tower is a permitted thing and the question is whether the mast or the monopole violates the presence of the spirit of the ordinance. Schilling suggested that the difference of it being a monopole versus what our Zoning Ordinance currently calls for is not significant enough of a difference in order to make there be any kind of not observing the spirit of the ordinance.

Chairman Gentile read the following aloud:

3. Substantial justice is done because:
Any loss to the individual which is not outweighed by a gain to the public is an injustice.

Chairman Gentile stated that whether you have a mast or a monopole, you will not have much change in the gain to the public except the monopole will provide more opportunity for service and the applicant in this case would be proportional in a sense.

Chairman Gentile read the following aloud:

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

Chairman Gentile stated that does changing from a mast to a monopole itself diminish property values. Schilling stated in and of itself she stated no. Chairman Gentile asked if anyone argued that it would and no one did.

Chairman Gentile read the following aloud:

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:

Chairman Gentile stated that in this case, the question is whether denying the change creates a unique sense of hardship and one may argue in this case that it is not the ideal location but the technological change from a mast to a monopole is uniquely advantageous and the question is whether requiring a mast represents a hardship for the applicant because it does require a reduction in the number of services provided, which it will also be a loss of benefit to the public .

Variance #3 – A variance from Article VI, Section 6.6.M of the Ordinance, which provides that “all ground mounts shall be of a mast type mount.”

Motion by Gentile, seconded by Rau to **GRANT** the variance request for a monopole because:

1. Requiring a mast would represent a hardship to the applicant and because of the reduction in capacity of providers and a loss of service to the public.

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

Variance #4 – To the extent necessary, a variance from Article VI, Section 6.6.K (2) of the Ordinance, which provides that a telecommunication facility “shall not be visible above the ridge line from public roads.”

Chairman Gentile asked Young to read aloud the Variance #4 as noted above.

Skaife asked if she could read from the Zoning Ordinance as follows: *“Wireless telecommunication facilities shall not be located within open areas that are visible from public roads, recreational areas, or abutting properties. All ground-mounted wireless telecommunications facilities shall be surrounded by a buffer of dense tree growth as per section 6.6F.”*

Chairman Gentile stated that we are not addressing the question of a buffer around the base and we are addressing the question of the visibility of the ridge line from the public road and that is because there is a buffer provided in the plan and none that it is required. He further stated that the board needs to address this from the perspective of the five criteria and he read the following aloud:

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 spirit of the ordinance is defined in its purpose statement: “This zoning ordinance, by application and provision of State Law, seeks to protect existing property owners against a new

use nearby which may be incompatible or undesirable and also damaging to existing owner's present property by lowering its desirability and value." This must be to a marked degree.

Chairman Gentile stated the board has established that this does not affect the health, safety or general welfare of the public from the perspective of physical damage and radiation, so the question really is focused on, does it alter the character of the neighborhood. The balloon test was conducted and the reality is how many locations was it visible from above the ridge line? There is a difference of opinion, of course, on this matter. Some people felt that any visibility of technological items in this area is objectionable. Others felt that it would benefit the public. The minor imposition on peoples visibility that would not be a significant issue and he asked the board how they felt about this first criteria and does it significantly alter the neighborhood. He further stated there are several things to think about and one is it is visible from portions of the neighborhood where it is placed and it is also visible from a distance from several places along the road as well as other locations. Skaife stated she feels it really conflicts with the Zoning Ordinance and that the visual impact is markedly negative in her opinion as she spent a lot of time on the balloon test walking around, where she believes the proposed base of the tower will be and walked around the neighborhood. She believes it goes beyond the visibility above the ridge line and it is about the tree canopy and it is about everything even at 130 feet, the bottom balloon was the smallest balloon and the least colorful balloon so it took a little bit of finding as the sky was gray and wind blowing which took the balloon slightly off vertical. She stated that she believes it is detrimental to the general area and it is a recreational area and she stated that our Zoning Ordinance states that *"it shall not be located within open areas which are visible from public roads, recreational areas, or abutting properties."* She further stated that this is visible from all of those.

Chairman Gentile stated what we can do is bring all of the arguments forward from the first variance (variance #1) which can be reworded slightly. He further stated that we have testimony from the public as well and conflicting testimony from other people but the fact of the matter is the changes of the neighborhood would be significant because of the rural remote ambiance are the defining characteristics of these neighborhoods and the presence of this particular cell phone tower is objectionable or it is not the case that there is a marked change to the neighborhood because of the visibility and the tower is reasonably limited, traffic loading is only a few trips a month. He further stated that Skaife testified that it is an impact on the recreational areas.

Schilling stated that this deals with the ridge line as opposed to necessarily inside the neighborhood and that inside the neighborhood should never be discounted but when we are looking at a variance for the ridge line, the question is, was it during the balloon test, visible enough so it significantly impairs the site line and the recreational nature and she believes it did, but she cannot attest to the 130-foot level because she was focused more on the 150 feet but she does remember being able to see, not just the 150 foot balloon, but all three of them, the 130, 150 and 170. Chairman Gentile stated that there is also the question that when we weigh these things back and forth, because our job as a Zoning Board of Adjustment is to act as a constitutional relief valve, we must balance the general interest of the public with the specific interest of the applicant and weigh both of those against each other in order to determine whether relief from the written ordinance is justified. He further stated that one aspect of that here is, it is not just the visual impact, but the visual impact in the context of whether this particular cell phone tower is needed. He further stated that if the need was extremely high, then the tolerance for a visual impact would also be higher and if the cell phone tower is not as needed in this location, then one is more than justified in saying "we don't need that visual impact in that location."

Chairman Gentile stated we can bring forward their argument from the first variance (variance #1) and skip the things that relate specifically to the height and changes to the neighborhood, we can simply say that because we have evidence that this location is not absolutely necessary and that the visual impact of the tower above the ridge line is not justified. Since there was no comment from the board Chairman Gentile moved on to the second criteria.

Chairman Gentile read the following aloud:

3. Substantial justice is done because:

Any loss to the individual which is not outweighed by a gain to the public is an injustice.

Chairman Gentile stated that in this case, substantial justice would be done if we were looking to grant the variance, so substantial justice is done to the public and to the applicant by the presence of this thing because it provides value to everyone concerned in the context of it being needed and if it is less needed then that value and the question is, can it be provided by some other source. He further stated that if the location is not the only feasible place for the desired service, then there is no particular gain to the public by use of this location in comparison to another, but the loss of the uniquely rural and remote character of the neighborhood violates the spirit of the Zoning Ordinance and that is what we said in the first variance request.

Chairman Gentile read the following aloud:

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

Chairman Gentile stated we come back to the same question we had before and in this case, the surrounding properties are those that are a little closer in and one could ask the question whether they are further properties out and the evidence would indicate that once you get more than 2,400 feet away from the tower, it is very hard to substantiate drop in property values but inside that 2,400 feet, there is a substantiation for a drop in property values which means that if we bring this forward as follows:

- The Affuso study convincingly demonstrates that homes within 2400 feet of the cell tower would sustain a loss in value of approximately 2 to 9 percent. This study focused on the effect on price based on distance from a cell tower using more than 23,000 sales over a 17-year period in Mobile County, Alabama, which includes rural as well as urban areas as conducted by the University of Southern Alabama, a disinterested third party, and so is more comprehensive and mathematically rigorous than the studies submitted for two New England towns which compared on the order of 10 sales each or 100 sales each and included opinion surveys of appraisers.

or

- The Affuso study, though, more rigorous and complete does not reflect New England and so, the two reports submitted for New England towns appear to reflect local reality much more accurately and they indicate that cell towers do not affect property values.

Chairman Gentile read the following aloud:

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:

Chairman Gentile stated that in this variance if the location is optimally uniquely suited for providing the service, and we do not grant the variance, then a hardship is given to the individual. He further stated that they have argued that this location is not necessary and therefore not uniquely optimal.

Rau stated that King Pine has an alternative setup that provides the service and they want to remove that and put this tower. He does not believe the hardship is there in large part. He believes by the board looking at this

variance and granting it, he does not believe the board should go forward with that as he believes that other alternatives need to be looked at. Chairman Gentile stated that as a matter of process, we do not have that complete as far as the town is concerned.

Chairman Gentile stated that as we have said before, if that condition as well as the second aspect of the hardship is as follows, which Chairman Gentile read aloud, and also stated, that if we do not establish hardship, based on the criteria noted below, then it defaults to hardship only if this is the only location where this service can be provided.

The proposed use is a reasonable one:

Either

- Given the less than optimal location for the stated purpose, this use is not reasonable.
- OR the provision of cell phone service to the additional service area which enhances public safety is a reasonable use of the location.

(2) If the criteria in subparagraph (1) 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 it.

In the case that hardship was not established by 1 and 2, then in this case the condition that **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 it.**

This reverts to the condition of the TCA, if it is the only feasible location, then hardship is established, but the TCA would override any consideration of the other 4 criteria.

Variance #4 – To the extent necessary, a variance from Article VI, Section 6.6.K (2) of the Ordinance, which provides that a telecommunication facility “shall not be visible above the ridge line from public roads.”

Motion by Schilling, seconded by Rau to **DENY** the variance request because it significantly impacts the rural nature of the area, the location is not necessary to provide this service and it negatively impacts property values in the area around the tower and not granting the variance does not create an unnecessary hardship because the location is not optimal.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile stated that the board needed to have a brief discussion for the record on the aspects of the implications of the TCA to our decisions. The TCA does provide some restrictions on how local boards can impose their Zoning Ordinances and it applies to the Planning Board as well as the Zoning Board and those things affect two things, one is the health and safety issue and that is not an issue for us and that we have evidence that was presented that shows that the maximum radiation levels provided by the tower as presented at 150 feet, were at a maximum of 14% of the maximum permissible exposure and that health and safety standard does not come into question and we have not argued anything other than no evidence was provided to us that the tower would exceed those FCC guidelines so we are within the TCA guidelines on health and safety.

Chairman Gentile stated that the other issue is whether or not we have effectively prohibited the only feasible location for a cell phone tower and he believes it is worth agreeing as a board that we, first of all, from a process, do not have the information from the Planning Board that would have informed us as to whether or not

this was the only feasible location. He further stated that because there were two other cell phone towers in process of application, whose coverage, we reviewed and was verified by our independent contracted engineer that there was sufficient coverage provided along Route 153 for the seven miles of distance where there was no coverage and that was complete coverage by the other two towers for seven miles only and 3.25 miles was covered by this particular application. So, the point of that is, if the board agrees, we have not done anything to eliminate the only feasible land, so therefore, our vote to deny two of the variance requests are, at least at our initial evaluation, respect the guidelines of the TCA. Chairman Gentile stated the TCA is the Telecommunications Act of 1996 federal law that does provide for the fact that coverage must be provided and therefore, we cannot effectively prohibit coverage where it is needed.

For clarification purposes see final Findings on the five conditions for a variance.

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 spirit of the ordinance is defined in its purpose statement: “This zoning ordinance, by application and provision of State Law, seeks to protect existing property owners against a new use nearby which may be incompatible or undesirable and also damaging to existing owner’s present property by lowering its desirability and value.” This must be to a marked degree.
 - The volume and clarity of the public testimony either
 - substantiates the fact that the changes to the neighborhood would be significant because the rural, remote ambiance is the defining characteristic of the neighborhood which would be markedly impacted by the presence of a cell phone tower. (if it is not proven to be needed at this location.)
 - Or does not substantiate that there is a marked change in the character of the neighborhood because the visibility of the tower is reasonably limited, traffic loading is only a few trips per month and sound levels outside the enclosure would be less than voice levels during generator operation.
 - There is either
 - evidence that this location is not the only feasible location to provide needed service because other applications provide more coverage to the critical need along Route 153.
 - Evidence that this location is the only feasible location for the desired service as supported by IDK’s comparison of coverage showing a stronger signal and an 8% increase in coverage in a defined section of Madison.
3. Substantial justice is done because:
Any loss to the individual which is not outweighed by a gain to the public is an injustice.
Either
 - Since this location is not the only feasible location for the desired service, then there is no gain to the public by the use of this location in comparison to another but the loss of the uniquely rural and remote character of the neighborhood violates the spirit of the zoning ordinance.
 - OR The benefit to the public by the use of this location for a cell tower provides enhanced public safety which outweighs the inconvenience of a nearby cell tower to the residents of East Madison.
4. The values of surrounding properties are not diminished because

either

- The Affuso study convincingly demonstrates that homes within 2400 feet of the cell tower would sustain a loss in value of approximately 2 to 9 percent. This study focused on the effect on price based on distance from a cell tower using assessing more than 23,000 sales over a 17-year period in Mobile County, Alabama, conducted by the University from Southern Alabama, a disinterested third party, and so is more comprehensive and mathematically rigorous than the studies submitted for two New England towns which compared on the order of 10 sales each and included opinion surveys of appraisers.
 - OR The Affuso study, though more rigorous and complete, does not reflect New England and so the two reports submitted for New England towns appear to reflect local reality more accurately. They indicate that cell towers do not affect 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:

Hardship for cell tower applications was defined by the case Daniels v the Town of Londonderry (2008). In order to establish hardship in this kind of case, the location of the property for the provision of the desired service would need to be so uniquely appropriate for this purpose that denying the variance, even if this were not the only feasible location, would represent a hardship to the applicant in their quest to provide this service not because it is the only feasible location, but because it is so uniquely favorable, that alternative locations are significantly less desirable.

- In this case either
 - The fact that other existing applications for cell towers would provide continuous service along Route 153 for 11 miles from Route 25 in Freedom to the existing coverage in Conway while this application only covers 3.25 miles of that distance, and the testimony of Dr. Kent Chamberlain that for the purpose of filling the service gap in this area, this location makes no sense, indicate that this location is not a uniquely favorable choice to provide missing cell phone coverage.
 - OR in spite of the fact that this tower only provides 3.25 miles of coverage along Route 153 and overlaps other service areas, it does provide some additional coverage which is needed.

The proposed use is a reasonable one:

Either

- Given the less than optimal location for the stated purpose, this use is not reasonable.
- OR the provision of cell phone service to the additional service area which enhances public safety is a reasonable use of the location.

(2) If the criteria in subparagraph (1) 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 it.

In the case that hardship was not established by 1 and 2, then in this case the condition that **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 it.**

This reverts to the condition of the TCA, if it is the only feasible location, then hardship is established, but the TCA would override any consideration of the other 4 criteria.

Chairman Gentile read aloud the provisions of the 30-day appeal period. He further added that in the event, because the process for the town is incomplete and in the event the town should conclude that this is the only feasible location, then that establishes a material difference in the situation in which means that even though the appeal period has expired, a reapplication is feasible. Chairman Gentile closed **Case #24-08**.

Case #23-13 – Re-Hearing Of The Zoning Board Of Adjustment's February 19, 2025 Decision

Chairman Gentile asked Young, Land Use Boards Administrator to read aloud **Case #23-13** as well as the posting notification.

Case #23-13 – Re-Hearing of the Zoning Board of Adjustment's February 19, 2025 Decision - requested by Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Chad and Brittany Ardizzoni and Aaron and Tiffany Clymer, 13 Lucerne Drive, Tax Map 103, Lot 060 to determine whether or not to limit them to 61 short term rental days a year.

PUBLIC MEETING NOTICE: Notification was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on May 7, 2025 as well as in the Conway Daily Sun on May 8, 2025. Chairman Gentile that the board is formally starting this case over.

Chairman Gentile stated that the board is formally starting this case over.

ELEVATION OF ALTERNATES: Chairman Gentile elevated Skaife to a full voting member so there is five-member board present.

Conflict of Interest: Chairman Gentile polled the board and there was no Conflict of Interest.

Chairman Gentile stated that as a courtesy, one of the reasons why we are doing this is so that Attorney Johnson has given the board a consistent series of arguments for each case, we want him to have in the record a consistent series of arguments because these have been spread out over many months and we have given arguments here and there and so Chairman Gentile wants to make them all even, that is to the extent that they apply evenly.

Waiver Request: Chairman Gentile stated the Waiver Request was irrelevant to this case.

Regional Impact: Chairman Gentile polled the board and there was no Regional Impact.

Attorney Johnson stated that he was there on behalf of his clients, Chad and Brittany Ardizzoni and Aaron and Tiffany Clymer and that this case is on for rehearing and by way of background, the court found that this was a grandfathered use and it came back to the ZBA and the ZBA applied a formula based on data provided at a prior hearing and came up with the ruling that his clients could use their property for short term rentals for no more than 61 days and his motion for rehearing was focused on the fact that it his belief that under the Zoning Ordinance and controlling law, that once you find it is a pre-existing use, there is no ability for the ZBA to limit the ability to do that use to a certain number of days prior to the Zoning Ordinance changing in March of 2022, the ability to short term rent your property was unlimited and so the use has not changed and the use is not expanded and the use has always been short term rentals and the fact that the court has already ruled that it is a pre-existing use, it is his position that for any of the cases where there has been a limitation set, that the ZBA erred and that is the primary reason. He further stated that he has included in all his motions for rehearing, the constitutional arguments, which he was not going to go through again (and for the record, these arguments are in previous minutes) but for the decisions for the Motions for Rehearing, three of the four Motions for Rehearing all relate to granting of the appeal with specific day limitations and so this argument that he is making

now applies to Case #23-23, Case #23-15 and Case #23-18, all of which, it is the same exact argument and he understands the boards reasoning of wanting to be consistent across the platform, but those three, from a rehearing basis are the same and the argument is that, if it is a pre-existing, it was a pre-existing use with no limitation whatsoever built in, either in common law or in the Zoning Ordinance before it changed, that the ruling should be that they are a pre-existing use and they are allowed to use the short term rentals however they want, and again, that is for cases #23-23, #23-15 and #23-18. He further stated that the rehearing on Case #23-19 is a purely constitutional argument but when we get there he would like to make a few points.

Chairman Gentile asked if anyone in the public wishes to speak to this. No one wished to speak.

Chairman Gentile stated the board will summarize their arguments and he wanted to cycle back as Attorney Johnson stated that there is no wording in the RSA or in our Zoning Ordinance that limits, and we take exception with that and Chairman Gentile read aloud RSA 674:19 as follows *“Specifically states that the Zoning Ordinance shall apply to any alteration of use and a Zoning Ordinance adopted under RSA 674:16 shall not apply to existing structures or the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before the alteration.”* Chairman Gentile stated the board feels that this is wording that allows the board to examine the manner in which, the short term rental was used and apply a limitation based on that. He further stated in our Article 1.3C of the Madison Zoning Ordinance, specifically allows the limitation of use and read aloud *“any land use to the extent existing at the time of the passage of This Ordinance, but not conforming thereto, shall have the privilege of continuing in such use indefinitely or re-establishing in such use within one (1) year of any discontinuance.”* Chairman Gentile reiterated that, once again, it is specifically limited to the extent existing at the time of the passage. He further stated that the board stated that in one of the other cases, listed the arguments that Attorney Johnson has seen but he will briefly summarize them as follows:

New London Land Use Association v. New London ZBA 1988 established four conditions under which pre-established non-conforming use may be expanded which assumes, of course it was somewhat limited before. All of which must be met in order for non-conforming use to expand. He stated, although there is one of those four conditions that particularly applies to this case which is particularly relevant and that is, as we heard from public testimony, and also from Police Chief King, when he was still Chief, submitted to the board a report covering a period of January, 2022 through March of 2024 and detailed all of the complaints of all the parking violations and noise, and a number of which involved short term rentals and during the ZBA meetings of November 15, 2023 and June 19, 2024, testimony was given of complaints of noise and parking violations from short term rentals and that is evidence that short term renters, at times, do not comply with the owners requirements to abide by parking regulations and to limit loud noises at night. It is therefore, reasonable that the ZBA conclude that expanding non-conforming use beyond its historically established levels can have a substantially different and negative impact on the neighborhood and the ZBA is therefore, within its authority to restrict non-conforming use to its established level to prevent an increase in demonstrative impact on the neighborhood.

Chairman Gentile stated that the above testimony has no bearing on whether or not a pre-existing established non-conforming use has the right to that, but it does have bearing on whether or not we can limit. Additionally, he stated that the Town of Salem v. Whitson in 2001 established the fact that, and he read aloud, *“an accessory use cannot become their primary use which further justifies the limitation on the usage to the previous established practice for a property so that homes which have been occasionally rented by owners on a short term basis in which have the status of a pre-existing, non-conforming use may not be turned into a full time short term rental property.”*

Chairman Gentile asked for any comments from the board and stated that these are the board’s arguments that they put forth in previous cases.

Attorney Johnson asked if the board had heard any of the above arguments? Chairman Gentile, stated, yes of course. Attorney Johnson stated that for the record, he does not believe there is any evidence in any of the cases for appeal that his clients renters had had any impact either with police, noise or parking violations and he does not believe that is in evidence and there is also no evidence in testimony before the ZBA, that any of the applicants are looking to convert their properties into full time short term rental uses and they all have testified that they use the property for themselves a period of time and so he does not believe that the primary use is actually accurate based on the presentations that have been made on the cases that have been heard or are now before the board for hearing. Chairman Gentile stated that the board is not specifically accusing Attorney Johnson's clients as being those who had violations but that Attorney Johnson has asked if the board has justification for limiting the days that pre-existing short term rentals can be used and the answer is, these are the reasons why we believe the board has the right to do this and he further stated, that of course, the whole point is that we are the constitutional safety valve preventing the public from being overrun by unnecessary regulations and other neighbors being overrun by scofflaws, and he is not implying Attorney Johnson's clients fit into one of those negative categories but the board tries to operate off a consistent basis.

Chairman Gentile stated he will summarize some of the board's arguments to the series of Attorney Johnson's constitutional arguments and he outlined it for the board as follows:

- *The legislative body (the town) does have the right to regulate land use and this town voted in 2022 to limit transient use of the property and Attorney Johnson has contended that this is Ambiguous.*

- *The town recognizes that owners have rights and the three primary rights is to live on their property, rent their property and sell or transfer their property and when the ordinance places a legally valid restriction on the use of the properties, such as a transient occupancy ,that cannot and does not apply to the owner but is limited to rentals, even if the word does not appear there and Chairman Gentile does not believe this is being that vague. He further stated that being the case, the ordinance is not unacceptably vague because it applies to all individuals equally except those who, as owners have the right to reside at their own property. He further stated that the ordinance does not discriminate against any class of individual and in no way violates the privileges and immunities clause because the ordinance makes no distinction other than assuming the owners right to use their own property within the legally and established use limitations granted by the RSA and certainly there is no violation of equal protection because the ordinance makes only the distinction based on the use of the property and not character the individual or a class of individual.*

- *Our ordinance has a clear purpose which guides due process stated in Article 1.1 which is “**the Zoning Ordinance by application and provision of state law seeks to protect its existing property owners against a new use nearby which may be incompatible and undesirable and also damaging to existing owners present property by lowering its desirability and value. All present uses may continue. Thus, the ZBA exists as a constitutional safety value. To consider and due process of which this deliberation is a part, the balance of the owners’ rights is in the authority of the local legislative body to regulate the land use.**”*

Chairman Gentile stated that the board noticed Attorney Johnson's arguments were under the Dormant Commerce Clause and the board is having a hard time considering its relevancy because if, Dormant Commerce Clause deals with goods, rentals are not goods, but if it applies, then it is almost self-defeating because commercial activity is specifically prohibited in Eidelweiss and it is not among those that are allowed in the rural residential district

Chairman Gentile stated that the above was a very short summary in response to Attorney Johnson's constitutional arguments. Skaife stated that a pre-existing, non-conforming use cannot just be expanded because of change into conformity and you cannot make non-conforming conform to expand it. Chairman Gentile stated that you cannot make non-conforming more conforming but you cannot make it less non-conforming. McAllister stated that we try to think of owners when we set their limitations that were higher than they have proved to the board and we have given them a break on the number of days they can rent their property. Chairman Gentile stated that the board was not trying to be ornery to those kinds of questions.

Chairman Gentile stated that the board is going to bring forward from the original hearing, the data that Attorney Johnson had provided so that the limitations could be calculated on the same basis. Chairman Gentile stated that since these are Appeals of an Administrative Decision, there is no specific process by which we have to go through for criteria like we do for the variances.

Chairman Gentile asked the board how they felt after hearing Attorney Johnson present his case and he further asked the board if they wanted to relax the limitations and that Attorney Johnson's request is to relax the limitations completely. He further stated that at this stage, we could make a motion and move through some of these cases quickly. Skaife stated to deny the appeal and continue on. Chairman Gentile stated we could provide the same or a different restriction and then it is up to Attorney Johnson whether he wishes to appeal to the Housing Board of Appeals or the Superior Court.

Rau stated that the board took each individual and modified, to their level of renting and in no way did we want to hurt them in their respective way of doing it and we have increased rental time amount by 15% and he believes these people have rented correctly and we were handed back in March of 2022 this fact that you cannot do short term rentals going forward after March of 2022 and these people have fallen into a situation that the court obviously disagreed with our decision and the court basically gave back to the applicants what their history was plus the 15% and he is not sure how much more the board should give the applicants.

Schilling stated that all non-conforming uses are usually considered adverse and to make something even more adverse is sort of going against your Zoning Ordinances to begin with. She further stated that when you are considering grandfathering and some of the other issues, whether or not an individual can change, expand or do something different with their property, one of the things you have to consider is any additional adverse impact on the neighborhood and in her opinion, that the impact on a neighborhood of someone who rents two weeks a year and has been doing this consistently for 15-20 years, is set at a bar and to then change that and say no, now you can rent it unconditionally all year long, that will change the impact on the neighborhood as it changes the comings and goings, the amount of traffic changes the nature of that particular neighborhood and it has an adverse impact on that particular neighborhood. She further stated that someone who has rented in a neighborhood for a 100-days or more, is a different impact on that neighborhood. She further stated that this changes the abutters perception, their comfort level and a whole lot of things but it becomes a substantially different affect.

Chairman Gentile asked Young if we have a list of Findings of Fact specifically for this? Young stated she did not believe so. Chairman Gentile stated that he wanted to add to the record for Case #23-13, effectively, the statement that has been read which will then become part of the record for the case extending which gives us all the arguments, constitutional and for the limitations and cases that have no grandfathering clause and that part will not be necessary.

Chairman Gentile stated the board could move towards a motion.

Motion by Gentile, seconded by McAllister to grant, in accordance with the court's order, the status of a pre-existing non-conforming use with the same limitation we had before which was 61 days.

Discussion: Attorney Johnson stated he understood the process but wanted to make leave a comment on the Privileges and Immunities Dormant Commerce Clause that one of the factors that the ZBA may be overlooking is that some of the owners do reside out of state in Massachusetts and that is what implicates the Dormant Commerce Clause and Privilege and Immunities because under the new Zoning Ordinance you can only do short term rentals if you are owner-occupied and that spreads impact on people who live a distance and out of state and there have been courts that have struck down such limitation and just wanted to put the board on notice that he does think the Privileges and Immunities Dormant Commerce Clause may have an impact here. He further stated that he know the ZBA disagrees and the ZBA is free to make whatever decision you want but he believes the board was a bit confused about what the basis of the arguments are and he wanted to give it a little bit more explanation because it is basically disadvantaging out of state owners of property. Chairman Gentile stated he understood this but what he did not grasp was, and he asked the board, does our Zoning Ordinance limit that to owner-occupied? Attorney Johnson stated that you cannot do short term rentals at all in Madison, unless it is owner occupied. Schilling stated that is for new people and not his clients who are grandfathered. Attorney Johnson stated that some of his clients do not have grandfathering status and his point is that, the owner-occupied limitation effectively violates the Privileges and Immunities Clause and the Dormant Commerce Clause is a clause for anybody who owns property and lives out of state, is like a functionally nullity to be able to exercise that right to short term rental your property. Chairman Gentile stated that the board's response to that would be that short term rental clause, it uniformly applies to people who live in the State of New Hampshire but do not live permanently in Madison as well as those who live out of state so he still fails to see how the out of state thing is an issue because there is no provision in Zoning Ordinance which specifically exempts people from one state or another. He further stated he did understand what Attorney Johnson was saying. Chairman Gentile stated that where people own property and is a second home is irrelevant. Chairman Gentile further stated that he does not read our Zoning Ordinance is written in a way it can be construed to apply differently to someone who lives in Massachusetts as opposed to someone who lives in New Hampshire. Chairman Gentile asked Attorney Johnson where in our Zoning Ordinance he referred to that you cannot do short term rentals in Madison, unless it is owner occupied? Chairman Gentile stated that if the limitation is to a Bed and Breakfast which is owner occupied, which is part of our definition, then that does not affect those who are renting their home out on a short term rental basis and obviously, only those who have pre-established, non-conforming use would be able to do that. Chairman Gentile stated he was going to add a new comment.

Attorney Johnson asked the board if he was going to get a new Decision? Chairman Gentile stated we will include in the minutes of tonight, and we can put it right in the letter of decision that would give Attorney Johnson a response and then the board will do everything they can to be as consistent as possible with each other. Attorney Johnson stated that for efficiency, this process can apply to a series of cases, that being Case #23-23, #23-15 and #23-18 as they are all substantially similar as all appeals were granted with varying restrictions on the number of days and he further stated that the argument that the board has made, whether he agrees with them or not, and will probably make the same ones, that would apply to #23-23, #23-25 and #23-18 and that #23-19 is on an appeal and had no history of pre-existing rentals so that is purely on a constitutional argument. Chairman Gentile stated that for the interest of efficiency, if we wanted to say that tonight, apply this argument of the same things to the next two cases and because they are the same thing, we would simply apply, assuming we vote on that, to apply the same restriction that was applied before. Chairman Gentile stated that we do not have a limitation on short term rentals that is related to being owner-occupied. Chairman Gentile asked the board for assistance in drafting language. Schilling stated that the Madison Zoning Ordinance does not have a clause that applies to owner-occupied transient rentals for owners of property that are pre-existing non-conforming short term rentals and that only applies to a Bed and Breakfast with a Special Exception.

There was discussion on how to vote on and the leg work is done and the board decided to open each case individually and vote and bring the information forward. Attorney Johnson stated he had no procedural objection.

Bill Dempster, from the audience addressed the board and asked if the hearing was still open and is the board going to close the hearing to go into the meeting? Chairman Gentile stated it is a good point and we have not technically closed the Public Hearing.

Motion by Gentile, seconded by McAllister to close the public hearing.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Young re-read the motion and the board moved to vote on the motion that is currently on the floor as follows:

Motion by Gentile, seconded by McAllister to grant, in accordance with the court’s order, the status of a pre-existing non-conforming use with the same limitation we had before which was 61 days.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Case #23-15 – Re-Hearing Of The Zoning Board Of Adjustment's February 19, 2025 Decision

Chairman Gentile asked Young, Land Use Boards Administrator to read aloud **Case #23-15** as well as the posting notification.

Case #23-15 – Re-Hearing of the Zoning Board of Adjustment’s February 19, 2025 Decision - requested by Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Keith and Alison Kellerman, 21 Haven Road, Tax Map 128, Lot 021 to determine whether or not to limit them to 69 short term rental days a year.

PUBLIC MEETING NOTICE: Notification was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on May 7, 2025 and posted in the Conway Daily Sun on May 8, 2025. Young stated that one abutter letter was refused.

Conflict of Interest: Chairman Gentile polled the board and there was no Conflict of Interest.

Waiver Request: Chairman Gentile stated the Waiver Request was irrelevant to this case.

Regional Impact: Chairman Gentile polled the board and there was no Regional Impact.

Chairman Gentile stated the board is bringing forward the same arguments that Attorney Johnson made with the same arguments that the board made in **Case #23-13** and are bringing those arguments, for the record, into this case and this case will be restricted to 69 days.

Chairman Gentile asked the public if anyone had any comments. There were none.

Motion by Schilling, seconded by Skaife to close the Public Hearing.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile asked Young to read the motion with the new limitation of 69 days.

Motion by Schilling, seconded by Gentile to grant the status of a pre-existing non-conforming use with the same limitation of 69 days.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Case #23-18 – Re-Hearing Of The Zoning Board Of Adjustment's February 19, 2025 Decision

Chairman Gentile asked Young, Land Use Boards Administrator to read aloud **Case #23-18** as well as the posting notification.

Case #23-18 – Re-Hearing of the Zoning Board of Adjustment’s February 19, 2025 Decision - requested by Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Matthew Petti and Jennifer Swift, 70 Skyline Way, Tax Map 205 Lot 048 to determine whether or not to limit them to 181 short term rental days a year.

PUBLIC MEETING NOTICE: Notification to abutters was sent Certified Mail Return Receipt Requested on May 6, 2025 and notification posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on May 7, 2025 and posted in the Conway Daily Sun on May 8, 2025.

Conflict of Interest: Chairman Gentile polled the board and there was no Conflict of Interest.

Waiver Request: Chairman Gentile stated the Waiver Request was irrelevant to this case.

Regional Impact: Chairman Gentile polled the board and there was no Regional Impact.

Chairman Gentile stated the board is bringing forward the same arguments that Attorney Johnson made with the same arguments that the board made in **Case #23-13** and **Case #23-15** and are bringing those arguments, for the record, into this case and this case will be restricted to 181 days.

Chairman Gentile asked the public if anyone had any comments. There were none.

Motion by Schilling, seconded by Skaife to close the Public Hearing.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile asked Young to read the motion with the new limitation of 181 days.

Motion by Schilling, seconded by Rau to grant the status of a pre-existing non-conforming use with the same limitation of 181 days.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile read aloud the provisions of the 30-day appeal period. Chairman Gentile closed **Cases #23-13, #23-15 and #23-18.**

Case #23-19 – Re-Hearing Of The Zoning Board Of Adjustment's February 19, 2025 Denial Of An Appeal From An Administrative Decision

Attorney Johnson stated that this case is purely on constitutional argument and the board has already made that argument previously in **Case #23-13, #23-25 and #23-18** and he believes the board could handle this in the same process.

Chairman Gentile asked Young, Land Use Boards Administrator to read aloud **Case #23-19** as well as the posting notification.

Case #23-19 – Re-Hearing of the Zoning Board of Adjustment’s February 19, 2025 Denial of an Appeal from an Administrative Decision is requested by Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Brian Burns, 1 Oak Ridge Road, Tax Map 109, Lot 087 to determine whether or not his circumstance allows for short term rentals relating to a denial from Robert Boyd, Code Enforcement Officer dated August 30, 2023 as to Article IV, Section 4.6A of the Town of Madison Zoning Ordinance.

PUBLIC MEETING NOTICE: Notification was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on May 7, 2025 and posted in the Conway Daily Sun on May 8, 2025. Young stated that she received an abutter notice back as the mailing address in the Avitar tax program has the exact address of what the abutter letter was addressed to and it was returned by the post office with a different address than what the town has in its records. Young is not sure if the abutter changed their address and did not notify the town. Attorney Johnson had no objection and believed Young made a reasonable effort to provide notice.

Conflict of Interest: Chairman Gentile polled the board and there was no Conflict of Interest.

Waiver Request: Chairman Gentile stated the Waiver Request was irrelevant to this case.

Regional Impact: Chairman Gentile polled the board and there was no Regional Impact.

Attorney Johnson stated he had nothing new to be added to his argument from the previous **Cases #23-23, #23-25 and #23-18.** Attorney Johnson stated that he wanted the board to be clear that they granted the hearing off a denial and there is no history of prior rental use so this is slightly different decision for the board but for the format of the Motion for Rehearing could be handled the same way. Chairman Gentile stated that the board wanted to match the consistency with Attorney Johnson’s arguments with the consistency of our arguments.

Motion by McAllister, seconded by Schilling to close the Public Hearing.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile stated the board is bringing forward the same arguments that Attorney Johnson made with the same arguments that the board made in **Case #23-13, #23-15 and #23-18** specifically as they relate to constitutional rights and are **eliminating** the section on the limitation of short term rental days and are bringing those arguments, for the record, into this case.

Motion by Gentile, seconded by Schilling to deny the Appeal from an Administrative Decision because there is no evidence of rental after 2013, more specifically in the year prior to the posting of the new ordinance. So, the property does not qualify as a pre-existing non-conforming use and the Madison zoning ordinance prohibits the transient rental of property for periods of 30 days or less.

Roll Call Vote: Gentile - Aye; Schilling – Aye; Rau – Aye; Skaife – Aye; McAllister - Aye.

The Motion passed 5-0.

Chairman Gentile read aloud the provisions of the 30-day appeal period. Chairman Gentile closed **Cases #23-19.**

Case #23-14 – Continued (October 18, 2023, November 15, 2023, January 17, 2024, February 21, 2024, March 20, 2024, April 17, 2024, May 15, 2024, November 20, 2024, February 19, 2025, March 19, 2025 and continued to May 21, 2025) - Appeal from an Administrative Decision from Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Daniel Moynihan, Sr., (previously owned by Ryan Finn and Grace Harrigan), 43 Oak Ridge Road, Tax Map 104, Lot 085 to determine whether or not his circumstance allows for short term rentals relating to a denial from Robert Boyd, Code Enforcement Officer dated August 16, 2023 as to Article IV, Section 4.6A of the Town of Madison Zoning Ordinance.

This case was not discussed during the meeting and by error, was not continued to the June 18, 2025 meeting.

Case #23-20 – Continued (October 18, 2023, November 15, 2023, January 17, 2024, February 21, 2024, March 20, 2024, April 17, 2024, May 15, 2024, November 20, 2024, February 19, 2025, March 19, 2025 and continued to May 21, 2025) - Appeal from an Administrative Decision from Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Cory, Jade and Cynthia Franklin, 26 Little Shore Drive, Tax Map 104 Lot 96 to determine whether or not their circumstance allows for short term rentals relating to a denial from Robert Boyd, Code Enforcement Officer dated August 16, 2023 as to Article IV, Section 4.6A of the Town of Madison Zoning Ordinance.

This case was not discussed during the meeting and by error, was not continued to the June 18, 2025 meeting.

Case #25-02 - Variance Request From Ethan and Laura Lemieux

Chairman Gentile asked Young, Land Use Boards Administrator to read aloud **Case #25-02** as well as the posting notification.

Case #25-02 - Variance request from Ethan and Laura Lemieux for property located at 269 North Division Road, Tax Map 229, Lot, 006, from Article IV Section 4.5 of the Zoning Ordinance to permit the construction of a two-car garage within the 30’ buffer to other wetlands, less than 0.25 acres outlined in the chart from the above article.

PUBLIC MEETING NOTICE: Notification was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on May 7, 2025 and posted in the Conway Daily Sun on May 8, 2025.

Conflict of Interest: Chairman Gentile polled the board and there was no Conflict of Interest.

Regional Impact: Chairman Gentile polled the board and there was no Regional Impact.

Waiver Request: Chairman Gentile asked if we had a Certified Plot Plan with the variance request.

Chairman Gentile swore in Ethan Lemieux.

Lemieux stated that what he has presented, is a Certified Plot Plan, for the septic design, and the location of the building which he drew over on this plan with measurements he did himself. He used triangulation on two points and used a scaled ruler and plotted this and made all the lines work. He further stated if he had to get an official plot plan with the garage on it, it would eat into five to ten percent of the cost to build the garage which will cost \$3,000 to \$4,000. Schilling stated that you need a Certified Plot Plan on your property but not one that had your proposed garage. Schilling stated his drawing was very helpful. Lemieux presented his case for a variance to construct a two-car garage within the 30-foot buffer to wetlands.

The board discussed with Lemieux the setbacks and also about the poorly drained soil and how close the garage would be to that. Lemieux stated that he hired H.E. Bergeron to do the assessment of the poorly drained soil.

After discussion, the board decided to continue the case to the next meeting on June 18th to allow Lemieux to provide additional information, including a wetlands delineation.

Motion by Schilling, seconded by Rau to continue **Case #25-02** to the June 18, 2025 meeting at the Madison Town Hall, Lower Level, Meeting Room at 6:00 pm.

The motion was voted on and passed **5-0**.

Case #25-03 – Variance Request From William and Patricia Burnell

Case #25-03 – Variance request from William and Patricia Burnell for property located at 8 Eidelweiss Drive, Tax Map 109, Lot 015, from Article 5.9, Section E & F of the Zoning Ordinance to permit a 10’x 12’ storage shed which is 63’ from the center of Bern Rd and the setback requirement is 65’. All other set back requirements are met. Also to permit a 12’ x 20’ metal carport which is 13’ from side boundary. Setback requirement is 20’. All other setback requirements are met. (This is a single carport).

This case was not opened nor discussed during this meeting and will be on the Agenda for the June 18, 2025 meeting.

Approval Of Draft Minutes – March 29, 2025 and April 16, 2025: To be reviewed and voted on at the June 18, 2025 meeting.

The approval of draft minutes dated March 29, 2025 and April 16, 2025 were not discussed during this meeting and will be on the Agenda for the June 18, 2025 meeting.

Approval of May 16, 2025 minutes: Motion by Gentile, seconded by Rau to approve the May 16, 2025 minutes as written. The motion was voted on and passed **3-0**.

ADMINISTRATION:

Election Of Chairman And Vice Chairman:

The election of Chairman and Vice Chairman was not discussed during this meeting and will be on the Agenda for the June 18, 2025 meeting.

Second Reading Of The Revised Rules Of Procedure:

Young referred the board to the Public Hearing section of our Rules and Procedures and stated that the last update was on November 15, 2023 on Page 5, Drew had noted that we need to switch **o.** to **n.** and **n.** to **o.** so just reversing them as well as a change to **#6. Appeals** and Young read them aloud as follows:

The board conducted the second reading of the revised Rules of Procedure. The changes included:

1. (Previously o. in the Rules of Procedure which will now become n.): The Chairman shall present a summery setting forth the facts of the case and the claims made for each side. Opportunity shall be given for correction from the floor.
2. (Previously n. in the Rules of Procedure which will now become o.): The Chairman shall declare the public hearing closed, unless a request is made by the applicant to continue the hearing. The Boad shall review and deliberate the information provided.

6. Appeals. A new sentence was added to now read **“This motion can be filed electronically and followed up with an original mailed.”**

Young stated this is the second reading of three required of the Rules of Procedure.

Adjournment: Motion by Gentile, seconded by McAllister to adjourn the meeting at 10:25 pm. The motion was voted on and passed **4-0**.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator

