

## Jackson Board of Adjustment

August 21, 2013

### UNOFFICIAL UNTIL APPROVED

**Draft August 22, 2013**

**Members in Attendance:** Frank Benesh, Jerry Dougherty, Dave Mason, Brian Walker. Alternates attending the meeting were Martha Benesh and David Matesky. Hank Benesh is the Videographer; Martha D. Tobin is the Recording Secretary.

Chairman Frank Benesh called the meeting to order at 7:00 p.m. David Matesky will be the voting member tonight.

**Approve the Minutes of July 17, 2013** Chairman Benesh asked for corrections. No one is able to identify the gentleman who was in the audience; he will remain anonymous. There were no further amendments or corrections. **Jerry Dougherty, seconded by Dave Mason, made a motion to approve the Minutes of July 17, 2013 as written. The motion passed unanimously (Benesh, Dougherty, Mason, Walker and Matesky).**

**Public Hearing 2013-05 Application for Variance – Wentworth** Chairman Benesh opened the Public Hearing at 7:01 p.m. This is a request for a variance to construct a building higher than the thirty-five foot limit; to grant the variance the Board reviews five criteria; if the applicant meets the criteria the Board must grant the variance. The granting of the variance will be in the public's best interest; the spirit of the ordinance is observed; substantial justice is done; the value of surrounding properties won't be diminished and literal enforcement of the ordinance would result in an unnecessary hardship and there are special conditions of the property that require the variance. The procedure is as follows: The applicant will make his presentation and then those who have are an abutter or with a direct interest will have the opportunity to speak. Just being a resident of Jackson or a neighboring town doesn't give folks the right to speak; they have to have a direct interest to be heard tonight. Chairman Benesh will try to keep commentary on point and away from discussion of items which are outside this Board's purview, such as whether the addition will be built using union labor or if there will be an impact on the historical district.

Claude Pigeon, from Couture Construction, will be discussing the application; he's been working in Jackson for many years; he worked on the addition to the Jackson Elementary School twenty-two years ago. He's worked on the Inn at Thorn Hill; Nestlenook and Nordic Village; his firm has its finger on the pulse of the community. This project has fomented and churned for a couple of years; the current building is one-hundred-thirty years old and obsolete. The kitchen and other facilities are not up to par and Fritz wants to improve the experience for the Wentworth's staff and clientele as well as adding inventory. The proposed building sits in the footprint of the existing building and is designed to fit into the lines of the existing hotel. He reviewed the drawings. The area above thirty-five feet has no living space and is only three-point-two percent of the gross building volume. The design is in keeping with the flavor of the town; Claude knows

he's not supposed to address historicism but the ordinance is in place to protect certain aspects of the village. The proposed plan will have no impact on the flavor of the village. He feels it meets the criteria of being in the public's best interest and keeping to the spirit of the ordinance. The reason for the thirty-five foot limit is to prevent "urban rise" with shadows and darkness; none of those will exist with the addition; the area is surrounded by spruce that are eighty-five to ninety feet tall. As far as views go, there is no vantage point that is going to be affected. Fritz has taken great pains to keep the planters and veranda that are in place now; from the pedestrian's point of view what they see will be almost unchanged.

Chairman Benesh would like to know what living space is above the thirty-five foot elevation. Claude noted there would be roof trusses and a twelve to fourteen foot wide corridor for ductwork and electrical conduit through the attic space; the area will have a few windows to provide light; there will be no useful space above the thirty-five foot elevation.

Martha asked what the codes require if no human beings are living in that space; Claude noted the sprinkler system will extend up into the trusses; they'll have to meet all codes. The Building and Fire Inspectors will be involved as will the Fire Chief.

David asked for an explanation of what they hoped to accomplish with this building. Claude noted that expansion occurred in a hodge-podge manner; the kitchen area is hard to deal with and storage is in buildings that are not connected; the facilities for the hotel staff have some access issues. They want to improve the flow of materials into the kitchen area; this has been designed as a new and modern kitchen; they are not reusing any of the components.

Brian is concerned with the hardship piece when the reason to go above thirty-five feet is esthetic; he wondered if there were any other reasons to allow this building to exceed the height limit. Claude noted that on the cash end of things, Fritz needs to develop a certain number of units for the project to carry itself; additionally, in doing hotel construction, there is a certain efficiency in going up three stories; in this case they are looking to create a seamless addition. It is certainly possible to change the design of the building to meet the ordinance but he doesn't think anyone would be happy with a square building with a flat roof. Martha believes part of the hardship is that Fritz has to match the addition to the building that remains as well as having to meet his financial model. Claude quipped he'd be lying if he said they couldn't meet the ordinance but what they have proposed is the only way to meet the financials as well as designing an addition that works with the building.

Chairman Benesh would like to know where the fire access is; Claude showed the areas where the Fire Department would be able to come in; there is a small amount that is not accessible; certainly the fire hoses and ladders would make up that difference. The building is eighty-five percent accessible for fire safety purposes. Dave wondered if plans for access are required under the safety code; Claude noted the applicant is not required to submit them under the IBC or Life-Safety Code. Jackson's Fire Chief and Code Enforcement Officer could approach the Selectmen and make it part of Jackson's local code. Jerry wondered if it would be helpful for the Board to see the full plat;

Chairman Benesh noted the Board could ask for it but the alternative would be to add the condition that the access be to the satisfaction of the Fire Chief, Fire Inspector and Building Inspector. Claude noted he has a site plan but he didn't bring it as he thought he was supposed to be addressing just the height of the building tonight.

David feels this is outside the Board's purview. Chairman Benesh thinks the argument would be that the Board needs to first decide what the purpose of the thirty-five foot height restriction is. Jerry noted the restriction is state-wide for fire safety; it is based on a fire ladder's reach. Chairman Benesh still feels the Board has to decide why this is included in Jackson's Zoning Ordinance. There is potentially a rationale for the thirty-five foot restriction. The Board could add the condition that there be no living space above thirty-five feet. Claude noted the upper-most living space will be well within the thirty-five foot limitation; the occupied floor will be accessible; the new construction will meet code and be state-of-the-art construction. Jerry commented when the Grand Summit exceeded the thirty-five foot height restriction the applicant provided the town with a fire truck with a sufficient ladder; he is bringing up this example to show that the thirty-five foot restriction has only to do with fire safety.

At this time there were no further questions from the Board; the applicant was asked if he had anything to add; Fritz would like to address the hardship issue. The upper area of the existing building doesn't have living space; the only thing up there is his office, a storage area and some air handlers; the new building will be the same; the things in that upper area will be supportive of the structure they are planning to build.

The plan does call for two hot tubs in the tower so folks can enjoy the view over the pear tree; client access will be through the interior while service will be from the secondary egress. Brian asked if the two hot tubs will be above thirty-five feet; the tub will not be higher than the thirty-five foot line. It was clarified that while the base of the tub wouldn't be above the thirty-five foot line, the people in the room would be. Brian is concerned there will be guests occupying space above thirty-five feet; Fritz doesn't see that as living space; folks will be sitting there for a period of time in water enjoying the view. Brian noted the hot tubs are not consistent with what the application says. Fritz noted the hotel currently has twelve of these radiant heat hot tubs; this discussion is an example of how the height restriction is a hardship; it affects the operation of the hotel and the amenities he can offer.

Fritz noted rule number one in hospitality is to segregate operations from the guests. This building will allow for that; he showed the Board the current traffic pattern for staff; staff are having to go outside, upstairs, downstairs and over various grades; in some areas the grade differences affect clients as well. Staff are currently having to carry laundry throughout the building; the new building will include laundry chutes from the second and third floors directly to the laundry and a dumbwaiter to bring the laundry up. Part of the hardship is that he wants to create an addition that looks like it has always been there.

Claude would like to bring up one point; he asked if the Board would be setting a legal precedent with its decision. Chairman Benesh noted the ZBA is not a precedent-setting Board.

Chairman Benesh noted there are letters of support from the Wentworth Condominium Owners Association, the Jackson Historical Society and the Jackson Historical Trust. There is a series of e-mails with Fire Chief Henry and Planning Board Chair Bennett which Chairman Benesh would characterize as supportive but with concerns about the water supply and access to the building; these may be addressed during the construction process.

Dave believes he understands the hardship argument being presented; if Fritz is not able to get the additional height over thirty-five feet, operations would be less efficient and the new building would be more difficult to service. Additionally information has been presented that shows the construction costs would be fairly significantly higher if he were to build within the restriction. Esthetically, the building would be less attractive. Fritz noted if he builds the addition under the thirty-five feet it will look like the little brother that was left behind.

Chairman Benesh invited comments from abutters or those with a direct interest.

Tony Betts is a Jackson resident and a long-term employee of the Wentworth; Chairman Benesh feels that gives Tony a direct interest. Tony noted the design is going to enable them to have hallways without small steps and/or rises in them. For elderly visitors the new design would be safer; for staff that are providing room service with a tray, having to step up and/or down is a safety issue. The new design will eliminate the changes in the surface that both guests and employees would have to traverse; that is a positive reason to let him do this.

Wayne Peterson feels he has a direct interest as a member of the town; he is concerned with the influence this case might have on other decisions that come before the Board. It was reiterated that the Zoning Board of Adjustment doesn't set precedent. Wayne asked if that statement would be captured in the minutes of this meeting; he was assured that was the case. Chairman Benesh noted he is trying to keep commentary to those with a direct interest, a Selectman or an abutter so if the Board makes a ruling those speaking would have standing to move for a rehearing or to appeal the decision.

There were no other comments from the public. Chairman Benesh is going to keep the Public Hearing open in case deliberations call for a continuance.

Fritz would like to raise one more point; Jackson is a seasonal resort area with a short window for construction. He has totally rebuilt the Cottages inside, including Fairlawn which required moving at a cost of sixty-five thousand dollars, between October and June. He would like to begin work in November and be done by July; if the decision gets delayed there will come a point where he would have to say it is too late. They are holding off business, like booking weddings, during that planned construction period so he really needs to know if this project is going to proceed or not.

Chairman Benesh asked if there was anyone from the Condo Association in attendance; there is not. Dave doesn't think the granting of the variance would reduce their property values; others on the Board feel it will raise their values.

Chairman Benesh asked what direction the Board wanted to go tonight; there remains concern over passing the hardship test. There has been a decision regarding a hotel in Portsmouth where the size of the building was an acceptable rationale for an exception. This is the first time the courts have suggested that buildings as opposed to the lot alone could be a driver of the hardship. The potential for not getting an acceptable return on his investment has an impact too as does the potential for loss of business if Fritz can't provide the amenities folks want.

Dave noted the Master Plan calls for the preservation of the atmosphere of the village; the Board has no back-up information regarding the thought behind the setting of the thirty-five foot height restriction. If the Board agrees it is for fire safety then here is a building that will be fully sprinkled and alarmed and the Fire Chief says it's not a problem. The areas where anybody will be are reachable by a thirty-five foot ladder. David reiterated that interpretation of code is not within the purview of this Board. Dave noted it is up to the Board to decide if there would be a significant benefit to the public. Under these circumstances, if the limitation is for fire safety, the benefit of keeping to the limitation doesn't seem to outweigh the hardship of not being able to build a seamless addition and not being able to get the business the applicant wants. If Fritz is required to adhere to the ordinance it would mean not having corridors that tie-in or having to pay more for a building that would stay within the thirty-five feet.

Jerry noted non-conforming properties are not to become more non-conforming; granting the variance would make the property less non-conforming.

Chairman Benesh noted the Board is told to look to the Master Plan regarding zoning requirements that exist. Jackson's Master Plan doesn't explicitly address the views, the small-town nature of the village or fire access.

Jerry noted the Wentworth has been the center of Jackson for a long time. Martha is concerned that this is a building on the National Historical Register. Dave noted that when those buildings were placed on the Register it was established that designation didn't prohibit anybody from doing anything to them. Martha feels it would be dreadful to the town to have a funny looking thing on the end of the existing building just so the addition would stay within the thirty-five foot restriction. No drawings were ever generated to meet the thirty-five foot restriction; if they were to keep to that they would only be able to have two stories or it would have required a different set up with a larger footprint; which would require a different variance.

Wayne has Jackson's bylaws and would like to know where it says that only abutters and those with a vested interest can speak at the Public Hearing; he would like to know specifically where Chairman Benesh's gag-order on the rest of those present is authorized. Chairman Benesh noted it is a state RSA. Wayne noted the town might want its bylaws to reflect this; there is nothing in Jackson's bylaws that limits commentary on applications. Chairman Benesh noted Wayne could go ahead and make a brief statement if he so desired.

Wayne is concerned here with fire science which the Board doesn't appear to be educated in; the Board's preoccupation is with getting the ladder to the windows so guests can get

out. Fire fighters need to be able to access the whole roof in order to ventilate the building; if they can't get a ladder up there, they can't ventilate. The second thing is that everyone keeps saying there are a lot of trees; do the trees help or hinder; he doesn't see what it would matter if it's a flat roof, no one can see it anyway. Folks are focusing on the fact that North Conway has a ladder that can reach the thirty-five feet but they can't get the North Conway ladder truck in there due to the trees.

Chairman Benesh allowed Fritz to respond briefly. He showed how fire personnel could gain access in the front; he may have to move some rocks and other things around to provide access in back; there is access from the east and on Main Street. Currently there are twenty-two rooms on two floors with two egresses each; the new building will have sixteen rooms on each floor with three egresses. It will be far better for fire safety than it is now.

The Board seems to be showing a core of support; if the Board allows this then it can attach a condition that the Fire Chief, Fire Inspector and Building Inspector are satisfied with the access.

The Board will go through the criteria; while not being experts about fire access, the Board does have a letter from the Fire Chief which recognizes that the building is over the height restriction. The Board has to accept what the Fire Chief says and he thinks it is fine with conditions. The spirit of the ordinance is to assure fire safety and esthetics.

**Dave Mason, seconded by Jerry Dougherty, made a motion that the Board finds the granting of the variance, with conditions, will not be inconsistent with the provisions of the Jackson Zoning Ordinance or the Jackson Master Plan. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

**David Matesky, seconded by Dave Mason, made a motion that the Board finds the granting of the variance, with conditions, will not be detrimental to the public safety, health or welfare. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

It was clarified the "conditions" are that Fire Chief Henry, Fire Inspector Gaudreau and Building Inspector Chalmers (the Inspectors) are all satisfied with the access to the building. Whatever they feel is necessary to assure public safety will be the conditions attached.

Brian has a concern with the folks in the hot tubs above the thirty-five feet; to his perspective that means "living space" and the application said there would be no living space above the thirty-five feet. No living space means there is no reason for a guest to be up there. Other Board members feel the Inspectors will consider all these things when they review the project. The Board is giving them the authority to say no if any aspect doesn't meet their satisfaction.

**Jerry Dougherty, seconded by David Matesky, made a motion that the Board finds that substantial justice is done by the granting of the variance, with conditions. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

**Dave Mason, seconded by Jerry Dougherty, made a motion that the Board finds that the values of surrounding properties will not be diminished by the granting of the variance. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

The Board also feels it has sufficiently discussed that literal enforcement would cause unnecessary hardship. **Dave Mason, seconded by David Matesky, made a motion that literal enforcement of the ordinance would result in an unnecessary hardship. The motion passed 4-0-1 (Benesh, Mason, Dougherty and Matesky in the affirmative, Walker abstains).**

Before the Board votes on granting the variance, Chairman Benesh would like to clarify the conditions being attached. Jerry noted the only condition being attached refers entirely to the fire safety issue. It was clarified if there is occupied space above the thirty-five feet then it needs to be understood that the Inspectors all have to be satisfied that public safety is met. They need to be satisfied with access and water supply as well as satisfied with the protection afforded in the hot tub area given the means of egress. Chairman Benesh noted the granting of the variance will be subject to anything that is reasonable and at their sole discretion. Jerry asked him to remove the term reasonable from the statement. The granting of the waiver will be at the Inspectors' sole discretion.

Martha would like to look at the accessibility to the roof; folks need to be able to physically get up there for ventilation; she'd like the Inspectors to address that specifically. Dave noted it has been addressed with the statement that Conway and North Conway have a ladder that can reach over that. Chairman Benesh noted that because the proposed building is fully sprinkled, accessibility to the roof is less of a problem. It was reiterated that Jackson's Fire Chief doesn't think it's a problem.

**Chairman Benesh, seconded by David Matesky, made a motion that the Board grant a variance subject to Fire Lanes and Occupancy above thirty-five feet in the hot tubs being acceptable at the sole discretion of Fire Chief Henry, Fire Inspector Gaudreau and Building Inspector Chalmers. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

Chairman Benesh closed the Public Hearing at 8:24 p.m.

Chairman Benesh noted the variance is granted however, he admonished the applicant that any abutter, person with a direct interest or the Selectmen can file for a rehearing with either new evidence that was not available at the time of this Public Hearing or if the Board made an error in its discussion, within the next thirty days; folks also have thirty days to appeal the decision to Superior Court. Chairman Benesh told the applicant he could expect to see some sort of decision published very early next week and he would then be good to go. If he were to start work immediately he would run the risk of somebody raising their hand during the thirty-day period. If someone moves for a rehearing the Board would meet to see if it accepts the reason for the rehearing; it has to be a compelling reason and or new evidence. If accepted, the process starts over from the beginning.

That being said, Chairman Benesh is not aware of any reason to have a meeting in the foreseeable future.

**Dave Mason, seconded by Matesky, made a motion to adjourn at 8:27 p.m. The motion passed unanimously (Benesh, Walker, Mason, Dougherty and Matesky).**

Respectfully submitted by:

*Martha D. Tobin*

Recording Secretary