

**TOWN OF JACKSON
ZONING BOARD OF ADJUSTMENT**

In re: *Edith P. Evans Trust, Tax Map R-16, Lot 12*
Appeal from Denial of Building Permit

June 11, 2013

I. FACTS

The subject lot (Tax Map R 16, Parcel 12), is located in the Rural Residential zone, and encompasses 2.9 acres, with a geometry that satisfies all Town of Jackson zoning requirements for single family residences (e.g. minimum lot size, setback). Additionally, a septic system design for the lot has been approved by NHDES and accepted as such by the Town. The lot does not have frontage on a street but does have access to Black Mountain Road for ingress, egress and utilities across an easement of unspecified width with the "improved travel surface" of the easement limited to twelve feet in width. The unspecified length and width of the easement area is intended to provide buffers as needed for snow removal, maintenance and repair of the driveway and bridge as well as for the installation of utilities. The distance from the boundary of the lot to limits of the Black Mountain Road right of way is approximately fifteen feet while the distance from the lot boundary to the traveled surface of Black Mountain Road is approximately thirty feet. The easement is, in all respects, an extension of the existing driveway which historically accessed a summer residence (a travel trailer was historically situated on the site) and related accessory buildings.

While the easement was granted as a matter of record title by Easement Deed dated July 1, 2010 recorded with the Carroll County Registry of Deeds at Book 2870, Page 372 (*Exhibit A*), the current and immediately preceding lot owners enjoyed permissive use of a driveway and bridge located on the abutter's lot since the lot was acquired by the predecessor of the current owner during 1959. The bridge and driveway crossing the abutting parcel have been in existence without interruption since 1960. The original bridge was on log stringers set on stone abutments. The original bridge was subsequently replaced by the current steel and concrete structure. The lot has been taxed as a residential building lot at all times since 1959.

II. PROCEDURAL STATUS.

H. David Evans and Gail E.H. Evans-Hatch, as Co-Trustees of the Edith P. Evans Trust submitted an application for a building permit dated March 15, 2013 to the Town. The application was denied by letter of the Building Inspector dated March 26, 2013 citing a non-compliance with RSA 674:41 as the basis for denial. The applicant then appealed to the Zoning Board of Adjustment taking the position i) that the subject lot and its access rights were a grandfathered, non-conforming use exempt from the provisions of RSA 674:41, and ii) that the driveway serving the premises did not fall within the definition of a private "street" as that term is used in RSA 674:41.



A public hearing to consider the appeal was held on May 15th at which the applicant presented its position regarding inapplicability of RSA 674:41. At the hearing members of the ZBA questioned whether any lot enjoys grandfathered status under RSA 674:41 and requested further information to determine whether the lot qualified for an exemption to enforcement as provided in RSA 674:41 (II). The public hearing was then continued to June 19th.

III. APPEAL

A. Summary

This supplemental memorandum addresses two bases for granting a building permit to the applicant as follows:

- 1) An "Exception to Enforcement" pursuant to NH RSA 674:41 II, whereby the ZBA may authorize or issue a building permit where issuance of the permit will not:
 - a) tend to distort the official map or increase the difficulty of carrying out the master plan upon which it is based,
 - b) cause hardship to future purchasers of the lot, or
 - c) cause undue financial hardship on the Town.
- 2) The lot is a "Constitutionally Protected" grandfathered pre-existing use.

B. Enforcement Exception.

1. Basis for Enforcement Exception.

a. Criteria for Appeal.

RSA 674:41 provides the ZBA with the ability to waive strict enforcement with the requirement that all lots have frontage on a public street¹ prior to issuance of a building permit. Exceptions to strict application of RSA 674:41 are available where denial of a building permit would result in "practical difficulty or unnecessary hardship" and where the proposed buildings will not "be related to existing or proposed streets". The former requirement (e.g. practical difficulty/undue hardship) is fact based and must be addressed based on the facts of each case. The latter requirement that buildings/structures shall not be "related" to a road requires a reasonable interpretation that will not lead to an absurd outcome.

- b. "Unnecessary Hardship" is caused by a denial of a building permit.

¹ Defined as Class V or better as well as certain further exceptions none of which are present for the subject lot. For this memorandum the frontage requirements of RSA 674:41 will be described as access to "public streets".



With respect to the subject lot, a denial of a building permit due to strict application of RSA 674:41 will render the lot worthless for residential uses and will deprive the owners of any “reasonable” use of the lot as considered in the context of its setting, resulting in “unnecessary hardship” as a matter of law. While New Hampshire Courts have not defined “unnecessary hardship” in the context of RSA 674:41, the concept of “unnecessary hardship” has been defined in the context of other land use regulations. The New Hampshire Supreme Court has consistently found that land use regulations cause “unnecessary hardship” to property owners where:

- i. A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;
- ii. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
- iii. The deviation from the ordinance would not injure the public or private rights of others.

In the context of the subject lot, denying the owners the right to construct a home on a 2.9 acre lot located in an area predominated by residential properties unquestionably represents an interference with “reasonable” use of the lot in the context of its setting. A review of RSA 674:41 in its entirety indicates that its primary purpose is to avoid access to lots by substandard roads where use of such roads would distort the official map, increase the difficulty of carrying out the master plan, cause undue financial hardship to the Town, or cause hardship to future purchasers. Since the easement area in question is essentially a driveway serving a single residence and running a distance of 30 feet or less, there is virtually no impact on the official map, implementation of the master plan, municipal costs, or future owners. The easement in question will serve as a driveway much as any other driveway in the Town of Jackson. Likewise, use of a 30’ driveway access strip to a single family residence will have no impact on the public or private rights of others. Accordingly, the criteria for finding that strict application of RSA 674:41 will result in “unnecessary hardship” is clearly present in the context of the subject lot and related building permit denial.

- c. Buildings contemplated by the subject building permit application are not “related to existing or proposed streets”.

RSA 674:41 does not provide guidance as to what is intended by requiring that the appealing party demonstrate that proposed structures are “unrelated to existing or proposed streets”. Taken literally, all buildings, regardless of where situated, are ultimately “related to” existing or proposed streets as it is impossible to obtain access to any lot for any meaningful purposes without, in the first instance, relying on a street to reach the lot. Such an interpretation, however, leads to an absurd outcome as it would render all appeals fruitless. New Hampshire courts have long and consistently held that statutes cannot be interpreted or applied to produce an absurd outcome. By way of example, the New Hampshire Supreme Court found that literal interpretation of a statute lead to an absurd result where a the interpretation would have required



that all lots straddling a town line fully comply with the ordinances of both towns even where the encroachment across town lines was an insignificant part of the lot as a whole. *See Churchill Realty Trust v. City of Dover Zoning Board of Adjustment*, 156 NH 668, 676 (2008). Literal application of the words “related to existing or proposed roads” would essentially render all appeals from strict application of RSA 674:41 impossible. This is an absurd outcome considering that the legislature, in fact, included appeal provisions within the statute.

A realistic and meaningful interpretation of the requirement that appeals be considered where proposed buildings will not be “related to” streets suggests that there must be direct correlation between proposed structures and street locations. In the present case, the lot is of ample dimensions to provide for placement of structures in a variety of locations while complying with applicable zoning requirements (e.g. setback). The ability to place structures on the lot is not limited or impacted by the location of the private right of way. The interior driveways will connect to the right of way but the geometry and locus of those driveways will not be materially influenced by the present location of the right of way. Thus, a reasonable interpretation of the requirement that appeals be considered where proposed buildings are “unrelated” to streets is present with respect to the subject building permit application.

2. Criteria for Exceptions to Enforcement.

Once an applicant has demonstrated the basis for an appeal, the ZBA may approve or issue a building permit for lots that do not have direct frontage on a public street based on a finding that “issuance of the permit or erection of the building would not tend to distort the official map or increase the difficulty of carrying out the master plan upon which it is based, and if erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.” RSA 674 (II) Thus, after demonstrating that the threshold issue of whether and appeal is justified is resolved, the ZBA must evaluate whether the “unnecessary hardship” caused by strict application of the RSA 674:41 is justified by the public benefit of strict compliance with that statute. In the present case, the lot owner seeks to continue using a driveway that has been in existence for over 50 years to serve a use (e.g. a single family residence) that is permitted by the zoning ordinance. The right of way providing access to the lot is privately owned, it crosses privately owned land, and will be maintained by the lot owner. In short, there is no reasonable basis for finding any public benefit arising from denial of the subject building permit, much less a public benefit of sufficient magnitude to justify a substantial hardship to the affected property owner.

C. Constitutional “Grandfathered” Status

RSA 674:41 (III) provides, in part, that “this section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section”. At the hearing before the ZBA held on May 15th there was some suggestion that the foregoing text eliminated grandfathered rights of access that may have existed prior to the adoption of RSA 674:41. That interpretation is both inconsistent with the purposes of RSA 674:41(III) and is unconstitutional. It is clear that the purpose of the statute is to supersede any less stringent provisions of a local ordinance. The statement that “no existing lot or tract of land shall be exempted from the provisions of this statute” is intended to clarify



that any local ordinance, regardless of its purported purpose, is subject to application of RSA 674:41. Any other interpretation leads to an unconstitutional outcome.

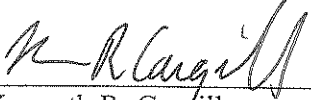
All property owners have a constitutional right to use and enjoy property free from unreasonable interference by the State and its municipalities. Among the constitutional rights enjoyed by all property owners is the right to continue so called "grandfathered" rights, being defined as those rights that existed prior to the subsequent adoption of statutes and/or ordinances that restrict or prohibit the pre-existing use. (*See, Dovoaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H. 222, 227 (2009), stating that, "The right to continue a nonconforming use is a vested right, secured not only by statute...but also by Part I, Articles 2 and 12 of the New Hampshire Constitution."). When "the restriction of a private right is oppressive, while the public welfare is enhanced only in slight degree, it is void." *L. Grossman & Sons, Inc. v. Town of Gilford*, 118 N.H. 480, 483 (1978), quoting from *State v. Paille*, 90 N.H. 347 (1939).

RSA 674:41 was initially adopted during 1983, 23 years after construction of the driveway and bridge. As originally adopted, RSA 674:41 did not require frontage on a public street, and was, in fact, interpreted by the Court to permit access to a lot across a deeded right of way. *See, Belluscio v. Town of Westmoreland*, 139 N.H. 55, 55-56 (1994). The statute was amended during 1995 to clarify that all lots must have frontage on a public street. At the time of that amendment the existing driveway and bridge had been in use for more than 35 years. As such, access to the subject lot via the existing driveway and bridge pre-existed efforts by the State to prohibit use of private rights of way for access to a lot.

Thus, notwithstanding exceptions to enforcement that may be available to the owner of the subject Lot, the fact that the driveway, bridge and use of those features pre-existed adoption of RSA 674:41 and, in particular the 1995 amendment requiring that all lots have frontage on a public street prior to issuance of a building permit renders RSA 674:41 inapplicable to the subject lot.

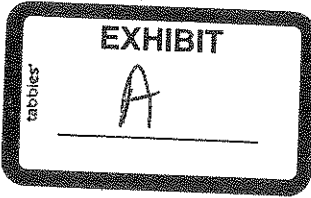
Respectfully submitted,
H. David Evans, Gail E.H. Evans-Hatch, Co-Trustees,
Edith P. Evans Trust,
By its Attorneys,

Cooper Cargill Chant, P.A.


Kenneth R. Cargill
2935 White Mountain Highway
North Conway, NH 03860

June 11, 2013





STATE OF NEW HAMPSHIRE

DEPARTMENT OF REVENUE ADMINISTRATION



REAL ESTATE TRANSFER TAX

Doc # 0007824 Jul 23, 2010 2:55 PM

Register of Deeds, Carroll County



***** THOUSAND	***** HUNDRED AND	40	DOLLARS
895354		\$	*****40.00
VOID IF ALTERED			

SPACE ABOVE THIS LINE FOR RECORDING INFORMATION

EASEMENT DEED

KNOW ALL PERSONS BY THESE PRESENCE that **Robert D. Davis and Beatrice R. Davis**, having a mailing address of RR1 Box 30, Jackson, New Hampshire (03846), for consideration paid, grant to **H. David Evans and Gail E.H. Evans-Hatch**, as Co-Trustees of the **Indenture of Trust By Edith P. Evans dated March 11, 1990**, having a mailing address of 9701 E. Shiloh Street, Tuscan, Arizona (85748), with *QUITCLAIM COVENANTS* a right and easement being more particularly described as follows:

That certain parcel of land located in the Town of Jackson, County of Carroll, State of New Hampshire The Grantees, their heirs, successors and assigns shall have the right to cross and re-cross a portion of the Grantor's land located on the northerly sideline of Black Mountain Road, so-called, said easement right to be located northerly of a bridge crossing Great Brook, so-called, and within the bounds a driveway as it presently exists. The Grantees, their heirs, successors and assigns shall have the right to improve said access easement provided, however, that the improved traveled surface of the access right shall not exceed twelve (12) feet in width. In addition to the foregoing access easement, the Grantees, their heirs, successors and assigns shall have the right to cross said easement area with aboveground and underground utilities of all manner and type customarily used to support a single family residence.

The easement rights herein granted shall be appurtenant to and forever benefit real property of the Grantee described in a deed of Edith P. Evans, dated July 7, 1992, and recorded with the Carroll County Registry of Deeds at Book 1755, Page 653.

MEANING AND INTENDING to describe and convey an easement encumbering and burdening, in perpetuity, a portion of that held y the Grantor's under deed dated January 11, 1990, and recorded with the Carroll County Registry of Deeds at Book 1434, Page 640.



COOPER CARGILL CHANT · ATTORNEYS AT LAW
 2935 WHITE MOUNTAIN HIGHWAY, NORTH CONWAY, NEW HAMPSHIRE 03860
 110 PLEASANT STREET, P.O. BOX 157, BERLIN, NH 03570

BK2870P60971

WITNESS their hands and seals this 15th day of June, 2010.

Witness

Robert D. Davis
Robert D. Davis

Witness

Beatrice R. Davis
Beatrice R. Davis

STATE OF NEW HAMPSHIRE
COUNTY OF CARDOLL, SS

Personally appeared the above named, Robert D. Davis and Beatrice R. Davis and made oath that the foregoing is their voluntary act and deed this 15th day of June, 2010

Before me,

Seal:

Norman J. Head Jr
Notary Public/Justice of the Peace
My Commission Exp. _____
Print/Type Name: NORMAN J. HEAD JR

Y:\CLIENT FILES\16036 - Evans\16038.000 - Easement- Black Mountain Road, Jackson\Documents\Easement Deed wpd

BK2870PG0372



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