

Jackson Board of Adjustment

December 21, 2011

UNOFFICIAL UNTIL APPROVED

Draft December 21, 2011

Members in Attendance: Frank Benesh, Joan Aubrey, Dave Mason, Brian Walker. Alternates attending the meeting were Gino Funicella and Martha Benesh. Martha D. Tobin is the Recording Secretary. Members of the public in attendance were: Kevin Dickie, Patricia Dickie, Jeff Mallett, Beatrice Davis and Bob Davis.

Chairman Benesh called the meeting to order at 7:02 p.m.

Approve the Minutes of November 16, 2011 Chairman Benesh asked for corrections; Joan Aubrey noted she has a couple of corrections: In the first sentence regarding the Dickies getting the permit for demolition, they reframed at 20' x 16' not 20' x 15'; in the middle of the paragraph the Minutes should reflect that they would use the 2" x 6" framing to accommodate larger windows to help for egress from the second floor. Gino noted Brian's last name is Byrne not Burn; Dave Mason noted they added on 80 square feet not 40 square feet. Joan noted on page 2 the sentence that states the entire house is in the setback should be struck as they are talking about the porch and there is a portion of the porch that actually meets all the setback requirements. Rather than striking it was amended to state that substantially the entire house is within the setback excluding a portion of the porch. **Gino Funicella, seconded by Joan Aubrey, made a motion to approve the Minutes of November 16, 2011 as amended. The motion passed unanimously (Benesh, Aubrey, Mason, Walker, Funicella, Benesh).**

Motion for a rehearing (Dickie) Chairman Benesh noted that tonight the Board is meeting to consider a motion for a rehearing that was received from the Selectmen; this means the Board is being given an opportunity to first decide what it did was right and then the Board would simply deny the motion to rehear; the second option, if the motion raises something substantial, the Board would have a new hearing or the third option is the Board could basically decide it can't decide tonight; suspend the meeting and make a decision at another meeting to be held very soon. The Board needs to respond to this motion within thirty days which means there has to be a response by December 24th; Chairman Benesh noted that to have tonight's meeting suspended to come to a conclusion at a later date is a legitimate outcome. There is a question as to why the Selectmen filed the motion; they were not at the meeting; any concerns should have come out at the hearing on November 16th when both sides could respond. Joan noted the ZBA didn't err in process; the meeting was noticed properly and the town received notice as an abutter so the Selectmen either knew or should have known; the Selectmen had already issued a building permit to reframe the second floor; why are they filing an appeal; this property came to the ZBA with the permit already issued. Chairman Benesh noted the Building Inspector raised the issue; Dave noted there was a change in what the Dickies wanted to do regarding reframing the second floor. Gino noted there is nothing mentioned by the Selectmen that changes the facts. It's not fair to have a decision then to have someone after-the-fact raise a question. Dave does have questions about what the Selectmen have

to say; it's not open and shut; he wants more time to look, search and talk; he's not in a position to deny or accept the motion to rehear the decision tonight. Frank asked that Dave put that aside and let the Board discuss the issues the Selectmen raised and decide what to do about it; the Chairman of the Selectmen is here tonight so perhaps the Board members could get clarification on these concerns. Brian agrees it is worth walking through the concerns to determine what is valid or not.

Before moving on Chairman Benesh asked if the Board members had any other comments regarding the Selectmen's standing to raise this. Dave noted the Selectmen have standing to request a rehearing; they represent the town but if there was a concern they should have notified the ZBA of those concerns before or during the hearing. The fact that there was a permit issued by the Selectmen to reframe is a problem. Gino noted that never has the ZBA had a motion for a rehearing and in this case the issue is inches; the decision was unanimous. Dave noted the issue, for him, is if the Selectmen had this information they refer to in their motion why didn't they bring it forward.

The Board went through the motion from the Selectmen and commented on the issues raised. Joan noted there's a statement that the reframing on the second floor that increased the interior space wasn't required to meet code; she pointed out the minutes of the Selectmen's meeting quoted that fact; the Building Inspector told the Selectmen that. Dave noted there is a gray area; if this is considered as new construction then one would say it needs to be built to current codes. He believes this work meets the definition of new construction because it's substantial however if this is considered an existing building then it would be questionable as to it having to meet codes. Dave pointed out the master plan includes as an objective that all new construction and substantial reconstruction meet new codes. Chairman Benesh also thought it was new construction. It's a given that what the Dickies are doing is not in compliance with the Zoning Ordinance; that's why they are coming to the ZBA. Joan noted a variance is a relaxation of the Zoning Ordinance; Martha pointed out it doesn't mean a relaxation in the building code. The Selectmen's first point doesn't say "grant a rehearing" to anyone on the Board. Brian asked if the Board were to have a rehearing could it come to the same decision and Dave noted if the Board thought that then there would be no reason to have a rehearing. Chairman Benesh noted it is very unusual for Selectmen to submit a Motion for a Rehearing and he's having a hard time understanding what the point was; Joan reiterated that safety is bigger than just the building code. The next item noted the proposed windows don't have to meet the egress standards but Dave noted that in a sleeping area you have to have an egress window and it has to be a certain size; the Board is not tied to what the building code requires; Brian noted the Selectmen's argument is that the Dickies don't need the extra space to put in bigger windows; Chairman Benesh noted that's true, they could do gables. The Board discussed whether this work required emergency egress windows and Dave noted this is why he thinks the Board needs more time to review this. It was noted that Jackson's Zoning Ordinance allows deviation for meeting safety needs; further if work is for safety it doesn't even require a variance. Chairman Benesh noted his willingness to vote yes in the first place is that this building is completely within the setback; there is no place for them to expand and there have been a number of cases that this Board has allowed others to do so. Dave pointed out that is not to say that someone who buys should expect to be able to expand. Martha noted anybody

could have come to the Board to ask this; the variance goes with the house not the owner. Chairman Benesh would like to review a few properties that have been allowed to expand; most recently the Board allowed Larry Garland to go from a flat roof to a slant roof largely because of safety and convenience; prior to that Brian Byrne, whose entire house is within the setback was allowed to build up from six to seven feet in height; also he was allowed to reframe the roof. Another case was the property of John and Jennifer Healy at 65 Thorn Hill where the lot is long and narrow; the building-envelop for setbacks is only fifteen feet wide. They had a deck and they wanted to put screen in; the Board thought it was a hardship as long as it was not turned into living area. Dave pointed out that in that case they went a little further into the setback to have stairs to exit the deck; the screen room on top of the deck is a huge increase in volume. In September 2008 McCleary got a variance for a pump house; in February 2007 a bulkhead into Wayne Peterson's basement was allowed by the Board; it was pointed out that approval was after-the-fact; this Board has also turned down a lot of variances without hardship. There are a number of properties that have so much land in the setback; what was being requested by the Dickies was modest. As far as causing harm to others or the town; it was difficult to offset the reasonable things being asked of the Board; this is not as unusual as would seem.

Martha noted she read the state fire marshal's letter and windows have to meet code and egress; Dave noted if this is considered new construction a window in the sleeping area is needed; if it is not considered new construction then they could keep the same size windows. This all comes back to safety; the Board would rather give them a larger window than see someone trapped or killed; they have a right to build a safe home. As far as the increase in square footage, Martha noted we're talking about a 2.5% increase; it's not a big expansion; if one takes into account that they lost about seventy square feet when they put in an entryway then overall they are losing 4%. Dave thought they took the area that was the sun-porch and turned it into living area but was informed they took a chunk of it out to form a 7' x 10' entry way; that's a loss of seventy square feet; they are asking to add eighty square feet for a net increase of ten square feet. It is fair to say the Board isn't looking at this from the perspective of the building code but safety and the Board considers this to be new construction which has to meet codes. If this was such an issue why didn't someone focus on it? Gino asked Selectman's Chair Bea Davis who wrote the letter requesting a rehearing; she noted it was written by Selectman Dougherty. Gino noted this Board made its decision and now the word he is hearing is that the Dickies lied; there is nothing in the Selectmen's request for a rehearing that says the Board made a mistake in its decision. Regarding the expansion of the deck to add a stairway to the ground; Dave noted the Building Inspector suggested the Board consider this for safety and common sense; not because the building code requires it. Martha picked up the plan of the property; circled an area and noted this is the only place they can actually build; there are two feet on the property that they can build on with no variance. Though an existing building is not required to meet building codes, Chairman Benesh reiterated they could have met the egress with gable end windows; Martha countered there is a sixteen foot drop. Joan pointed out there are lots of ways to address safety and the Selectmen should have come in with suggestions; this Board can't re-engineer the Dickies' house. Dave noted the Selectmen are considering this an existing building not new construction. Selectmen's Chair Davis noted the Selectmen were

concerned with the increase in the volume where they went out two feet on two sides; Chairman Benesh noted that was the requested variance which the Board granted because the change was modest and there was hardship due to the entire house being in the setback just like the five other examples he listed earlier. No one is saying if there was nothing there the Dickies could build a house there but given that there is a house already there this was viewed as a minimal request. Selectman's Chair Davis noted she had been told she wouldn't be able to talk at the original meeting about this variance; Chairman Benesh noted it was a Public Hearing and folks are asked to give their input there. This Board thinks this is new construction; it's all new electrical and plumbing work and needs to meet current codes; Chairman Benesh discussed this with Building Inspector Chalmers and he supported the finding that the second floor is new construction. The second floor construction couldn't be there without reinforcing the ceiling.

Brian noted item 3.4 (Findings of Fact) is the Selectmen's big concern. Chairman Benesh noted that the house being within the setback didn't come out as strongly as it might have in the ZBA's decision. Joan noted there may be other properties within the setback but this Board doesn't know if any others of those will come in to request a variance. Chairman Benesh noted he's looking at the hardship due to the unusual setback; there are not many existing homes on 0.1 acre. Martha noted all this volume stuff is due to the issues the town had with the Snowflake Inn; this house was built in 1870; the state took land for the road; it seems like everyone around the Dickies can do what they want but the Dickies can't. Chairman Benesh pointed out there are other properties like the Wild Cat Tavern that can't expand up; there are homes on Tyrol where the owners want to go up too; this is unique and doesn't apply everywhere. Joan reminded the Board that this was discussed the night the Board made its decision; Brian also pointed out this did not set a precedent at all. Dave noted the volume increase does violate the Zoning Ordinance but not the spirit of the Ordinance. Regarding the Selectmen's concern over 3.6 Chairman Benesh noted the Board made the decision to grant the variance not due to the building codes but for safety and that it was not unreasonable. The Selectmen are arguing there were other ways to meet egress needs but the Board didn't find that was the case; they agreed egress was an issue for both the second floor and the deck. Gino believes there is no reason to change this Board's original vote; the Selectmen can go to court and overturn it if they want; Jackson has been to court twice with far more pronounced issues; if they take it to court the town will spend a ton of money and will lose. Brian noted the Selectmen's motion for a rehearing claims they have new information; where is that information; why wasn't it put in the motion? The Selectmen are saying they have new information that counters what was said at the hearing meaning the Board made its decision with faulty information. Chairman Benesh noted there's a difference between "new information" that would have been reasonably available had the Selectmen arrived at the November meeting versus new information that wouldn't have been available at that meeting. Their argument is much stronger if it wasn't generally available information; Dave wondered if the Board should suspend its decision and give whoever has the new information the opportunity to tell about it? If this Board denies a rehearing and the Selectmen want to go to court they can't talk about the coming to light of new information unless an injustice would be done. Joan doesn't feel the Selectmen can persuade the Board without having provided the information they say they have. Dave noted if the information wasn't available at the

time of the meeting it's an egregious withholding of information; the Selectmen should have provided the information; this is innuendo. Chairman Benesh agrees the Selectmen had an obligation to supply the reasons.

Gino would like to deny the motion for a rehearing; the Dickies have money invested; Martha reminded him that money is not a consideration for this Board; the Dickies could have waited on their work. Joan noted that she respects the Selectmen and regrets they didn't speak their concerns at the November hearing; she believes the property is unique; nothing that has come forward proves the Board made a mistake.

Gino Funicella, seconded by Brian Walker, made a motion to deny the motion for a rehearing. Chairman Benesh asked for comments and Dave noted he thinks the Board made a correct decision based on the information it had at the meeting; if the Board had more information they might have seen it differently or perhaps the Board would have come to the same decision. It was noted that sometimes in rushing to make a decision the Board thinks it is helping everybody out and it ends up with a decision that is hard to justify. Gino argued the vote was unanimous last time and after tonight's discussion the Board still agrees it was correct. Joan noted there is nothing that says the Board made a mistake; absent any other options it's not the Board's job to re-engineer the work. Chairman Benesh noted he's having a hard time thinking of some reason that even begins to be questionable as to a mistake being made in this decision; his only uncertainty is do the Selectmen have a right to write the letter moving for a rehearing and Dave reiterated that the Selectmen do have the right to move for a rehearing as representatives of the town. There was no further discussion. **The motion to deny the motion for a rehearing passed unanimously (Benesh, Aubrey, Mason, Walker, Funicella, Benesh).** The motion for a rehearing is denied and Chairman Benesh will write the response.

Set Date for Annual Meeting (January 18, 2012) Chairman Benesh noted there is a requirement for the Board to have an annual meeting in January to elect a Chair and review its bylaws including the possibility of his being able to submit files electronically versus having to scan them; the Board needs to include telephonic response in its bylaws as well. The meeting will be held on the regular meeting night of the third Wednesday in January (1/18/12)

Dave Mason, seconded by Martha Benesh, made a motion to adjourn at 8:11 p.m. The motion passed unanimously (Benesh, Aubrey, Mason, Walker, Funicella, Benesh).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary