

Jackson Board of Adjustment

December 12, 2012

UNOFFICIAL UNTIL APPROVED

Members in Attendance: Frank Benesh, Joan Aubrey, Brian Walker, Dave Mason. Alternates attending the meeting were Martha Benesh and Dave Matesky. Martha D. Tobin is the Recording Secretary.

The Chairman called the meeting to order at 7:05 p.m.

Variance Application from Robert Ruppel. Chairman Benesh reviewed tonight's procedure; he noted the Public Hearing will be opened, the applicant will talk about what he wants and why; interested parties, generally abutters, will have an opportunity to ask questions, express support or opposition and then the Public Hearing will be closed and the Board will deliberate; the Board may or may not make a decision tonight; the Board may ask for input from the town attorney or may write a decision; the Board would then reconvene and finish the discussion. Since Gino Funicella is absent, Martha Benesh will be the voting alternate; any decision requires three of the five votes to pass.

Chairman Benesh opened the Public Hearing at 7:07 p.m.

It was noted that abutters were noticed. The Hearing was also noticed in the *Conway Daily Sun* and in the E-news.

The issue is intrusion on the setback; substantially the entire garage is in the setback. The Board can decide to not grant a variance or ask for a more precise measurement. Whether it's half the garage or the full garage, the legal issues are the same.

Robert Ruppel joined the Board; he noted the road won't be as close as twenty-five feet; half of the garage is within the setback. Chairman Benesh noted there is some uncertainty regarding the ROW; he asked if the actual ROW would be determined by stakes in the ground. Robert affirmed that would be the case. Until then the actual ROW won't be known.

Robert noted a property owner should be allowed to enjoy their property; to the extent that the zoning rules unreasonably interfere with that then they should be waived and that's why he's here. This property is 1.4 acres with a fifty-foot setback on the road and twenty-five foot setbacks on the other boundaries; when looking at what he has for buildable area the best location is where he proposes to put it; it will be dug into the hill.

Robert feels this would meet the spirit of the regulation and would not be contrary to the public interest as it will enhance the neighborhood. Dave Mason wondered why Robert located the garage where he's proposed as opposed to the left of his house; Robert noted it's where it is due to the proximity to the house itself and because he wanted the ability to get from the garage to the house. The potential builder, Rob, reviewed the plans; he noted it would be at least double to site it where Dave suggested. In terms of whether a

variance would do substantial justice; Robert noted most of the houses in the neighborhood have garages so it wouldn't be inconsistent. That's his explanation; as he gets older he is concerned at not having a garage; he wants to have some shelter and a place to unload the groceries.

Chairman Benesh asked if Robert had considered placing the garage on the current driveway; Robert noted it would interfere with his view; he also doesn't think it would look good; it's better to be out of sight. Rob noted the drive is fairly narrow and slopes on the side.

Joan asked if Robert had considered moving the garage closer to the house; Rob noted there is a gas tank that is 10 feet from the house, he believes he's cut this as close as he can.

Martha noted if these folks cut into the side of the hill they will have to reinforce the road that goes by there. Rob noted that would be a consideration but his take is that the people who do the excavation will make that determination. Dave reminded them the building inspector would be involved too.

Chairman Benesh is struggling with understanding this request; setbacks should apply to everybody in the same way; the variance exists for those properties that are unique or special compared to other properties; it appears what Robert is saying is that this property is unique based on having a rectangular property and the frontage is on the long side, not the short side, of the property. Robert noted the road curves around forming two sides; the surrounding properties have one-hundred-fifty feet of road frontage and he has five-hundred-thirty feet; that's the issue. Dave noted Robert's lot is not as deep as the other properties which makes it difficult to meet setbacks; that is what makes his house unique.

Joan asked when the home was built; it was built in 1988.

Martha asked when Robert bought it; he purchased it in 2006. Martha noted there have been no changes to the Zoning Ordinance since he bought it; Robert noted the original covenants, which have since expired, had a fifty-foot setback.

Chairman Benesh took out the map for the Board to review.

Martha noted there is an easement that goes across this property; Robert doesn't know what it is; Martha noted it looks like it is next to the ROW for the town; easements usually have owners; the association used to own this but the association doesn't exist anymore; she wants to know who owns it; she doesn't feel the Board can approve the building without knowing who owns the easement. She was reminded the ROW for the utilities on ***??Tempee Road *** (sorry) was owned by an association. Dave noted if the proposed garage were being built on the easement then that would be germane; in this case it is not. Martha is just asking to have it looked at. Robert reviewed his understanding of where the ROW is; it was explained that measurements are not from the edge of the property, they are from the sides of the ROW. This property has the ROW so there is another ten feet he can't do anything with. While the plan shows he is twenty-seven feet from the ROW this has to be looked at; the Board needs to know where the ROW is.

As there were no further questions from the Board at this time; Chairman Benesh noted this is the part of the Hearing where he asks if anybody would like to speak; he did get an e-mail from Joseph; they are abutters and Ginger and he have reviewed this plan and have no objection as long as the garage is placed per the drawing. Walt **** and Kathy have reviewed the plan and it looks to them like it would be a nice improvement; he hopes to help resolve any issues and they are here in support of it. Joe Vella is an abutter, too; he has no issues and hopes it goes through for him.

The Board was asked if there were any further questions; there were none.

Chairman Benesh closed the Public Hearing at 7:34 p.m.

The Board began deliberating; there are five criteria the Board must consider when determining whether to grant the variance; some of these will be fairly straightforward; proving unnecessary hardship will generate discussion.

1. Granting of the variance would not be contrary to public interest Chairman Benesh has a letter from Town Counsel Peter Malia from last September regarding this not being contrary to the public interest. The question to consider here is would it alter the essential character of the neighborhood or threaten health or public welfare. Joan is concerned that he is cutting into a hill near a road; cutting into the hillside might cause the road to collapse so that is a public safety issue; Dave noted they won't be able to cut into that slope without meeting engineering standards and that answers the safety considerations. Martha pointed out that it was deemed too expensive to build on the low side and wondered about building on the high side; she was informed it's eighteen feet from the base of the garage to the road; that's pretty high. Dave pointed out that the cost of doing it one way or another is not for the Board to consider.

Martha is still concerned with the association; the intent of the neighborhood was to have fifty-foot setbacks. Chairman Benesh doesn't think the Board's decision on the variance is affected by this; whether another entity wants to enforce the fifty-foot setback is up to them; there are two of the abutters and a letter in support; those who should be most concerned don't believe it will alter their neighborhood. Dave noted the character of the neighborhood is rural-residential.

Chairman Benesh asked who built the three houses up by Kevin Killourie; Kevin complained that the Planning Board let it happen without requiring screening and no variance.

Joan noted the Board can't answer what conditions would be reasonable if they don't know about cutting into the side of the hill. Dave noted that is not the Board's issue; it's for the engineer and building inspector although the Board could add the condition that the cut needs to be engineered properly. Joan noted the cut could change the visual character of the neighborhood. Dave noted no one will even see it from the road.

2. The spirit of the Ordinance is preserved The Board agreed about this during earlier discussion.
3. Substantial justice is done, the loss to the individual is not outweighed by the gain to the general public The criteria that substantial justice would be done means any loss to the individual is not outweighed by gain to the general public; there is a balancing here. Dave noted not granting the variance isn't going to result in more gain to the town/general public than loss to property owner; that would be an injustice. Joan noted the Board is not saying he can't build a garage; he just has to put it in a different spot. Dave noted if the Board has him set it somewhere else he'll lose the esthetics of his house; he wondered what the gain is to public; he doesn't see any big gain by denying this variance.
4. The value of neighboring properties is not diminished The Board has the information provided by abutters as well as the property tax information. Objections may be taken that property values may be decreased but those wouldn't prevent granting the variance. No one is saying there's a problem.
5. Literal enforcement of the Ordinance would cause hardship The hardship test means that there are special conditions of the property that distinguish it from other properties that make the variance necessary for the owner to use their property. Martha agrees the frontage is special but the hillside doesn't make it special since everyone in Jackson lives on a hill; there is still a lot of property they could use to build the garage. Dave noted these folks have very little buildable space due to the shape of the property which is different from the properties around it. Joan noted these lots weren't big lots but they all have a spot to put a house; they all have the same issue. Dave believes the others are all more buildable than this lot. Joan feels the Board doesn't have the terrain information here to determine that. Chairman Benesh reminded the Board its task is to find it special; these are all small lots; is it the long frontage that makes it special? Joan doesn't feel it's unique; there isn't a lot of buildable space on a lot of these lots; his may be the least buildable but none of them are large. Dave noted the uniqueness causes him not to be able to put up garage. Chairman Benesh noted owners are not guaranteed they can build a garage.

Dave noted that unless there is a greater good to the public than the Board is supposed to grant the variance. Joan noted Robert's property is just like everybody else's; everyone has this problem; is Dave saying everybody should get a variance? Dave feels the road curve makes this property unique; it has greater width and depth.

Martha noted that when she drove around there everybody had attached garages, not separate ones. Chairman Benesh pointed out that the Kiernens' garage is twenty-five feet away from the house. Martha noted Robert chooses to put his garage fifteen feet away; he is choosing to not put it in the driveway; that's not a hardship. If Robert moved the tank he'd still be in the setback but not so much in the setback. Dave doesn't think that's necessary as one can hardly see the road from the lot.

Chairman Benesh noted the second part may be easier to address; the proposed use is a reasonable use. This might be more relevant to building on commercial property but not here; Joan noted this is a residential property being used as residential. Frank wants to know how big the variance is here; if the Board seems like it is disposed to go in that direction then the Board needs to get a more precise measurement. Martha wondered what the difference is since it's still in the setback. Chairman Benesh asked if it would matter if it was the house and not the garage; Martha doesn't believe it's going to matter as he won't be in compliance even if he moves it ten feet. The abutters speak to this; folks won't see the garage from the road. Martha wants to know how much space is between the garage and the road so the Board will know the depth of the buffer; normally the Board would expect a survey showing precisely where things are.

Chairman Benesh would like to take a straw poll; at issue is whether the hardship criteria can be met; he asked how many voting members feel they met the hardship test owing to special conditions that distinguish it from other properties. Dave and Brian believe the criteria has been met; Joan is not convinced it's that unique; she pointed out that the Board has turned folks down with less than this due to setbacks; when Helen Mosely wanted a variance for a garage the Board turned it down. Dave noted it is clear these are to be decided on an individual basis. It was noted this is where the buffer becomes important; there are other options to the owner. The building is already fourteen feet into the buffer. The Board agrees the owner can't build in the ROW.

Chairman Benesh noted the Board can attach conditions to the variance; the Board could have Robert move it further away from the road or require that he has to plant certain kinds of trees.

Joan's concern is that going forward she can see the possibility of someone putting a second floor on this and making it a living space; Chairman Benesh is concerned too. Martha is also not comfortable with this; she reminded the Board that folks can go up thirty-five feet in this town. Dave disagreed, noting they can't as that would be expanding the non-conformity. One of the things the Board is concerned about is the effect on the neighborhood; the Board needs to protect the character of the neighborhood; to add thirty-five feet wouldn't work. Martha wants to make sure the Board doesn't leave the door open for that to happen.

Chairman Benesh reiterated that the Board can put conditions on the variance; he reminded the Board its action signals the community as to what might be allowed and where the line is drawn. While the property may be unique, Joan noted that doesn't mean the owner gets all he wants. Dave noted the other lots up there could build a garage and this one can't; that would make it truly unique; their ability to do anything up there is limited.

Chairman Benesh believes the Board has two leaning for; two leaning against and one on the fence with the non-voting member saying to do it. David feels the visual impact will be nothing but Joan believes the Board doesn't have enough information to determine that; the owner needs to provide a survey. She believes the Board should adjourn this to

another meeting to get a plot plan with a survey that shows exactly how far away the building is from the ROW, from the travel ROW and to have information on the visual impact. David believes the vegetation is an issue there too; Chairman Benesh noted if the Board votes yes then it would be only on condition that there would be foliage screenings.

Chairman Benesh is getting the sense there are not enough votes tonight to say yes. He asked Robert if he is willing to have a survey done and come back to the Board. Robert asked how much that would cost; Chairman Benesh isn't sure; he would guess around \$500 to \$1000; the Board needs the precise location of the garage, the precise location of the ROW, the travel ROW and the pavement.

Chairman Benesh noted the building inspector will make sure the footings Robert is going to pour comply; he noted the Board may also propose moving it; Robert also heard that another issue was some kind of requirement for screening and/or maintaining trees. Robert is okay with this; the whole area is wooded. Robert needs to stake out the garage location as part of the survey as well. Robert is not sure how long it will take to do this; the Board's next meeting is January 16, 2013; this decision may need to be delayed if the owners are not able to finish the survey; it will depend on the snow in there. This isn't going to be built during the winter anyway; if Robert can't get a survey for January he will get it for later. Robert thanked the Board for considering his variance and let them know they did a great job covering the issues.

The meeting will be continued to the 16th of January; Chairman Benesh expects there will be another hearing on the 16th as well for an appeal from the Selectmen's decision regarding a trailer on Route 16 because the Zoning Ordinance prohibits tenting and/or trailers in the Village District.

Joan Aubrey, seconded by Martha Benesh, made a motion to continue the meeting at 8:22 p.m. The motion passed unanimously (Benesh, Walker, Mason, Aubrey and Benesh).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary