

Jackson Board of Adjustment

June 19, 2013

UNOFFICIAL UNTIL APPROVED

Draft June 26, 2013

Members in Attendance: Frank Benesh, Joan Aubrey, Brian Walker, Dave Mason and Jerry Dougherty. The Alternate attending the meeting was Gino Funicella. Hank Benesh is the videographer; Martha D. Tobin is the Recording Secretary.

Visitors: Ken Cargill, David Evans, Bea Davis, Bob Davis, Norman Head, **gentleman who sat next to David Evans w/cane?***

Chairman Frank Benesh called the meeting to order at 7:00 p.m.

Approve the Minutes of March 20, 2013

Approve the Minutes of May 15, 2013

There are several Board members who didn't get copies to review; no one has a key to get into the Office to make copies. There is a copier at the Library; an offer was made to make copies there but the Board is going to table these for the next meeting. For those wishing to get electronic copies, these are on the town website.

Terry, John; 32 Frances Street (Map R18, Lot 45) – Continuation of Public Hearing & Deliberation regarding a variance from zoning ordinance concerning setbacks and expansion of a non-conforming use in the Rural Residential Zoning District As Gino was on the Board and during previous discussion involving the Terry case, he will be voting while Jerry will recuse himself. Jerry is okay with recusing himself as long as he is not precluded from discussion. This was continued from the last meeting to give Mr. Terry an opportunity to present additional information if he chose to do so; Chairman Benesh received an email from Mr. Terry stating he would not be able to attend tonight and there has been nothing new submitted. Joan asked if Mr. Terry asked for more time; he did not. Jerry noted Mr. Terry has made an application to the Selectmen again. Chairman Benesh noted Mr. Terry's email simply states he is not able to attend tonight; thanks for the continuation anyway. The Board continued the Hearing to give him time to present more information so Chairman Benesh feels the Board should move forward unless other members think the Board should not.

Chairman Benesh reopened the Public Hearing at 7:02 p.m. There is no one in attendance regarding this application and no members of the public have any comments; Chairman Benesh feels the Board should make a final decision. Joan noted if the Board makes a final decision Mr. Terry has thirty days to ask for an appeal or rehearing; Chairman Benesh noted Mr. Terry would need to have new evidence or proof the Board made an error in its decision; asking for a rehearing brings a higher threshold for evidence; he'd have to present information that is substantially different. Dave wondered if presenting new information about the uniqueness of the property would be enough; Chairman Benesh reminded the Board that it has been advised not to give a rehearing just because the owner was ill-prepared at the original Public Hearing. Dave

believes this should be tabled. Jerry agreed noting Mr. Terry isn't here to ask for a continuation. Chairman Benesh noted Mr. Terry was at the last meeting.

Gino Funicella, seconded by Joan Aubrey, made a motion to continue the Public Hearing to July 17, 2013. Joan feels this is reasonable as Mr. Terry may not have an understanding of his situation. Jerry noted Mr. Terry is on the Selectmen's agenda for their next meeting. There was no further discussion. **The motion passed 5-0-0 (Benesh, Aubrey, Walker, Mason, Funicella).**

Evans, H. David & Gail E. H. Evans, Co-Trustees of the Indenture of Trust of Edith P. Evans – Continuation of Public Hearing & Deliberation concerning an Appeal of an Administrative Decision denying a building permit for lack of compliance with RSA 674:41 regarding access to a street, on property located at Black Mountain Road, just above Dundee Road (Map R16, Lot 12) in the Rural Residential Zoning District Chairman Benesh noted Jerry was not on the Board during the Evans case; Jerry would like to be involved; he has read the minutes and reviewed the tape.

Chairman Benesh reopened the Public Hearing at 7:08 p.m. Ken provided a newly completed plat of the lot. At the last meeting the Board noted the standard applies to all lots so there was no grandfathering; Ken started thinking about this; grandfathering mostly applies to municipal ordinances not land use at the state level. In Constitutional Law grandfathering is the highest form of law and takes precedence over all else; grandfathered rights are those that existed prior to the adoption of statutes and/or ordinances. The Evans family has a vested right for uses that existed prior to 674.41; the property was purchased in 1959; the bridge was put in in 1960 and rebuilt in 1968. This lot and configuration with the driveway and bridge has been in continuous use since 1960. The bridge existed fifteen years before 674:41 went into effect. Chairman Benesh believes the change in use affects the grandfathering; they are asking to go from a summer camp to a year-round residence. Ken noted the law makes no distinction on the use.

Jerry noted Mr. Evans is seeking relief from 674.41 Part 2 and wondered if he has addressed Part 1 which calls for him to go to the Selectmen or the Planning Board. Mr. Evans went to the Selectmen and his application for a building permit was denied. Jerry noted the denial came from the Building Inspector, not the Selectmen. Mr. Evans also has redress to go to the Planning Board to ask to have the access platted as a road. Chairman Benesh reminded Jerry the only decision before the Board tonight is whether to grant an exception or not. Dave noted Part 1 doesn't preclude the owners from asking to come forward on Part 2; Jerry noted it does; the applicant has to be denied first by the Selectmen. Chairman Benesh noted the Selectmen were involved in the decision to deny the permit; Jerry feels the applicant hasn't met the criteria of Part 1 and this Board may not want to rule on it. Ken isn't sure how to get around this concern; Chairman Benesh noted the Board members all understand there are other options for the applicant; the Board will focus on what it can and can't decide.

Ken noted if the first argument that 674.41 doesn't apply isn't acceptable, the applicant qualifies for an appeal; the public benefit doesn't outweigh the hardship to the owner. This property is surrounded by similar properties; applying the ordinance to the property interferes with reasonable use of the property. The general purpose of the statute is to prevent the issuance of a building that distorts the official map; Jerry noted Jackson doesn't have an official map. Ken noted the tax map is the official map; Jerry disagreed. Issuing a permit wouldn't interfere with the Master Plan as the property is zoned and has been taxed as Residential. Erection of the building will not cause hardship to any future purchasers; this property is the same as any other residential property in Jackson.

Jerry wants to know who accepts liability for the bridge; the bridge is an issue; he wondered if there is someone who can speak to the construction of the bridge and that it will meet town

requirements. Ken noted Jackson has no driveway construction standards regarding bridges or culverts. Jerry wants to know who is liable if a \$50,000 excavator falls into the stream. Ken noted the liability would be the property-owners' and that of the equipment owner. Jerry wants the bridge inspected by Engineer Phillips, Building Inspector Chalmers and Road Agent/Fire Chief Henry. This can be a condition of the exception, if one is granted. Jerry wants to know who owns the bridge; he believes the easement gives the Evans the right to travel over the land; it is not a transfer of land. Ken noted the easement says the owners of the easement have the right to construct a road. Bob Davis noted the Trust owns thirty feet of land; they own the land that the bridge is on.

Ken returned to his argument that erection of this building will not cause hardship to any future purchaser; he noted anyone who buys a property is buying the hardship; there are other properties just like it in Jackson.

Granting the exception will not have an undue financial impact to the town as the town has no responsibility.

Ken doesn't see how the Board can make a solid argument that any of these are an issue.

The second part of the argument for the exception is that there is no fair and substantial relationship between this driveway and the purposes of the ordinance. Deviation from the ordinance will not impact the rights of others as this has existed for years. Denial of this will cause unnecessary hardship; the statute can't be read so literally. Jerry noted it's hard to show hardship until the owners have asked the Planning Board for platting. Ken noted they don't have to go to the Planning Board; platting a sixty-foot ROW is a practical difficulty; Jerry noted Ken is inaccurate about what the Planning Board would plat. Ken will discuss that at the next meeting if necessary. He believes the applicant qualifies for the exception and reviewed a couple of situations created by this section's adoption in the '90's.

Joan wants to put a condition on the property that it won't be subdivided. There is a question about whether this should go to the Planning Board. Chairman Benesh noted the Board has narrowed the problem; these concerns could be part of the Board's deliberation. Jerry wants to make sure there's a waiver for liability and that this is made part of the deed so future buyers are aware of the conditions. Ken noted the Board could grant the variance with conditions.

Chairman Benesh asked for comments from abutters; Bob Davis noted there are an awful lot of situations like this; the lot next door has no frontage; there's one up the road where the owner expanded the deck and built up higher; Bissell increased volume; there's a home on Meserve Road with no frontage and that was approved; he wants to know why the Board is picking on this applicant. Chairman Benesh asked if the Board should infer that Bob feels the Board should grant the exception; Bob agreed that was his point.

Chairman Benesh noted the Board may wish to receive some information from the Town Engineer or the Building Inspector regarding conditions to impose; he feels it's best to continue the Public Hearing however for completeness he'd like the Board to consider the original argument that 674.41 doesn't apply and that the Board has jurisdiction to decide that the Selectmen didn't apply the statute properly. Dave thinks Ken has a great argument; Jerry reminded all that this is a great argument if it's an accurate interpretation; he thinks the Board should get confirmation on this. It was clarified that 674.41 allows the ZBA to rule on this. The Board unanimously agreed it is taking the position that it can rule on whether the town is properly applying 674.41.

Chairman Benesh thinks there are some merits to granting the exception; he is not sure he sees the argument that the owner can build here as long as the connection to the road and/or easement meets whatever standards are appropriate. This is his view without deliberation. Gino believes if this were to go to court the owners would get what they want. Dave believes the owners have made their case for an exception and the Board can put conditions on it. Joan agrees an exception is in order with the following conditions; the lot is not to be subdivided and that they meet driveway standards.

Chairman Benesh noted driveway standards require the intersection with the road to be at ninety degrees (+/-) and to have a paved apron with a ten-foot radius. There is nothing regarding bridge construction however the Board would require that Inspector Chalmers approve the construction to handle a fire truck. Jerry recommends a review by the Fire Chief, the Engineer and the Building Inspector as appropriate. Joan reminded folks this is a driveway not a road; Chairman Benesh passed around the standard. Ken believes this applies only to driveways in the town ROW. Chairman Benesh noted the idea is to be able to get a fire truck up to the house. Joan noted the exception would be conditioned on getting a waiver of liability. If this were just a driveway no inspection would be needed; the Board feels an inspection is called for because of the bridge. While Chairman Benesh would like to apply the condition about how the bridge has to be engineered Dave feels this should be left to the town representatives who will be inspecting the bridge as discussed above. Any cost to engineer the bridge is the owners'. Ken is concerned with this discussion; Chairman Benesh noted all driveways have to meet the town of Jackson and state standards. Ken asked to see the document that supports that statement.

Jerry doesn't see how the condition that it not be subdivided applies; Chairman Benesh noted if the Evans' subdivided then they would have to meet other standards. Jerry noted they would only have to meet the ones that apply now; Brian agrees. Jerry feels the Evans should go to the Planning Board; he would object to voting in the affirmative to grant the exception until the proper authorities have commented on the bridge.

A waiver of municipal liability would have to be added as a condition to the exception, if one is granted. Joan would like to give the Evans more articulation as to what the Board is looking for. Dave noted the Board is looking for some statement regarding who owns the bridge and that the access to the property is a driveway not a travel way. Chairman Benesh wants to make sure the Fire engine can turn into the driveway and make it across the bridge; he doesn't want to see the town's equipment get stuck; in addition, if a vehicle were to go through the bridge there would be pollution to deal with. In order to approve the exception to enforcement; the applicant must prove to the town that the bridge is adequate.

Jerry noted this issue isn't going to go away; the Planning Board and/or the Selectmen should discuss how to deal with this. Chairman Benesh agrees; the ZBA is appropriate to deal with this as an exception; but both Boards need to be involved. This Board's members seem to be the only ones looking out for the town; someone has to make sure the access is appropriate for the intended use and set some standards for the bridge.

Chairman Benesh suggests the Board reach out to Engineer Phillips and Inspector Chalmers about this case; he'll take a crack at the language but Engineer Phillips and Inspector Chalmers need to make sure the bridge meets reasonable specification. Ken noted it is typical to have a licensed engineer certify suitability for traffic prior to issuing the building permit. David is concerned that the Board is now telling him he has to have the bridge inspected; it was clarified the Board is asking town staff to perform that inspection.

Dave believes the Board needs advice from Engineer Phillips and Inspector Chalmers about how to word the conditions and would like to continue to Hearing to next month's meeting; he's not

comfortable granting the exception and then having the town representatives inform the Board about “this and that” turning up during inspection. Chairman Benesh believes the Board can grant the exception with the three conditions of not being subdivided with that restriction being recorded; having a signed waiver of risk liability and that the bridge meets the reasonable standards of the Town Engineer and the Building Inspector. Dave thinks the Board could get that input and grant the exception next month; the Board can’t grant the exception until it knows how to write the conditions; the Board should get input from the Fire Chief too. Bob isn’t sure why there’s so much concern about getting fire engines up there as the Fire Department has hoses long enough to go from the road.

Dave Mason, seconded by Jerry Dougherty, made a motion to grant the exception subject to the following conditions which the Board will have drafted for its July 17, 2013 meeting: Construction of the bridge will allow for emergency vehicles; the lot can’t be subdivided; the owners will sign a waiver of liability which will be recorded. The motion passed 5-0-0 (Benesh, Aubrey, Walker, Mason, Dougherty). Ken thanked the Board for its input; he will put together a list of the recordable restrictions for the July meeting.

Dave Mason, seconded by Jerry Dougherty, made a motion to continue the Public Hearing to July 17, 2013 at 7 p.m. The motion passed 5-0-0 (Benesh, Aubrey, Walker, Mason, Dougherty).

Dave Mason, seconded by Brian Walker, made a motion to adjourn at 8:10 p.m. The motion passed unanimously (Benesh, Walker, Dougherty, Aubrey, Mason).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary