

Jackson Board of Adjustment

November 20, 2013

UNOFFICIAL UNTIL APPROVED

Draft December 1, 2013

Members in Attendance: Frank Benesh, Joan Aubrey, Dave Mason, Brian Walker and Jerry Dougherty. Alternates attending the meeting were Martha Benesh and Gino Funicella. Members Absent: David Matesky. Alternates absent: None.

Chairman Frank Benesh called the meeting to order at 7:02 p.m. He noted Board Member David Matesky has recused himself and is in the audience tonight as an abutter. There are at least three other members that have been represented by Counselor Sager but the Board doesn't feel that's adequate reason to be recused. Since there are five voting members at the table, neither of the Alternates will be voting.

The Board's first order of business would normally be approval of their last set of minutes however Chairman Benesh doesn't have them; neither does anyone else. This will be done at the Board's next meeting.

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 opened the Public Hearing at 7:04 p.m. and noted this is the building that has been known as the Abenaki Ski Club; he reviewed the case before the Board tonight. The Selectmen denied a permit based on Section 2.3; it is the Board's job to determine if the Town's interpretation is correct. The Board's scope is limited to this; it's can't determine if something is desirable or not. The purpose of the Zoning Ordinance is to protect the community and the Board's job is to determine if the Zoning Ordinance has been misinterpreted. The Hearing was noticed in the *Conway Daily Sun* and posted on bulletin boards around town as well as being in the e-news. Abutters were notified by certified mail. All the application material is available online. Pages one through twelve are the original appeal; pages thirteen through twenty-two are additional materials and pages twenty-three and on are letters from abutters.

Town Engineer Burr Phillips noted he went to the site for review; what he saw is a building that's been used as a ski club and has clearly been a ski club for quite some time; at least since the 1970's. The owner is proposing to convert this to a five-bedroom house. The town tax card says there were beds in five of these rooms but having something like forty beds in there shows that it wasn't seen as a five-bedroom, single-family house. The Zoning Ordinance implies that if you discontinue a use for seven years, you lose that use; by extension they are changing this from a ski club to a residential use so they need to comply with the requirements. If they can't comply with the requirements for what they want or have then the Zoning Ordinance says they can have two bedrooms. This is a challenging lot, there are wetlands, poorly drained soil and a stream running through it. While he agrees that the existing situation is less than desirable, he thinks the Selectmen made the right decision. There is a difference between being able to construct a system

of this size and the lot being able to support it. The property requires three waivers to physically be able to put a five-bedroom system on this lot and that would be provided the state grants those waivers.

The defense is saying this has grandfathered status; the Board believes it could be grandfathered as a ski club or lodging house but not as a single-family house. Changing this to a single-family residence is not a non-conforming use however it is a change of use.

Joan noted the purpose of the Ordinance is to protect public health and safety; the town engineer has stated a five-bedroom system can't be done without waivers on this lot. There would be too much waste being put into this lot. If the owner chooses to put in a five-bedroom system but is only granted two bedrooms, that becomes a matter of enforcement. The leechfield could be made large enough but it would not be appropriate to the environment.

Martha noted Amonoosuc Survey says the owners don't have enough land to do this; if the surveyor says this is the case, why is the Board going through this process. It was noted the owners had the right to appeal the decision and have done so.

Jerry noted the Board is being asked to decide if the Selectmen erred in their ruling; he asked Engineer Phillips if they made that decision based on his skills as an engineer and understanding of Jackson's Zoning Ordinance. Engineer Phillips believes that was the case. Jerry noted he's not a soil scientist or an engineer. He asked Selectmen's Chair John Allen if the Selectmen's decision was based solely on the recommendation of the Building Inspector and Town Engineer; John agreed it was.

Chairman Benesh thinks the Board is saying that while this isn't construction, the change of use triggers the need to comply with this Section.

Engineer Phillips noted Section 6 applies to subdivisions; some are saying this is a lot of record so Section 6 doesn't apply; if that were the case then anyone with a lot of record can do what they want with it. The town developed Section 2.3 that applies to lots of record.

Frank would like to push the question a bit more...there's a three-bedroom house on Tyrol; it's a small lot and is non-conforming; it needs a new septic system. Would the Board contend that the system would have to be limited to two-bedrooms in this case? Dave noted that would not be the case because this is a lot of record with a three-bedroom house on it. The issue driving this denial is the change of use from a ski club to a single-family house.

There were no further questions or comments from the Board; Chairman Benesh asked for the applicant's input.

Attorney Richard Sager is representing the applicant; he noted his client disagrees with the decision for a number of reasons. Attorney Sager provided a series of deeds for the house going back to 1922 all of which list this as a parcel with building and land; that description never changes so we know the building has been there since at least 1922.

This building has always been a five-bedroom house and we know that from a number of sources; the town tax assessment card from 2005 refers to the house as having five bedrooms; a letter provided by Elaine Smith-Fugere states that she lived in the home until 1981 when her mother sold it; it had six bedrooms at that time; her parents' bedroom was on the first floor and there were five bedrooms on the second floor.

As far as this being a change of use, Attorney Sager disagrees; it's always been a five-bedroom house; it's still a five-bedroom house. Even when it was being used as a ski lodge, and Attorney Sager pointed out there was no permit issued for that, that probably went into effect before Jackson had Zoning but essentially, this has continued to be used as a house, it was not a gas station, it was not anything else; people slept there, they ate there, they used the bathrooms, the use hasn't changed. There is the same amount of wastewater regardless of what is in the ground; if there is a five-bedroom house, which there is, there should be a five-bedroom system not a two-bedroom system.

Attorney Sager would also like to point out that he is not sure why the town didn't do something about this property before now; this property was supported by a failed cesspool that was bubbling over and apparently draining into a stream. If someone reported this, the town would have inspected it, it would have failed and then the owner would have had to replace it. Attorney Sager believes that system would have been replaced with a five-bedroom septic system as there is a five-bedroom house on the property.

In reading letters from the abutters, their concern is about bulldozing the current building and putting in a big house, Attorney Sager wants folks to understand that this can't be done even if the new owners wanted to. The lot is too small to put up a new five-bedroom house so that was never their intention; they are actually renovating the house, sanding the floors; they plan to stay here and use it as a winter house; he understands the owners live in Florida. They are trying to do the right thing; a five-bedroom system costs more than a two-bedroom one would. If this building was used for skiers to sleep and they removed some of the walls and transformed it from a five-bedroom house into something else then that would be a plan to abandon the five-bedroom structure. This building has the same layout as it had in 1922 and it's been taxed as a five-bedroom house; the state will approve this system for a five-bedroom house if the state gets the okay from this Board to overturn the Board of Selectmen's decision.

Dave wants to know how Attorney Sager knows the state will approve this; Attorney Sager noted there is an email to Burr from NHDES in the Board's packet. The house is grandfathered as a house and this is a repair of the existing system.

Martha noted it is not a repair; it is a replacement; this is a new system; it was a cesspool and now it's a system. Attorney Sager feels repair or replace are the same; the Board disagrees. Attorney Sager is using the language the state would use; if you have a system that existed prior to 1967 when the regulations went into effect then if it needs to be repaired or replaced, the state would allow you to do so. Jerry feels if the system were left where it was and was fixed, that would be a repair; the new system is moved; they are not repairing the cesspool; they are replacing the cesspool with a septic system.

Attorney Sager isn't sure the terminology matters; if you have a system serving a five-bedroom house that was installed prior to 1967, the state says you are allowed to have a replacement or repaired system, whatever word the Board wants to use. It was noted the state says it is allowed if the town says they can do it; the email from DES doesn't say it will approve the waivers; Attorney Sager agreed he doesn't know for sure the state would approve the waivers however, Section 2.3 of the Zoning Ordinance specifies the applicant shall be limited to construction of a two-bedroom home if the lot doesn't meet requirements; Section 2.3 doesn't apply as this is not construction. He thinks if there was no building then it would be appropriate but it's not valid when there's already a house here.

There is also a letter from Badger Realty regarding the house having six bedrooms in the 1990's.

Attorney Sager noted his client is aware of the concerns of the immediate neighbors and he is willing to agree that if he attempts to take down the current building and build a new one then this approval, if granted, will be rendered null and void. Attorney Sager has a copy of a decision written in the Board's usual format should they want to make a decision in his client's favor.

Chairman Benesh noted he'll take input from the Board then move on to abutters and those with a direct interest.

Joan noted this is an appeal of a decision made by the Selectmen so the guidelines in place for the Board are pretty specific.

Martha noted her concern is with the effluent; the last system failed; she'd like to know if there's a study tracking the effluent or how long this went on or how much damage was done; she is concerned with kids playing in the yard with toxic waste. Attorney Sager noted if NHDES was looking at this the owners would have to address it but this didn't happen on their watch. Martha noted they own it now; they could sue the previous owners but they would be responsible for anything that travels through the lot. She wants to know if they are aware of this. Attorney Sager believes that is why he's in attendance tonight, so the owners can take care of this.

Attorney Sager had no further comment; Chairman Benesh asked if Engineer Phillips had any response to Attorney Sager's arguments.

Engineer Phillips noted Attorney Sager is saying Section 2.3 doesn't apply because this isn't new construction. The verbiage may not be completely eloquent but he was around when this regulation was written and the intent was for this to apply to existing lots of record. If this doesn't apply then anyone with an existing house of record can do whatever they want provided it's an approved lot. Chairman Benesh isn't sure he understands the reasoning. Section 6 applies to subdivisions; Section 2.3 applies to lots of record so if the house exists, the owners don't have to meet the minimum lot requirements so he could put a ninety-bedroom house in. It defies logic that the ordinance doesn't apply here; what would be the intent of the law if that were the case? The second comment was essentially, do we want to see, a two-bedroom or a five-bedroom system. There is nothing in Jackson's or the state's regulations preventing the

owner from oversizing the system to accept seven-hundred-fifty gallons per day, the requirement for five bedrooms, instead of three-hundred gallons per day, which is the requirement for a two-bedroom home. This comes across to Engineer Phillips like they are going to do it anyway so let them put in the five-bedroom system.

As far as the building having been a five-bedroom house and it still being a five-bedroom house; the previous owners had twenty-five to thirty kids in those five bedrooms and that's a pretty unusual residential use. Having beds in the house is not the same as it being a residential house. This was a ski lodge; Chairman Benesh noted the tax records have it as having five-bedrooms. Engineer Phillips noted the Assessor only looks at the value based on number of bedrooms not what the rooms are used for or septic. The tax record identifies this as the Abenaki Ski Club; also in the Selectmen's meeting one of the Selectmen stated he knew the cook at the Ski Club, so that was pretty good evidence of use.

Chairman Benesh noted the Board knows the prior owner was the Trust; it was purchased in 1978 from the Steinmeisters, which sounds like it ought to be a ski club as well.

Helene Matesky noted there is evidence that in 1991 the town treated this property different from a residence because it had a fire inspection. Private residences have never been inspected. Chairman Benesh noted no one is disputing that this was a ski club.

Lisa McAlister had hired Inspector Chalmers to look at this property as she was considering purchasing it; he told her she'd be lucky to get a two-bedroom approval. The present owner had to have known there were issues with the soils and this size of a lot. Additionally, the basement was built below the water level, there are two oil tanks down there, it is flooding continually; it's wet down there even when it's not raining. There's water in there permanently so this could be classified as a toxic waste issue. She would like to see the town follow up on this as effluent is going into the stream that flows into a Wild & Scenic River. Those two big issues were the reason she didn't buy this property.

Helene noted the law isn't always reasonable; the Selectmen did what they thought was required by law; she's heard of other properties where cesspools are open and/or overflowing. This is an opportunity for the Selectmen to bring all of these up to standard. Their decision was appropriate; there was no other decision they could have made.

Selectmen's Chair John Allen noted he had a similar situation. The cesspool failed on his property, he had a six-bedroom house and was not allowed to put in a six-bedroom septic system on his non-conforming lot; he could only put in three bedrooms; this was in 1982.

Chairman Benesh will allow Attorney Sager to make some final comments.

Attorney Sager doesn't understand how Section 2.3 applies; Engineer Phillips said the owner could put in ninety bedrooms but that is not so, the state would not allow that; they wouldn't allow more than five bedrooms because that's what the property is grandfathered as. The property owner has rights and his job is to keep the state or town from taking those rights. If you have a house that existed prior to 1968 the state says you can repair or rebuild the septic as needed to accommodate what is there and what is there is a five bedroom house. The owner is entitled to a five-bedroom home.

Engineer Phillips noted he was being extreme when he said someone could put in ninety-bedrooms; his point was that there is a maximum amount of sewage that can go into this soil and a five-bedroom system would put too much stress on it.

Martha wondered if the issues from the Life Safety inspection were corrected; the Board doesn't have to look at this issue tonight but it goes to establishing this as something other than a residential use as individual homes don't have inspections. This property hasn't met the standards for twenty-five years with oil tanks floating around in the basement. She was reminded this is not the Board's issue tonight; it's to decide whether the Selectmen erred or not.

Chairman Benesh noted this is an appeal regarding how the Zoning Ordinance was applied; the Board has to first determine this is something it can review; which the Board agrees is the case. The second decision is whether Section 2.3 applies to a house that originally had six bedrooms then was used as a lodging house with twenty to thirty bunks in those six bedrooms and now going back to a five-bedroom single-family home. It comes down to the intent as well as what it says in Section 2.3.

Dave noted these are all legal interpretations and no one here is a lawyer; he'd like to continue the Hearing to have this addressed by town counsel or other person qualified to advise the Board. Chairman Benesh had informed the Selectmen that the applicant was being represented by counsel and they could ask counsel to attend tonight but they chose not to. Dave feels the members of the ZBA should have the option to ask questions of a lawyer about this.

Jerry noted any decision would be subject to appeal and then it would go to court; it is the Board's responsibility to make a decision which is simply, "did the Selectmen err in their ruling"; they aren't soil scientists or engineers; they went with the input from Jackson's Engineer, who is not a lawyer, he's an engineer. Jerry doesn't see how this Board can find that the Selectmen erred when they were following the Engineer's recommendation.

Chairman Benesh is going to put aside the request to engage counsel at this time; he'd like to discuss what Section 2.3 says and what its intent is. The Board members don't have to be scientists to do this; it's the Board's duty to look at Section 2.3 and to defend it. Jerry noted if 2.3 only applies to new construction then that negates the town's ability to use it. While the Board thinks it's the change of use that is invoking Section 2.3, Dave thinks the Board doesn't have to make that decision without the advice of counsel. Chairman Benesh is not there yet although he hears what Dave is saying. He's still trying to understand the use of Section 2.3 here. If something conforms then Section 6 applies; but that is for subdivisions so does it apply to a single family home on a single lot. The Board has in the past used Section 6 to limit what people can do on their lot; Dundee Road was one of them recently. Those owners had to do a soil survey and ended up moving their lot line as the lot didn't have enough square footage for what they wanted to build.

Attorney Sager is saying Section 2.3 doesn't apply as this is not construction but the Selectmen thought this was a change of use so Section 2.3 does apply. The property isn't grandfathered due to the change of use. If the home burned they would be allowed to

rebuild the home as-is but they'd then have to bring everything, including the septic, up to code. Jerry pointed out that the current size of the bedrooms wouldn't meet current code.

The Board was reminded this is not what is in front of it tonight; it's to determine if the Selectmen erred in their decision; the Selectmen used the best testimony to make their decision; Jerry doesn't see how the ZBA can say the Selectmen made an error. It was explained if the Board agrees that Section 2.3 doesn't apply and the Board agrees there's no change of use then the ZBA would have to find that the Selectmen made a mistake. Jerry doesn't feel that's what happened; Brian agreed; he sees no error in the decision.

Chairman Benesh wondered if the Board could do more to discover what the intent was of Section 2.3 when it was adopted. Dave noted the only way to do that is to speak to those who were around then; Engineer Phillips has already stated what he thought the intent was and Dave was on the Planning Board at that time. It was not intended to only apply to new construction and for Attorney Sager to say it does so is self-serving; if it doesn't apply to buildings that exist then there's no way for the town to control what it is trying to control with Section 2.3.

Joan reiterated the purpose of the Ordinance is to protect the health and safety of Jackson's residents. Engineer Phillips has explained that the land can't support a five-bedroom system. If the Selectmen made a mistake then the town loses its ability to protect the health and safety of its residents.

Chairman Benesh feels what the Board is saying is if there were a three-bedroom house on a non-conforming lot and someone wanted to add a fourth bedroom then either Section 2.3 doesn't apply and there are no controls in Jackson's Zoning Ordinance limiting the number of expansion bedrooms on a non-conforming lot, or Section 2.3 does apply and if you have a non-conforming lot you can't expand the number of bedrooms you have. Dave pointed out the latter has been told to people over and over and over.

The discussion comes down to, "Is this a change of use or not". Jerry noted the Board members have to ask themselves, "Is a ski club a single family home". Chairman Benesh noted this Board may be asked to answer that; Jerry noted he is asking for that answer now. Dave feels the fact that a safety inspection was done means this was something other than a single-family home otherwise there wouldn't have been an inspection.

The Board agrees that Section 2.3 applies because this is a change of use. The change of use negates grandfathering. Martha noted the town can't grandfather toxic waste.

Joan Aubrey, seconded by Frank Benesh, made a motion that the Board finds the property is being changed from a lodging unit to a dwelling unit. The motion passed 5-0-0 (Benesh, Aubrey, Walker, Mason, Dougherty).

Chairman Benesh agrees with Dave that this should be tabled; he'd like the Board to meet again for a vote after he's written up a draft. Jerry noted the procedure has always been that the Board has taken its vote and then the decision was drafted. Chairman Benesh agreed but he'd like to clarify why the Board thinks Section 2.3 applies to a

change of use. It was clarified that Section 2.3 applies because the property is not grandfathered and it's not grandfathered due to a change of use.

Attorney Sager noted he is usually advising Boards, not sitting on the other side of the table like he is tonight; he'd like to offer his input. The Board can't read the ordinance the way they'd like it to be written; Section 2.3 says nothing about change of use and the only way to get to that as an intent is to admit the ordinance is not clear; it says construction. He would encourage the Board to speak with Counselor Malia as they are on the cusp of making a fundamental error in the interpretation of the ordinance. Section 2.2 talks about non-conforming uses not 2.3. He really feels this is a strange case.

Dave thinks the Board has a couple of choices; it can get advice from town counsel and consider its response or the Board can vote tonight then spend time, effort and money going to Superior Court; he feels it would be prudent to get counsel. Jerry doesn't think the Board should make a decision based on fear of court. The Selectmen have been reluctant to spend money on legal fees but Dave believes it will be less expensive to get a couple hours of legal advice now than to have this go to court.

Chairman Benesh gets the sense that the Board would find that Section 2.3 applies because the property is not grandfathered due to the change of use and therefore the Selectmen didn't err in their decision. He is not convinced. He'd like to draft a decision then engage Counselor Malia or somebody else if the ZBA can't use Counselor Malia due to conflicts of interest. Jerry would like a date for this to happen. Chairman Benesh noted he can usually come up with a draft decision within three days to a week however with Thanksgiving next week, the Board agrees to adjourn the Hearing to Wednesday December 4, 2013 just in case there's a need for additional testimony.

Jerry wondered what questions would be put to the Board's attorney; Chairman Benesh would ask the Board's attorney to be in attendance at the reconvened hearing and the Board could hold a Non-Public Session prior to making its decision during Public Session. Dave would like the attorney to answer if the town's evidence supports the Board's belief there's been a change of use and there is no grandfathering. Then, given the way Section 2.3 has been applied, does the Board's attorney agree with Attorney Sager that Section 2.3 only applies to construction. Gino suggested the meeting should be held in Public Session not Non-Public Session. Jerry has a big qualifier; one gets the answers based on the questions one asks. He thinks the Board should ask if the Town Engineer erred in his recommendation to the Selectmen. It was noted that is not the issue; the issue is did the Selectmen err in misinterpreting what was going on at this property. The attorney should be asked if the Board is about to make an error in its ruling.

Jerry wondered about contacting the LGC to save some money. Chairman Benesh noted this case is much more detailed than anything he's brought to the LGC before and no matter what, at the end of their letters they add the caveat that we should talk to town counsel anyway. Counselor Malia may make a suggestion as to a better way to write the finding of fact regarding the change of use which was discussed.

Joan feels it's important that all those hearing testimony tonight be able to attend the reconvened meeting; Chairman Benesh noted it would be nice but not required; Joan may not be able to attend.

Chairman Benesh received permission from Selectmen's Chair Allen to engage counsel.

Chairman Benesh continued the Public Hearing to December 4, 2013, to begin at 7 p.m. at the Town Offices. As this is a continuation and the original notice stated that tonight's hearing may be continued, no new notice is required.

Joan Aubrey, seconded by Brian Walker, made a motion to adjourn at 8:38 p.m. The motion passed unanimously (Benesh, Aubrey, Mason, Walker and Dougherty).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary