



April 13, 2014

Sent Via Hand Delivery to Jackson Town Office & Email

Zoning Board of Adjustment
Frank Benesh, Chair
Town of Jackson
P.O. Box 268
Jackson, NH 03846

**Re: Application for Appeal from Administrative Decision
Tax Lot Number: R-13, Lot 19**


Dear Mr. Benesh:

Enclosed please find the *Amended Application for Appeal from Administrative Decision* filed on behalf of our client, Arthur Couture that you and I discussed last week. Because the attachments for this Appeal are identical to those previously submitted, I am not including them with this Amendment.

At this time we are electing to proceed with this Amended Appeal and not proceed with our prior Application for Variance that was filed contemporaneously with the original Appeal. Please let us know if you have any further questions. Thank you for your assistance. I remain,

Very truly yours,

THE CRISP LAW FIRM, PLLC



Jack P. Crisp, Jr., Esquire

JPC/cpj
Enclosure

pc: Client (Enclosure)

6072-12.2

AMENDED APPLICATION FOR APPEAL FROM ADMINISTRATIVE DECISION
BOARD OF ADJUSTMENT
PO Box 268, Jackson, N.H. 03846

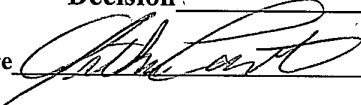
Revised July 19, 2006

Do not write in space below:

Case No. _____ Date Filed _____

ZBA Signature _____ Public Hearing _____

Decision _____

Applicant Signature  Date 4/14/15

TAX LOT NUMBER: R-13, Lot 19

Name of applicant: Arthur R. Couture
Address: 155 Sweden Street
Berlin, NH 03570
arcouture@ne.rr.com
Owner: Same
Location of property: Greenhill Road
Acres: 60

APPEAL FROM AN ADMINISTRATIVE DECISION

Relating to the interpretation and enforcement of the provisions of the New Hampshire Revised Statute §674:41 and an appeal from the decision of the NH Interim Building Official Bob Goudreau, CFPS not to issue the building permit under §674:41, II.

Decision of the enforcement officer to be reviewed:

Email communication issued by Town of Jackson, NH Interim Building Official Bob Goudreau, CFPS notifying Arthur R. Couture (hereinafter "*Applicant*") that he would not be issuing a building permit. See attached email communication from Bob Goudreau to Applicant, dated February 27, 2014.

Mr. Goudreau's decision not to issue a building permit to your Applicant was ratified and memorialized in the Jackson Board of Selectmen meeting minutes. See attached page 3 of Board of Selectmen Minutes, dated March 6, 2014.

NUMBER: Unknown DATE: February 27, 2014

Section §674:41 of the New Hampshire Revised Statutes:

Pertains to the erection of buildings on streets and prohibits the construction of any building, and the issuance of any permit for construction of any building, on a lot within the municipality "*unless the street giving access to the lot upon which such building is proposed to*

be placed” is either (a) a class V or better highway, (b) corresponds in location and lines with streets shown on the official map, subdivision plat or street plat approved by the planning board, or street located and accepted by the local legislative body, (c) a class VI highway with the detailed conditions, or (d) a private road with the detailed conditions. See NH RSA §674:41, I. The identification of “*street giving access to the lot*’ means a street or way abutting to the lot and upon which the lot has frontage. It does not include a street from which the sole access the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria” defined in the aforementioned sub-paragraphs. See NH RSA §674:41, II.

In order for your Applicant to appeal from the decision of the Town of Jackson Board of Selectmen denying his building permit application pursuant to NH RSA §674:41, II the following two conditions (1) and (2) must apply:

- 1. The enforcement of the provisions of NH RSA §674:41 “*would entail practical difficulty or unnecessary hardship.*”**

The N.H. Supreme Court has concluded the terms “practical difficulty” and “unnecessary hardship” to not be two separate standards, but interchangeable terms used to convey the same standard. See *Merriam Farm, Inc. v. Town of Surry*, 071812 NHSC, 2011-311 (2012). The Court held that when evaluating questions of “practical difficulty” and “unnecessary hardship” the definition for “unnecessary hardship” in NH RSA §674:33, I(b)(5) should be used. See *id.*; see also NH RSA §674:33, I(b)(5) states “*unnecessary hardship*’ means that, owing to special conditions of the property that distinguish it from other properties in the area: [1] 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, and [2] The proposed use is a reasonable one.” NH RSA §674:33, I(b)(5)(A)(i)-(ii). If the above criteria are not met, “*an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.*” NH RSA §674:33, I(b)(5)(B).

a. Unnecessary hardship two-part test

There is not an issue with respect to the fair and substantial relationship between the public purposes of the statutory provision and the specific application of that statute to your Applicant’s property. The purpose for the statute is to assure that the Town will not become responsible for plowing, maintaining or improving the access to a private residence and emergency vehicles, including police, fire and ambulances will be able to access the residence. Applicant has a deeded fifty foot easement in perpetuity. In this instance, when fully completed, the driveway will have been constructed in compliance with the Town’s standards, according to the design of Horizon Engineering a professional engineering firm and by an experienced and professional contractor. Additionally, Horizon Engineering Senior Project Manager Tyler Phillips, CTESC, North Country Soil Services Wetland Scientist Gregory Howard and Lobdell & Associates Soil Scientist Raymond Lobdell, CWS/CSS have been utilized to ensure the driveway will not adversely impact the Property or any abutting property

upon full completion of the driveway and private residence, attached garage and barn. The Fire Chief/Road Agent has indicated the driveway should be acceptable to his department once the plans are completed as approved when the Driveway Permit was issued. The Fire Chief/Road Agent has periodically monitored the construction of your Applicant's driveway to ensure this occurs.

There has not been, and will not be, any request for the Town to assume any responsibility for the plowing, maintenance or improvement of the driveway. Accordingly, the purposes of the statute and Town ordinance will not be contravened by the granting of this appeal.

Secondly, unnecessary hardship and practical difficulty would occur if the building permit is denied because your Applicant's proposed use of the property is a reasonable one. Your Applicant has been permitted to build, and has substantially constructed a 6000' long driveway that leads to an area on his property where he has proposed to build a barn and thereafter a residence with an attached garage. Your Applicant intends for this property to serve as the location for his primary home. The Town of Jackson was aware of your Applicant's plan to build a residence prior to approving his Driveway/Underground Cable Permit ("*Driveway Permit*") on April 30, 2013. The Town was also aware of the very substantial cost associated with the construction of this driveway. It has monitored the progress of this construction through its Road Agent/Fire Chief. A reasonable use of your Applicant's 6000' long driveway is to provide access to a constructed residence, attached garage and barn.

It would be unjust and unfair to have issued your Applicant a driveway permit based on plans that would result in the expenditure more than \$250,000.00 to then deny him a permit to build the residence the driveway connects to a public way.

b. Alternative unnecessary hardship standard should be evaluated if the Zoning Board of Adjustment finds your Applicant has not met the two-part test.

Should the Board of Adjustment find that your Applicant has not met the two-part standard for "unnecessary hardship" as detailed above, the enforcement of NH RSA §674:41 should be found to entail practical difficulty or unnecessary hardship under the alternative "unnecessary hardship" standard in NH RSA §674:33, I(b)(5)(B). If your Applicant's building permit is denied, the property and 6000' driveway could not be reasonably used in conformance with NH RSA §674:41.

The hardship and practical difficulty caused to your Applicant by the denial of this building permit is immense. To date, your Applicant has expended in excess of \$250,000.00 to design and construct the approved driveway in reliance on the Driveway Permit issued by the Town and the representations a building permit could be issued. Your Applicant's understanding was based on communications with Town officials including the Building Inspector that a building permit could be approved by the Town. Your Applicant was assured by the then Building Inspector, following issuance of the Driveway Permit and before

driveway construction started, that the legal reason now given under NH RSA §674:41 for denying a building permit was not a basis upon which a permit could be denied.

Your Applicant's intention when purchasing this property and applying for a Driveway Permit has always been to build a home with an attached garage and storage barn on the property. The Town of Jackson was aware of your Applicant's future building plans when he applied for the Driveway Permit because the driveway drawings that were submitted had always included at the end of the driveway a residence, attached garage and barn. Your Applicant began constructing the R-13, Lot 19 driveway on June 28, 2013 and it was substantially completed at the end of November, 2013. *See* Start of Construction Notification, dated June 19, 2013.

The damage caused to your Applicant should his building permit be denied will include a financial loss of approximately \$250,000, the significant time and energy expended on constructing the already approved driveway, and the inability for your Applicant to utilize his property for his residence or otherwise. In addition, the value of your Applicant's property will substantially decrease if the constructed driveway cannot be used as a means of access to the proposed building and any future proposed buildings.

Enforcement of the provisions of NH RSA §674:41 would entail practical difficulty or unnecessary hardship given that *"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"* and the proposed use of the property as a residence is a reasonable one. Alternatively, the property cannot be reasonably used under a strict interpretation and following of NH RSA §674:41 as there is no street giving access to your Applicant's property that meets the requirements provided in the statute.

2. *"The circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets."*

There is no established case law in New Hampshire that explains the phrase *"circumstances of the case,"* so therefore your Board of Adjustment is left to evaluate an undefined standard and your Applicant will apply the plain language meaning.

The circumstances of your Applicant's case are such that the proposed residence, garage and barn he intends to build will be accessed by a 6000' driveway from Greenhill Road. This driveway has already been substantially completed. Prior to your Applicant's application for a Driveway Permit and its approval by the Jackson Board of Selectmen, there had been a long history of access to your Applicant's lot through an access road on an abutting property that has frontage on Greenhill Road. Your Applicant has a fifty (50) foot wide easement deeded in perpetuity.

The purpose behind this requirement, that the circumstances of the case do not permit the proposed building to be related to existing or proposed streets, is based on the concern that a year-round home that does not have frontage on a public way may not be accessible for

emergency vehicles, including police, fire and ambulance. In addition, the Town does not want any future responsibility for the plowing, maintenance or improvement of the driveway.

At the time your Applicant applied for and received the Driveway Permit he worked with the Town of Jackson, its Fire Chief/Road Agent, Horizon Engineering, soil scientists and environmental engineers to ensure that the driveway as now substantially constructed was built to the Town's standards in a professional and responsible manner so as to provide for emergency vehicle and fire truck access. The construction of the driveway will therefore not pose a safety or access hardship to future purchasers and residents. Horizon Engineering Senior Project Manager Tyler Phillips, CTEESC, Lobdell & Associates Soil Scientist Raymond Lobdell, CWS/CSS and North Country Soil Services Wetland Scientist Gregory Howard concluded that neither the proposed driveway nor residence would have an adverse impact on the area's wetlands and environment. The State of New Hampshire has reviewed the work of Horizon Engineering and the soil scientists, as well as the proposed driveway drawings, and concluded similarly that the area's wetlands and environment would not be harmed by your Applicant's construction proposals. As a result of these evaluations, your Applicant was issued an Alternation of Terrain Permit and Wetlands Permit from the New Hampshire Department of Environmental Services in connection with his proposed driveway drawings.

Finally, there has been and will be no request for the Town to assume any responsibility with respect to the plowing, maintenance and improvement of the driveway. The driveway will be constructed in such a manner that such issues should not exist. If this were not the case, future purchasers of the property would be presented with a hardship and safety concern. This concern is not present in the circumstances of your Applicant's case.

In approving an appeal, Board of Adjustment may make any reasonable exception to NH RSA §674:41 if the following two considerations are found to be true:

1. *"The 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 base."*

Your Applicant's building application pertains to his proposed barn, future residence and attached garage. Because the driveway is being constructed consistent with all town standards and requirements and according to professional engineering drawings, your Applicant has met all the conditions that were imposed upon him for this construction. At the time your Applicant applied for and received the Driveway Permit the question of whether any distortion of the official map of the Town or its master plan was presumably addressed. Since the Driveway Permit was issued it must be presumed there was not a concern of any potential distortion or difficulty. The driveway as constructed and the related residence will not tend to distort the official map or increase the difficulty of carrying out the Town's master plan. The residence will be built in a residential area of the Town and will be similar in its use and impact to other residences in the general area.

2. The "erection of the building issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality."

Issuance of a permit will not cause future purchasers of the property, or the Town, undue financial hardship or impact because of the standards to which the driveway has been and is being constructed. The Fire Chief/Road Agent has indicated so long as the driveway is constructed according to these standards and requirements he sees no issue with Town emergency or law enforcement vehicles accessing the property. Similar to any other residential property, the Town will have no responsibility for the maintenance of Applicant's driveway that leads to Applicant's planned residence, attached garage and storage barn. Accordingly, the spirit and intent of the statute are not disturbed by the granting of this statutory exception under NH RSA §674:41, II.

The following additional information must be completed regarding the property in question:

Is any Use or Structure currently Non-Conforming? YES _____ NO X _____

If yes, explain in detail:

Does the property in question including all existing or proposed building, signs, driveways, and septic systems meet Jackson Zoning Ordinance requirements and applicable state regulations? YES X NO _____

If no, explain in detail:

ADDITIONAL INFORMATION: Summarize below any information from preliminary discussions with any state agency personnel in regard to the case. In addition, attach copies of any correspondence from state agencies, or Jackson officials and boards pertaining to the property.

NH RSA §674:41 was a subject of discussion at the time your Applicant applied for a building permit to construct the driveway from Greenhill Road to his sixty acre parcel of land. The parcel includes a fifty (50) foot wide easement from Greenhill Road to the parcel. There was an access road to the parcel that existed for a very substantial period of time. On April 4, 2013, the Board of Selectmen extensively reviewed the statute at issue. The meeting minutes note your Applicant's property "*has a frontage issue; there's no frontage on a town road; and the state RSA prevents building without road frontage*" and also mentions that your Applicant's easement does not create an exception to this rule. See page 2 of the Board of Selectmen Minutes, dated April 4, 2013.

However, after some consideration the Board of Selectmen went ahead and approved your Applicant's application for a Driveway/Underground Cable Permit on May 16, 2013. Road Agent Henry saw no problems with issuing the permit and the Board of Selectmen unanimously voted to approve the permit. *See* pages 2-3 of the Board of Selectmen Minutes, dated May 16, 2013. Your Applicant was told after this meeting by the then Building Inspector Andy Chalmers that the driveway building permit was approved because there was an access road that had existed for a substantial period of time, the Town had granted Applicant a Driveway Permit and, therefore, legal access to the property was found and NH RSA §674:41 did not apply.

Your Applicant, having been provided a Driveway Permit by the Board of Selectmen and told by the Building Inspector Andy Chalmers that NH RSA §674:41 did not apply, went forward with building a driveway on the property. Construction of the 6000' long driveway began on June 28, 2013 and it was substantially completed at the end of November, 2013. *See* Start of Construction Notification, dated June 19, 2013. Approximately \$250,000.000 was spent by your Applicant to construct the approved driveway in reliance on the Driveway Permit he was issued and the determination by a Town Official that NH RSA §674:41 did not apply. Your Applicant would not have invested such a substantial amount of money unless he had understood the Town could issue a building permit. His reliance on the Driveway Permit he was issued and the determination of the Building Inspector, a Town official, that NH RSA §674:41 did not apply was reasonable.

On December 12, 2013 your Applicant filed a building permit application with the Town of Jackson for the construction of a barn at the end of his permitted driveway. At the Board of Selectmen meeting on February 6, 2014 it was noted that there was no reason to deny your Applicant's building permit, and that Building Inspector Goudreau would sign off on it. *See* page 1 of Board of Selectmen Minutes, dated February 6, 2014.

This did not happen, as your Applicant was informed on February 27, 2014 in an email from Building Inspector Goudreau that due to the prohibitions contained within NH RSA §674:41, he could not approve of your Applicant's permit. Building Inspector Goudreau's denial of the building permit was based on a recommendation from former Building Inspector Andy Chalmers. *See* email from Bob Goudreau to Applicant, dated February 27, 2014; *see also* email from Andy Chalmers to the Board of Selectmen, dated January 2, 2014.

Understandably, the denial of the building permit was a complete surprise to your Applicant. He had been issued the Driveway Permit, the former Building Inspector had advised him NH RSA §674:41 was not a problem and based on the discussion at the February 6, 2014 meeting of the Jackson Board of Selectmen (*See page 1 of the Boards minutes*) he anticipated a building permit would be approved. Mr. Couture relied on representations from the Town Building Inspector that NH RSA §674:41 did not apply to his property, and he had expended \$250,000.00 for the construction of a driveway based on the permit and these representations.

A building permit should be granted for your Applicant based on the common law policy and principles of equitable relief. To deny your Applicant's building permit for the

construction of his residence, attached garage or barn would be unfair, unreasonable and unjust. Not only will the Applicant lose the approximately \$250,000.00, time and energy expended constructing the approved driveway, but he will not be able to utilize his property for his residence and its value as a whole will substantially decrease. Should your Applicant not be granted a building permit, he would have relied on Town officials' representations to his detriment and the detriment of the community.

Timely Notification of Denial of Building Permit

Finally, the Town of Jackson Building Code as adopted March 2013 at Section 9 requires the Town Building Inspector to act upon a building permit application promptly and within thirty days of the date of the application or the submittal of a complete application. This section goes on to require if the permit is denied the reasons therefore shall be clearly stated in writing. Your Applicant's building permit application was submitted on December 12, 2013. In a February 13, 2014 email the Interim Building Inspector, Bob Goudreau, CFPS, makes it clear no action had been taken on your Applicants building permit application. *See enclosed* email from Bob Goudreau, CFPS, dated February 13, 2014.. Notification was not provided to your Applicant until February 27th, 2014. Accordingly, a requirement of Section 9 of the Town Building Code was violated.

For further support of your Applicant's Amended Application for Appeal from Administrative Decision, please see the previously submitted documents and correspondence.

NOTE: This application is not acceptable unless all required statements have been made.

Attach a copy of the enforcement officer decision and all pertinent documents and correspondence.

Use additional attachments or separate sheet to provide answers to questions, if the space provided is inadequate.

IMPORTANT NOTICE - Board of Adjustment By-Laws state that information from the applicant and/or his representatives must be provided to the Board no less than 7 calendar days prior to the date of the public hearing.

If you have questions about this application, please review the application instructions and checklist and the ZBA information found on www.jacksonvillage.net under Boards and Commissions. In addition, you may contact the Chairman of the Board of Adjustment, PO Box 268, Jackson, NH 03846