



**TOWN OF MADISON
ZONING BOARD OF ADJUSTMENT
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**ZBA MINUTES
July 17, 2024**

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

EXCUSED: None.

OTHERS PRESENT: Madison TV, Kasia Scontosas, Kate Young, Land Use Boards Administrator

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

PLEDGE OF ALLEGIANCE/ROLL CALL: Ohlson led the reciting of the Pledge of Allegiance.

ELEVATION OF ALTERNATES: No alternates were elevated as there was a five-member board present.

Gentile stated we have one case tonight which was continued from January 17, 2024 and asked Young to read **Case #23-23** aloud as well as the Public Meeting Notice.

Young, Land Use Boards Administrator read aloud the Public Meeting Notice and posting as follows:

Case #23-23 – Continued (January 17, 2024, February 21, 2024, March 20, 2024 and April 17, 2024)
Variance request from Henry P. Moscone, for property located at 23 Mount Washington Drive, Map 111, Lot 7, from Article V Section 5.9(A) of the Zoning Ordinance to permit the metal roof over his trailer for protection. **(Scheduled to be heard at the June 19, 2024 Public Hearing but continued to the July 17, 2024 Public Hearing).**

Young stated that back in December, 2023 she received a letter from Moscone requesting to continue his case until June, 2024 which was granted at the January 17, 2024 meeting and in the January 17, 2024 minutes there was a motion made to continue **Case #23-23** to June 19, 2024. Young stated on June 3, 2024 she received another continuance request from Moscone due to him being out of state for the June 19, 2024 meeting and that the board continued again, **Case #23-23** by motion at the June 19, 2024 meeting.

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 December 27, 2023 and on June 27, 2024 and notifications were mailed out on December 27, 2024 and posted in the Conway Daily Sun on December 29, 2023.

Gentile stated that we have a five-member regular board tonight.

Conflict of Interest: Gentile polled the board for any Conflict of Interest and there was none.

Waiver Request: Gentile stated they have copies of drawings submitted by Moscone but not a Certified Plot Plan. Gentile stated they are caught between the requirement of a formality and whether precision of formality helps the board. McAllister stated in his opinion, it does not matter as the applicant is only putting a roof on a building that is already there and he is not changing any footprints and he does not believe the board needs a

Certified Plot Plan. Schilling stated it is not that simple and that Moscone needs a variance for the location for where the structure currently is because it is closer than the setbacks and he does not meet them. McAllister stated that is not what the request says and all it says is “to build a metal roof over his trailer.” Gentile stated that it is the dimensional request and that the notice does not mention the dimensions but the dimensions are part of the application. Rau stated he went to the property and what it is, is a canopy over metal posts. Rau asked if there was an issue with the RV sitting where it is or is it just the issue with the structure that encompasses the RV? Gentile stated that going back to the origin of this variance request, it goes back to a denial of a building permit because it does not meet the setback requirements. Schilling read aloud the explanation from the Code Enforcement Officer’s denial dated December 7, 2023. McAllister stated then the notice was wrong as it only states “to permit the metal roof over his trailer for protection.” Gentile questioned that it is wrong because it did not include the dimensions? Young, Land Use Boards Administrator stated she does her notice from what is provided on the application from the applicant and that she cannot add dimensions from the Building Permit Denial as that information was not contained in Moscone’s application. Rau stated the notice is only referring to the metal roof. Gentile stated there are some of issues and the first issue is a rejected building permit based on the dimensional setbacks and asked if a Certified Plot Plan is needed? Gentile further stated there is also the issue with a stone wall that does not meet the dimensional requirements, as well as another building. Moscone stated the other building has been there for 20 years since he bought the land. Gentile also stated there is an encroachment of the neighbor’s garage onto Moscone’s property. Moscone stated that was there when he bought the land. Gentile stated at a minimum, the board can act on this request but it does not relieve the issues and he asked Moscone if the brick wall is a permanent wall? Moscone stated yes, it is. Gentile stated the brick wall is a fixed structure which would need a variance request and if the barn or Quonset hut has been there for over 20 years and the town has done nothing, then there needs to be a request for an Equitable Waiver.

McAllister stated he is looking at a copy of a Certified Plot Plan. Gentile stated that this plan does not have this item on it that we are discussing. Dempster stated that the drawing diagram has different dimensions than the plan with regards to the critical measurements. Gentile stated that they are different dimensions and the question is, in terms of procedure, whether the board is requiring a Certified Plot Plan. Gentile asked Ohlson if he thinks a Certified Plot Plan is needed since he is the Chairman of the Planning Board and may have some view on this? Ohlson stated it is always good to have and that the proposed structure is eight feet from the property line which is very close. McAllister stated it has been there for a long time and the town has done nothing about it. Ohlson corrected McAllister and stated he is talking about the proposed structure. Moscone stated there was no flat level land anywhere on the parcel and where it is now was the only place to put it. He further stated that everything is sloped and the land is one big hill. Gentile asked the board if anyone else felt that if someone was going to park an RV there long term, it is easy enough to level it? Moscone stated he raised the grade three feet using Coleman blocks. Gentile stated in order for the board to make an assessment, the board would need a contoured diagram. Moscone stated that the town is taxing him on the structure as a building and his taxes have gone up. Rau asked Moscone how long the RV had been there? Moscone stated over a year. Gentile stated that the fixed structure needs to meet setback requirements. McAllister asked if it is a temporary structure? Moscone replied that it has eight legs open with a metal roof.

Martin joined the meeting at 6:10 pm.

Dempster called a point of order that Moscone had not been sworn in.

Gentile stated a Certified Plot Plan certainly would help and he asked the Board if they felt a Certified Plot Plan would help? Dempster stated his concern is the draft plan Moscone provided and that there are different dimensions and numbers. Martin stated that any time there is a question of setbacks, that this board has required a Certified Plot Plan. Moscone stated he has had to pay twice to have it certified and does not want to have the property surveyed again. Gentile stated that Moscone has provided two different sets of measurements. Gentile stated the challenge is there are two different sets of dimensions. Gentile stated that the board is caught in a several procedural issues. McAllister previously asked, if this is even a fixed structure and if the board determines it is not a fixed structure, then this whole thing goes away. Gentile stated that there is a wall there that

is a fixed structure which is not a part of this request which is on the diagram that was submitted to the board. Rau asked what does the board consider a fixed structure? Martin stated the board should go by the Zoning Ordinance of definitions. McAllister read aloud to the board, the definition he googled on his phone of a fixed structure. Gentile stated that if it does not appear as a definition in the Madison Zoning Ordinance then it is reasonable for the board to use a normal definition from an acceptable dictionary. Gentile stated the board is stuck on procedure and they need to address whether the board requires a Certified Plot Plan and he asked if the board wanted to depart from that procedure and if so, then he would like a motion that the board consider whether or not the structure is a fixed structure.

Motion by McAllister, seconded by Rau that the definition of this structure is not considered a fixed structure.

Discussion: Schilling disagreed because a temporary structure does not sit there for a year or a year and a half and is necessarily pinned to the ground to keep it stable and it is not of such a weight where it is light enough that four guys could pick it up and move it but that this is a large structure that sits on the ground and is pinned to the ground. Martin stated it makes it so the structure cannot be moved by the wind. Moscone stated you put pins in the ground to hold a tent down. Schilling called a point of order and stated to Moscone that this is a discussion amongst the board but that he will have his chance to speak and express his opinion. Dempster stated these are not tent stakes and they have screws. Schilling stated that the intention of the structure is to protect the RV on a consistent basis year after year after year and Moscone is not going to take the structure down and move it anywhere. McAllister stated that there is no foundation. Schilling stated it does not matter that there is no foundation.

Ohlson read the definition of a structure from the Madison Zoning Ordinance to the Board. Ohlson stated that this is a structure. Gentile stated that a structure has setback requirements. Martin stated 5.9A of the Madison Zoning Ordinance states Structures and Buildings. Gentile stated the current ordinance speaks to it as being a structure.

Young, Land Use Boards Administrator read aloud the current **Motion** on the floor as follows:

Motion by McAllister, seconded by Rau that the definition of this structure is not considered a fixed structure.

This motion was not voted on and did not pass.

Schilling asked if this motion is to state that this is not a structure? Gentile stated yes, that is the motion and an Aye agrees it is not a structure and a Nay agrees with the Madison Zoning Ordinance.

Young, Land Use Boards Administrator questioned if the motion on the floor is that the definition of this structure is not considered a fixed structure.

McAllister stated he would revise his motion to now read as follows:

Motion by McAllister, seconded by Rau that Mr. Moscone's structure is not considered a fixed structure.

Gentile - Nay, Schilling - Nay, Dempster - Nay
McAllister - Aye, Rau - Aye

The **Motion** was voted and passed **3-2**.

Gentile stated this is a structure as the board sees the ordinance and stated the board now needs to decide what to do about the measurement issue.

Gentile swore in Moscone.

Moscone stated that the survey pins are in place and the property has been surveyed twice. Moscone further stated since they know where the pins are that you can draw a line across and measure it and that it is eight or nine feet on one side and 14 feet on the back side and he understands it is not 25 feet but there was no other place to put the structure.

Dempster stated his concern is the board is being asked to make a decision that is going to stick with this property in perpetuity and what we do not know in the future is that potentially, it says a structure and Moscone may move his carport and you still have a variance in place to put a 16 x 40 foot structure there. Schilling stated that it is not necessarily what Moscone might do, but if he ever sells the property, the variance continues with the property and that new owners may do something different in the future. Gentile stated they have two sets of different measurements and maybe the use of a building contractor or engineer could help. Gentile stated the board is obligated to decide, based on the five criteria for a variance but the board is allowed to address an existing structure. Gentile stated we have two significantly different dimensions and one is 56 feet and one is 40 feet. Schilling stated that she does not want Moscone to have a new Certified Plot Plan prepared and she is in favor of a licensed contractor to confirm the measurements and distances. Schilling further stated that the two plans conflict with each other and a licensed professional is needed. Moscone stated the lines are askew and that one corner is closer than the back corner. Gentile stated they are not disputing that but they have two different diagrams that show two entirely different numbers. Moscone was confused and did not understand where the 40 feet was coming from and that there is no 40 foot measurement. Schilling stated it was the diagram he submitted with his building application. Moscone stated he did not pull the building permit to put the metal structure up. Schilling read aloud the following from the Building Permit Application that Moscone submitted **“To erect a cover 16 x 40 over existing trailer for protection. No footings or foundations. Attached to ground by steel pins.”** Moscone was confused on the measurements and Skaife showed him his diagram and explained the discrepancy in the measurements. Schilling stated that the board does need something that is different from the two diagrams that Moscone had submitted because they conflict with each. She further stated that having a licensed surveyor or third-party contractor involved could give the board a set of guidelines so the board could concretely say that these are the approximate widths.

Gentile asked the board if they believe it is unreasonable for a licensed surveyor due to costs or would a third-party contractor to measure distances be an acceptable alternative to a licensed surveyor? McAllister stated if we get a third set of the dimensions, what have we done and we have not solved anything.

Rau stated he would like to see correct numbers and he agreed with McAllister, where do we go from here? Schilling stated that the board could accept the numbers from a certified licensed professional and that is what the board should go by. Rau asked if Boyd, Code Enforcement Officer could do this. Schilling stated that the board cannot task him to do this. McAllister stated there are two different dimensions, one being to the center of the roadway and the other to center of the right of way. Moscone asked who decides where the center of the road is? Martin asked why do we not have measurements to the road if it has been surveyed? Moscone stated the road is basically a cow path. Moscone stated he has given the board two Certified Plot Plans.

Dempster asked if the Certified Plot Plans include the current lot that Moscone is on? Moscone stated of course. Dempster asked other than what Moscone has submitted, if he has a Certified Plot Plan of his one-acre property at 23 Mount Washington Drive? Moscone stated he had someone in Conway do a Certified Plot Plan and charged him \$7,000.00 twice. Dempster stated that if Moscone already has a Certified Plot Plan, can someone go out and at least give the board, based on that Certified Plot Plan, the dimensions that the board needs to make a decision and asked if this could be a contractor? Moscone asked how would a contractor know where the center of the road is? Schilling stated that would be his job and the plan is done by Ammonnosuc Survey and she does not believe it shows the entire property.

Gentile stated that a possible procedural process could be that the board decide to accept a Waiver Request and make a determination as to whether or not the board grants the variance and if the board grants the variance, they could make it conditional that a professional third-party, licensed contractor or surveyor provide the board with

the dimensions. Gentile stated if the board denies the variance, then the whole thing becomes irrelevant. Dempster asked from a procedural standpoint, the board could accept the Waiver Request with a condition on it? Gentile stated no, we do not accept the Waiver with a condition but we could possibly accept the Waiver Request and the board could proceed with the hearing and deliberation and in the motion to grant the variance, make a condition that the board gets dimensions for the record and if the motion is to deny the variance, the dimensions become irrelevant. Martin stated we could just accept the fact that it is too close to part of the variance per the ordinance and we can work forward based on that information alone and after the fact, require specifics, if need be. Ohlson stated we have done “not too exceed measurements” in the past and we could grant this not to exceed 56 feet because we need 75 feet and 8 feet where you need 25 feet. Martin stated we can go forward based on what information has been provided. Gentile stated the critical issue is how close is the structure to the property line and they do not want to set a precedence for people to think they can put all buildings on the property line and we cannot create this issue unless we know the five criteria in which is case Moscone, is entitled to a variance because of the unique conditions of that property. Martin stated he believed the board could go forward with this based on what information they have been provided.

Schilling asked how does the cement wall figure into this and should we disapprove Moscone’s request for the roof structure which is already up and may have to be taken down. She further stated we have not addressed the fact that there is now another structure that is encroaching on the lot lines. Martin asked if the cement wall would be considered a retaining wall? Moscone stated it is. Gentile asked how does a retaining wall fit into this? McAllister stated that is not part of the application. Schilling stated that someone must have complained about the roof structure. Moscone stated no one complained and he did not think the structure was an issue. Moscone stated that as far as the wall, they are just Coleman blocks. Gentile asked is a fence is a wall? Ohlson stated there is a definition for stone wall and read that definition aloud from the Madison Zoning Ordinance under definitions. Schilling stated it is not a stone wall by the definition. McAllister stated we do not have a definition for what Moscone has done with the wall. Rau stated this is not part of the application submitted. Gentile stated the board cannot ignore this. McAllister stated it could be taken down by a machine. McAllister asked if they could move forward with the not to exceed language? Gentile stated the board can address the question of the structure that is contained in the application but that the other items like the wall and other building should be referred to Robert Boyd, Code Enforcement Officer on what to do. Gentile further stated that he is not sure what to do about the encroachment of the building and that the other structure that exists, meets the definition of the need for an Equitable Waiver because it has been discovered now through these proceedings and that there is a Quonset hut inside the 25 foot setback. Gentile told Moscone he would need to come back to the Zoning Board with an Equitable Waiver Request.

Gentile asked the board for a motion to accept the Waiver Request for a Certified Plot Plan.

Motion by Schilling, seconded by McAllister to accept the request for Waiver for a Certified Plot Plan.

**Gentile – Aye, Schilling – Aye, McAllister – Aye, Rau – Aye
Dempster – Nay**

The motion was voted on and passed **4-1**.

Regional Impact: Gentile polled the board and there was none.

Gentile stated that Moscone had already been sworn in and asked Moscone what is the variance is for and would he like to speak? Moscone stated the structure does not bother the neighbors and no one has complained and the structure was to protect the RV.

Gentile stated the board is now going to collect the Findings of Fact as follows:

Findings of Fact:

1. According to the definition of “structure” on Page 63 of the 2024 Madison Zoning Ordinance, the roof is a structure subject to the setback requirements of Section 5.9.A.
STRUCTURE – That which is erected or assembled using a combination of materials for occupancy or use, whether portable or affixed to the ground. This includes structures of permanent or temporary construction, plastic, fabric, and/or canvas covered frame structures, structures for agricultural uses, blocks or permanent foundations, and all sheds and storage facilities. Septic systems, driveway pavement, fences or stone walls, flag poles, and well pump houses are not considered structures for the purpose of this ordinance.
2. This roof structure already exists.
3. We have two sets of dimensions provided by the applicant, but the structure unquestionably encroaches on the setback requirements of 75 feet from the center of the road and 25 feet from the property line required by section 5.9.A of the Zoning Ordinance.
4. There are other setback issues with existing buildings, namely a Quonset hut on the same property line and a neighbor’s garage which encroaches Mr. Moscone’s property (Lot 16) which are not mentioned in the application.
5. The selected location for the roof for which this variance application was made has been leveled to accommodate the RV parked under it.
6. The RV or trailer has been in the selected location for approximately two years.
7. There has been no record of complaint from any abutter.
8. The roof was installed over the parking spot sometime shortly thereafter and so may have been there close to two years.
9. The lot itself, Parcel 16 on Tax Map 111, is 1.07 acres and is an existing, non-conforming lot in the rural residential zone which predates the Zoning Ordinance and is protected under article 1.3.A of the zoning ordinance.
10. [Suggest that the board make note during approval of the minutes that there is an obvious and inconsequential admin. error in the application, namely the lot number was reported as “7” previously owned by Mr. Moscone, but this application is for Lot 16 and there is no question that it is Lot 16 being discussed]

Motion by Dempster, seconded by McAllister to close the Public Hearing and deliberate on the merits of the case. The motion was voted on and passed **unanimously**.

Gentile explained to Moscone that he is welcome to stay but that the Public Hearing is now closed and he cannot contribute any information as the board will be in deliberation from this point on.

Board Deliberation:

Gentile stated that the Board’s objective is to access the questions associated with the five criteria. Gentile suggested that the board start in reverse order with hardship which is the fifth criteria. Gentile stated for the purpose of understanding what is hardship, he read aloud to the Board, the Zoning Board of Adjustment’s Handbook, Page 28, RSA 674:33I which addresses the question of hardship.

Gentile stated he was now going to read aloud to the board, a specific set of criteria that has been handed down from the court regarding the following cases **Simplex v. Newington** and **Grey Rocks Land Trust v. Town of Hebron**. Gentile asked the board if anyone wanted to argue for or against hardship? Martin stated he makes the argument that there is no hardship because the unique characteristics of the property, being the slope of it, were overcome by the leveling with the retaining wall and if it had been ten more feet and 17 more feet inwards of his property, we would not even be sitting here right now. Schilling stated when she considers unique characteristics

of a property, one of the things that comes into mind is, is the piece of property too small and we have had several homeowners who the size of their lots were so small and to meet that building envelope and to be inside those setbacks was impossible. Gentile stated they were grandfathered in because they were subdivided before the ordinance. Schilling stated that this piece of property being 1.1 acres and the size of it and the layout of it regardless of what bit of slope there is, those are unique enough to this piece of property to warrant that when you were originally establishing where you were going to put the structure, you could put it anywhere. Schilling further stated that she feels the uniqueness of this property is that it was convenient for the homeowner and there is no unique characteristics that would warrant a hardship.

Gentile stated this is a lot that was subdivided before the ordinance and it is a lot that is slightly over one acre and they can add this to the Findings of Fact and the size of the lot and the provisions of 1.07, the lot is a legal lot and therefore there might be in certain circumstances, that the building envelope has to be encroached upon, however, the trailer we are talking about is eight feet by 40 feet on a one acre lot and there is nothing unique about that particular property that would require the placement of the trailer just on the overall dimensions, given the fact that there is a slight slope to the land and there is no boulder in the middle, not outcropping of rocks, no stream crossing, it is 99% cleared and grassy and it is not completely leveled and it is evidenced that it was leveled for the trailer. Dempster stated that the size of the trailer and after asking Moscone about the size of the Pontoon boat, that area where the Pontoon boat is currently stored looked level and there is space there to put the RV trailer of similar size and that this could be another option. Gentile stated that the board is not required to redesign the property. Dempster stated he is just saying there is not a hardship. Gentile stated that what he is hearing from the board is that the arguments are leaning to the fact that, the property itself, does not have unique characteristics that require the RV to be parked in the 25-foot setback requirement. Rau stated that he does not feel it needs to be changed and he believes the situation Moscone is in, in that environment with a neighbor whose garage is on part of Moscone's property and that we were talking about the structure but now we are talking about having to move the RV to where the Pontoon boat is so it will comply. Dempster interjected and stated that was not what he was saying and that one of the listed parts in the application is hardship because there was no other place to put the trailer but when he looked at the site and after asking Moscone the questions about the size of the trailer and Pontoon boat, it appeared to him, there were other locations that the trailer could possibly be put and it takes away the hardship argument. Gentile stated that one of the board's obligations in balancing the rights of the property owner and all the five criteria, that the board should be moving things toward conformity with the Zoning Ordinance. Gentile further stated that the board is obligated to give the benefit of the doubt to the property owners when they meet the five criteria. Gentile also stated the board is obligated to insure that they just do not do favors for people because it has always been that way.

Gentile stated that if the board thinks that this is not moving towards a hardship, then the board must meet all five criteria and he polled the board asking them if this is a hardship. Dempster stated it is not a hardship. McAllister stated it was hard to say. Schilling stated based on the definitions for hardship and the tests, that it is something that was addressed in case Crossley v. Pelham which is establishing nothing more than the need to the personal landowner and that the hardship be unique to the applicant and its parcel. Schilling further stated there is no uniqueness to this parcel other than the somewhat slope of it and this is something that fits in the personal need of the landowner as opposed to the ordinances and she stated there is no hardship. Rau stated he disagreed and stated he thinks it is a hardship in where Moscone put it the structure in two years ago and it is a piece of property that Moscone chose to put it on and when he goes back and reads the application, we are talking about the roof structure but now we are talking about having Moscone move the trailer up on the hill. Schilling stated she did not say that and Moscone is free to leave the RV exactly where it is but the roof structure is the issue. Martin stated that if you are going to move the roof structure, you are going to move the RV also. Schilling stated this is Moscone's choice and he can choose not to put the roof structure up. Rau stated but Moscone has already done it and it is up. Schilling stated then Moscone would have to remove it. Gentile stated in the board's deliberations, the board needs to approach this as it has not been done and that is why the court cases say that the plight of the landowner does not come into the question of whether or not is it hardship and the question is, whether the property itself warrants relief from ordinance because the uniqueness of the property requires that.

Gentile stated that from what he is hearing, that the board is a little bit split on this and he asked the board if they want to continue and look at all the other criteria? McAllister asked if the board denies this variance, what does the board expect Moscone to do? Martin stated we do not expect anything. Gentile stated Moscone has options and stated he can move the RV and structure, he can take the structure down, leave it and incur fines or move it. McAllister stated that all the board is concerned with is the letter of the law and not common sense. Schilling stated that is not true. McAllister stated it is. Gentile asked McAllister to elaborate on this? McAllister did not respond. Rau stated that where this is sitting, there is vegetation between the road and Moscone's structure and that the structure does not stand out. Rau further stated that if Moscone sells this property, that someone can put a house on the top of the hill where it should be but putting the trailer on top of the hill is crazy as he has the RV tucked away where it currently is. Martin rebutted stating that when he built his house, he had to follow the ordinances and procedures and go through the proper channels and ask permission and not forgiveness and you have a building envelope where you do not have to jump through the hoops. Rau stated he totally agreed that this does not fall into the right variance within the 75 foot and 25 foot setbacks and the whole thing does not work from the neighbor to Moscone. Rau further stated that, the board has done cases in Madison Shores and nothing complies. Schilling stated but there was hardship for this other piece because of the nature of the size of the lot but this one was done two years ago and again, putting the RV where it sits is not an issue and has never been an issue but once you start to establish other structures by creating a wall and an overhang, you start to have to get into the position where you need to comply with the ordinances and the fact is, Moscone did not. Rau stated is it a structure that could easily or somewhat easily be taken down. Schilling stated that so could a shed and it could be easily taken down, but it still is a structure. Schilling stated that if we have an issue with the definition of a structure, then maybe the board needs to go back to the Planning Board and change the definition and vote on a new definition for a structure. Schilling further stated, that at the moment, the existing ordinance by the definition says it is a structure and as such, it must comply with the ordinances and the setback requirements. Schilling further stated that the fact that it did not, does not, and has not, is somewhat irrelevant to the board's requirement and that the board's requirement is should it, must it and not how does it. Rau stated that the board has had worse variances between 56 and 40 feet for a garage. Schilling stated based on numbers alone, Rau is correct but based on those numbers and those other pieces of property were always tested by the same five criteria of which hardship was always one of them and there was a unique characteristic to the piece of property that lent itself to the homeowner who could not comply with the ordinance and in this instance, the owner could have complied and still could as we are only talking about the roof structure.

Dempster stated that the board is being asked to grant a variance to a 16 x 40 structure and the board is looking at it as being a structure that currently exists and if this property gets sold, that structure that Moscone has on his property goes and it still says that this property has a variance in perpetuity for a 16 x 40 structure it could become a barn or a house. Dempster stated his point is, if the board grants a variance for a 16 x 40 structure, that anything that fits the definition of a structure could potentially go there. Rau stated the structure is a metal tent. Schilling stated it is currently. Gentile stated the variance runs with the land and once the variance is granted, it is in perpetuity and it does not matter so long as the dimensions do not change and anything can be put in that place within one year.

Ohlson stated he does not think there is a way but if you call it a temporary structure and then no one could come back and get a building permit. Schilling asked how long does it have to be in place or not in place to qualify as temporary structure? Ohlson stated there is no way to do that. Ohlson read the definition of structure as contained in the Madison Zoning Ordinance again aloud to the board. Martin stated that permanent or temporary is irrelevant. Schilling stated that definition does not distinguish between temporary or permanent. Skaife stated a Rhino tent is a structure.

Gentile suggested that the board look at the other criteria since there is not a clear feeling yet. Gentile stated the board is not going to vote on the criteria individually and moved onto the second criteria which is the values of surrounding property should not be diminished and asked if anyone feels that the structure diminishes the property values in Madison Shores? All members stated no.

Gentile moved to the third criteria which is, is substantial justice done and stated the criteria for substantial justice is any loss to the individual which is not outweighed by a gain to the public is an injustice. Gentile stated that he suggested before that the gain to the public is that the board is obligated, where the five criteria are not clearly met, to continue to move the community toward compliance as opposed to away from compliance and also, we are enjoined, repeatedly, by the courts, not to simply grant a favor and we are obligated to operate ethically under the statements of the law and so we are obligated to make a decision, however it falls out. Gentile asked the board if substantial justice was done here in favoring the ordinance in the interest of the public or is substantial justice granted here and not based simply as favor because it exists, but because there are other considerations like the nature of the property, nature of the neighborhood and public health and safety that do not appear to be an issue in this particular case? Gentile asked the board for any comments? Schilling asked if we are discussing substantial justice and what is the gain to the general public and there really is not any gain as we are not trying to erect a telecommunications tower or a garage used for business and there is no gain to the public? Gentile stated he countered Schilling's statement and that any move towards compliance and order is a benefit to the public. Schilling agreed and stated granting this variance is not a gain to the public to grant Moscone to have this structure by continuing to enforce the current ordinances and Schilling believes that the gain to the public is moved towards compliance. Martin asked Schilling if that outweighs whatever loss that happened to Moscone if we denied it? Martin asked does us doing our job outweigh Moscone having to move it? Schilling stated yes, because we move towards compliance. Dempster stated he was still going back to the 16 x 40 structure and he believes that the board is moving more towards compliance and if we remove potential for the public in the future, he is looking at this a different way and looking at what it is and what it could be in the future. Gentile asked Ohlson, as this affects Moscone, is this the correct argument? Gentile stated he believes that the Zoning Ordinance does not allow any expansion of non-conforming use but if we grant a variance for this, it becomes an authorized non-conforming use and that non-conforming use is then defined by dimensional variances we have granted and then that structure, because it is a structure, can be any structure as long as it does not change dimensions. Rau asked if we can grant a variance in this case just for this situation and if Moscone sells this property, it is understood that the structure and where he put his RV is non-acceptable and was given the variance for this one-time purpose? Gentile stated if Moscone was handicapped, then the answer is yes but the answer is no. McAllister asked if the board could put a requirement on variance stating that, if and when you sell your property, the variance is revoked? Gentile stated no.

Gentile stated the question is, is substantial justice done and does the board feel that granting this does an unusably good job of preventing a loss to an individual. Gentile stated the loss to the individual in this case is that the board does not grant the variance for a structure within eight feet of the property line. Martin stated if they deny Moscone, does the benefit having Moscone remove the structure or deconstruct it outweigh Moscone's ability to have it? Schilling stated the board cannot look at the deconstruction part and all they can look at is not granting the variance and Moscone does not get to have a carport over the RV and does that cause more damage than the gain to the public of moving toward compliance. Gentile stated the argument here has been that we are looking to the gain of the public by not allowing a structure to exist eight feet from that property line and in the future, on a lot where there is no house, then that is where that house would go versus he is doing this, it is ok and what is the harm. Gentile stated we are discussing the structure. Gentile stated he argues that there is no substantial justice done to Moscone because we are protecting the public from the possibility of having a structure built on that property eight feet from the property line. Ohlson stated that we would all admit that the trailer with a carport is in keeping with the neighborhood. Gentile stated that is the next question.

Gentile moved the discussion to one and two of the five criteria being the Spirit of the Ordinance is observed and the variance will not be contrary to the public interest. Gentile stated these two things are generally answered together because effectively, it does not alter the essential characteristic of the neighborhood nor does it threaten the health and safety or general welfare of the public. Gentile does not think these two items would be encroached upon and the general character of the neighborhood is not going to be changed because it is relatively chaotic there. Martin stated they are small lots. Rau stated it is a seasonal area.

Gentile stated that the board needs to decide if substantial justice done and does the gain to the public outweigh Moscone's right to maintain a structure there, and that variance will run with the land.

Gentile moved the discussion to the fourth criteria, property values unlikely will be accepted. Gentile stated it will be the third and fifth criteria of the five criteria. Gentile asked the board if they wanted to take a vote or needed further discussion? The board was agreement to move to a motion which is as follows:

Motion by Schilling to **DENY** the variance request for relief from the setback requirements because it does not meet the two criteria, that being hardship and substantial justice and the value to the homeowner does not outweigh the value to the public in denying the variance or structure approximately eight feet from the property line which runs with the land and there is no unnecessary hardship to the property because there is nothing unique to the property that requires the roof structure to be placed closer than the setback requirements.

Gentile explained to the board there is a motion on the floor to deny the variance based on criteria #3 that the value to the public in denying a variance so that a structure cannot be put in that location in perpetuity outweighs the short term gain to the homeowner and because it does not require Moscone to move his RV and criteria #5 that there is no argument for unnecessary hardship because there is no unique characteristics of the lot that requires of the placing of structure inside the setback requirements.

The motion was seconded by Dempster.

Discussion:

Rau stated that Madison Shores is a unique situation in where Moscone lives and he is not in favor of Moscone removing the structure of the house. Dempster stated that as for abutters in the future, they would have no say if the 16 x 40 structure was permitted. Gentile stated Moscone does not have to move the RV, only the structure over the RV. McAllister stated he felt the structure was fine where it is and further stated he does not believe a future owner is going to take what is there and make it more substantial.

Gentile asked the board to vote on the motion currently on the floor.

By roll call vote the motion was voted on follows:

Gentile – Aye, Schilling – Aye, Dempster – Aye

Rau – Nay and Dempster – Nay

The motion passed 3-2.

Gentile stated to Moscone that he does not have to move the RV and the variance denial is for the dimensional request for the roof structure.

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

Moscone asked the board what the time limit is to take down the structure? Schilling stated that the board did not say he has to take the structure down but that he is not in compliance and the board is not granting a variance. She further stated to Moscone that he can choose what he wants to do and she suggested that he talk with Robert Boyd, Code Enforcement Officer about what his options are. Gentile stated that we are not an enforcement Board and questions of enforcement need to go to Boyd. Schilling stated that if Boyd is unable to answer his questions, then he should go to the Selectmen.

APPROVAL OF DRAFT MINUTES:

June 19, 2024 Meeting Minutes: Gentile asked who attended the June 19, 2024 meeting as there were limited members present who can vote on these minutes? Rau stated he was present as Acting Chairman and then turned

the meeting over to Martin who became Acting Chairman, McAllister and Skaife. Gentile asked Martin to supervise the approval of the June 19, 2024 minutes. Martin did not see any revisions that needed to be made.

Motion by McAllister, seconded by Rau to approve the June 19, 2024 minutes as written. The motion was voted on and passed **unanimously** with a vote of **4-0**.

May 15, 2024 Meeting Minutes: Gentile stated he had done a review of these minutes since they were quite long with Young, Land Use Boards Administrator and he did find some additional revisions to be made tonight. Rau thought this was a great idea as the board spends a lot of time correcting grammatical errors and the board needs to spend more time at meetings on content.

Dempster stated that the first couple of cases that night, he had been recused so he cannot vote or have any input on these minutes. Young stated that Dempster can vote on the last two cases that being **Case #24-03** and **Case #24-04** which were variances but he cannot vote on anything to do with STR's with regard to **Case #23-15**, **Case #23-18** and **Case #23-13** that were all heard that night. Schilling stated that Dempster can call out grammar or spelling errors but not content.

Motion by Schilling, seconded by Rau to approve the May 15, 2024 minutes as amended due to grammatical/spelling errors.

Gentile stated that the vote needs to be made in two parts. Schilling stated the Martin needed to be elevated to vote on the first part of the minutes which were **Case #23-15**, **Case #23-18** and **Case #23-13** which were all STR cases. Gentile elevated Martin so he can vote on the May 15, 2024 minutes. Skaife stated that she just voted on the June 19, 2024 minutes and she was not elevated. Gentile elevated Skaife for the purpose of voting tonight on the May 15, 2024 minutes and the June 19, 2024 minutes.

Schilling stated that Rau cannot second the above motion as he was not present at the meeting May 15, 2024 meeting.

Young interjected and stated that Gentile, Schilling and Skaife can vote on the May 15, 2024 minutes and Martin can vote on the first half of the May 15, 2024 minutes up to the top of Page 20 as that is when Martin was then relieved from the meeting as he appeared telephonically and hung up.

The above motion was not voted on and did not pass.

REVISED MOTION:

Motion by Schilling, seconded by Martin to approve the May 15, 2024 minutes as amended due to grammatical/spelling errors up to the top of Page 20. The motion was voted on and passed **unanimously** with a vote of **4-0**.

Gentile stated that members voting on the second half of the May 15, 2024 minutes are Skaife, Dempster, Schilling and Gentile. Rau and McAllister were not present and Martin was relieved from his telephonic appearance and hung up.

Motion by Schilling, seconded by Skaife to approve the remaining May 15, 2024 minutes as amended due to grammatical/spelling errors from the top of Page 20 to the end. The motion was voted on and passed **unanimously** with a vote of **4-0**.

ADMINISTRATION: Young had nothing to report.

ADJOURNMENT: **Motion** by McAllister, seconded by Schilling to adjourn the meeting at 8:40 pm. The motion passed **unanimously**.

The next Public Hearing of the Zoning Board of Adjustment will be held on August 21, 2024 at 6:00 pm at the Madison Town Hall, Lower Level.

Respectfully submitted,
Katharine Young
Land Use Boards Administrator