

Jackson Board of Adjustment

December 4, 2013

UNOFFICIAL UNTIL APPROVED

Draft December 8, 2013

Members in Attendance: Frank Benesh, Joan Aubrey, Brian Walker, Dave Mason and Jerry Dougherty. The alternate attending the meeting was Martha Benesh. 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.

Approve the Minutes of November 20, 2013 Joan Aubrey, seconded by Jerry Dougherty, made a motion to approve the Minutes of November 20, 2013 as written. The motion passed unanimously (Benesh, Aubrey, Mason, Walker and Dougherty).

Continuation of Public Hearing – Appeal of Administrative Decision, Owner Schoennagel, Map V 02, Lot 53; Denial of a five bedroom septic system design based on Jackson Zoning Ordinance Section 2.3 Chairman Benesh reopened the Public Hearing at 7:03 p.m. The Board has an information packet which includes a privileged letter, which is not to be shared outside the Board, he asked the members not to mention any specifics during discussion tonight either. Chairman Benesh noted the Board can take additional testimony or ask questions at this time; the Board members took a few minutes to review the information packet, which also included a draft decision.

The one thing that is not mentioned is whether Section 2.3 deals with more than new construction or expansion. Chairman Benesh feels the Board should have discussion as to whether or not there was abandonment of the single-family dwelling or if there was a change in use from a lodging house to a single-family dwelling. He suggests in the draft decision that the prior use was not abandoned.

Dave Mason noted there are three tests this case has to meet; items number two and three are met; going from a thirty-four beds to five doesn't make the situation worse and the impact on the neighboring properties can only be positive. The Board could argue this is a new or different use if there is agreement that going from a ski house to single-family dwelling is a change. The other argument is that this is a residence and it's always been a residence. He believes if this case has to meet the three tests in order for the Board to determine this is not allowed then that will be difficult.

Chairman Benesh noted he and Dave have the advantage of having spoken with Counsel. This property meets the test for expansion of a non-conforming use; there is no evidence of abandonment of the single-family dwelling. It changed to a lodging house but there is no evidence that the prior use was abandoned.

Martha Benesh wondered if the fact that the house is somewhat uninhabitable indicates an abandonment of the use; the property was sold as uninhabitable; there's oil in the basement. Dave noted the argument could be made that having a situation that made the

house uninhabitable amounts to abandonment however, he'd like to know at what point the building became uninhabitable. The people who bought it are trying to make it habitable. The town only notified them five or six weeks ago that there was a situation that needed to be fixed. Martha noted a letter went to the (former) owners in 1992. Chairman Benesh noted that even though they didn't immediately do the work the Board would have to argue that the owners were stating the intent to abandon the use as residential. Dave pointed out that Jackson's Zoning Ordinance says the use has to be abandoned for six years otherwise they retain the non-conforming use.

Jerry wants to know how a possible change of use plays here; Chairman Benesh noted no one is disputing that it was a ski lodge; the issue is that they have the right to change it back to a single-family house. Jerry noted there are many lodging facilities that were single-family homes; he wondered if Chairman Benesh is maintaining that's not a change in use. Chairman Benesh noted it is a change of use but not an abandonment of the single-family dwelling. The use was residential; folks were residing there. There is no distinction on the tax records to say this was a lodging facility versus this was a single-family five-bedroom home. Jerry believes it would be appraised as a business not as a residence. Dave noted the appraisal looks at the piece of property not as a Residence or a Bed & Breakfast. Jerry noted assessors look at the comps; they would compare it to other like properties. Dave noted if he were trying to sell this he would want to advertise it as a five-bedroom home. He doesn't see how the owner abandoned the residential use. They didn't knock out any walls; that would have been an overt act that shows the intent to abandon the five-bedroom residential use; there needs to be an overt act or failure to act. Jerry believes the overt act signaling the intent to abandon the residential use happened when the building became a ski lodge. Dave noted the ski lodge may not be a single-family home but it is a residence. Jerry believes a hotel is a residence for many people; they abandoned the single-family use then. Chairman Benesh reiterated there is no question there was a change of use; someone can change the use but not abandon their grandfathered rights to go back to a single-family home. Jerry disagrees.

Joan noted the Board thought the single-family dwelling use was abandoned when it became a lodging house. Now they want to go back to a single-family dwelling which is a change. It sounds like the Board is now saying this property doesn't have to be approached like a new dwelling unit. Chairman Benesh noted the owners changed the use; they had a right to change the building to a lodging house; now they are changing it back; they didn't abandon the right to use it as a single-family dwelling. They have a right to use it as a five-bedroom house.

The Board can stop its discussion right here; that's all the Board members need to make their decision.

There is the separate question of whether Section 2.3 applies to only new construction. The Planning Board needs to look at Sections 2.3 and 6 as they are not clear. Chairman Benesh is having a hard time seeing how it applies to a change of use; there is no evidence of that being the intent. This was put in place to help the folks up on Tyrol and it limited folks to two-bedrooms. The Planning Board needs to decide whether they would sponsor an ordinance clarifying that Section 2.3 applies to an increase in bedrooms and/or does not apply to a change of use.

Joan is struggling with this; if the property were going in the other direction, had it been a lodging house, then became a single-family home then wanted to go back to a lodging house, wouldn't the town require them to meet all codes? Chairman Benesh noted that there would be rules that would apply to a lodging facility as it is a commercial use. Joan noted that the Board is trying to address health and safety issues because of the change of use.

Dave noted if the property is still a single-family residence or the owner has the right to use the property as a single-family residence with a pre-1967 system, DES will allow them to repair or fix that system if it fails. While others argued the owners need waivers that they may or may not get, Dave noted it's been DES's general action to allow this. If the single-family use wasn't abandoned then it will be up to DES whether they get the permit or not; it's not up to Jackson. If the Board agrees with this then it should override the Selectmen's decision. Jerry noted that would be the case unless members feel that going to a lodging house was abandonment of the single-family use. There are any number of restaurants that were single-family homes; he wondered if Dave would just let those all go back to residential use. Dave noted most times there's been an overt act, such as structural changes, when a residence is turned into a restaurant. Dave believes if the owners had been living in the building, say on the second floor, while it was a restaurant then they could change it back to a single-family home. Dave doesn't think that's what the Board is discussing tonight. Jerry disagreed; he believes that when this was changed to a lodging house the single-family use was abandoned. Chairman Benesh thinks the Board has to look at the previous owners' actions or lack thereof at the time of the conversion; if they'd taken down walls or installed a commercial kitchen that would show sufficient intent to abandon the single-family use; the Board is not aware of any structural changes that happened. Jerry noted there were several dozen bunk beds in there; Frank noted that's furniture, not a structural change.

Chairman Benesh believes the Board is not going to reach consensus; he'd like to poll the Board and see how people vote. The Board has to address the issue of change of use and/or abandonment and whether Section 2.3 applies to change of use. There are two important decisions the Board needs to make. If the Board is to uphold the Selectmen's decision then the members have to make a determination that: a) the prior use was abandoned; b) their right as a non-conforming use doesn't meet prong number one of the test and c) Section 2.3 applies to more than new construction.

Dave noted the change or expansion won't render the location less adequate; in this case it will be a more adequate use to have a five-bedroom approved system than to have thirty-four beds with a failed cesspool. The change will definitely impact the neighborhood properties; it will be better. He believes that going to a single-family home from a lodging house is a change that arises naturally from the grandfathered use. Jerry disagrees; the change doesn't arise naturally; it's a change of use. Dave noted the owners are allowed a change of use if it's grandfathered. Using it as a ski lodge is a residential use; it has always had six bedrooms since 1922. Brian agrees with Jerry, he thinks this does constitute a new and different use.

Chairman Benesh agreed the Board can make that argument; there are a lot of Supreme Court cases out there about this stuff; there are no clear lines here. What the Board does have is language and common sense; Jerry noted if the Board affirms the Selectmen's

decision, the Selectmen are not going to ask them to knock down walls to make it a two-bedroom home; it is going to be a five-bedroom home. It is not a behavior of the Selectmen to go in and look at beds in houses but the town would have enforcement power if it's assessed as a two-bedroom home.

Chairman Benesh reiterated that the Board has three questions to answer and how the members decide on those will determine if the Board upholds or overturns the Selectmen's decision.

Joan noted Section 2.3 specifies construction; it doesn't say anything about modifying however the Board took testimony from John Allen about his failed system; he had to take bedrooms out. Jerry believes the proposed installation of a new system meets the definition of "construction"; they are not repairing the cesspool, they are constructing a new septic system. Joan thinks Section 2.3 is referring only to construction of a dwelling, not the septic system. Dave noted the property predates Section 2.3; Joan noted there is evidence that the town has used Section 2.3 to prevent expansion but they aren't expanding. Jerry noted where people are rehabilitating an existing property there is construction. Chairman Benesh doesn't think that was the intent of the town when it approved the ordinance. Joan agreed, noting the Board has to be literal in its interpretation of the Ordinance; it may not be written the way the Board wanted or meant.

Attorney Sager suggested the Board look at whether Section 2.3 applies to a change of use; if the Board determines Section 2.3 doesn't apply then the Board is done.

Helene Matesky noted that she was on the ZBA for six years; if the town has interpreted an ordinance in a consistent way that becomes the rule. The Board has taken testimony from both Selectmen's Chair Allen and Jackson Engineer Phillips that this has been applied consistently when there are out-of-compliance properties. Chairman Benesh noted the Board has also heard other testimony showing that's not always the case.

Chairman Benesh would like to go through each of the three questions he raised.

- 1) Can the Board determine that the owners of this property, either by overt act or a failure to act, have abandoned the use as a single-family dwelling? **The Board voted 3-2-0 (Aubrey, Walker and Dougherty in the affirmative; Benesh and Mason in the negative) that the single-family use was abandoned.**
- 2) Can the Board agree, as a non-conforming use, the owner meets the three prongs for a natural change or expansion of a non-conforming use? Brian asked that each prong be taken separately as the Board agreed earlier that the first prong is the only one that is arguable. The Board is going to take prongs two and three first.
 - a. Prong #2 **The Board voted 0-5-0 (Benesh, Aubrey, Walker, Mason and Dougherty) that the change will make the property less adequate.**
 - b. Prong #3 **The Board voted 0-5-0 (Benesh, Aubrey, Walker, Mason and Dougherty) that the change or expansion will have a substantial (negative) impact on neighboring properties.**

- c. Prong #1 **The Board voted 3-2-0 (Benesh, Aubrey and Mason in the affirmative; Walker and Dougherty in the negative) that the single-family use was not abandoned and the change arises naturally out of the grandfathered use.** Jerry noted the property was a ski lodge; it was sold as a ski lodge; the owners took actions to run it as a ski lodge. Joan noted even as a ski lodge it was still operated as a dwelling facility; it was not a business, like a gas station, being changed to a dwelling.

The Board chooses not to move onto addressing the third question of whether Section 2.3 applies; it has already decided this is a change or expansion of a non-conforming use for which the owners have the right to do so.

Dave Mason, seconded by Joan Aubrey, made a motion to overrule the Selectmen's vote to deny the Schoennagel permit. The motion passed 3-2-0 (Benesh, Aubrey and Mason in the affirmative; Walker and Dougherty in the negative).

Chairman Benesh closed the Public Hearing at 8 p.m. He will modify his draft decision and share it with the Board. He would also suggest the Planning Board modify Sections 2.3 and 6 as they lack clarity. Jerry thinks both Building Inspector Chalmers and Engineer Phillips should be involved in this.

Other Business Bea Davis would like to know if a person got a variance from the Planning Board whether the ZBA can rescind it. Chairman Benesh noted if someone with standing disagrees with a variance they can move for a rehearing with the ZBA or the Selectmen within thirty days. If the motion for a rehearing fails then the case can go to Superior Court however, if it's taken to Superior Court then the complainant can only raise the issues that were discussed at the original hearing. Bea noted someone applied for a variance regarding specific things but now doesn't need the variance and doesn't want to comply with the requirements of the variance. Chairman Benesh noted the variance goes with the land so it is a right that goes with the land; the proper thing would be to approach the Building Inspector about it; if the property in question doesn't need to make use of the variance then ask the Building Inspector whether it's ok or if someone with standing doesn't agree s/he can appeal it.

Dave Mason, seconded by Chairman Benesh, made a motion to adjourn at 8:04 p.m. The motion passed unanimously (Benesh, Aubrey, Walker, Mason and Dougherty).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary