

September 19, 2022

P.J. Cyr, Chair
Coos County Zoning Board of Adjustment
34 County Farm Road
P.O. Box 310
West Stewartstown, NH 03597

**Re: ZBA's August 30, 2022 Decision on Variance Application of the
Mount Washington Railway Company**

Dear Chair Cyr and Members of the Board:

I represent Keep the Whites Wild (KtWW), a non-profit organization interested in the ZBA's August 30, 2022 decision on the application of the Mount Washington Railway Company ("Railway") for a variance for "the construction of a 28' x 120' train platform where 10' 8" would be within the 25' setback to the White Mountain National Forest." See Railway's August 8, 2022 variance application. KtWW attended the August 30, 2022 hearing.

The Board held a hearing on August 30, 2022, at which three Board members were present, constituting a quorum. In the video recording of the hearing provided by a member of the public, members Mark Evans and Scott Deblois are heard informing the Railway's representatives, Earl W. Duval, Esq. and Wayne W. Presby, that there was not a full board present and offering the Railway the opportunity to defer the hearing to a later date. Attorney Duval stated that "it's our understanding, Mr. Chairman, if there's just the three of you, if we proceed forward, then in order for us to be successful, we need a unanimous [vote]." Member Deblois reiterated to Attorney Duval, "You understand that?" Attorney Duval looked at Mr. Presby who nodded his head and said "yes." Attorney Duval then made his presentation on the variance application.

After closing the public hearing, Mr. Theberge and Mr. Evans voted to grant the variance, and Mr. Deblois voted against it. Thus, the vote was 2-1. The next day, a Notice of Decision was erroneously issued, stating that the variance was granted by a vote of 2-1. However, that Notice of Decision was retracted, as it was issued in error.

The Board's August 30, 2022 2-1 decision was a denial of the variance pursuant to RSA 674:33, III, which requires "[t]he concurring vote of three members of the board shall be necessary . . . to decide in favor of the applicant on any matter on which it is required to pass." The Board's vote was not a non-decision; it was a denial. When the Railway opted to go forward with less than a full board, the Railway assumed the risk of less than a unanimous approval; any vote less than 3-0 would be a de facto denial. As

seen in the video, Attorney Duval and Mr. Presby understood the risk and, nevertheless, decided to go forward.

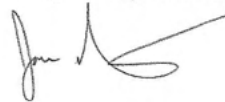
It is my understanding that the Board has scheduled a continued deliberation of the Railway's variance application for September 27, 2022. This would be an unlawful legal error because the Board denied the variance application on August 30. The motion to approve the application was not approved with a 3-0 vote, and the hearing was closed. No decision to continue the hearing was made before or after the Board made its decisive 2-1 vote. Therefore, there is no legal basis for the Board to further consider the variance application.

Even if the September 27, 2022 deliberations were a lawful continuation of the August 30 hearing, it would have to be properly noticed pursuant to RSA 676:7, V, because at the August 30, 2022 hearing, the Board did not continue the hearing to a date certain. However, there is no legal basis for the Board to open the deliberations again. If the law allowed for this, consider the implications. Any time there is less than a full Board, the first hearing could be rendered meaningless and the process could continue without end. This is why RSA 674:33, III exists and why the Board gave the Railway the option on August 30, 2022 to go forward that night or continue the hearing until there was a full Board. The Railway made an informed decision to go forward, and the Board would be committing legal error to give the Railway a second bite at the apple.

Additionally, the Railway appears to have recently widened the Waumbek Station platform despite the variance not having been granted. This is the very work for which a variance is required. The attached photographs, all taken in September 2022, show the extended platform being constructed. I cannot imagine that the Board would condone an applicant going forward with a project knowing full well that a variance is required for the project.

I recommend the Board consult its legal counsel regarding the legality of its proposed September 27, 2022 deliberations and the effect of the 2-1 vote on August 30, 2022.

Very Truly Yours,



Jason Reimers

Enclosures

Cc: Derek Ibarguen, Forest Supervisor
White Mountain National Forest







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WASHINGTON



