TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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ZBA MINUTES
May 15, 2024

ATTENDANCE: Drew Gentile, Chairman, Sharon Schilling, Vice Chairman, Bill Dempster, Marc Ohlson, Alternate, Jennifer Skaife, Alternate and Jacob Martin, Alternate – by phone

EXCUSED: George Rau and Doug McAllister

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

PLEDGE OF ALLEGIANCE: Schilling led the reciting of the Pledge of Allegiance.

Gentile reached out to Martin via telephone and stated that he needs to go through the formalities of Martin participating telephonically and will do that when he opens **Case #23-15**. Martin was not present at the meeting as he is on a family vacation and Gentile stated he is opening the meeting now.

CALL TO ORDER: Gentile, Chairman called the meeting to order at 6:04 pm.

Gentile stated that **Case #23-15** and **Case #23-18** were continued from last month and that the other short-term rental cases may be continued or tabled to another date certain and that the Rehearing for **Case #23-13** must be heard tonight because of the 30-day deadline. Gentile further stated that as to the hearing of **Case #24-03** and **Case #24-04**, it may be too late to hear these cases tonight as the board does not start any new business after 9:00 pm and the meeting ends at 10:00 pm but this will be up to the board's discretion.

ELEVATION OF ALTERNATES: Gentile raised Skaife and Martin from Alternates to full voting members making the board a four-member board tonight which Attorney Johnson agreed to. Gentile stated that Martin is appearing telephonically and there are rules and procedures that need to be followed to appear telephonically and Gentile now needed to ask Martin a series of protocol questions for electronic participation as follows.

1. Gentile asked Martin why his reason for not attending in person is not reasonably practical? Martin stated he is in Washington, DC on vacation.

2. Gentile stated the procedure requires that a quorum be physically present at the location of the meeting and for the public, he just elevated Skaife, he is here and Schilling is present and a quorum is three and including Martin, this makes a four-member board tonight. Gentile stated that Attorney Johnson agreed to having a four-member board since the board could not produce a five-member board

tonight. Gentile stated that for the applicants that have cases later, the board does have the option to continue their case if they want a five-member board.

3. Gentile asked Martin, board members, Attorney Johnson if they can all hear Martin and Gentile asked Martin if he could hear Attorney Johnson? Gentile then asked the members of the public if they could hear Martin? All parties agreed they could hear each other.

4. Gentile asked Martin to identify any persons present at his location? Martin stated there was no one present with him.

Gentile stated they will continue with a four-member board. Gentile stated that the board was at the stage of preparing the Preliminary Findings of Fact for **Case #23-15** and that the board is still in a public hearing and will be able to take additional comments. Gentile stated he will review the Findings of Fact in their current state for **Case #23-15** and then allow Attorney Johnson the opportunity to add anything new to the case. Gentile read aloud the following Preliminary Findings of Fact as identified at the April 17, 2024 meeting and the question is, whether there is a valid claim to be grandfathered.

Gentile asked Young to read aloud **Case #23-15** as well as the posting notification.

Young read **Case #23-15** aloud as well as the Public Meeting Notice posting as follows:

Case #23-15 – Continued (October 18, 2023, November 15, 2023, January 17, 2024 and February 21, 2024 and March 20, 2024 and **April 17, 2024) - Appeal from an Administrative Decision** from Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Keith and Alison Kellerman, 21 Haven Road, Tax Map 128, Lot 21 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 4.2 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 April 24, 2024.

Gentile confirmed that **Case #23-15** was continued from the April 17, 2024 meeting.

Conflict of Interest: Gentile asked Skaife if she had a Conflict of Interest? Skaife had none and Gentile stated that the board was polled previously and had none.
Waiver Request: Gentile stated the board previously determined there was a Waiver Request which was accepted last month.
Regional Impact: Gentile stated there was none and the board was polled last month.

Gentile read aloud the Preliminary Findings of Fact collected at the April 17, 2024 meeting as follows:

<u>Preliminary Findings of Fact</u>:

1. The primary question is whether there is a valid claim to be grandfathered.

2. The home is in the Silver Shores Homeowners Association.
3. Silver Shores HOA was chartered in 1976 and currently has 13 homes, 11 of which are rented seasonally, as has been the habit since 1976 (Mr. Audette, VP of the Silver Shores HOA)
4. The HOA charter foresees rentals without distinguishing between long or short term.
5. Mr. Audette and Mr. Johnson stated that the charter of 1976 provides the homeowners with the right to an existing non-conforming use.
6. We have testimony from Mr. Knight and Mr. Audette that the Moore's, who were the owners from 2015 until the Kellermans purchased the home in December, 2022, were part time residents who rented the home *out* regularly every year. They estimated that at perhaps 60 days or more per year without documentation.
7. The Moore's declined providing testimony or documentation, preferring not to get involved, per the Kellerman's testimony.
8. Prior to 2015 the home was owned by the Davis family who were full-time residents and therefore were unlikely to have rented the home out per Mr. Audette.

Gentile asked Attorney Johnson if he wanted to amend anything in the Preliminary Findings of Fact?

Attorney Johnson stated yes, he would and at the April meeting, the board requested to see a complete copy of the Charter (which said copy is in file **Case #23-15)** and he referred the board to the Charter. Martin was asked if he had seen a copy and he stated no. Gentile stated to Martin that the board is looking at a copy of the Silver Lake Shores Homeowner documents. Attorney Johnson explained that the first five pages are the Articles and then attached are the Silver Shores Restrictions and referenced in those restrictions, Paragraph three and Paragraph six, Attorney Johnson read aloud in Paragraph three, **"No part of the land and no building or structure placed thereon shall be used in the conduct or carrying on of any trade, business or occupation of any kind whatsoever, except that the premises may be rented for occupation as a residence"** and then read aloud Paragraph six, **"These covenants and restrictions and each of them, are hereby declared and agreed to be covenants attached to and running with the land and shall continue in full force and effect until amended or modified by the written consent of all lot owners."** Attorney Johnson then provided the board with the Silver Shores Rules and Regulations and referred the board to the Statement of Purpose section. Attorney Johnson read the following sentence aloud **"These rules and regulations apply to lot owners, guests, and renters of Silver Lake Shores property."** He then read aloud under General Regulations #9 **"Those renting property should use discretion as to the number of persons allowed the use of their property and Silver Shores facilities."** Attorney Johnson then referred the board to the last page of the document under the Enforcement section and read aloud **"Copies of Silver Shores Rules and Regulations should be available in each cottage for information, guidance and compliance of all (This is especially important in rented cottages)."** Attorney Johnson reiterated that this is from 1976 and predates the passage of the Madison Zoning Ordinance and he submits that by virtue of these documents, that the rental use is permitted and that the Kellermans had a pre-existing now non-conforming use and is grandfathered to continue to rent the property as was discussed at the April 17th meeting. Gentile confirmed that Martin heard Attorney Johnson. Attorney Johnson stated the next document he is giving the board is confirmation of Mr. Kellerman's testimony at the last hearing which shows the first rentals of the property after they acquired the property (which said copy is in file for **Case #23-15**). Attorney Johnson stated the last document he gave the board is an update from Mr. Kellerman to show the number of days he rented the property through December of 2023 is to

corroborate the fact that his use has been consistent with the testimony from the last proceeding which is roughly 60 days per year of rental and to show no abandonment of use of the property (which said copy is in file for **Case #23-15**).

Gentile clarified for Martin that the board now has confirmation of the rental as presented last time he was at the meeting as well as confirmation of the rental period beginning in 2015.

Gentile asked if anyone in the public wished to speak to this and if so, that he would need to swear them in. Gentile swore in Kathy Koziel, John Cancelarich, Bill Dempster, Paul McKenna and Nick Borelli. Gentile stated that with respect to the question of grandfathering, one of the questions that needs to be answered is grandfathering before 2022 or before 1987.

Kathy Koziel, 7 Lakeview Drive – Koziel stated that at the last meeting there was testimony that the prior owner, Davis owned the property, used the property and never rented the property and that information was basically hearsay and since then, one of the prior family owners of Davis had been contacted which was Alan Davis, Jr., and even though the description of the property use from Attorney Johnson stated that it was historically used as a short term rental and has always been used as a short term rental and that the use had never been abandoned, Gentile interjected and stated from 2015. Koziel read aloud the email dated April 26, 2024 from Alan Davis, Jr., (a copy of which is in file for **Case #23-15**) and she provided copies of the email to the board and she reiterated the property was never rented prior to 2015. Gentile stated the testimony already corroborates which was already asserted to, that the house was rented first in 2015. Attorney Johnson objected to this because he had not seen the letter, the letter was written by someone who was not present at the public hearing tonight and not sworn in and you cannot swear Koziel in for something someone else wrote. Gentile stated again, the testimony corroborates that which was already asserted, that the house was rented first in 2015.

Bill Dempster, 157 Doe Drive – Dempster stated that from the last meeting there was an open item and that one of the reasons for the board's continuation was that the board was going to ask Attorney Johnson about precedence, the homeowners association versus a Zoning Ordinance. Dempster asked if the attorney had been contacted and if so, could the board share that at this meeting. Gentile stated the board has done research into this and during deliberation, they will discuss the results of their research.

Nick Borelli, 5 Lakeview Drive – Borelli stated that in this case, the town ordinance was put in place back when zoning was introduced in 1987 and the homeowner's association, no matter what is says, would have to comply with what the town or state has in place. Borelli also stated that as far as "non-conforming use of land or building which is entitled to protection against zoning provision is one that was lawful when the restriction was enacted, for example, a prior property use, at the time of the amendments of the Keene zoning ordinance in 1955 and 1957 did not exist lawfully and cannot be given the protection of non-conforming use and provisions which exempt existing uses are intended to favor uses which were both existing and lawful, not to aid users who have succeeded in evading previous restrictions" Id. at 358-60 which was taken from the **Arsenault v. Keene case, 104, N.H. 356 (1962);1**.

Gentile asked if anyone else wished to speak? Cancelarich raised his hand. Gentile stated that the board already has his testimony and Gentile asked if Cancelarich could summarize his testimony and not repeat the same information as stated previously.

John Cancelarich, 108 Eidelweiss Drive - Cancelarich referred the board to his handout (which was received on May 15, 2024, which said copy is in file for **Case #23-15).** Cancelarich stated that the only thing that may apply to this short-term rental is in our zoning ordinance which is under Article 4.2B. Special Exceptions #7. Lodging House (Bed and Breakfast) facilities which is strictly defined in our ordinance as a private owner-occupied residence with guest house. He further stated that the only transient kind of lodging permitted in Rural Residence is owner occupied Bed and Breakfasts. Cancelarich read sections of his handout aloud to the board. He further stated that the private owner-occupied residence must go through Special Exception and notify abutters and prove satisfaction conditions so it will not be a nuisance, setbacks, parking, property values and safety. He also stated we have laws that we need to follow.

Gentile asked Martin if he had any questions, he had none. Gentile asked Schilling and Skaife if they had any questions, they had none. Gentile asked the public if anyone else wished to speak. No one did.

Gentile stated that what he did not hear tonight is what he would consider a significant amendment to the Preliminary Findings of Fact previously listed and does not see any changes and what is important for the board and what is not in question, is the house was rented regularly after 2015 and if the date that qualifies for grandfathering is March of 2022, then this house has a pre-existing non-conforming use prior to 2022 and the point is, if 2015 was the date of the first rental and 2022 is the date that establishes the right to grandfathering, that is what the board has to decide. Gentile stated that if 1987, 1990 or 2010, depending on the version of the Zoning Ordinance, however the Zoning Ordinance in 2015 already has all the provisions which were mentioned and which we have checked and double checked so the 2015 version of the Madison Zoning Ordinance also predates the date of the sale of the house. Gentile further stated that if the 2015 and earlier ordinances establish the fact that short term rentals were not permitted then there is no right to be grandfathered even if the house had been rented from 2015, the board can grant that and it is approximately 60 days a year. Gentile stated the board will need to decide whether the critical date is 1987, 2015 or one of the ordinances in between, but again, stated that all the provisions mentioned are in the 2015 Zoning Ordinance. Gentile asked if Attorney Johnson had anything to add? Attorney Johnson stated that their position is the March 2022 date that matters for the reasons he has articulated before and otherwise, under the pre-existing ordinances, these were all permitted uses as single family dwellings and therefore, permitted to be used. Attorney Johnson further stated that there is nothing restricting rentals until the March, 2022 ordinance. He further stated that there was zero enforcement action ever taken by the town for short term rentals until after the March, 2022 ordinance and it is further proof that supports the fact that it was the March, 2022 ordinance that changed to make short term rentals no longer permitted which then triggered this proceeding.
Gentile stated that mentioned in the Findings of Fact was that the HOA had a provision for rental from 1976 and that the laws change all the time and that the 1987, the Zoning Ordinance in its original form, took effect in that any home that was already established in 1987 that was currently renting has established a pre-existing, non-conforming use at that time. Gentile stated that a home which did not already have the use would normally not be considered to have the right to establish a new use under the then current ordinance.

Gentile asked for a motion to close the Public Hearing to deliberate on the merits of the case.

Motion by Schilling, seconded by Skaife to close the Public Hearing and deliberate on the merits of the case.

Martin called a point of order that a roll call was needed.

Roll Call Vote: Gentile – Aye; Schilling – Aye; Skaife – Aye; Martin – Aye
The motion passed by a roll call vote of 4-0.

Gentile explained to the public that board is now proceeding with the deliberation and that this is a public meeting and they are welcome to listen but there will be no further contribution from the public.

Gentile asked if the board could link transient to motel. Skaife stated that expectations of motel is limited services, private space, parking, someone on call if needed and she stated that short term rentals fall into hospitality. Martin agreed. Gentile stated the definition of motel goes back to 2015 which predates the purchase of the house so that the use was already prohibited in 2015. Gentile stated we need to add to the Findings of Fact, the understanding of a definition of motel. Schilling stated that the board discussed the HOA and Schilling stated the board needs to add to the Findings of Fact, the link of actual use of the homeowner renting, actively renting for compensation for Meals and Rooms Tax. Gentile stated they also need to add to the Findings of Fact the understanding of the normal characteristics of a motel and establish that this property substantially meets the definition of a motel.

During the deliberation process, the board discussed whether this short term rental fit into the definition of a Bed and Breakfast or a motel. After much deliberation by the board, they concluded that this short term rental did not fit into the definition of a Bed and Breakfast. It was discussed that there would have had to have been a hearing for a Special Exception, as well as a Bed and Breakfast is owner occupied. The board then deliberated on whether they felt they had clear language on the definition of motel and concluded that, this short term rental fits into the definition of motel because it provides lodging on a transient basis with the obligation of paying Meals and Rooms Tax. Also, it provides cleaning services for compensation as well as provides independent access and independent parking, which are all normal characteristics of a motel and are not permitted in the rural residential district.

Gentile polled the board and asked, if they felt they were in a position, to make a motion? Gentile stated the board needs to add their understanding of the definition of a motel to the Findings of Fact and he further stated, that the board is leaning to not granting the grandfathering clause on the basis that this is a motel usage which is already prohibited. Schilling stated that we also need to add what the board believes to be characteristics of a motel and in the Findings of Fact, link the actual use of the home that the homeowner is renting and show those points that it would connect, therefore, that the homeowner is actively renting it for compensation that includes the Meals and Rooms Tax. Gentile stated that we have a definition and we need to make sure, in the Findings of Fact, that this case does meet the criteria. Gentile stated he is making the ninth Findings of Fact which is the board's understanding of the normal characteristics of a motel. Gentile stated the tenth Findings of Fact is to establish that this particular property, substantially, meets the definition of a motel.

Gentile stated what this also allows is the potential for a Rehearing, should the owner be able to prove that it does not meet the characteristics that the board has listed and this would be the grounds for a Rehearing.

Case #23-15, April 17, 2024, and May 15, 2024

Findings of Fact:

1. The primary question is whether there is a valid claim to be grandfathered.
2. The home is in the Silver Shores Homeowners Association.
3. Silver Shores HOA was chartered in 1976 and currently has 13 homes, 11 of which are rented seasonally, as has been the habit since 1976 (Mr. Audette, VP of the Silver Shores HOA)
4. The HOA charter foresees rentals without distinguishing between long or short term.
5. Mr. Audette and Mr. Johnson stated that the charter of 1976 provides the homeowners with the right to an existing non-conforming use.
6. We have testimony from Mr. Knight and Mr. Audette that the Moore's, who were the owners from 2015 until the Kellermans purchased the home in December, 2022, were part time residents who rented the home *out* regularly every year. They estimated that at perhaps 60 days or more per year without documentation.
7. The Moore's declined providing testimony or documentation, preferring not to get involved, per the Kellerman's testimony.
8 Prior to 2015, the home was owned by the Davis family who were full-time residents and therefore, were unlikely to have rented the home out per Mr. Audette.
9. The board understands these characteristics to define a motel based on the definition of "motel" in the Zoning Ordinance and the common understanding of what a motel is:
    a. It is a building or buildings that offer the service of lodging.
    b. For compensation with the obligation to pay meals and rooms tax.
    c. Which provide basic support services such as cleaning and scheduling.
    d. Independent access.
    e. Adjoining parking.
    f. The lack of a rental contract for non-transient occupancy.
10. The short-term rental of 21 Haven Road meets the definition of a motel:
    a. The property has been rented on a short-term basis since 2015 on the order of 60 days per year and the current owners intend to rent for a similar amount.
    b. Presumably meals and rooms tax is being paid, though no documentation was submitted to the board.
    c. Basic services were provided; the owners used Airbnb as a contact and scheduling agent, the home was provided furnished and cleaned.
    d. There is independent access to the building.
    e. There is adjacent parking.
    f. There was no rental contract for non-transient use.
11. Motels are not a permitted use in the rural residential district according to Article 4.2 of the Zoning Ordinance.

Motion by Gentile, seconded by Schilling to deny the Appeal from an Administrative Decision because:

- There was no legally established, pre-existing, non-conforming use since the Homeowner's Association Charter provision for renting was restricted by the Madison Zoning Ordinance of March, 2015 prior to the purchase and first rental of the house.
- The rental meets the characteristics of a motel as defined by the ordinance and described in the Findings of Fact above, which is not a permitted use in the rural residential district under article 4.2 of the Zoning Ordinance.

Roll Call Vote: Gentile – Aye; Martin – Aye; Schilling – Aye; Skaife - Aye
The motion passed by a roll call vote of 4-0.

Gentile stated that since the board unanimously decided to deny the appeal and that the way it is written, does give the applicant the opportunity to provide data that would contradict the board's assessment.

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #23-15.**

Case #23-18

ELEVATION OF ALTERNATES: Gentile raised Skaife and Martin from Alternates to full voting members, making the board a four-member board tonight which Attorney Johnson agreed to.

Gentile asked Young to read the public notice for **Case #23-18** aloud.

Young read aloud **Case #23-18** as well as the Public Meeting Notice as follows:

Case #23-18 – Continued (October 18, 2023, November 15, 2023, January 17, 2024 and February 21, 2024, March 20, 2024 and April 17, 2024) - Appeal from an Administrative Decision from Matt Johnson, Esquire, Devine, Millimet & Branch, P.A., Agent for Matthew Petti and Jennifer Swift, 70 Skyline Way, Tax Map 205 Lot 48 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 4.2 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 April 24, 2024.

Gentile confirmed that **Case #23-18** was continued from the April 17, 2024 meeting.

Conflict of Interest: Gentile asked Skaife if she had a Conflict of Interest and she had none and that the board was polled previously and had none.
Waiver Request: Gentile stated the Waiver Request was accepted at the April 17, 2024 meeting.
Regional Impact: Gentile stated there was none and the board was polled last month.

Gentile stated the board was going to review the Preliminary Findings of Fact collected at the April 17, 2024 meeting as follows:

Preliminary Findings of Fact:

1. Date of Purchase was April, 2023.
2. First rental by the current owners was June 9, 2023.
3. There is documentation to prove regular rentals from February, 2021.
4. There was no lapse of rental activity in the time frame back to February, 2021.
5. Selective level of activity is
    a. 32 rentals for 157 days in 2021
    b. 27 rentals for 103 days in 2023
    c. 2022 and 2024 were not estimated in the meeting.
    d. The current owners anticipate renting on the order of 100 days per year.
6. The home is in the Skyline Estates Owners Association. There is no mention of rentals in the deed restrictions.
7. The home was built in 2018, the first documented rental is in 2021.

Gentile stated that the request is to recognize a pre-existing, non-confirming use based on the March, 2022 date of the Madison Zoning Ordinance change and this is a similar situation here and is the March, 2022 date the critical date or is an earlier date the critical date.

Attorney Johnson stated and continues to say that the Zoning Board of Adjustment is getting their analysis wrong and it is the March, 2022 date and he wanted to draw the board's attention to the Code Enforcement Officer's enforcement actions, notice and cease and desist and it all refers to the fact that, with the change in the ordinance, it clarified that they are not being used as a single family dwelling and there has never been enforcement action to his knowledge, ever initiated over the thought that these actually qualified as motels and he also believes this is an erroneous interpretation by the Zoning Board of Adjustment as made in the last case. Attorney Johnson stated that factually, he believes this case presents the same as the prior case and it is up to the Zoning Board of Adjustment to make their decision, however they wish. He reiterated the fact that the board is not doing this correctly and he believes it is the ordinance change of March of 2022.

Attorney Johnson asked the board if the short term rentals are barred by the motel definition and if so, why was there never any enforcement action initiated by the town until the March, 2022 Zoning Ordinance change and, if in fact, short term rentals were barred by the motel definition going back to 2015, why was there any need to amend the ordinance to add the transient definition and the transient limitation to the dwelling unit definition which came about in 2022? Attorney Johnson stated his position that this is proof of when the change happened and not in 2015 or earlier as the Zoning Board believes it is in their prior rulings.

Gentile asked anyone from the public wished to speak to **Case #23-18** who has not been previously sworn in to please identify themselves so Gentile can swear them in and asked that they do not repeat their arguments from previous meetings.

Nick Borelli, 5 Lakeview Drive – Borelli stated as far as Attorney Johnson stating they were not a problem and why didn't the town do something about it, that what happens is the Building Inspector does not go around and policing and once something is brought forward in the town by anyone that is

upset with it and in the ordinance is existing then that is when it gets brought out and not only that, even if the ordinance exists, and was never used, it does not matter because anytime a problem starts, it can be used. He further stated that you cannot build a motel in a residential use area and that it is up to potential buyers to know what the ordinances in the town are.

John Cancelarich, 108 Eidelweiss Drive – Cancelarich stated he was submitting a document for this case (which said copy of document is in the file for **Case #23-18)** and that he is aware that the board has gathered their facts and he wanted to add the fact that there is a sort of rental being done on special exception and that the board did not have this mentioned in their Findings of Fact, which is owner occupied and it is important to say if you allow one, it restricts all the other ones because it could have been put in there. Gentile was confused and asked Cancelarich for clarification. Cancelarich stated that Gentile previously stated that it is similar to motels and Cancelarich stated that motels are not mentioned in here and that is correct, because it is permissive only and if it was allowed, it would have to be owner occupied and would be a Bed and Breakfast. Cancelarich then stated that on Attorney Johnson's narrative it is not correct and that Attorney Johnson is creating a narrative that does not exist in our town and we did go after people before March, 2022 and also what happened during that time period was the Planning Board tried to create an ordinance to have short term rentals and then the town voted and how the town voted to choose and then the town stopped going after people because the Planning Board was creating an ordinance and they wanted to see what would happen with the town. Cancelarich stated that Attorney Johnson's narrative is not correct that this is not the first time that the Selectmen have ever gone after people.

Paul McKenna, 59 Oak Ridge Road – McKenna stated that Attorney Johnson statements as to no issues and he can furnish numerous Madison Police reports on the short term rental owner that lives next to him and that the Chief of Police sent the short term rental owner a warning stating that if it continued the owners were going to be fined.

Gentile stated that for the record, that while the board acknowledges that some the short term rentals have had numerous complaints, what this board is examining is not whether there have been problems with the experience of short term rentals, but whether or not the underlying ordinance permits them and that the Zoning Board is not enforcement but actually the lowest level of court trying to decide what the law says, as opposed to trying to determine based on the experience of what those things are. Gentile stated the board does appreciate the fact that they have had a problem and those problems have been a driver for some of the Warrant Articles that have been passed.

Gentile stated that what they need to do as a board, is to decide to what extent, this case overlaps similar decisions they have made to this point and that the board is obligated to act fairly and consistently but that the unique characteristics of each case may give the board grounds to give a different decision because the applicability of the situation and that this is what the board needs to debate.

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

Attorney Johnson stated that the average person looking to buy a property and looking at the Madison Zoning Ordinance and looking at the definition of motel, would not consider that the ability to rent their own single family house on a short term basis fell within that definition and there is inherent ambiguity

there and then that raises the administrative clause statute which is to the extent that has not been interpreted in a way that the Zoning Board is now and is inconsistent with prior performance.

Gentile asked for a motion to close the Public Hearing to deliberate on the merits of the case.

Motion by Schilling, seconded by Skaife to close the Public Hearing to deliberate on the merits of the case.

Roll Call Vote: Gentile – Aye; Martin –Aye ; Schilling – Aye; Skaife – Aye.
The motion passed by a roll vote of 4-0.

Gentile asked the board if they felt there were characteristics of this request that radically differ or insignificantly differ from the previous (**Case #23-15)** that would require a completely new analysis? All four board members stated no. Gentile stated the board will look at this in a more detail, and for the board to be consistent with previous decisions that have been made, the board does not need to research back into the details of earlier ordinances. Gentile stated that what this would mean is that effectively, the board could take the same argument and further explained what the board did not do with the last case was that the board had agreed in November that they would not need to rehash all of the legal arguments that Attorney Johnson had put forward and in earlier cases, Gentile stated the board had addressed them at least once every evening and to be fair, while the board is well aware of those arguments as they made their decision in the last case, he believes it is fair consider those arguments so they are a part of the record. Gentile stated the board will bring their responses to those arguments from the minutes of April 17, 2024 which are as follows:

"Legal Analysis

The Board of Selectmen and the Code Enforcement Officer made an error of fact in issuing a Notice of Violation. As will be explained below, the Madison Zoning Ordinance changes cannot be applied to the Owners property because they are unconstitutional.

First, the Owners property is a pre-existing nonconforming use. It was used for short term rentals historically and after the most recent amendments to the Madison Zoning Ordinance in March of 2022. Because the property always has been used for short term rentals, and that use has not been abandoned, the current owners, the Owners, are entitled as a matter of law to continue the pre-exiting nonconforming use. The Madison Zoning Ordinance expressly recognizes the ability to continue prior nonconforming use at section 1.3(c).

Second, the amended "dwelling unit" definition upon with the Code Enforcement Officer is relying is unconstitutional because of its vagueness, ambiguity, and/or overbreadth. As written, it is unclear what the definition intends to cover. Second home owners as well as seasonal renters could be barred by this new definition from accessing their property in Madison. The revised definition of dwelling unit does not differentiate between owner or rental occupancy. Were this amendment to be valid, an owner of a second home bought after March of 2022 would not be allowed to use his or her property for periods of less than thirty days. This definition is thus void given its complete ambiguity. Officer Boyd's "Notice of Violation" letter claims that the 2022 changes "make it clear that a house that is

primarily rented to guests on a short-term basis, rather than used as a residence, does not meet the definition of single-family house." However, the change to the ordinance does not include the word "rental." Moreover, the Town voted down two proposed amendments directly addressing short-term rentals, Given this set of circumstances, the Town should not base its enforcement actions on ordinance language that is so vague. The Chief Justice of the New Hampshire Supreme Court has cautioned that any ambiguity in a land use regulation should be, in his opinion, construed in favor of protecting private property rights. <u>See</u> <u>Conway v. Kudrick</u>, 2022-0098 (MacDonald, CJ., concurring opinion). Following that guidance should cause this board to reject any enforcement actions until the Madison Zoning Ordinance is modified to be clear what is restricted and what is not.
Third, the amended Madison Zoning Ordinance violates the substantive due process rights of the Owners and creates a regulatory taking under the New Hampshire and Federal Constitution. Madison lacks the statutory or constitutional authority to restrict a use of their property that the Supreme Court had confirmed is a residential use. Such an action is fundamentally unfair generally and to the Owners property, in particular. By barring them from using their property for residential short term rentals unless owner-occupied, Madison is depriving them of a recognized fundamental right of property ownership and creating a regulatory taking.

Gentile stated that the board countered Attorney Johnson's First, Second and Third Legal Analysis as previously noted above and that NH RSA 674:16 (as noted from the March 19, 2024 minutes), specifically, grants the town's legislative body the right to regulate land and building use. Gentile stated that they do have the right to regulate land usage but that this board does not have the right to do so and it is the legislative body of the town which writes the ordinance, which, the wording can be quite challenging at times because there are warrant articles and counter warrant articles, some are passed, some are not and sometimes there are holes in the ordinances which make it particularly challenging as there is not a consistent congregational body that works on the definitions. Gentile further stated that town legislative body does have the right and it is not a regulatory taking.

Fourth, the amended Madison Zoning Ordinance violates the Owner's equal protection rights. The amended Zoning Ordinance affects property so it is subject to intermediate level scrutiny. Madison cannot show that the amended ordinance is substantially related to an important governmental objective. Madison cannot discriminate against owners of property who wish to engage in short term rentals, a recognized residential use, but freely permit long-term rentals. It cannot be a substantial governmental objective to allow long-term rentals at the expense of short-term rentals, especially absent any evidence of proof to support disparate treatment. The Code Enforcement Officer's interpretation deprives the Owners of use of an otherwise proper use of their property and improperly favors hotel, motel and bed-and-breakfast operators by barring their competition. The zoning ordinance should not be used to pick winners and losers in the tourism industry

Gentile stated the board countered the Fourth part of the Legal Analysis by stating that the point of the ordinance was to promote the town's purpose in promoting the rural living and to minimize the use of what was intended to be family housing for transient use and this is the point of the purpose that Schilling pointed out earlier.

Fifth, the amended Madison Zoning Ordinance violates the holding in <u>Britton v. Town of Chester,</u> 134 N.H. 434 (1991). In that case the Supreme Court struck a zoning ordinance that acted to restrict

access to affordable house 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 affordable housing."

Gentile stated the board countered the Fifth part of the Legal Analysis as the board felt this objection was not relevant to the case because short term rentals do not restrict, in any, way, shape or form, access to affordable housing, and in fact, short term rentals make it more complicated to get affordable housing rather than the ordinance making it more difficult. Gentile stated that this is a very brief response to the legal points that were advanced before and that these are a matter of record of our previous meetings as well and the board is going to be consistent on those points.

Gentile stated the board needs to focus on the specific question as raised in the First argument of the Legal Analysis which is grandfathering and whether the board can bring forward the same decision the board had on the previous case**.** Gentile asked Martin to respond. Martin stated be believes it falls under the 2015 ordinance because the house was built in 2018 and he does not believe it is grandfathered.
Schilling stated she agreed to specifically as to the timing of purchase, rental, previous rental, existing non-conforming use and any types of these chronological pieces to establish and that none of that is established here and all of it is post the purchase and starting to rent in February, 2021 and she does not believe this is substantially different than (**Case 23-15).**

Gentile stated it is not substantially different as we have a date where the rental is recent and even though it predates 2022, we are dealing with exactly we are deal with the same question and can bring forward those final Findings of Fact. Gentile stated they have the Preliminary Findings of Fact (which are noted above) and stated that #7 was the home was built in 2018 and the first documented rental was in 2021. Gentile further stated they have the same #8, and in this case, basically pick up at #9 from the previous case (**Case #23-15)** which would be the characteristics of a motel and then list the six characteristics of a motel and then #9 in this case then lists the reason why the board believes this case is worth being more explicit, not just simply bringing that forward as the board is obligated to consider each case. Gentile stated this is a documented rental that began in 2021 and for the sake of argument, 100 days and a few more per year which, were for compensation with the obligation to pay Meals and Rooms Tax. He further stated that basis services were provided, such as cleaning, the owners had an agent (Airbnb) acting as an agent for providing short term rentals, independent access and parking as well as no rental contract with the intention of renting anything other than on a transient basis.

Gentile asked if the board if they felt they could take the same motion from (**Case #23-15)** but before they do, Gentile asked the board if they wished to amend or change the summary statements just mentioned on why this case meets the definition of a motel? Schilling stated she had nothing further to add and neither did Skaife.

23-18 April 17, 2024 and May 15, 2024

<u>Findings of Fact:</u>

1. Date of Purchase was April, 2023.

2. First rental by the current owners was June 9, 2023.
3. There is documentation to prove regular rentals from February, 2021.
4. There was no lapse of rental activity in the time frame back to February, 2021.
5. Selective level of activity is
    a. 32 rentals for 157 days in 2021
    b. 27 rentals for 103 days in 2023
    c. 2022 and 2024 were not estimated in the meeting.
    d. The current owners anticipate renting on the order of 100 days per year.
6. The home is in the Skyline Estates Owners Association. There is no mention of rentals in the deed restrictions.
7. The home was built in 2018, the first documented rental is in 2021.
8. The board understands these characteristics to define a motel based on the definition of "motel" in the Zoning Ordinance and the common understanding of what a motel is.
    a. It is a building or buildings that offer the service of lodging
    b. For compensation with the obligation to pay meals and rooms tax
    c. Which provide basic support services such as cleaning and scheduling
    d. Independent access
    e. Adjoining parking
    f. The lack of a rental contract for non-transient occupancy.
9. The short-term rental of 70 Skyline Way meets the definition of a motel
    a. The property has been rented on a short-term basis since 2021 on the order of 100 days per year and the current owners intend to rent for a similar amount on the order of 100 days per year
    b. Presumably meals and rooms tax is being paid, though no documentation was submitted to the board
    c. Basic services were provided; the owners used Airbnb and VRBO as a contact and scheduling agent, the home was provided furnished and cleaned
    d. There is independent access to the building
    e. There is adjacent parking
    f. There was no rental contract for non-transient use.
10. Motels are not a permitted use in the rural residential district according to Article 4.2 of the zoning ordinance.

Gentile asked for an identical motion.

Motion by Schilling, to use the same motion from **Case #23-15** that the board used to deny. Gentile stated no, we cannot do this.

Gentile asked Young to read aloud the motion to deny from **Case #23-15 "deny the appeal because the home had not established a pre-existing, non-conforming use."** Young stated you cannot use this because it talks about the HOA Charter of 1976. Gentile agreed that the board cannot use the same motion.

Schilling withdrew her motion as noted above.

Motion by Schilling, seconded by Gentile that based on the Findings of Fact as noted above, the Appeal from Administrative Decision was denied because:

- The rental usage meets the characteristics of a motel as indicated in the Findings of Fact and as defined in the 2018 Madison Zoning Ordinance, which is not a permitted use
- Because the owner did not establish any transient rental history prior to February, 2021, therefore, not establishing any pre-existing non-conforming short-term rental use.

Roll Call Vote: Gentile – Aye; Martin –Aye ; Schilling – Aye; Skaife – Aye.
The motion passed by a roll vote of 4-0.

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #23-18.**

<u>Case #23-13</u>

Gentile stated the board is now going to decide whether to rehear **Case #23-13.** Gentile stated this is a deliberation of the board only.

ELEVATION OF ALTERNATES: Gentile raised Skaife and Martin from Alternates to full voting members, making the board a four-member board tonight which Attorney Johnson agreed to.

Gentile stated the board received a Motion for Rehearing from Attorney Johnson stating reasons why he is appealing the case. Gentile stated that the board may, on its own initiative, without reference to Attorney Johnson's arguments, decide they made a mistake and if that is the case, the board may decide independent of his arguments, to rehear the case. Gentile further stated that to rehear the case, Attorney Johnson, in his arguments, would have to provide new information that could not have reasonably been known at the time presented, or he could make a case that the board made a procedural error which would be grounds to rehear. Gentile further explained that someone disagreeing with the Board's decision is not adequate grounds to rehear the case. Gentile further stated that the board needs to either agree with Attorney Johnson that there is new information that needs to be considered or there is some procedural error that the board has committed or independently, the board may recognize they made a mistake.

Gentile stated he was going to summarize the case and he has five observations to respond to Attorney Johnson's motion as follows:

1. Gentile stated that he did not believe Attorney Johnson provided new information that was not already known.

2. Gentile stated that Attorney Johnson has alleged several errors as follows:

a. That the basis dated for grandfathering being said in 1990 is an error because of missing definitions. Page 3. Gentiles response to that is that the board used different definitions than Attorney Johnson referred to in his arguments.

b. Attorney Johnson alleged that Conway v. Kudrick defines a short term rental as residential and not commercial usage. Gentile stated the board took the stance that Conway v. Kudrick does not apply to the definition of a residential usage uniformly to all things in New Hampshire but rather makes the wording of the local ordinance the primary consideration so that, as stated explicitly in the court case, one might come to a different conclusion in a different city.

c. Attorney Johnson alleged that motel does not apply because it refers to multiple buildings on Page 5 but the definition itself clearly states it can be a single building.

d. Attorney Johnson then rehashes the legal arguments on Pages 5 and 7 and states that the board did not address them, however, the board did exclusively address the same set of arguments 30 minutes prior to this case in the other case Attorney Johnson presented on the responses which are part of the minutes and the board did agree at the November 15, 2023 meeting the board would not have to continually rehash all of those arguments in every single case in any detail but that the board did address them the same evening and they are part of the minutes.

e. Attorney Johnson alleges that the board failed to provide a factual basis for their decision, but there are eight Findings of Fact listed in the minutes as well as in the decision letter and that in particular, point #5 explicitly states the ground for denying the appeal.

Gentile stated this is his short response and asked the board to please feel free to state if they feel there is grounds to rehear this case. Martin, Schilling agreed with Gentile and Skaife had no opinion. Gentile asked if any of the members found anything that Gentile listed above inadequate. Schilling agreed with Gentile's five points and she did not find in the motion for rehearing any new evidence that the board had not considered previously as well as any errors in law and she stated that Attorney Johnson disagrees with the board's decision and that is not a reason to grant a rehearing.

Gentile stated that one thing the board needs to agree on, is that a case could be made if the board had not stated a factual basis for their decision. Gentile read aloud the decision letter for **Case #23-13,** (a copy of which is in the file for **Case #23-13)**. He asked the board if there was any inadequacy in the decision letter? Martin stated no, he feels the Findings of Fact are factual. Schilling stated the board did not miss putting anything substantial in the decision.

Gentile asked the board for a motion.

Motion by Martin, seconded by Schilling to deny the Request for Re-hearing of the Zoning Board of Adjustment's March 20, 2024 Denial for **Case #23-13** because no new evidence was presented and there was no apparent error in procedure.

Roll Call Vote: Gentile – Aye; Martin –Aye ; Schilling – Aye; Skaife – Aye.

The motion passed by a roll vote of 4-0.

Gentile stated that Attorney Johnson could take the case to the Housing Board of Appeals or the Superior Court.

Gentile asked Attorney Johnson if he wanted to continue the remaining short term rental cases to a date certain? Attorney Johnson agreed and asked that the remaining cases be continued six months out to a date certain to allow for the court process to play out and then there will be clarity whether the remaining cases will become necessary or not because ultimately, the ZBA decisions the board has made so far have raised the question of what the court will have to decide to whether the court will agree with the ZBA or Attorney Johnson. Attorney Johnson reiterated continuing to a date certain so he does not have to re-notice the cases and he would be happy to revisit them if becomes a lot longer and we need to do something different. Gentile stated the board would be happy to entertain those kinds of procedural questions.

Young stated she was concerned about the hearing date waiver. Gentile stated that, technically speaking, the board must make a decision within 90 days or dismiss the case without prejudice. Attorney Johnson stated he can waive this. Gentile stated that the board would like Attorney Johnson to put that signature on record so that later, if the cases go to court, there is no reason to cause a procedural problem. Young asked if Attorney Johnson was going to sign the waiver request for each application? Attorney Johnson stated it would be easier if he could send an email to Young with a list of cases stating he hereby waives the requirement. Young stated she would email him the language. Young then stated upon receipt of his email, she would put a copy in each file.

Kathy Koziel, 7 Lakeview Drive – Koziel stated if these cases are postponed for six months and they do go to trial and the applicant loses, what happens to all the fines that are potentially accruing from this past August when those properties received their cease-and-desist letters? Gentile stated this is a Selectmen's issue and further stated that the town has been reasonable and if they continue to rent defiantly, the town is within its rights to enact the fines, but if on the other hand, owners are cooperative, the town is fully within its rights to minimize the fines. Gentile further stated the Zoning Board is not the enforcement entity and it is the Selectboards issue. Gentile further stated there are reasonable grounds for the town to suspend accruing the fines unless, there is a behavioral reason. Koziel stated there are five cases pending that did not present any evidence whatsoever that they rented before March of 2022 and the fact that the property was historically short term rental was not used as one of Attorney Johnson's arguments. Koziel stated that these five cases should be easily heard because the facts are so specific. She stated that **Cases #23-19, #23-20, #23-22, #23-24** and **#23-25** never rented before March of 2022. Schilling asked Koziel if she is saying these five cases are not dependent of the outcome of the court case? Koziel stated yes, because there is not one of those that the Zoning Board has heard yet. Gentile stated that the board is not competent to make those decisions without a hearing and the board's choice is to either honor Attorney Johnson's request to continue or the board could continue the cases to next month. Gentile stated there has not been a public hearing on any of those cases so the board would be making a decision without any input on those cases. Gentile further stated that it may seem on the surface that these cases are very straight forward but each case has its own unique characteristics.

Gentile asked Attorney Johnson for his input. Attorney Johnson stated he believes it is appropriate to continue all cases and the outcome of the other cases are probably going to drive that analysis of whether those cases will go forward anyway. He further stated the early court cases will probably answer the questions for all of the pending Administrative Appeals. Gentile stated by allowing these cases, the board is not taking the owners off the hook for a potential fine, but the board is preventing taking the town's time hearing all those cases that might be decided by a court case and then would basically disappear one way or another. Gentile stated that this does not take short-term owners off the hook for fines.

Paul McKenna, 59 Oak Ridge Road – McKenna stated he agrees with everything Gentile said, with the exception of one thing, he asked the board why they are waiting six months and the cases should be revisited after two months and if more time is needed, then give them four months and do it this way? McKenna believes we will know by two months as to if it is going to go forward, what cases will go forward and six months is way too long. Attorney Johnson stated that he understands, but under the statute, he cannot appeal a case until he has provided a Motion for Rehearing to the Zoning Board and the Zoning Board has denied the rehearing. Attorney Johnson stated the first one he can appeal within the next 30 days is this meeting and there will have to be one more meeting and this is why he picked six months because it will take some time to get it to the Superior Court and Attorney Johnson cannot do it any faster because there is a mandatory Motion for Rehearing process that he needs to follow where he cannot appeal it. Gentile reiterated what Attorney Johnson previously said, that should the court case decision be earlier, he could come back to the board and then the board can decide to either withdraw the cases or act accordingly or re-notice the cases and hear them two months earlier and that there are several options.

Motion by Gentile, seconded be Schilling to continue the following cases as agreed to by Attorney Matthew Johnson to November 20, 2024 at the Madison Town Hall, Lower-Level Meeting Room at 6:00 pm:

Case #23-14 for Ryan Finn & Grace Harrigan
Case #23-16 for Monica Maria McMillian & Laura Thompson
Case #23-17 for Seamus & Kayla Walsh-O'Brien
Case #23-19 for Brian Burns
Case #23-20 for Corey, Jade & Cynthia Franklin
Case #23-22 for Kaylin Deschenes & Kalene Kouch
Case #23-24 for David and Julie Keiselbach
Case #23-25 for Rishi Saxena and Abhishek Sahai

Roll Call Vote: Gentile – Aye; Martin –Aye ; Schilling – Aye; Skaife – Aye.
The motion passed by a roll vote of 4-0.

Gentile invited Dempster and Ohlson back to join the board for the remainder of the meeting.

Gentile raised Ohlson, Alternate to a voting member as he wants five members on the board. Skaife, Alternate had been previously elevated. Gentile excused Marting at 8:50 pm from the meeting and ended the telephone call.

Case #24-03

Gentile asked Young to read the **Case #24-03** aloud as well as the Public Meeting Notice as follows: Young read aloud **Case #24-03 - Variance** request from James Rothermel, Agent for Chelsey R. Gillis, Trustee of James & Bonnie Rothermel Irrevocable Trust, 388 High Street, Tax Map 232, Lot 34, from Article 5.9, Section A of the Zoning Ordinance to build a garage that would be 60 feet from center of road.

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 April 24, 2024 and in the Conway Daily Sun on April 25, 2024.

Conflict of Interest: Gentile polled the board and all members stated they had no conflict in this case via roll call.

Waiver Request: Gentile stated that there is a Waiver Request included in the application.
Discussion: Gentile stated that it is critical for the board to know if the garage would be at the proposed 59 feet or 60 feet from the center of the road and he asked Rothermel why a Certified Plot Plan was not included? Rothermel stated that he was not imposing on any abutters, just the road itself and it was an easy measurement to obtain, he did it himself. He further stated he has been in the building business for over 50 years and have done many of these in the past. He also stated he did take the tax maps that are posted on the internet and used that for the guides for the map he did and provided. Schilling stated one of the contentions of this case is that the terrain is sloping and there is no place else to put the garage and the Certified Plot Plan would be helpful to give the board a better idea of how this is sitting. Dempster stated since the hand-drawn map contained no known boundary markers, rods or pins that we would give the board something official to go on and if the board is going to decide on a variance that is going to stay with the property in perpetuity, he would want a Certified Plot Plan. Rothermel stated the only thing he would need to apply to is the center of the road and the abutter are all far enough away and it does not apply to the 75-foot setback and the only setback they are going after is from the center of the road and the road does measure 20'6". Gentile stated the primary issue here is that the garage is not 75 feet from the center of the road and that the board is within its rights to require a Certified Plot Plan which will give the board critical information in making a decision.

Dempster called a point of order that Rothermel had not been sworn in. Gentile swore in James Rothermel, Agent for Chelsey R. Gillis, Trustee, James and Bonnie Rothermel Irrevocable Trust and John Arruda, abutter.

Schilling stated that in the application, the reason the garage needs to be located 60 feet from the road and not 75 feet from the road is based on the topography of the land and based on the sloping, we do not have any information that shows that and having a Certified Plot Plan would give the board that information.

John Arruda, 40 North Division Road – Arruda stated he has been an abutter for 25 years and he is on the east side of Rothermel and that Hathaway Road is much closer than 75 feet and it will not change anything in the neighborhood. Arruda further stated that all homes are right on the road and the properties do have a drop off.

Gentile stated he did make a site visit and he can corroborate the challenge of the drop off and one of the reasons it looks flat is the driveway parking area has been filled so that it is level. Gentile does not believe a Certified Plot Plan will give the board information critical for the town to say it is a reasonable request.

Skaife asked if the board could put a cushion in that it be no more than a certain footage. Gentile stated yes, the board can make a restriction and a build cushion.

Gentile asked the Board for a motion.

Motion by Gentile, seconded by Ohlson to accept the Waiver Request. The motion was voted on and passed **3-2.**

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

Gentile asked Rothermel to present his case. Rothermel stated he wants a variance to set his new garage to a 60-foot setback. Rothermel further stated he counted every inch and added another foot and will also set up string lines to eliminate any issues.

Gentile asked what will happen with the two buildings currently on site. Rothermel stated they will be removed. Rothermel stated the driveway is established already and should not impact the road.

Gentile stated there is a significant drop although not a construction challenge but it would make it more expensive.

Gentile stated the board is going to review the five criteria and that there are provisional answers in the application which the board can accept as is or amend.

Gentile stated if there are no questions, the board can move to establish their Findings of Fact and then close the public hearing and deliberate.

Case 24-03 May 15, 2024

<u>Findings of Fact:</u>

1. The homes and outbuildings in the neighborhood are mostly old and were built closer than 75 feet from the center of the street so that a 60-foot setback does not change the character of the neighborhood.
2. The lot slopes down from the road so that existing drive and parking area are already significantly filled in order to be level as one moves away from the road.

3. This slope means that moving the garage further from the street would require significantly more fill for both garage and parking area in front of the garage which would require a significant increase in the cost of construction.
4. The existing sheds, which are approximately 60 feet from the centerline of the road, will be replaced which will be an aesthetic improvement for the neighborhood.
5. The closest abutter to the new garage, John Aruda, supports the project and agrees that a 60-foot setback would not change the character of the neighborhood.

Motion by Ohlson, seconded by Dempster to close the Public Hearing to deliberate on the merits of the case. The motion was voted on and passed **5-0.**

Gentile stated the board is now going to deliberate and there will be no further public comment.

Gentile stated the five criteria contained in the application have been answered as follows:

Findings on the five conditions for a variance:
The board accepted the wording of the five points of Section 2 of the application as arguments supporting all five conditions to be met for a variance with one addition to paragraph 1 b of the application:

SECTION 2: APPLICATION FOR A VARIANCE

A Variance is requested from Article 5.9, Section A of the Zoning Ordinance to permit:

To build a garage that would be 60 feet from center of the road.

Facts supporting this request:

1. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship as follows:

a) The special conditions of the property that distinguish it from other properties in the area are:

This is a sloping property that is typical of the neighborhood. We are asking for a variance to set the footprint of garage in the partially flat area which would be 60 feet from center of roadway versus 75 feet of the Zoning Ordinance. This location works well with the existing driveway and there would be minimum fill required that would change the topographies of the property.

b) Owing to those special conditions, no fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property, because:

This would not impact anything that would affect the neighbors or general public.

The slope of the lot would require considerable increase in cost for additional fill if the garage were to be moved back to the 75-foot setback requirement.

c) The proposed use is a reasonable one, owing to those identified special conditions because:

If we did not build garage as requested, the building would require a larger expense:

a) Deeper foundation.
b) Large amount of fill for the inside and outside of the foundation.
c) More trees removed.

2. The Variance will not be contrary to the public interest because:

There is no change to drainage or roadside. The proposed use will not impact nearby properties in any way.

3. The spirit of the Zoning Ordinance will be observed because:

The natural setting between garage and road will not be disturbed. Between the road and garage is a stone wall and sloping ground that limits view of garage keeping with the existing appearance of the property.

4. Granting the Variance would do substantial justice because:

It will enhance property value, will not change the topography of the land and will limit costs.

5. The values of the surrounding properties will not be diminished because:

This should add value to properties.

Gentile asked the board for a motion.

Motion by Ohlson, seconded by Schilling to grant the variance request because it allows efficient and reasonable use of the existing filled drive while enhancing the aesthetics of the property and on the condition that the garage be no closer than 60 feet from the centerline of High Street. The motion was voted on and passed **5-0.**

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #24-03.**

Gentile asked the board that since it was 9:30 pm did the board want to continue **Case #24-04**? Corey Gregoire, applicant, for **Case #24-04** stated that his case is the same as the previous **Case #24-03** except that he has provided a survey. The board decided to hear **Case #24-04.**

<u>Case #24-04</u>

Gentile asked Young to read **Case #24-04** aloud as well as the Public Meeting Notice as follows:

Case #24-04 - Variance request from Corey M. Gregoire, 3 Bristenstock Drive, Tax Map 108 Lot 98, from Article V, Section 5.9(F) of the Zoning Ordinance to permit an accessory building (garage structure) to impede upon 65 feet center line of the road front setback.

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 April 24, 2024 and in the Conway Daily Sun on April 25, 2024.

Young stated that an abutter, Lawrence Fitzpatrick was sent an abutter notification which was mailed on April 24, 2024, Certified Mail Return Receipt Requested and was returned by the Madison Post Office to "return to sender attempted not known unable to forward." Young stated that Gregoire, the applicant, did provide the correct mailing address label for Mr. Fitzpatrick and Young confirmed the address with the tax card of record and it was correct. Young stated she did her due diligence to notify the abutter and the mailing address was correct according to the records in the Madison Town Hall as the address of record on the tax card is where the tax bills are sent. The board agreed to move forward with the case as every attempt was made to provide notice.

Conflict of Interest: Gentile polled the board and all members stated they had no conflict in this case via roll call.

Waiver Request: The applicant provided the board with a Site Plan prepared by Steven E. Heyliger, P.L.L.C. which was unsigned and the board accepted it.

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

Gentile swore in Corey Gregoire, applicant and John Conley, abutter.

Gregoire explained to the board that he is looking for a building permit for a garage structure similar to what the board just heard for **Case #24-03**. Gregoire stated there is quite a bit of elevation change from the residence to the bottom of the property, which is about a 25-foot elevation change and over approximately 150 feet. He also stated that there is a flat spot on the bottom of the base of the property and the residence is at the top portion of the property and to access the property during the winter months, it is very difficult and keeping vehicles off of the main street is a safety concern. He further stated that he needs adequate winter storage.

Gentile asked the board members if anyone had a chance to do a site visit? Ohlson stated he did and Gentile stated he did as well.

Schilling asked Gregoire if the garage is going to abut to the elevation? Gregoire stated yes, as far back as he can push it to the slope.

Dempster asked Gentile if Conley wanted to speak?

John Conley, 3 Reinach Place – Conley stated he is the abutter of Gregoire and that the garage Gregoire is building will not affect his site lines and it will improve the quality of Gregoire's property.

Gentile stated the board is going to now collect the Findings of Fact.

Findings of Fact:

1. A close abutter, Mr. Conley, supports the project.
2. Due to the natural inclines on the property, the proposed location is the only reasonable place to put a garage.
3. Even so, construction will require minor excavation of the existing ledges on the side of the garage.
4. The proposed structure and resulting setbacks are in keeping with the character of the neighborhood.

Gentile asked for a motion to close the Public Hearing to deliberate on the merits of the case.

Motion by Schilling, seconded by Dempster to close the Public Hearing to deliberate on the merits of the case. The motion was voted on and passed **5-0.**

Findings on the five conditions for a variance:
The board accepted the wording of Section 2 of the application as support for meeting the five conditions of a variance as follows:

SECTION 2: APPLICATION FOR A VARIANCE

A Variance is requested from Article 5 Section 5.9(F) of the Zoning Ordinance to permit:

> **An accessory building (garage structure) to impede upon 65 feet center line of road front set back.**

Facts supporting this request:

1. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship as follows:
   a) The special conditions of the property that distinguish it from other properties in the area are:
      1. **Gradient contour of residence is approximately 25' from start of driveway to structure.**
      2. **Difficult to park off of street.**
      3. **New structure would allow easier street access.**

   b) Owing to those special conditions, no fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property, because:

This exception would not impede any established side setbacks, however, would only encroach front boundary ordinance.

c) The proposed use is a reasonable one, owing to those identified special conditions, because:

1. **As stated above: No side or rear abutters are negatively affected or impacted with approval of this exception.**
2. **This would allow all vehicles to remain off the main road so as not to affect winter plow/road treatment.**
3. **This would allow vehicles and other necessary storage during off season months to keep from being exposed to harsh exterior conditions.**

2. The Variance will not be contrary to the public interest because:

   There is simply no negative impact.

3. The spirit of the Zoning Ordinance will be observed because:
   This location is the only location on the property that said structure could exist and is off of the existing driveway.

4. Granting the Variance would do substantial justice because:

   It eliminates possible public safety if vehicles were to be parked on the street during harsh winter conditions.

5. The values of the surrounding properties will not be diminished because:
   It would only be a property value add.

Motion by Gentile, seconded by Dempster to grant the variance because it is a reasonable use of the property and consistent with the character of the neighborhood and due to the nature of the property, there is no other feasible or reasonable location for the garage. The motion was voted on and passed **5-0.**

Gentile read aloud the provisions of the 30-day appeal period. Gentile closed **Case #24-04.**

APPROVAL OF DRAFT MINUTES:

Motion by Schilling, seconded by Gentile to approve the April 17, 2024 minutes as amended due to grammatical errors. The motion passed by a vote of **3-0.**

ADMINISTRATION: Young had nothing to report.

ADJOURNMENT: Motion by Ohlson, seconded by Schilling to adjourn the meeting at 10:15 pm. The motion passed by a vote of **5-0.**

The next Public Hearing of the Zoning Board of Adjustment will be held on June 19, 2024 at 6:00 pm at the Madison the Madison Town Hall, Lower-Lever meeting room.

Respectfully submitted,

Katharine Young
Land Use Boards Administrator