

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Carroll Superior Court
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**SUMMONS
ZONING BOARD APPEAL
RSA 677:4**

Case Name: **David & Christina Caldwell, Jr. v ZBA Town of Jackson**
Case Numbers: **212-2015-CV-00099**

Date Complaint Filed: July 17, 2015

A Complaint has been filed in this Court. A copy of the Complaint is attached.

The Court ORDERS that ON OR BEFORE:

August 31, 2015	Christina Caldwell; David Caldwell, Jr. shall have this Summons and the attached Complaint served upon ZBA Town of Jackson.
September 21, 2015	Christina Caldwell; David Caldwell, Jr. shall file the returns of service with this Court. Failure to do so may result in this action being dismissed without further notice.
30 days after service	ZBA Town of Jackson must file an Appearance and Answer or other responsive pleading and certified record of all previous proceedings with this Court. A copy of the Appearance and Answer or other responsive pleading must be sent to the party listed below and any other party who has filed an Appearance in this matter.

Notice to ZBA Town of Jackson: If you do not comply with these requirements, you will be considered in default and the Court may issue orders that affect you without your input.

Send copies to:

Christopher T. Meier, ESQ

Cooper Cargill Chant
2935 White Mountain Highway
North Conway NH 03860

BY ORDER OF THE COURT

July 17, 2015

Abigail Albee
Clerk of Court

(406)

THE STATE OF NEW HAMPSHIRE

CARROLL, SS.

SUPERIOR COURT
Docket No.

DAVID CALDWELL, JR. AND CHRISTINA CALDWELL,
Plaintiffs,

v.

TOWN OF JACKSON ZONING BOARD OF ADJUSTMENT,
Defendant.

COMPLAINT
AND RSA 677:4 APPEAL FROM DECISION ON MOTION FOR REHEARING
OF DECISION OF THE JACKSON ZONING BOARD OF ADJUSTMENT

NOW COME the Plaintiffs, David Caldwell, Jr. and Christina Caldwell, by and through their attorneys, Cooper Cargill Chant, P.A., and pursuant to RSA 677: hereby complains against the Defendant Town of Jackson Board of Adjustment's decision to deny the Plaintiff's request for a 5'8" variance from the 50' front setback mandated by the Jackson Zoning Ordinance, in order to allow a covered handicap ramp on the front of the Applicant's home on their property on Tin Mine Road, Map V10, Lot 33-A (the "Property"). As reasons in support, the Applicant states as follows:

PARTIES

1. The Plaintiffs, David Caldwell, Jr. and Christina Caldwell (the "Caldwells") are husband and wife and Rhode Island residents with a physical address of 6500 Post Road North Kingstown, RI 02852.
2. The Town of Jackson Zoning Board of Adjustment ("Board") is a municipal corporation with a principal place of business at 54 Main Street, Jackson, NH 03846.
3. The Plaintiffs own property situated at 200 Tin Mine Road in the Town of Jackson a/k/a Tax Map 10, Lot 33-A, which is the subject of this matter (the "Property").

PROCEDURAL HISTORY

4. On or about January 14, 2015, the Caldwells filed by hand a variance application with the Town of Jackson seeking to allow a front porch on their home on the Property, which encroached 5'8" into the 50' front setback provided by the Town of Jackson ordinance.
5. On February 2, 2015, the Board held its first hearing, which was continued.
6. On March 25 and April 15, 2015, the Board held continuations of the public hearing.
7. The Board voted on both March 25 and April 15, 2015 that the Applicant met the following criteria for variance: a) granting the variance would not be contrary to the public interest; b) the spirit of the Ordinance would be observed; and c) the values of surrounding properties would not be diminished.
8. At the March 25 hearing, the Board also found that substantial justice would be done by granting the variance.
9. However, on April 15, 2015, in denying the variance, the Board found that substantial justice would not be done, contradicting its prior vote.
10. The Board also found at the April 15 hearing that the Applicant proved neither hardship nor the criteria for a disability variance.
11. The Board proceeded with different members as between the March 25 and April 15 meetings. The new member of the Board, James Gleason, indicated that "they've [the other members of the Board] have filled me in on all of this....", Hearing, at 7:00, however the Board has no minutes of a hearing where this discussion was held, nor was the public or applicant invited to such a discussion.
12. On April 21, 2015, the Board published its decision denying the Caldwell's application for a variance.

13. On May 15, 2015, the Caldwells timely filed by hand a Motion for Rehearing with the Board.
14. On June 17, 2015, the Board held a hearing on the Caldwell's Motion for Rehearing, and denied the same at that hearing. Upon information and belief, a written decision denying the motion for rehearing has not issued.

ARGUMENT

A. Procedural Argument

15. RSA 677:3, II provides that: "Upon the filing of a motion for a rehearing, the board of adjustment ... shall within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration."
16. The Motion for Rehearing in this matter was filed on May 15, 2015, 30 days from which is June 14, 2015, which being a Sunday is extended to June 15, 2015.
17. The Board failed to either grant or deny the motion for rehearing within 30 days, and therefore the variance should be deemed granted.
18. Alternatively, the Board should be equitably estopped from defending the application for a variance – given that the procedural requirements of RSA 677 are held strictly as against the applicant property owner, so should they be held as against the Board and Town.

B. Substantive Argument

19. The Board erred in denying the variance, failing to find that substantial justice would be done, failing to find hardship, and failing to find that the criteria were met for a disability variance, for the following reasons:

(i) Substantial Justice

20. The NH Supreme Court has indicated that the grant of a variance will achieve “substantial justice” if, in the absence of the variance, there would be a loss to the property owner that is not outweighed by a gain to the general public. Farrar v. City of Keene, 158 N.H. 684 (2009). Here, the loss to the property owner if they could not complete the project, and have to remove the porch and corresponding roof, from the setback, would be significant. Conversely, there is no cognizable harm to the general public from the grant of this variance.
21. Moreover, the Supreme Court has indicated that public benefit from the grant of the variance can be weighed in favor of granting a variance – here, this project would certainly provide the Town of Jackson a benefit by having a model of a Zero Energy Ready Home within its borders. The deck proposed is part of a larger project designed to create what is believed to be the first “net zero” home in Jackson. This is a LEED certified home being built to the standards of the U.S. Dept of Energy Zero Energy Ready Home program, so it will be pretty close to "net zero" making enough power to run the house. The placement of the home, and the angles, are to ensure the azimuth direction necessary to make the solar roof shingles work. The open deck and ramp (and corresponding roof) only encroach into the 50 foot front setback by 5 feet and 8 inches. Moreover, the conservation benefit in having such a home, and having such a home as a model for others, is itself substantial to Jackson, and to the larger public.
22. No abutters (or anyone) appeared in opposition to the plan, and the variance. In fact, both abutters have incursions into the front setback for either a ramp or front porch, similar to that of the applicant’s proposal, so the minor incursion proposed here (5’8” into 50’ setback) will not be out of place in the neighborhood.

23. In fact, the Board actually agreed at one of the meetings that the home looks better with the porch than without.

24. Finally, as to the substantial justice criteria, the Board at its March 25, 2015 meeting voted that the Applicant had met this substantial justice criteria, and then voted on April 15, 2015 that the Applicant had not. This is also error.

(ii) General

25. The Zoning Board proceeded with different members at each of the various hearings. The Applicant was not given the option to proceed with the same members; and some members did not hear all of the evidence presented. This is also error.

26. The new Member of the Zoning Board indicated at the April 15, 2015 meeting that he was provided with information and an explanation of the Application outside of a noticed meeting of the Zoning Board. This is also error.

(iii) Hardship

27. Owing to the special conditions of the property that distinguish it from other properties in the area, denial of the variance would, and will, result in unnecessary hardship. The property has the following special conditions:

- 1) This is a substandard unbuilt (but grandfathered as buildable) lot of 0.36 acres; which is burdened differently than other properties in the district, and likely the majority of unbuilt properties in the district.
- 2) The building envelope is only approximately 25' by 75'; on a significant slope on the shorter angle.
- 3) The azimuth angle of the sun requires the proposed configuration of the house and porch for the solar shingles to work, and to allow a home that approaches net-zero.
- 4) While there are other sub-standard lots with the same slope and configuration, this is not the entirety of lots in the District (see Harrington), and moreover, the majority of the lots (including the two

abutters), were built out before zoning, and were built out in the front setback as proposed by this variance request (including the abutter having a similar porch on the front to handle the slope of these lots, allowing for street level access with a drop for the foundation).

- 5) The Subject Property is additionally unique in that it is one of these substandard lots (and upon information and belief the only one on this section of street) which was not built prior to the adoption of this front setback.
- 6) The Subject Property has a different configuration from the actual road versus the right of way from either abutter or property on this Road. Namely, while the front setback measures from the right of way, as shown on the submitted map, the travelled Road does not run the center of the right of way, and varies significantly among lots. Therefore, the Subject Property is treated differently from other lots vis a vis the Road, which affords other lots a different treatment relative to the general purpose of the Ordinance, which in keeping rural character presumably relates more to setback from actual travelled ways, not rights of way. In any case, the Subject Lot is treated differently from its neighbors based upon the variation of road setback versus right of way setback.
- 7) Certain of the plans showing this lot (including the original plat and/or older Jackson tax maps) show that a significant portion of this lot, and the building envelope on this lot, was within wetlands. This is the now unbuilt portion of the building envelope. While there are currently no discernible wetlands now, the fact of significant prior wetlands certainly would have impacted whether the lot was built prior to zoning (i.e. when the wetlands existed), and creates an additional special condition of the lot.
- 8) Each abutter lies within the setback. At 186 and 206 Tin Mine Road, the houses are in the setback. At 202 Tin Mine Road (See attached, built in 1990), the house is 47 feet from the setback, and the deck is 6 feet further into the setback. The Applicant's property is unique and has a "special condition" because it was not grandfathered or given a variance.

28. Owing to these special conditions, no fair and Substantial Relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property. This is application for an area variance for a 5'8" encroachment into the front 50' setback (there is still 44 foot and 4 inch setback from the right of way),

which will allow for a unique and exciting to take place in Jackson. The special conditions described above necessitate the variance and make it such that there is no “fair and substantial relationship between the general purposes of the ordinance and the specific application of this provision [the front setback] to the property” and this project. In other words, the general purpose of the ordinance, to promote the general welfare while retaining the essential character of the Town of Jackson, can and will be met while allowing this slight variance from an area provision.

29. The Proposed Use is a reasonable one because the proposed use is residential, and is allowed by the Ordinance. The slight area variance leaves a 44’ 4” setback to the right of way, and allows for a significant project in the public interest to occur – namely a project which will stand as a model for energy conservation within the Town of Jackson.

(iv) Disability

30. The variance was also requested as a disability variance pursuant to RSA 674:33, V. The Board unanimously found that the applicant’s mother has a recognized physical disability and that she would regularly use the premises. The proposed ramp would allow applicant’s mother to easily access the house. In finding that this was not a “reasonable and necessary accommodation” for Applicant’s mother, the Board erred.
31. The Board misinterpreted RSA 674:33, V – “reasonable accommodations” as used in the statute means that the board must find that reasonable accommodations are necessary to allow the disabled person to use the premises; not that the variance is absolutely necessary to provide such accommodations.
32. The Board finding that the ramp might be able to be placed elsewhere on the property in order to deny the variance; without any evidence of the same, or any evidence of cost, was

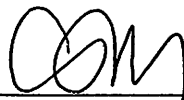
clear error.

33. In further support, the Applicant refers to the evidence and argument presented at the multiple hearings before the Zoning Board.

WHEREFORE, for all these reasons, the Plaintiffs respectfully requests that this Court reverse the decision of the Town of Jackson Zoning Board of Adjustment to not issue a variance under the Jackson Zoning Ordinance and grant such further relief as is appropriate.

Respectfully Submitted,
The Plaintiffs,
DAVID AND CHRISTINA CALDWELL,
By THEIR Attorneys,

Dated: July 17, 2015

By: 

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