

## Jackson Board of Adjustment

May 15, 2013

### **UNOFFICIAL UNTIL APPROVED**

*Draft as of May 26, 2013*

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

Chairman Frank Benesh called the meeting to order at 7:01 p.m. If no one has any complaints, he'd like to move to the Evans case as his lawyer is in attendance tonight.

**EVANS** Chairman Benesh opened the Public Hearing at 7:02 p.m. and reviewed postings and responses to notices. The Board reviewed the rejection letter. Ken Cargill noted this is a 1.9 acre lot and has always been accessed by the bridge; the property owners have an easement deed now; the driveway connects to Black Mountain Road; no one can interfere with the driveway. Ken is coming at this in three ways; he's generated a detailed memorandum. The denial stems from a note Engineer Burr Phillips put on the plans stating there is no street frontage as required. Engineer Phillips is talking about the easement as a street; the Evans driveway is not a street; it's a driveway. Secondly, this is a grandfathered non-conforming use if one assumes the denial was correct; it's been taxed since 1959 as a building lot; there is water serving the property; subsequent laws can't affect that. The town can't deprive the property owner of his rights. Thirdly, the town is estopped from denying this is a building lot as it has been presumed to be a building lot for many years. The deficiency was pointed out to the owner, the owner remedied the situation and after recording the easement the town continued to tax it as a building lot.

Chairman Benesh wants to know how Ken addresses the issue that the street giving access to the lot does not include an easement or ROW. Ken noted this easement is appurtenant to the lot; the RSA talks about private roads that travel a distance; this is a driveway. Chairman Benesh and Joan disagree with this argument.

Chairman Benesh noted this is the Board of Adjustment; it can interpret the Zoning Ordinance and can grant waivers to RSAs. He's not sure the ZBA has the jurisdiction to consider this; the town denied it based on state law. The ZBA can grant an exception, which has not been asked for. The ZBA does not have the authority to interpret if the town is applying the law appropriately. Joan noted there is no grandfathering under state statute. RSA 674.41 allows someone to come in and ask for an exception but Ken didn't ask for one. Ken noted he can do that now; he doesn't think it applies but if so then this should be excepted as Jackson has continued to tax it as a building lot. Joan noted that is interesting but not this Board's concern or issue. Ken noted this is factual information and does belong at this Board; historically the town has treated this as a building lot then says the owner can't build on it. If the Board is troubled by grandfathering then Ken would like the Board to consider estoppel; the owner is entitled to his property rights.

Ken will request a waiver; the owner has, in good faith, made changes to the lot to meet the Zoning Ordinance. Chairman Benesh noted if Ken is going to request a waiver the Hearing would have to be continued as the Board will have to address the criteria.

Chairman Benesh is not sure the Board has jurisdiction for the argument Ken is presenting.

Chairman Benesh asked for input from any abutter or those affected by this case.

\*\*\*Mulloon Road guy\*\*\* noted if this gets turned down there are a lot of other lots that are exactly the same; every time they change hands the town is going to circumcise them and tell them they can't do it. There are others who own land down the road and only have a driveway access to their property.

Jerry Dougherty III asked to speak; Chairman Benesh noted that the Board rules don't allow him to speak but given Jerry's prior role on the Planning Board he will allow it.

In Jerry's opinion the Board made the correct decision and interpreted 674.41 correctly; the attorney is walking around it. There are options; the Planning Board can declare it a street instead of an easement or driveway. The Selectmen have the right to waive the requirement and the Fire Chief can require sprinklers in the house if the street doesn't meet requirements for getting to the building.

Ken noted this is not a policy-making decision; the ZBA doesn't establish precedent. There was no access; there was a meeting with the town and access was established. Chairman Benesh noted he was there when the Board made its decision; their denial was done with the expectation that the owner would be applying for an exception not making this argument. Bea asked if they can come back and ask for an exception. Chairman Benesh would need to postpone the Public Hearing to the next meeting to give Ken the ability to prepare an argument for an exception as this Board has done in the past. There are specific criteria to being able to grant that. There are other avenues; all of them will struggle with the same things; is a twelve-foot easement adequate. Joan noted 674.41 is a way to regulate road access for the town; is the easement sufficient; there are other lots that are going to have the same issue; the Board has to figure out a way to allow owners to have property rights. The Board can either deny this and they can go to the Planning Board or this Board with an exception. Ken would prefer to have the Public Hearing continued. The Board will consider Ken's interpretation.

Chairman Benesh will continue the hearing until June 19, 2013 and Ken will provide the Board with the reasons why this qualifies for an exception.

Bea noted the Board had mentioned a twelve foot ROW; the easement is thirty feet. Joan will clarify this for the next meeting. Ken noted the improved surface has to be twelve feet; the easement is thirty feet. Chairman Benesh wants to know how wide the bridge is; Joan wants a waiver of liability for the town regarding access. Ken will get information to Frank's email.

**Gino Funicella, seconded by Joan Aubrey, made a motion to continue the Public Hearing to June 19, 2013. The motion passed 5-0-0 (Benesh, Mason, Funicella, Walker and Aubrey).**

**Case 2012-02: Robert Ruppel Variance concerning Map V07, Lot 123 Request for a rehearing by Selectmen.** Chairman Benesh noted this is not a Public Hearing; it is a public meeting to have a discussion among the Board members regarding this decision. A variance was granted and the Selectmen or any other resident can file a motion for a rehearing to look at the information; if the Board thinks it made a mistake and grants the motion then the owner will be allowed to start over. The Board needs to determine if justice was served; if there was an error made or if the town can produce more evidence that was not available at the meeting. The Board will not focus on arguments that should have been made but were not. Everyone has the original decision as well as the Selectmen's arguments to use for reference during this discussion.

One of the points made by the Selectmen is that the town may have liability during snow removal and construction may undermine the road surface. Joan noted the Board talked about the health and safety aspect of this; it was clearly stated that the Building Inspector may impose more conditions, such as requiring a bond. The town has a path if there is concern about undermining the road. Dave Mason noted the site disturbance code is another way to address this concern.

Chairman Benesh noted the Board has one decision to make; did it err in its decision.

The spirit of the ordinance is upheld. The Board talked about the purpose of the ordinance being to maintain the rural character of the town. David Matesky noted the Selectmen are not presenting any new information.

The value of surrounding properties will not be diminished. There were neighbors who supported this application; the value of property will not be reduced by putting in a garage.

As far as the hardship argument, Ruppel could have put the garage elsewhere on the property. Dave Mason noted it seems the thought is if you can put it someplace else that doesn't require a variance or a waiver then there is to be no variance. When Dave reads the statute; the property needs to be distinguished from other properties; but only the properties in that development. The Board talked about this and thought there was nothing that distinguished it from other properties in that development.

The proposed use is a reasonable use; the Board agrees it is reasonable to put a garage on one's property.

Chairman Benesh noted the criteria were met and the variance was granted. Chairman Benesh did have a brief conversation with Christine at the LGC who was unable to offer an opinion. She noted it is a close call but she is very comfortable with the thought process the Board went through. Chairman Benesh is hearing consensus that the Board should deny the request for a rehearing. **Dave Mason, seconded by Joan Aubrey, made a motion to deny the request for a rehearing. The motion passed 5-0-0 (Benesh, Mason, Funicella, Walker and Aubrey).**

**Case 2013-01: Boehringer, Map R18, Lot 23** Chairman Benesh opened the Public Hearing at 7:52 p.m. and reviewed postings and responses to notices. The Board needs to understand what is being requested here; Brad is asking to increase the volume of non-conformity; if he were keeping within the existing envelope, keeping the building heights the same, there would be no zoning impact.

Brad let the Board know there are discrepancies between his deed and the Association by as much as twenty feet. He noted this building is set on old telephone poles; he'd like to be proactive and put in a foundation before this falls down. The place has been added on to four or five times so he has to lift the house and he'd like to put a full foundation under it. In addition, he wants to push off the wonky bathroom and square off the building for ease in putting in the foundation. He'd also like to take the five various pitches and make only two; the roof would remain at the current height. When putting in the foundation, his goal is not to lift the house any more if can avoid it; the floor height is now four feet above grade, it would look horrible to be higher but he won't know until excavating starts.

Joan wants to know if he'll be adding a loft or a second floor to the home; Brad noted there is already a knee-high loft in there for storage; there are no closets in this building.

Martha wondered if he'll be redoing the roof to meet current code and if he will be changing the height of the roof. Brad is not going any higher; he doesn't know if he has to meet current code. Chairman Benesh would like to see what the new roofline is going to look like; Brad showed the Board pictures and explained how he planned to match the current roofline.

Martha asked if Brad will be moving the septic system; he doesn't want to touch it. If he had to move it he'd put it closer to the buildable area per the survey. Brad asked Building Inspector Chalmers if he needed to do anything about the septic and he understood there was nothing he needed to do. Chairman Benesh noted Brad needs to show what is there for a septic design; Brad will speak with Ammonoosuc about this but reminded the Board that this is a 0.21 acre lot; if he has to do a new septic system then the house is going to remain on piers. Joan noted the Board is addressing setbacks, which was the reason for the denial. Dave would like input from Engineer Phillips and Inspector Chalmers.

Chairman Benesh noted Zoning is intended to apply to everybody equally; when the Board grants a variance it is due to the uniqueness of the property from its surrounding neighbors. He is struggling to find any uniqueness. Brad noted it's less than a quarter acre and it's constrained on two sides with fifty-foot setbacks. He can't do anything to his property the way it stands. The survey is different than the deed; Chairman Benesh noted sixteen feet on the northern aspect changes the lot; the building would almost fall within the buildable area. Brad noted that is why Ammonoosuc was unwilling to finalize the survey. Chairman Benesh noted these properties are all about the same size; several of the neighboring properties have the same issue.

The Board had no more questions for Brad; Chairman Benesh asked for input from any abutters.

\*\*\* Neighbor lady \*\*\* has the property next door; she believes the line has been moved; the surveyors ribbon is closer to her porch. Chairman Benesh noted this lot line is a problem. She knows exactly where the pins are and what is there. She was told there was no septic system there, that's why she didn't buy that lot. Chairman Benesh asked if she had any comments regarding the requested variance to put in a foundation. \*\*\*\* woman's name\*\*\* wants to see what Brad plans to do otherwise they say no; he's too close to them and it's a very small lot. Chairman Benesh asked to clarify if she is saying he should not be allowed to do this. That is what she means. There's no room; she wants

to see what he is planning to do; her husband is an architect. Chairman Benesh noted the drawings are available online.

The Public Hearing will remain open while the Board deliberates as there may be more questions. Dave Mason noted the prime criteria was to find uniqueness; if there's none then the Board's deliberation is done. Chairman Benesh is having the same issue; there is a whole group of fifteen or twenty quarter acre lots that all face basically the same issues on setbacks. Brad noted that means he can't do anything with his lot; Martha noted he knew the limits on the property when he bought it.

Chairman Benesh noted if the Board wants to proceed tonight; it would be difficult to do anything as there is still uncertainty as to where the boundaries are. Joan noted one scenario doesn't require a variance at all. Dave wondered if the subdivision takes precedence over Brads' deed; Brad doesn't think so. The only way to satisfy that answer is to have a signed survey; Ammonoosuc doesn't know the answer to that question which is why they wouldn't signoff. Dave wondered if Brad were to get a legal opinion that the subdivision, which shows the shorter lot, doesn't take precedence then Ammonoosuc could certify the survey and if the lines are in accordance with the deed then no variance is needed.

As far as taking action tonight, Chairman Benesh doesn't think the Board is going to grant the variance unless someone can find any way this application meets the hardship test. Brad is not sure there are any other corner lots built on; that doesn't matter to the Board. Joan thinks the Board should deny this tonight; Brad can reapply if he gets substantially different information. Dave noted if the legal decision is that the deed takes precedence then this application can go to the Selectmen. Chairman Benesh feels there's no point to continuing this; it can't get past the hardship test; this would also affect view and density to some extent. He may be unfairly burdened but Brad's neighbors all have the same issues. If the deed has precedence than he has the space he needs.

Chairman Benesh has an interesting note; the flood plains are being remapped and the state has the ability to look at a specific situation and can move land out of the flood plain; he wonders if it is the same with ROWs; Brad's deed takes a chunk of the ROW.

Chairman Benesh would like the Board to proceed through the criteria to be fair.

This work would not be contrary to public interest and is in keeping to the spirit of the ordinance. It won't affect the public's health, safety or welfare and it won't change the neighborhood. **The Board unanimously agrees these two criteria are met 5-0-0 (Benesh, Aubrey, Walker, Funicella and Mason).**

As far as substantial justice being done, Joan isn't sure how to judge this; he's putting in a basement; he doesn't plan to go any higher than the current height and the Board could impose that as a condition. There is one abutter who feels there is an issue. Dave doesn't think the loss to the individual is outweighed by the gain to the public; the individual is suffering a loss more than the public would gain if this is denied. **The variance fails this test 2-3-0 (Benesh and Aubrey in the positive; Mason, Walker, Funicella in the negative)**

Values of surrounding properties are not diminished. While there is an abutter who is concerned; Chairman Benesh doesn't see how it would diminish the value of surrounding

properties; Dave thinks it would improve the values. **The Board unanimously agrees this criteria is met 5-0-0 (Benesh, Aubrey, Walker, Mason and Funicella).**

Chairman Benesh is still struggling with the last criteria of creating an unnecessary hardship. **The Board unanimously agrees this criteria is not met 0-5-0 (Benesh, Aubrey, Walker, Mason and Funicella).**

**Joan Aubrey, seconded by Gino Funicella, made a motion to deny the variance because it could not find unnecessary hardship. The motion passed unanimously 5-0-0 (Benesh, Aubrey, Walker, Mason and Funicella).**

Chairman Benesh let Brad know the decision will be published within five days and it will explain why the Board did what it did. If Brad thinks the Board made a mistake he can file a motion for a rehearing. Brad's argument would be the Board failed to see a special condition here. Barring that, he is restricted to building within the existing envelope. The Zoning Ordinance applies to everybody; the purpose of a variance is for some special or unique hardship.

Chairman Benesh closed the Public Hearing at 8:34 p.m.

**32 Francis Ave** Chairman Benesh opened the Public Hearing at 8:35 p.m. and reviewed postings and responses to notices. John noted he will do his best to make his case and answer any questions the Board has. When he purchased the property he had no idea the cabin fell within the setbacks. He hired someone to do the septic system; the property was surveyed and they found that five feet of the corner of the cabin falls in the setback. Brad's building permit was denied and he's applying for a variance for an addition. He's aware the Board is concerned with height. Martha noted the Board doesn't want views blocked but this is in the flood plain. John noted he's in the floodway which is the lesser of the two designations. DES still needs to be notified if he digs there.

Dave noted the Board has the same questions they had for the previous applicant; he needs to answer what is unique about his property. John noted it's unique in that the cabin is on concrete blocks; he had no idea the setback was the corner of cabin and he can't put the stairway on the other side as there's a block and brick fireplace.

Ron Briggs surveyed the property and Engineer Phillips has accepted the septic plan. John is looking for a waiver to improve the existing situation; this is only for a two bedroom home. Currently he has two 7' x 7' rooms and the bathroom is in a closet; he wants to add a second floor. Chairman Benesh noted there are many folks in the same situation; this is not unique. Dave noted the Board doesn't have a lot of information about the surrounding properties here; he'd like to continue the Public Hearing to another meeting to get more information about the other properties in the area so the Board can see if there is anything unique about this property. Chairman Benesh noted it's up to the applicant to prove that to the Board, not for the Board to find the proof. Dave noted the Board gets applications from people who don't really understand what they are trying to explain to the Board; they don't address the things the Board needs to know; they don't understand. Chairman Benesh noted the Board does have a responsibility to help people with their applications; he will send an email referring to the criteria and how the Board makes their decision. If John asks then the Board can continue the Hearing and allow John to amend his application. John noted the ordinances came in after the cabin was built; he isn't building the building in the setback.

\*\*\*Property owner on Mulloon Road\*\*\* noted he ran into the same situation when he built his camp; it was non-conforming in that a portion of the building was in the setback already, that is grandfathered. It was explained John is seeking to enlarge the building in the setback; \*\*\* mulloon road guy\*\*\* wanted to do that too and was denied.

John is very frustrated; he asked what he is supposed to do; it was noted the town has denied these in the past; everyone can't expand. Martha wondered if he could move the building into the buildable area; John noted that would be a lot of money; he can't build the stairway on the other side as there are ten windows on that side. Chairman Benesh noted John is being treated the same as those on Francis Street, Spring Street and Mulloon Road. John noted he wouldn't have bought this if he'd known about the setbacks.

Chairman Benesh can continue the Hearing if John thinks there's something more he can add to his argument. There are other options for building that would meet Zoning. Dave noted there are properties in town and they want to make changes and can't. The answer may be John can't make the changes he'd like to make however if he can figure out what is unique about his property over others in the neighborhood he might have a chance. John noted the wetlands are a huge issue; he is surrounded by wetlands. Dave wondered if anyone else has wetlands to deal with; this might be the answer to what is unique. Joan noted John has to have evidence to show his property with wetlands and the proposed area being the only place to build. John isn't sure where the wetlands are; Joan reiterated he will have to show it. **Gino Funicella, seconded by Brian Walker, made a motion to continue the Public Hearing to June 19, 2013. The motion passed unanimously.**

\*\*\*Mulloon guy\*\*\* wants to know why there isn't a disclosure on these properties; so folks know they are non-conforming. John agreed, noting he was told by two town officials he could do what he is proposing to do on the property. \*\*\*Mulloon guy\*\*\* noted one of their neighbors tore everything down, put in a new well and then was told he couldn't build on the lot. He did what he could to fix up his camp as it was.

Chairman Benesh noted John has raised an issue of estoppel if the town told him he could do something then stopped him from doing it. He should be prepared to present that information in a month in addition to information on his property's uniqueness.

There are surveys done when there is a mortgage; the bank should be interested in knowing if the property is violating Zoning. This is a question of ethics.

John asked where he can get the evidence being requested; who does he call to get this evidence. Chairman Benesh noted the Board can help up to a point but they can't serve as counsel. There are a number of legal cases that talk about this; Chairman Benesh will send an email to John and see if it sparks any ideas. He doesn't see, at this time, how John is going to make that case; maybe the wetlands will be the deciding point. The other option is estoppel; if town officials gave John assurance he could do something, he needs to provide their names and what they told him. John wondered how folks know any of this without having a survey done; Board members wondered who would buy property without a survey first. John will be responsible for any survey needed.

Martha noted the tax thing keeps coming up; there are lots that are not buildable but are taxed as building lots. Dave noted if it's a lot of record the owners have a right to use the lot; it doesn't have to meet current standards.

The Evans case raised some issues; the Board agrees Chairman Benesh should consult an attorney. He tried to have a discussion with Town Counsel Peter Malia; there were emails back and forth including to all three of the current Selectmen. There was the possibility that the Selectmen could take this to court and if that were to happen then Counselor Malia would have a conflict of interest. Chairman Benesh will start with the LGC. Even if the Evans come back with a request for an exception, he would like to be proactive and find out if the Board can make an exception with conditions.

Before closing the meeting Chairman Benesh would like folks to know he expects there to be a variance request from the Wentworth so the meeting in June will have Evans, John Terrie and the anticipated variance request from Fritz.

Jerry is having trouble with the decision on Boehringer and Ruppel with respect to hardship. Chairman Benesh noted the Board has to balance the purpose of the setback requirement and what Ruppel wanted to do. Boehringer didn't have uniqueness of property; Jerry disagreed; Boehringer is the only lot with two sides with fifty-foot setbacks. It was noted there are a couple of pieces the Board has to consider; there must be a special uniqueness that separates it from other properties and there has to be a benefit to the public that is greater than the loss to the property owner. Because Ruppel is building into the hillside and the roofline of the garage is expected to be at or below the travel way the Board didn't see how view could be impacted for the neighbors and if he built elsewhere there would be a greater impact to the neighbors. The Board was also influenced by Ruppel's neighbors; there were at least four if not five of them at the meeting speaking in favor of this and there was a letter of support from a neighbor who couldn't attend the meeting. It was not an easy decision for the Board to make; it took two meetings. Jerry noted the minutes of the first meeting seem to be one-hundred-eighty degrees out from the second meeting. Martha noted the Board has to roll from one side to another as it explores these applications; Chairman Benesh noted it was a very closely balanced case; the Board had difficulty deciding on what the right decision was. He talked with Christine at LGC; she elected not to make an opinion but she could see the Board's argument and it was logical.

**Dave Mason, seconded by Joan Aubrey, made a motion to adjourn at 9:11 p.m. The motion passed unanimously (Benesh, Mason, Funicella, Walker and Aubrey).**

Respectfully submitted by:

*Martha D. Tobin*

Recording Secretary