



**TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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**ZBA MINUTES
November 15, 2023**

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

EXCUSED: Shawn Bergeron

OTHERS PRESENT: Madison TV, Aysia Morency, Kate Young, Land Use Boards Administrator, Chris Boldt, Esquire, Matt Johnson, Esquire and members of the public.

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

ELEVATION OF ALTERNATES: There was no elevation of alternates.

PUBLIC HEARING:

Gentile stated that as to the agenda, there are a lot of cases and the Board will not hear any new cases after 8:45-9:00 pm and will cease the public hearing portion at 9:45 pm to conduct housekeeping items and the meeting will end at 10:00 pm.

Gentile stated they are opening with **Case #23-10** which was continued from last month. Gentile asked Dempster if he was recusing himself? Dempster stated yes, pursuant to RSA 673:14 and recused himself from **Case #23-10**. Ohlson also recused himself as he is the Chairman of the Planning Board and he and Dempster removed themselves from the Board and sat in the audience.

Gentile stated we now have a five-member board and because there is a slightly different Board, Gentile asked Young to read the case and posting notice.

Young read aloud **Case #23-10 – Continued from(October 18, 2023) – Appeal from an Administrative Decision** from Nicholas Gage, 10 Barden Place, Map 110, Lot 21 to determine whether or not his circumstance allows for short term rentals relating to a denial from Robert Boyd, Code Enforcement Officer dated June 7, 2023 as to Article 4.2 and 4.4 of the Town of Madison Zoning Ordinance.

PUBLIC MEETING NOTICE: Notification of this public meeting was posted on October 25, 2023 in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices.

Conflict of Interest: Gentile polled the Board and there was no conflict of interest.

Waiver Request: There is no Waiver Request as this is not a Variance and is irrelevant.

Regional Impact: The Board previously addressed this and there is no Regional Impact.

Gentile asked how many members of the public were present to speak to **Case #23-10** and stated he will swear them in individually.

Gentile asked Gage if he had anything to bring to the Board.

Gage stated he wanted to go over some dates he provided the Board at the October 18, 2023 meeting. Gage stated he applied for his loan on December 8, 2020, on December 26, 2020 – Rent STR to cover loan, February 24, 2021 he closed on the loan, he had two final inspections on April 5, 2022 and May 24, 2022. Gentile stated the Board received a copy of the Certificate of Compliance from the Code Enforcement Officer that the grading had been completed on October 23, 2023.

Gentile read aloud Article 4.6A from the Zoning Ordinance, the definition of Non-Transient and Transient as follows:

- A. Permitted Uses. It shall be primarily a district of single-family residences and accessory buildings. One dwelling unit shall be the maximum allowable on any one lot and in any one building. Other permitted uses include home occupations, churches and public buildings. Business, commercial enterprises and agricultural uses are prohibited.**

Definition of Non-Transient Occupancy: “Non-Transient Occupancy – Occupancy of a structure for any period of time greater than thirty days.”

Definition of Transient Occupancy: “Occupancy of a structure for any period of time up to and including thirty days.”

Gage stated he drew up an affidavit which states his intent to rent which also included text messages from a friend who designed the property which Gage handed said Affidavit to Gentile.

Gentile read the Affidavit aloud – **(See Exhibit A attached hereto and made a part of these minutes).**

Gentile addressed the public and asked if there were any abutters that wished to speak as well as anyone from the public that wished to speak.

Gentile swore in Robert Boyd.

Robert Boyd, 55 Knight Road - Boyd asked if anyone else received any affidavits and Boyd wants it backed up by someone else other than Gage who has an interest. Boyd asked what the three dates were the property was rented as an STR because at the first meeting, Gage’s testimony was just friends and family and no rental but then three active STR rentals and stated that Gage rented the property as a Short-Term Rental three times after March, 2022.

Gentile asked Gage what the approximate rental dates were and Gage did not know but thought it was February 2023 and rented three more times in February. Boyd stated it was three times, January, February and March long after the ordinance was passed in March of 2022.

Gentile stated that Robert Boyd is the Code Enforcement Office for the Town of Madison.

Gentile swore in Nicholas Borelli.

Nicholas Borelli, 4 Lakeview Drive – Borelli stated he is speaking in opposition to this appeal and that the purpose of this meeting is to see if the Code Enforcement Officer erred and the Board should deny the application based on the facts and read aloud his submitted opposition to the Board. (See **Exhibit B, C & D attached hereto and made a part of these minutes**)

Gentile swore in Jay Buckley.

Jay Buckley, 58 Eidelweiss Drive stated that in 2019 Gage came to the VDOE to obtain a driveway permit which said permit must be presented to the Code Enforcement Officer before he issues any building permit. At that time, Buckley was a commissioner and he was the one who received it and then took the driveway permit to Gage and at that time, Gage mentioned to Buckley that he was intending to rent the property. Gentile asked what was the approximate date? Buckley stated in the fall of 2019. Gage stated it was 2020 and Gage stated he did not do anything or cut anything until 2020.

Gentile stated that Dempster was sworn in at the previous meeting on October 18, 2023.

Bill Dempster, 157 Doe Drive – Dempster referred the Board to Section 6 Occupancy which is part of Mr. Gage’s mortgage which Dempster got from the Carroll County Registry of Deeds website and read aloud as follows:

“Occupancy. Borrower shall occupy, establish, and use the property as Borrower’s principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower’s principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond the Borrower’s control.”

Dempster stated to his knowledge this has not happened. He then stated that the Town of Madison building permit issued by the Town of Madison Code Enforcement Officer on April 27, 2022 has signatures on the first page and the key piece of information was that the permit was given to the applicant based on the conversation with the Code Enforcement Officer and Dempster read the following aloud:

“Hi Nick you are allowed to do your own mechanical installations as long as you own the home and it will become your primary residence. Will you be making the residence your primary home? Gage replied yes, my current plan is to live in Madison full time.”

Based on the above information Boyd then issued the electrical, plumbing and gas permits and by doing the work yourself, you are exempt from state law and can do the work yourself if you are going to live there and the permit was issued based on that and the applicant did not occupy the home but instead rented it out and that makes the installations against the New Hampshire code law.

Gentile swore in Nichole Nordlund.

Nicole Nordlund, 227 East Madison Road stated she understands what Gage went through with the building process as she also had the same issues as costs went up and she stated that Gage had to take out loans and the Board should take this into consideration.

Schilling asked Boyd if the first step in the construction process is the driveway permit. Boyd stated yes.

Gentile asked the Board if they had any more questions for any members of the public that spoke and there were none.

Boyd stated he strongly recommended that the Board look at the facts and evidence of what took place versus intent.

Gentile asked Gage if he required any additional time to provide any additional documentation. Gage stated no, and he stated the Board wanted to see his proof of intent and he feels he provided that today and when you read the RSA's and laws, he noticed the unnecessary hardship was very commonly used in decisions being made by Boards in the towns and in the RSAs and unnecessary hardship as he stated in his affidavit will absolutely be the case depending on the outcome of the Board's decision.

Gentile asked the Board for a motion to close the Public Hearing.

Motion by McAllister, seconded by Schilling to close the Public Hearing for **Case #23-10**. The motion passed **unanimously**.

Gentile explained that the Board will now deliberate and that the public cannot speak as it is the Board's discussion. Gentile further explained that basis of the appeal is whether Gage is entitled to relief from the ordinance because he was vested before the ordinance took place and not just intent and that is the question the Board needs to answer.

Notes on Finding of Fact:

1. The appeal is a valid appeal of an administrative decision regarding application of the Madison Zoning Ordinance which was filed within 30 days of the date of the violation letter it was appealing.
2. The lot for this single-family house was purchased January 19, 2018.
3. Construction of the home began in February of 2020.
4. In November, 2020 the Gage's decided not to move to Madison from the Boston area but to keep two homes and rent the Madison home short-term so that they could defer costs and enjoy the home themselves for shorter visits. This predates the March, 2022 change.
5. In December, 2020 they applied for a loan to complete the home which closed in February, 2021. **Updated points 4 and 5 during the November 15th hearing to: On December 8, 2020, Mr. Gage applied for a loan. On December 26th they decided not move to Madison as a single, permanent residence, but to rent the house then under construction to help cover the costs of building and operating the Madison home. They closed on the loan February 26, 2020. Affidavit attached. This predates the STR discussion in Madison.**

6. The home was effectively completed in March, 2022 and final inspections were scheduled for April and May of 2022.
Updated during the November 15th hearing to: The code enforcement officer notified the ZBA on October 23, 2023 that all inspections were complete. Mr. Gage stated that he had a Certificate of Occupancy in hand (without specifying the date, but presumably after the October 10, 2023 ZBA meeting. The effective date of completion was March, 2022, as the first final inspection was performed on April 5, 2022.
7. The earliest recorded date of the discussion for limiting short term rentals in Madison is in the selectmen minutes of May 18, 2021, which is 6 months after the decision the Gages made to keep two houses and rent one short-term.
8. The burden of proof that a party had a good faith intent to rent their home and had vested that decision prior to the March, 2022 changes to the town ordinance lies with the party making the appeal.
9. We continued the case to allow Mr. Gage time to find any kind of documentation or other evidence that could clearly show that he had a vested purpose to rent prior to the change in the ordinance.

Additional findings of fact presented during the November 15, 2023, hearing:

1. Mr. Gage submitted an affidavit which stated, in summary, that he planned to rent the house in December 26, 2020 and had made all the investment in the construction by the time of the ordinance change March 8, 2022, substantiated by the date of the first final inspection on April 5, 2022, less than one month after the ordinance change.
2. Mr. Jay Buckley stated on behalf of Mr. Gage that Mr. Gage stated to Mr. Buckley in a conversation at the site at the time of the issuance of the driveway permit which was about late autumn 2019 (well before the STR discussion), that he intended to rent the house at least some of the time. Mr. Jay Buckley was at the time of the discussion a commissioner in the Village District of Eidelweiss.
3. The board heard conflicting evidence (submitted in writing) that
 - a. Mr. Gage signed a rider on the mentioned loan that he would live in the house as a primary residence for at least 1 year.
 - b. Mr. Gage stated on the building permit that he was building a primary residence so that he would be exempt from hiring licensed contractors for portions of the labor he could do himself.

Summary of the board's deliberation:

The board would be able to grant Mr. Gage the status of a pre-existing, nonconforming use if it were unequivocally clear that the home was built for the purpose of renting and substantial financial investment had been made by the time of the passage of the ordinance on March 8, 2022.

While financial investment was made before March 8, 2022 and in light of the loan document and building permit information, there is no conclusive evidence that the home was built for the purpose of being a rental property.

Gentile asked the Board for a motion.

Motion by McAllister, seconded by Schilling to deny the Appeal from an Administrative Decision for **Case #23-10** because no clear evidence was presented that the project was designed as a Short-Term Rental and documented as such through insurance, building permits, loan applications or similar as we also further discussed the conflicting testimony in the detailed minutes. The motion passed **5-0** with Dempster and Ohlson recusing themselves as they both have a conflict of interest.

Gentile stated to Gage that this does not mean that he cannot rent his property and he has the option to rent it for 31 days or longer. Gentile further explained for example, that if Gage has renters for February and June and neither renter is 31 days, he does have the option to come back to the Board with a variance request and that is the reason he would come for a variance but not the reason he would get a variance and the reason he would get a variance is he would have to argue that he meets the five criteria for a variance but that Gage does have other options other than Short Terms rentals.

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #23-10**.

Gentile stated that for the record, **Case #23-11** has already been heard and decided.

Gentile opened with **Case #23-12** which is also an Appeal from Administrative Decision which was continued from last month. Gentile asked Ohlson if he was recusing himself as he is the Planning Board Chairman and he also asked if Dempster is recusing himself. Dempster stated he is recusing himself from **Case #23-12** pursuant to 673:14 and they both removed themselves and sat in the audience.

Young read aloud **Case #23-12 – Continued - Appeal from an Administrative Decision** from Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Andrei and Erica Medeiros, 81 Knight Road, Tax Map 256, Lot 089 to determine whether or not their circumstance allows for short term rentals relating to a denial from Robert Boyd, Code Enforcement Officer dated August 10, 2023 as to Article 4.2 of the Town of Madison Zoning Ordinance.

PUBLIC MEETING NOTICE: Notification of this public meeting was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on September 28, 2023, Conway Daily Sun on October 6, 2023 and posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on October 25, 2023.

Conflict of Interest: Gentile polled the Board and there was no conflict of interest by roll call vote. Gentile stated there is a five-member board.

Waiver Request: There is no Waiver Request as it is not required for this kind of appeal.

Regional Impact: Gentile polled the Board and there is no Regional Impact by roll call vote.

Gentile explained the procedures and that Attorney Johnson can present his case, approximately five minutes and the Board has the option to ask questions at any time during the presentations and then abutters who wish to support the case will speak first and then abutters who oppose the case can speak and then anyone in the public will be given three minutes to speak. Gentile further stated that they were not there tonight to decide if Short Term Rentals are good or bad it is about specific instances.

Gentile swore in Matt Johnson, Esquire.

Johnson stated he represents the Medeiros and he had a procedural question for the Board and stated that most of the applications are for clients of his and he has a series of legal arguments that apply across the board to all the applications and also has facts specific arguments relative to individual applications for individual property owners and asked the Board and he does not believe the Board wants to hear him say the exact same legal argument over and over and since the minutes are being kept for the meeting, is it possible if he could make an opening statement that would apply generally to all the applications and then go into facts specific circumstances for each applicant as the legal arguments are the same across the applications. Gentile stated that, in order for the Board to do this, the Board would have to have the freedom to record those legal arguments and carry them from one case to the next and the Board is obligated to hear every individual case on its own merits but Gentile did understand what Attorney Johnson is saying. Attorney Johnson stated that his point being is that minutes from this hearing are all going to be contemporary and will track all that but his only point is so long as were there be further appeal or for the Board's consideration of subsequent applications, they can consider the fact that those other legal arguments that have already been articulated to the Board tonight and for simplicity purposes, were not all of these be met tonight, he would restate those at the next meeting so there is a continuity and clarity and no gap. Gentile stated everyone is here will hear the legal argument once and will carry them case by case in writing he believes that is fine. Chris Boldt, Esquire, Attorney for the Zoning Board of Adjustment stated that as long as Attorney Johnson's arguments are in his written materials, Attorney Boldt stated that it is very clean. Attorney Johnson stated it is in the letter he provided with the applications.

Attorney Johnson stated he had a few legal points and understands what the town may have intended to do but that the Zoning Ordinance Amendment in March, 2022 creates more legal problems than it may have been intended to design to fix as it creates a giant selective enforcement problem, people protection violation and potentially and a lot of dissent impact across property owners in Madison which he does not believe was intended and for that reason, he is asking that the ZBA uphold these Administrative Appeals and refer it back to the Selectmen for their consideration because the Zoning Ordinance as constructed now, is subject to court challenge in his opinion. Attorney Johnson stated that this applies in all the applications that the Notice of Violation says "non-owner-occupied rental" and if you look at the Zoning Ordinance, "non-owner-occupied rental" does not exist in the Zoning Ordinance and this language was created by the Code Enforcement Officer. Attorney Johnson stated that Single Family homes per the Zoning Ordinance are permitted in all districts except commercial. Attorney Johnson read aloud the definition of a Single Family home as follows "a Single Family home is defined as any building containing one dwelling unit and a dwelling unit and a dwelling unit since March 2022 is defined as "One or more rooms arranged, designed, or used for non-transient residential purposes with independent sanitary and cooking facilities" and the Non-Transient definition is defined as "Occupancy of a structure for any period of time granter than 30 days" and there is no further definition in that and no indication of how it was arrived at. Attorney Johnson read aloud the definition of "Transient Occupancy" which is defined as "Occupancy of a structure for any period of time up to and including thirty days." Attorney Johnson stated that following these definitions, a lawful single-family home exists only if an owner occupies the property for more than thirty days and Madison has plenty of single-family homes that are second homes and under Madison's Zoning Ordinance a second homeowner does not occupy their property for more than 30 days, it is not a permitted use under the March, 2022 amendment. Attorney Johnson further stated that there has been no evidence of any code violation notices that have gone out to any second homeowners who are not trying to rent their property

on an STR basis who do not occupy that second home for more than 30 days on whatever period of time the ordinance really defines but does not say and this is a selective enforcement problem as well as an equal protection violation because the town passed an ordinance and said that the Code Enforcement Officer is enforcing against people who want to use their property for an STR but there has been no enforcement for people under the ZBA language under the ordinance as passed, would independently be a violation and that is a problem and leaves the Town of Madison to exposure from a litigation standpoint for an equal protection violation and selective enforcement because there is no legitimate or good faith basis to treat the STR's differently than owners who occupy a home and do not occupy it for more than 31 days. Attorney Johnson stated this a fatal defect in the Zoning Ordinance and the court has recognized in the Britton v. Town of Chester, 134 N.H. 434 (1991) that if the ordinance as amended excludes a class or has fatal defects, it can be found unconstitutional and invalid and Attorney Johnson submits that if further challenged in the Superior Court, Supreme Court or the Housing Appeals Court that would be the result.

Attorney Johnson stated that oddly enough, the only group that fits with the new definition passed in March, 2022 is long term renters as they can be over 31 days and would be permitted under the new Zoning Ordinance. Attorney Johnson further stated if someone owns a second home and does not use it for more than 30 days, they are no longer allowed to use it because they don't meet the definition of a single-family home as modified by the new definition of dwelling unit and he is asking the ZBA to carefully consider the havoc, and circumstances and the unintended consequences of this zoning amendment change in March of 2022.

Attorney Johnson stated the town website is misleading as there is no disclaimer or any suggestion that maybe you cannot do it or you can under only circumstances and under the new interpretation of the new Zoning Ordinance this is taking people's rights away and how they use their property and historically, people have been able to use their property to rent short term and long term and there is no legitimate basis to treat the short term rentals different than the long term rentals and this deprives property owners the right to use their property. Attorney Johnson further stated that the ZBA should consider that in all these cases, they are second homes wherein it is not their primary residence and they buy property, pay taxes and do not get to vote on any zoning changes which are disenfranchising them from what they have been able to do historically for their property. Attorney Johnson asked that the ZBA consider for all these cases the unintended consequences the legal analysis of what happens and how this amendment would play out and the impact it would play out if relief is not given to people who are trying to use their property as a short-term rental and this is the legal argument.

Attorney Johnson stated that the Medeiros do not have a prior rental history and they bought their property in June of 2022 right after the zoning ordinance was changed and if the Medeiros are called to testified, they could testify that their real estate agent called the Madison Town Hall and asked about short-term rentals and was told there were no restrictions except in the Eidelweiss District. Attorney Johnson further stated that he wished he had an affidavit or a name and stated this property was always going to be a rental as his clients went through the 1031 Exchange process and if it was helpful, he could provide the Board with a copy of the Medeiros insurance binder which says it was for rental properties.

Attorney Johnson stated the decision and the new enforcement action by the town has real significant economic consequences for the Medeiros as they have STR rental contracts through Airbnb and other platforms and there could be costs associated for them to be able undo this and as noted in his legal argument the town website still does not suggest you can do short term rentals and is a generic

description of it and since they bought the property right after the zoning ordinance changed, and they were buying a second property, you cannot argue the fact that the Medeiros should have known about it because they were up here they were not up here and they do not have the rental history but they clearly intended to rent the property for rental purposes and again, the insurance policy would indicate it was being used for a rental property and use it for rental income.

Gentile asked Attorney Johnson if the property was used as a short-term rental prior to the Medeiros purchasing it. Attorney Johnson stated it is unclear and they do not have any evidence to support that. Gentile stated there are three blocks of time, one being anything before 1987 when the zoning ordinance came into effect and anything between 1987 to March of 2022 and anything after March of 2022 and that presumes of course, the zoning ordinance is valid. Gentile stated for grandfathering, the Board needs evidence and the burden of proof is on Attorney Johnson to show this process was already in place with things like the insurance, rental contract or even a contract with a realtor they were looking for rental property. Attorney Johnson stated his clients can testify that a rental was a permanent goal and that is why they asked their agent to call to Town of Madison to find out if there were any restrictions on being able to rent the property. Gentile stated it would be helpful to know when the Medeiros started working with an agent and when the process was underway. Gentile stated he could bring that information to the January public hearing. Attorney Johnson asked if he could provide that information at the January public hearing as well as any further proof on the contact with the Town of Madison. Gentile stated that he is not giving an opinion that Board will agree this is sufficient information. Attorney Johnson understood. Attorney Boldt stated if the Board is asking for additional documentation, it may be helpful for Attorney Johnson to have a longer list so you see the same things in each case. Gentile stated for the record the list would include insurance documentation, record of agreement with real estate agent looking for rental properties, mortgage documents, preapproval of the loan, tax history of the property, testimony of the previous owner as to rooms and meals tax. Schilling asked for the number for the meals and rooms tax which is separate from a social security number. Attorney Johnson stated he assumes this applies to all the cases. Gentile stated it does but these properties which are pre-existing non-conforming properties and not an exemption from the zoning ordinance and what this means is that they can continue in the same vein that they were before and this is why it would be helpful to know if there was a tax record before or if the previous owners rented it out significantly during the year that this information would be helpful.

Gentile addressed the members of the public and asked if there were any abutters supporting this case. There were none.

Gentile asked if there were any abutters against this case.

Gentile swore in Robert Boyd as this is a new case.

Robert Boyd, 55 Knight Road - Boyd stated he is the Code Enforcement Officer for the Town of Madison as well as a home owner and lives next to the applicant and that the owners never introduced themselves and since the Medeiros closed on their property, every weekend there are new people renting and they are noisy, loud, swearing, rude, loud music, non-stop noise, speed issues on the road and that there are kids riding bikes and this is dangerous as well as security issues and fireworks. Boyd stated he cannot enjoy his property and he has called the Madison Police Department several times. Boyd further stated that this property was the primary residence of Jim and Kathy Frati and they have in the past rented it long term but this was their primary residence for a few years before they sold the property.

Boyd further stated that as far as purchasing property after rules are put in place stated if he were going to buy property, he would research the town's rules and he would not buy a place for short term rental in a town that has zoning ordinances that prohibit short term rentals. Boyd also stated that he fields phone calls from realtors for perspective buyers of what is allowed as far as STR's and his answer is always transient occupancy is not allowed and he further stated that he knows for a fact that town employees have the same response. Attorney Johnson stated Boyd is making up the intent of other town employees and he can testify but not as to what other people's state of mind is.

Gentile asked if there were any other abutters that wish to speak and asked if Attorney Johnson wanted to speak. Attorney Johnson wanted to point out that Boyd can testify about what he sees and he does not have a dispute about that because that is his own personal knowledge but a huge chunk of Boyd's testimony stated he heard from other people who are not hear to testify.

Martin read aloud letters from abutters.

Martin read aloud a letter from Daniel Mertsch for the record. **(See Exhibit E attached hereto and made a part of these minutes).**

Martin read aloud a letter from Gary Kotfila for the record. **(See Exhibit F attached hereto and made a part of these minutes).**

Martin read aloud a letter from Richard and Nancy Osborne for the record. **(See Exhibit G attached hereto and made a part of these minutes).**

Gentile stated the following letters are not abutters which Martin read aloud.

Martin read aloud a letter from Dee Dempster for the record. **(See Exhibit H attached hereto and made a part of these minutes).**

Schilling read aloud the Fourth paragraph of Attorney Johnson's Legal Analysis submitted with the application on September 21, 2023 for **Case #23-12** aloud for the record as follows:

“Fourth, the amended Madison Zoning Ordinance violates the holding in Britton v. Town of Chester, 134 N.H. 434 (1991). In that case the Supreme Court struck a zoning ordinance that acted to restrict access to affordable housing in Chester. In this case, the Madison Zoning Ordinance definition of “dwelling unit” precludes the creation of affordable housing because the definition is applicable throughout all districts in Madison and the owner-occupied requirement as interpreted by the Code Enforcement Officer undercuts the ability to create meaningful affordance housing.”

Gentile resumed reading Exhibit H aloud for the record.

Gentile read aloud a letter from Kathy Koziel for the record. **(See Exhibit I attached hereto and made a part of these minutes).**

Gentile asked if anyone from the public wished to speak and he will be limiting comments to three minutes.

Gentile swore in Karen Dlugosinski.

Karen Dlugosinski, 70 Mt. Washington Drive – Dlugosinski read aloud for the record her document. (See Exhibit J attached hereto and made a part of these minutes).

Gentile swore in Bill Dempster.

Bill Dempster, 157 Doe Drive - Dempster stated for the record that Dee Dempster is his wife and he handed out a Facts and Timeline to the Board (See Exhibit K attached hereto and made a part of these minutes). Dempster stated the singular question of this Administrative Appeal is did the applicant demonstrate the Code Enforcement Officer erred in the interpretation and enforcement of the Madison Zoning Ordinance. The Selectboard acting as the required enforcement authority for Madison Zoning and Cordell Johnston, Esquire, the town’s attorney interpreted the amended definition of dwelling unit and concluded that short term rentals are no longer a permitted use after March 8, 2022. The Code Enforcement Officer was delegated to commence sending letters for voluntary compliance all by notification of violation. This enforcement process was adopted by the Madison resident voters in 1987 Article II, Section 2.1 of the original Madison Zoning Ordinance and it has not been amended in thirty-six years. For the record, Dempster read aloud from the Madison Zoning Ordinance of March 2022 the following:

“ARTICLE II. ADMINISTRATION AND ENFORCEMENT

2.1 Enforcement: Violations and Penalties.

It shall be the duty of the Board of Selectmen or its designated Building Inspector to:

- A. Generally administer and enforce the provisions of This Ordinance. The Board of Selectmen shall administer This Ordinance literally and upon well-founded information of any violation hereof to initiate immediate steps for enforcement.”**

Dempster went over the Facts and Timeline he previously gave to the Board (See Exhibit K attached hereto and made a part of these minutes) and stated the one that is really important is that the applicants first recorded short term rental on Airbnb or VRBO was October, 2022 which was six plus months after the March, 2022 date. Dempster further stated that two letters of voluntary compliance sent to the applicant were on November 9, 2022 and January 24, 2023, the applicant has yet to respond to either letter. Notification of Violation was issued on August 10, 2023 and sent to the applicant and the applicant did not reply to the Town of Madison until September 21, 2023 with an Application for Administrative Appeal. Dempster further stated the March, 2022 Amendment amended the definition of “dwelling unit” uses plain and easily understood words that allow a person a reasonable opportunity to know what is prohibited. Short term rental owners in Madison including the applicant understood the language of the amended ordinance as what is expressed during 2022 and 2023 group discussions on social media and Dempster stated he does have electronic copies if the Board would like them. Dempster went on to say the facts and timeline as presented demonstrate that Code Enforcement followed the enforcement process that has been in place since 1987 and there was no error in the interpretation of enforcement of the Madison Zoning Ordinance. Following the Supreme Court ruling in the Kudrick v. Conway case the ordinance was once again reviewed by the Selectboard attorney and the

Code Enforcement was given the green light to proceed. This case is crystal clear, the applicant violated the Madison Zoning Ordinance and the logical fact-based conclusions is to deny the appeal.

Gentile swore in Laura MacFeeley.

Laura MacFeeley, 54 Knight Road – MacFeeley stated she is an abutter to this STR property and that during bike week this past spring there were multiple people coming and going it was very loud and the renters had no curtesy for the residents living there and on the 4th of July, renters set off fireworks and there have been a lot of party people renting this property.

Gentile swore in Nick Borelli.

Nick Borelli, 4 Lakeview Drive – Borelli asked that the Board deny the application and go by the facts. (See Exhibits B, C & D attached hereto and made a part of these minutes).

Gentile asked Attorney Johnson if he wanted to reply. Attorney Johnson stated not at this time and they will take the document list and get those documents for the next hearing. Schilling asked if he was requesting a continuance. Attorney Johnson stated he was asking for a continuance to the next available hearing date. Gentile asked Attorney Johnson if he wanted the hearing in December but he told Attorney Johnson that the Board changed the December meeting from December 20th to December 13th or he could go to January. Attorney Johnson stated maybe in December but as of right now he is going to a trial in California. It was decided amongst the parties that the hearing would be January 17, 2024 would be the date.

Gentile asked the Board for a motion.

Motion by Martin to continue **Case #23-12** to the January 17, 2024 meeting at 6:00 pm.

Discussion:

Attorney Boldt stated the Board needs to include where and a time and also if they allowed to continue renting in the interim or not and the statute says status quo and status quo is their renting and they obviously have knowledge of issues being raised but that the Board needs to be clear on what the Board is saying. Gentile stated the hearing will be January 17, 2024 at 6:00 pm at the Madison Elementary School Gymnasium, pending availability and Gentile asked the Board if they want to stay with the status quo and allow the applicants to operate as they currently are. Gentile asked what is the status quo and asked Attorney Johnson if his clients are currently renting as a result of the cease-and-desist letter or not. Gentile asked Boyd, Code Enforcement Officer if there is a Notice of Violation or a cease-and-desist letter? Boyd stated it is a Notice of Violation. Attorney Boldt stated the Statute is 676:6 and read the meaningful portions aloud:

“The effect of an appeal to the Board, meaning the ZBA, shall be to maintain the status quo. An appeal of an issuance of a permit and an appeal of any order or other enforcement action shall stay all proceedings under the action appealed from unless the officer from who the appeal is taken certifies to the board of adjustment, after notice of appeal shall have been filed with such

officer, that, by reason of facts stated in the certificate, a stay would, in the officer’s opinion, cause imminent peril to life, health, safety, property, or the environment. In such case, the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the superior court.”

Attorney Boldt stated that the above paragraph is basically saying that status quo is without the enforcement and he further stated that cases he has seen it done in the past is there was an enforcement action saying stop all work but the work needed to be done a little bit to button up the house or get the drainage structure in so the enforcement is what is stayed.

Gentile asked Boyd if there is a health safety issue involved in this. Boyd stated he was not sure but he wanted to add to the answer of the last question about the letter. Boyd stated that the August 10, 2023 letter is a Notice of Violation where there is a bolded paragraph which Boyd read aloud as follows:

“You are hereby ordered to cease using the property as a short-term rental immediately. Please be advised that if you continue to use the property in violation of the ordinance, the Town of Madison will commence legal action in court.”

Boyd stated it is a Notice of Violation and cease and desist. Attorney Boldt reviewed the letter and stated the reference is to the proper statutes 676:17 which states the penalty which is the enforcement arm so he would treat it as a cease and desist. Gentile explained to the Board that it is not status quo and they cannot continue to rent the property and if they do, it is in violation and that is not this Board’s issue but the Selectmen. Attorney Boldt stated penalties consider to run and the Selectboard can take action and impose penalties. Gentile explained that the Board is continuing the case to January 17, 2024 and the cease-and-desist order stands and the town is free to enact whatever penalties if that cease-and-desist order is not obeyed. Attorney Boldt stated that the penalties continue to run whether the Selectboard takes an action right now and he doubts they would because it is from of this Board but it is one where there is risk to the property owner. Gentile stated that if they continue to rent, fines may accrue.

Motion by Martin, seconded by McAllister to continue **Case #23-12** to the January 17, 2024 meeting at 6:00 pm. at the Madison Elementary School Gymnasium, pending availability and the cease-and-desist language continues to apply pending the appeal pursuant to RSA 676:6. The motion passed **5-0** with Dempster and Ohlson recusing themselves as they have a conflict of interest.

Gentile stated the Board was taking a five-minute recess and will re-adjourn at 8:10 pm.

Gentile stated the next case is **Case #23-13** which is a short-term rental case that has a grandfathered clause associated with it. Dempster asked if he should recuse himself and did so under the conditions of RSA 673:14 and voluntarily recused himself from **Case #23-13**. Gentile also stated for the record, Marc Ohlson is recusing himself as he is the Planning Board Chairman and he cannot act on these cases on the ZBA and act on the Planning Board for short-term rentals.

Gentile asked Young to read the case.

Young read aloud **Case #23-13 – Continued from October 18, 2023 - Case #23-13 – Appeal from an Administrative Decision** from 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 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.

PUBLIC MEETING NOTICE: Notification of this public meeting was posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on September 28, 2023, Conway Daily Sun on October 6, 2023 and posted in the Town Hall upper and lower levels and Madison and Silver Lake Post Offices on October 25, 2023.

Conflict of Interest: Gentile polled the Board and there was no conflict of interest by roll call vote. Gentile stated there is a five-member board.

Waiver Request: There is no Waiver Request as it is not required for this kind of appeal.

Regional Impact: Gentile polled the Board and there is no Regional Impact by roll call vote.

Gentile asked Attorney Johnson if he wanted to continue this case to collect similar data or continue with the Public Hearing. Attorney Johnson stated he would prefer to begin this case as his clients were present and can answer some of the questions and that for this property there is a rental history. Gentile stated Attorney Johnson can present his case and that Attorney Johnson already made his legal case and Attorney Johnson had asked previously not to repeat it as this is already in the minutes but that Attorney Johnson wanted to go over the details of this case.

Attorney Johnson stated he represents Chad and Brittany Ardizzoni and Aaron and Tiffany Clymer and he handed out a rental history report prior to and leading up to the time of the Zoning change in March, 2022. (**See Exhibit L attached hereto and made a part of these minutes**). Attorney Johnson stated this is an Owner Statement from Select Real Estate who was the property management company for the prior owners of the property and it shows there was a consistent rental history going back to 2017 and every year from 2017-2022 and his clients could testify they continued to rent but they rented the property on a sporadic basis only and they do have a mortgage on the property and if sworn in they would testify that their mortgage has a restriction on it that they cannot rent the property for more than half the year or else it would violate the mortgage and if they were sworn in, they could testify that they do not ever rent the property for more than that and that this is a vacation rental for them as families but also supplemental periodic limited short term rentals to help defray the cost of the property.

Attorney Johnson stated the legal arguments are the same as before but in this case, there is a record of the prior owner using the property for a short-term rental on a consistent basis up to, through and after the zoning ordinance changed in March, 2022 and they would therefore submit to the ZBA that his clients fall under the grandfathering exception under the zoning ordinance that qualifies a pre-existing non-conforming use that has an established track record and presented in the rental history (**Exhibit L attached hereto and made a part of these minutes**) and his clients would testify that they have continued to rent it but on a slightly less rigorous basis so they have not abandoned that use and his clients can provide more information on their current rental if that was a fact that the ZBA deemed important but he stated they wanted to establish that the property had been rented before the zoning ordinance had changed.

Gentile asked if the previous owner lived their part time and rented part time as the current owners. Attorney Johnson stated he did not know. Gentile asked for clarification that the current owners will not

rent more than 50% of the time and Attorney Johnson stated that is correct because they are restricted under their mortgage that they cannot rent the property for more than 50% of the time. Gentile stated that from the ZBA's perspective the board is curious to know whether the history reflects at least 50%. McAllister stated it probably does not come under the previous owner's mortgage, the 50%. Gentile stated the pre-existing non-conforming use it can be expected to limit it to the same thing for example even though they rented it half the time the previous owners could rent it for 25% of the time, the Board does not have to guarantee an expansion. Attorney Johnson asked to interject and stated that with regard nonconforming use he is not sure additional rentals in a yearly period is an expansion and the use is residential and if the use has changed to be something different, he would agree with the Board that this is an expansion and he does not agree with the Board as to the mathematical certainty to how they rented the property prior to versus how they rented currently and he would agree with the point at the extremes if the history had been that the property had only been rented one week a year for ever and now someone wants to rent is 350 days out of the 365 days, he is not sure under the Zoning Ordinance under a prior pre-existing non-conforming use he is not sure it requires a mathematical precision. Gentile agreed but stated they do have to respect the fact that a significant expansion of the use can be measured in any number of ways and one of those is the number of days. Attorney Johnson stated he wanted to emphasize the point name the significant expansion of use.

Attorney Johnson referred the Board to **Exhibit L attached hereto and made a part of these minutes**, last page under Occupancy which states 1/1/2017 through 8/31/2023 (2434 days). Attorney Boldt stated to look at the dates as there are 11 weekends in 2017 and 19 weekends in 2021. Attorney Johnson stated there are groups of renting one or two days.

Schilling asked as to the statement (**See Exhibit L attached hereto and made a part of these minutes**) dated September 6, 2023 and she asked why wait until now to produce it? Attorney Johnson stated he was not sure he had it until he had it and he brought it to this meeting and did not think that was an issue. Schilling did not understand why it was waited to produce it. Attorney Johnson stated his clients bought the property in June of 2022 which was after the March, 2022 deadline and they started looking in March before it was passed and they did look at the town website and tried to perform their due diligence and that it there is no easy to know the Zoning Ordinance changed.

Gentile asked if there were any abutters that wished to speak in favor of this project. There were none. Gentile asked if there were abutters that wished to speak against this particular project.

Attorney Johnson stated that his clients would have had abutters who were willing to speak but one abutter just had hand surgery and the other couple have the flu and this is why they do not have abutters there to speak.

Gentile asked if there was anyone in the public not an abutter that wished to speak to this project.

Gentile swore in Paul McKenna and Michael Brown for this case.

Paul McKenna, Oak Ridge Road - McKenna thanked the Zoning Board to let him speak in opposition to speak to non-compliance dwellings. McKenna stated these businesses bring issues to the town, nuisance violations, overparking, septic issues to pollute the waters, overcrowding of our transfer station to name a few. He further stated there are laws in place Ordinance 4.6A to stop this from happening and in March of 2022 the voters passed a Warrant Article that amended the definition of "dwelling unit" and

the definition of dwelling unit does not suffer from vagueness, ambiguity and/or overbreadth (See **Exhibit M attached hereto and made a part of these minutes**). He further stated that Madison is what is called a permissive zoning ordinance under which a property may not be used for any purpose or manner other than those specified for a given district. McKenna recited caselaw *Portsmouth v. Working Stiff Partners 172 N.H. 611 (2019)*. (See **Exhibit N attached hereto and made a part of these minutes**) said a permissive ordinance “is intended to prohibit all uses that are not expressly permitted.” He further stated that the New Hampshire Supreme Court has consistently ruled that only lawful uses are eligible for non-conforming use exception to new zoning restrictions see *Arsenault v. Keene 104 N.H. 356 (1962)*. He believes the decision the Zoning Board is about to make could dramatically change the character of the town and to enforce the law.

Michael Brown, 22 Little Shore – Brown read his statement aloud and stated the following:

“Did the applicant demonstrate the Code Enforcement Officer erred in the interpretation of the enforcement of the zoning ordinance. Brown stated the Selectboard acting as a required enforcement body of Madison zoning from their attorney interpreted and amend the definition of a dwelling unit and concludes that STR’s are no longer a permitted use after March 8, 2022 and the Code Enforcement Officer was delegated to commence the issuing letters of voluntary compliance following notifications of the violations. The enforcement process was adopted by Madison residents and resident voters in 1987 and the Eidelweiss Residential District was added in 1990. Sections 1.3C and 4.6 have not been amended in over 33 years. It shall be the duty of the Board of Selectmen or the designated Building Inspector to generally administer and enforce the provisions of this ordinance. The Selectmen shall administer the ordinance literally and upon well founded information and any violation hereof can initiate the meetings steps of enforcement. The timeline shows the property was purchased on June 10, 2022 and the applicants first recorded STR was on August, 2022, just five months after March, 2022 and after direction of the Selectboard, a voluntary letter of compliance was issued to the applicant on June 11, 2023 and the applicants did not respond. A notification of violation was issued on August 16, 2023 and the applicants did not respond to the town until September 21, 2023 with the application of administrative appeal. The March, 2022 amendment defines dwelling unit uses plain and easily understood words that allow persons of ordinary intelligence to respond reasonably to know what is prohibited. Each STR owner in Madison understood the language of the amended ordinance and it was expressed during the 2022 and 2023 group discussions on social media and the fact that the timelines were presented demonstrate Code Enforcement has followed the enforcement process that has been in place since 1987. The bigger question for the Board is did the applicant provide information demonstrated prior rental property to meet these requirements in section 1.3C since the Eidelweiss Residential District was added to the Madison Zoning Ordinance in 1990. If it cannot be demonstrated as a clear case the applicant violated the Zoning Ordinance and the conclusion is to deny the appeal.”

Bill Dempster (previously sworn in), 57 Doe Drive – Dempster stated he received information from his neighbor read aloud from the 1990 Zoning Ordinance with regard to 4.6A permitted uses as follows:

- “• It shall be primarily district of single-family residences only.**
- One dwelling unit shall be the maximum allowable on any one lot and in any one building.**
- Other permitted uses include home occupations, churches and public buildings.**

Business, commercial enterprises and agriculture uses are prohibited.”

Dempster stated he wanted to make sure the Board had this information and he is guarding it with his life. Gentile stated to clarify Dempster’s point is in order for a pre-existing non-conforming use to continue, it has to be legally established at its inception and that Dempster is alleging that even though they have a record of it being rented out for years prior, that in fact, it was not legally established. Dempster stated that is correct and the records that they have brought are going back to 2017. Gentile stated the question is whether this was legally established or not prior to that point. Dempster also stated for the record that there were a couple of letters that were sent in were requested to be read into the record. Gentile stated that there are.

Michael Brown, 22 Little Shore – Brown handed a letter to the Board Members. Gentile stated that will take care of the letters when the Board has heard the testimony.

Robert Boyd, Code Enforcement Officer - Boyd asked if the current owners that received this letter provide evidence to the town that they were actively conducting a Short-Term Rental activity within the year prior to the ordinance being passed in March of 2022? Gentile stated that from a technical perspective, if they bought a unit that was being handled as a Short-Term Rental and they did not allow that to lapse for one year but they began it within one year then that kind of use runs with the land and it is not the owner and they do not have to start from scratch. Gentile stated as long as they did not let it lapse so it was abandoned and it was legally established as a pre-existing non-conforming use, then they are allowed to continue it even if they start after the ordinance was changed. Boyd again asked if anything was sent to the town to show that because there were no responses to the letters. Gentile swore in Chad Ardizonni.

Chad Ardizonni, 13 Lucerne Drive - Ardizonni stated he did in response the letters email the prior rental history and then he received an email from someone at the town then asking for a current rental history so he did send current rental history as well so the rental history has been sent to the town. He stated he could not pull this up on his phone tonight due to no service but he did send the documents. Gentile asked Ardizonni which town address he used. He stated he thought it was a woman named Nancy. Young, Land Use Boards Administrator stated it was sent to Linda Shackford, Town Administrator.

Attorney Johnson stated his clients have not let it lapse and they have rented the property since they bought the property in June, 2022 and Ardizonni testified he sent the town that information but Attorney Johnson stated he did not have that information with him or he would have given it to the Board Members. Attorney Johnson stated they primarily only rent it on weekends which is 12-18 weekends a year which is consistent with the prior history that he showed the Board Members.

Attorney Johnson further stated that he wanted to touch legally permitted use issue as he believes it is a red herring and stated that he does not think there is anything in that definition from the 1990 ordinance that says that a single family home cannot be rented and he further stated you can have single family residence and that is the use, the New Hampshire Supreme Court has said that renting a residential property is a residential use and the fact that people could rent their property before the zoning ordinance change, that was permitted and he also noted that to the best of his knowledge, there is no zoning enforcement actions ever taken over someone to prior to the amendment of the zoning ordinance

and he stated the Board heard testimony from people in the audience that the Selectmen counsel says it is now illegal as of March 8, 2022 and following this logic, it was permitted beforehand so he does not think there is any finding that it was not permitted and if it was not permitted before, what was the point of the zoning amendment. Attorney Johnson further stated that if it was not enforced since 1987, then you have a giant selective enforcement problem.

Paul McKenna, 59 Oak Ridge Road – McKenna stated that some of the information provided to the Board, which they have not had the opportunity to read yet, will show the Board cases that said **“if a community does not enforce something, it does not mean the law is right there and goes on to site a case i.e. Working Stiffs....”** and this is in the Board’s package. McKenna stated he has said this already, **“that Madison has a permissive zoning ordinance under which a property may or may not be used for any purpose or manner other than those specified in the given district and with the Portsmouth Working Stiffs case, it says a permissive ordinance is intended to prohibit all uses that are not expressly permitted.”**

Attorney Johnson stated in talking about uses, it has always been permitted to have a single-family dwelling, living there and using the house as an owner or renter is the same thing and he stated it is still using the property and further stated that single family dwellings were allowed before and it is a use and not ownership status and he asked the Board to focus on that.

Nick Borelli, 5 Lakeview Drive - Borelli disagrees with Attorney Johnson and used an example that if he invited someone to his house for dinner, you have your dinner and you part your way and if you come to his house, he gives you dinner and he makes you pay for it, that is a business and asked, what is the difference between using a home as a place to rest your head or using a home to pay to keep your head there. Borelli further stated that as far as the ordinance of when and where as far as the time frame, these type of rentals were only allowed prior, as the ordinance says, in 1987 so that means none of these rentals Attorney Johnson is talking about from that point to now, are not legal and if at any point during the one year period it has not been used as a rental and the ordinances are designed for people like him who is a common man, a contractor and this is how they read these things. Borelli stated that Attorney Johnson’s comes here and argues as he is in front of a judge and throws as much stuff as he can against the law and hopes something sticks and tries to get the Board all fouled up in the head and that is how this gentleman works.

Jay Buckley, 58 Eidelweiss Drive - Buckley stated he wants to make sure that this Board is focused on what he believes to be is there evidence or proof to show that this applicant to this Board can provide sufficient evidence showing that there was rental history prior to March 8, 2022 and asked if this is what we are focused on and he is asking a question. Gentile stated that was the first step of the appeal was that it was grandfathered by previous rental history.

Gentile swore in Kurt Blaisdell.

Kurt Blaisdell, ? - Blaisdell stated he had a rebuttal to a previous statement and stated if we are going to start talking to you people about business use of a property because it is not legal then our children and grandchildren charging to babysit someone, then the Board will have to start enforcing this also. Blaisdell further stated that it is foolish arguments to bring up things of that nature when that is not what the discussion is about because there is a lot of business being operated at residences everywhere that therefore if that statement is true that are illegal than you have a lot of things to enforce.

Paul McKenna, Oak Ridge Road – McKenna stated he has been to approximately 50 Selectboard hearings and he did not want to go but did because of this. McKenna further stated the Selectboard stated, per their lawyer, there are approximately 200 STR's in Madison and they have been told when they first tried do this thing that it was overwhelming so the Selectboard decided to take the ones from March, 2022 post March, 2022 and go after those approximate 40 first. McKenna stated that people have asked what about the ones prior to March, 2022 and the Selectmen's answer has been we will deal with it later and they have not said those are grandfathered or anything like that and nobody has.

Gentile asked if anyone else wanted to speak. There were none.

Gentile stated that a couple of letters need to be read into the record and that they have been read before. Martin read aloud again a letter from Dee Dempster (**See Exhibit O attached hereto and made a part of the minutes**). Martin also read aloud again a letter provided to the Board from Kathy Koziel (**See Exhibit P attached hereto and made part of the minutes**).

Gentile asked the Board if they had any questions for Attorney Johnson or anyone else.

Martin asked Boyd that the applicant reference sending possible emails to possibly Linda Shackford or to the town and asked if any proof was received and does that get forwarded to Boyd pursuant to the

letters Martin read aloud as referenced as the above Exhibits. Boyd stated not really and it pretty much goes to the Town Administrator and he receives copies and letters are drafted and he signs them and once the letters go out that is the end of his involvement. Boyd stated the request, he believed, was for all of the cases and that the individuals would receive a letter and respond and if they could show that they actively have been renting the STR's within the year prior to the ordinance being passed, he believed that this is what the Selectboard is looking for, and then the Selectboard would be looking at that and considering whether that was going to be allowed and if no evidence was presented, he believed the Selectboard went forward with this stage.

Gentile asked Boyd if he meant the Town Administrator and Boyd stated he thought most of the correspondence was going to Linda Shackford.

Gentile stated the Board could close the hearing but he asked Attorney Johnson if there was any reason that he wished to continue this case (**Case #23-13**) or was he looking for any other evidence. Attorney Johnson stated he does not believe they need to ask for a continuance as they have the rental history that establishes the use prior to March, 2022 and his clients have testified they have continued it so there is no issue of a lapse and he believes the evidence is sufficient for the Board to rule on this appeal tonight. Schilling stated she disagreed without proof of the paperwork which they said they produced that shows that the house was rented anywhere from February 2022 and they did not start renting it until 2023 and that would mean that the house had lapsed and a year had gone by and she has no evidence that shows that the house was rented after February 18, 2022. Attorney Johnson stated if his client could get internet access, he could prove this. Schilling stated that she does not think they have conclusively satisfied an evidence piece and she is looking for that evidence and she told Attorney Johnson his contention was there was no reason for a continuance and she feels there may be and in order to provide that proof to show consistency and no lapse she further stated that if Attorney Johnson just wants to go

with the evidence presented, she would say there is a lapse. Attorney Johnson stated he would ask for a continuance if that was the Board's position and he believes the evidence is sufficient but that Schilling is telling him how she is viewing it and they need to poll the rest of the Board. Attorney Johnson stated his client has already provided this to the town and once his client has internet access, he will provide that evidence to the Board.

Gentile asked Attorney Johnson again, for the record, what was the date his clients began the rental. Attorney Johnson stated August of 2022. Gentile asked when was the first advertisement. Attorney Johnson stated they bought after June, 2022 so it would have been after June of 2022. Attorney Boldt asked Attorney Johnson that in the materials that are provided there is a breakdown of expenses but he does not see any meals and room tax line. Attorney Johnson stated he would need to look at this and Attorney Boldt also asked Attorney Johnson when he gives the information on the current rentals to also give the meals and room tax information as well so it is complete.

Schilling asked Young, Land Use Boards Administrator to check with Linda Shackford, Town Administrator to see if the rental history is in a file.

Gentile stated that the Board does want to hear some additional evidence to make sure there is a less than 12 month overlap between these items.

Gentile stated that for the record, 1.3C does allow legally established pre-existing non-conforming uses to continue and this is the basis of this appeal and statutory basis on which this Board could potentially allow the applicants to continue in this usage.

Gentile asked the Board if they wanted to move to continue this case.

Motion by Schilling, seconded by McAllister to move to continue **Case #23-13** to January 17, 2024 at 6:00 pm here at the Madison Elementary School Gymnasium, to be determined, pending availability.

Discussion: Gentile stated in this case, the status quo is that there is some evidence of previous use. Schilling stated they are under the cease-and-desist order which Schilling read aloud. Attorney Boldt stated it is the same language as used in the prior case. Attorney Johnson stated that unlike the prior case, his clients did send evidence of prior and current use to the town so he thinks this is a slightly different scenario and it is clear that the Code Enforcement Officer does not get that information so he believes this is different from the first case as his client has provided proof. McAllister stated that the Board can only vote on what they have in front of them. Gentile stated the technicality is there is risk to Attorney Johnson's client but under the assumption that it is clarified then of course, assuming that the appeal is granted, then there is no basis for a fine.

Motion by Schilling, seconded by McAllister to continue **Case #23-13** to the January 17, 2024 meeting at 6:00 pm here at the Madison Elementary School Gymnasium, pending availability and the cease-and-desist language continues to apply pending the appeal pursuant to RSA 676:6. The motion passed **5-0** with Dempster and Ohlson recusing themselves as they have a conflict of interest.

Gentile asked that the Board formally continue the existing cases that have not been heard yet tonight, to a specific date and time. Attorney Boldt asked Gentile to confirm with Attorney Johnson that January 17, 2024 is the date he wants to continue the cases. Gentile asked Attorney Boldt if the Board could

continue all the cases with one motion. Attorney Boldt stated yes, because Attorney Johnson is the attorney on all of the cases and the Board needs to list out each case number. Gentile asked the Board for a motion.

Motion by Martin, seconded by McAllister to continue **Case #23-14, Case #23-15, Case #23-16, Case #23-17, Case #23-18, Case #23-19, Case #23-20 and Case #23-22** to the January 17, 2024 at 6:00 pm to be held at the Madison Elementary School Gymnasium, pending availability and the cease-and-desist language continues to apply pending the appeal pursuant to NH RSA 676:6. The motion passed **5-0** with Dempster and Ohlson recusing themselves as they both have a conflict of interest.

ADMINISTRATION:

Gentile stated that the legal line in the budget was cut from \$11,000.00 to \$9,000.00 by the Selectmen. Schilling stated she tried to argue for it. She further stated that the ZBA was increasing this line to \$11,000.00 and the Selectmen were concerned that this was for short term rentals which is what the \$80,000.00 now down to \$75,000.00 would take care of it and the ZBA line at the moment is we have \$7,500.00 for last year and the ZBA only expended \$5,500.00 and the Selectboards issue is that the ZBA has not expended the \$7,500.00 and part of the \$5,500.00 is short term rentals which will get reimbursed so the ZBA has not even spent the \$7,500.00 why do we need \$11,000.00 and the ZBA can probably make do on \$9,000.00.

Schilling had a question on the Rules of Procedure as it does not read right to her. Schilling stated the third line under Proposed language reads “be open after 9:00 P.M. and will commence by 10:00 P.M.” Gentile stated there are typos and it should read “be opened after 9:00 P.M. and the meeting will conclude by 10:00 P.M. as noted in yellow below. Schilling read aloud the Current language and Proposed language aloud as follows:

“Current language:

1. Regular meetings shall be held in the lower-level meeting room of the Madison Town Hall, at 6:00 P.M. on the third Wednesday of each month, when an application is to be heard. Other meetings may be held on the call of the Chairman provided public notice and notice to each member is given in accordance with RSA 91-A:2, II.

Proposed language:

1. Regular meetings shall be held in the lower-level meeting room of the Madison Town Hall, at 6:00 P.M. on the third Wednesday of each month, when an application is to be heard. No new business will be **opened after 9:00 P.M. and **the meeting will conclude** by 10:00 P.M. Other meetings may be held on the call of the Chairman provided public notice and notice to each member is given in accordance with RSA 91-A:2, II”.**

Gentile stated this is the second reading of the Rules of Procedure. Young stated she will make the changes and hand out the revised Rules of Procedure to the Board at the January 17, 2024 meeting.

Gentile stated a change needs to be made to the October 18, 2023 minutes on Page 2, second sentence strike the word “more” and in the third sentence remove “without encroaching on Moscone’s property.”

Dempster had a revision on Page 7, bullet 7. remove “also found.”

Approval of Minutes: Motion by Schilling, seconded by Dempster to approve the minutes of the October 18, 2023 meeting as amended. The motion passed **6-1** with Martin abstaining as he was not present at the October 18, 2023 meeting due to police training.

The Board received a letter dated October 10, 2023 from Bruce Adams and Susan Perry, 475 Maple Grove Road, Map 238, Lot 002 with regard to a Short-Term Rental Accusation. Schilling stated that the action should be that the Board of Selectmen should remove them from the list although some should check to make sure they are not renting. The Board felt that since the letter was addressed to Linda Shackford, Town Administrator that the Zoning Board of Adjustment did not need to take any further action.

ADJOURNMENT: Motion by Dempster, seconded by Martin to adjourn the meeting at 9:20 pm. The motion passed **unanimously**.

The next Public Hearing of the Zoning Board of Adjustment will be held on January 17, 2024 at 6:00 pm at the Madison Elementary School Gymnasium, pending availability.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator