

Jackson Board of Adjustment

April 30, 2014

UNOFFICIAL UNTIL APPROVED

Draft May 12, 2014

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

Chairman Frank Benesh called the meeting to order at 7:00 p.m.

Election of Chair and Vice-Chair Chairman Benesh asked for nominations. **Dave Mason, seconded by, Jerry Dougherty, made a motion to nominate Frank Benesh as Chair. The motion passed 4-0-1 (Matesky, Dougherty, Mason and Walker in the positive; Benesh abstaining).**

Dave Mason, seconded by, Jerry Dougherty, made a motion to nominate David Matesky as Vice-Chair. The motion passed 4-0-1 (Benesh, Dougherty, Mason and Walker in the positive; Matesky abstaining).

Public Hearing – Denial of Building Permit/Couture Chairman Benesh noted the permit was denied as Jackson's Ordinance prohibits building without frontage on a street. Mr. Couture could plat the driveway as a street through the Planning Board and it would have to meet town standards; or he can ask for an exception through this Board, which he has done. The Board has to agree the four tests have been demonstrated. The Board can then approve, deny or approve with conditions. All abutters have been noticed with return receipts from eleven and the Hearing was posted appropriately. Two prior applications were withdrawn in favor of the one before the Board tonight.

There have been arguments made regarding what may have been said by a town official shortly after the granting of the driveway permit; that would be *estoppel* which is outside the power of this Board to consider. Sonny could bring that argument to the Selectmen or he can take it to court. This Board is limited to powers of zoning; the argument of *estoppel* is well outside what the Board can consider and Mr. Couture's attorney has been advised and has been asked to focus on the four elements only.

The process is for the applicant or his attorney to speak; any abutters or others with a direct interest would be allowed to speak and then there will be the opportunity for rebuttal. The Board will then ask questions and deliberate then based on discussion either pause or close the hearing. The Board may or may not make a decision tonight. There is another application that has come to the Board so it will be meeting again in a few weeks.

Jack is prepared to make a statement however Chairman Benesh noted the Board has seen all the documents and typically asks for a quick presentation honing in on the four elements. Jack noted RSA 674.41 is a statute created for the purpose of preventing issues of sight-line, emergency access or development such that more people move up there and then want the town to take the

road over. The RSA is trying to prevent that from happening. As originally enacted, the Supreme Court found an easement was sufficient under the ordinance but a few years later it was rewritten to eliminate that interpretation of access; that is still an issue for the Board to consider regarding practical difficulty or hardship. Section 2 provides that the Board may make reasonable exceptions and has the power to issue the building permit and can subject it to conditions. Jack would like to discuss this in the different categories the Chair outlined.

Jack noted issuance of a permit does not distort the town map nor does it increase the difficulty of carrying out the Master Plan of the town. There is no official map and allowing this home to be built would cause no difficulty regarding the Master Plan. He doesn't see how a hardship could be created for a future buyer or an undue financial impact placed on the municipality and the Board could not require the structure to be related to a street.

The Board noted if emergency vehicles can't use the driveway then that is an issue. Jack noted there is no case law that interprets this; he'd like the Board to look at the statute as a whole and the statute gives the Board the power to exempt this application.

If the circumstances of this case would result in a structure that would create an undue hardship for a future purchaser or a financial liability to the town, it would be imprudent to issue the permit. Jack asked the Board to look at the history; this parcel comes with a deeded fifty foot ROW, not the typical twenty five feet. Mr. Couture could construct the driveway to town road standards however that would imply future development of the property around it. Mr. Couture has gotten Alteration of Terrain and Wetlands Permits; that is a time-consuming and expensive process to get folks out to survey it and create topographical drawings.

Jack asked the Board to keep the design of the driveway in mind. The State has looked at this and has issued both permits. The driveway was designed by Horizon Engineering; stamped/certified drawings have been provided to the town. It has been constructed by a contractor to meet town standards and specs. Jackson's Fire Chief/Road Agent has been out there several times and at the Selectmen's meeting the Fire Chief/Road Agent recommended the permit be issued so it is Jack's belief the driveway meets the town's need for access. Given the amount of effort, investment and the degree of construction being done in a professional manner, issuing the building permit will not be any issue for access or to any future purchaser or a burden to the town. The purpose of the statute is to assure emergency vehicles have a way to access the property.

Dave Mason asked if the plans meet town specs; the intention was to meet town requirements. The overhead shots were taken from the temporary bridge; they showed an eighteen to twenty percent grade; this will actually be four to six feet higher so it will be at fifteen percent; there was another place that was in sixteen or seventeen percent that is now at fourteen. Jack noted the town will get as-built plans when the driveway is done; it will meet town standards.

Dave Mason asked if the easement is deeded; it has been recorded. That document needs to be provided. The Board has heard the ROW is fifty feet wide; Dave would like to know how long the easement is; the entire driveway is about six thousand feet. Chairman Benesh asked if the easement specifies where the driveway has to be; the easement could be located anywhere on property. The easement grants thirty five hundred feet or so to Sonny Couture; it is the depth of the property crossing. Martha Benesh asked if any other accesses are written into the deed; Jack

doesn't think so; Chairman Benesh noted the owner can do what he wants; subject to the easement.

Jerry noted the statute calls for the limits to be part of the deed prior to issuance of the Building Permit. He wondered if there would be any deed restrictions speaking to limits of municipal responsibility. Chairman Benesh noted what the Board has done in past cases is insist on a municipal lien waiver that absolves the municipality. Even though this is a driveway, the Board can still impose restrictions and conditions without limitations; the Board required sprinklers on another property.

Jack noted he was asked not to argue *estoppel* however, the statute does require a showing of hardship. For the purposes of tonight, RSA 674.33 provides a definition of hardship and Mr. Couture does contend there is hardship here. He was issued a driveway permit; a building permit application was submitted; the point of putting in the driveway was to build a home. Mr. Couture has spent a quarter million dollars on this driveway. Granting the permit will not create a hardship. The purpose of the statute is to prevent situations where emergency vehicles can't get up to the home or the town is being asked to take the road over. That should be no problem here as the driveway is being constructed in accordance with Jackson's standards.

Chairman Benesh wants everyone in attendance to be able to address their concerns and then Mr. Couture and/or his attorney will be able to rebut.

Engineer Burr Phillips is in attendance tonight; he was asked for input and he noted this particular driveway has had some issues with erosion lately. Jack noted he has engineering information on that, which he provided.

Chairman Benesh asked for abutters to speak at this time either in support or opposition.

Allen Brooks lives on Green Hill Road above where this work has been going on. While the driveway permit was issued, Allen thinks the Fire Chief/Road Agent should also be looking at the safety issue of where the driveway is going to come out; it's very unsafe right now. This driveway is right on a corner and in the winter there are snow plows and school buses that come around that corner; it seems a dangerous place for a driveway. If that was not considered at the time of the issuance of the driveway permit, so be it. Allen's own driveway isn't safe, either; he fears for his cats and grandchildren; now he's fearing for his own life with this driveway entrance.

Chairman Benesh noted Fire Chief/Road Agent Henry, acting as Road Agent, issued the driveway permit; that addresses where the driveway comes out and sight lines. He hopes Fire Chief/Road Agent Henry looked at that; the actual construction of the driveway is the responsibility of the Building Inspector as much as anything else that is built. Jerry noted there are many driveways with inappropriate lines of sight. The Shaw property had the same issue and they cleared out a huge property to improve the lines of sight; he's not sure the Board would want that much land cleared. Chairman Benesh would encourage Allen to talk to Fire Chief/Road Agent Henry. Dave Mason noted Jackson's driveway standards include line of sight; the Board has to assume they were adhered to; if not, shame on Jackson; the driveway permit has been issued. Engineer Phillips noted the only comment Fire Chief/Road Agent Henry has made is that he was of the belief there was an existing road that compelled him to issue the driveway permit. Sonny noted there was a lot of discussion about this at the Selectmen's meeting.

Brian Byrne is an abutter and is concerned about the silt in the brook that goes through the bridge; while a lot of effort can be put into controlling the silt, Brian's concern is whether, on such a property, it is really possible to control that much silt and soil. He doesn't think washouts can be managed on this type of property; he's thankful Sonny's made the attempt. Chairman Benesh asked if Brian is suggesting the Board not approve the permit and Brian noted he's not doing that, he is just mentioning his concern about erosion. Dave Mason noted Jackson has a site disturbance regulation; the Board just needs to look at the Shaw property to see the results there. There can't be erosion coming off that property; Sonny will have to control it. Brian would like to see that stopped before any erosion happens. Chairman Benesh noted the Board is in this position as there is already a driveway permit. These issues wouldn't come up if both the driveway permit and the building permit were issued at the same time. Brian noted he saw there was an issue before the driveway permit was issued. Gino Funicella noted Mr. Couture is building a driveway he has to use daily, he's not going to build one that is going to collapse.

Sonny noted this driveway has a set of drawings; he has an Alteration of Terrain permit. He's paid three thousand dollars to the State for looking at the concerns Brian is bringing up. This property has been surveyed by a soil scientist who studied every drop of water that ever hit that parcel in the last hundred years and plotted where it goes. No one in Jackson ever had this type of engineering; he put in the controls he thought were necessary. There were some issues with heavy rain; Sonny had his engineer come out to look at it and the plan was changed. He also put in culverts to spread the run-off out; some of those froze or weren't in when the erosion happened. Engineer Phillips noted the site disturbance is significant; there is a note from the engineer that they know there are erosion issues. Sonny noted his plan is to go back and address those issues but not during construction.

Engineer Phillips noted the Board asked him to review the driveway with the key element being emergency access. Engineer Phillips did look at the plans and looked at the site; the plans do not comply with Jackson's driveway regulations for grade. Sonny has assured the Board that the maximum grade will be fifteen percent. There also needs to be pull-outs every one hundred feet so emergency vehicles can pass each other. The first five hundred feet in from the road to the bridge is far steeper than what is considered a stable slope; Engineer Phillips noted the plans need an engineer stamp that says it will be stable. He suggested the Board add the condition that the road stability be reviewed by an engineer. Sonny noted that area is temporary, it will be pulled back and the bank will be tapered and trees will be cut; it won't stay like it is now.

Chairman Benesh noted this is more than a normal driveway; he is troubled; he wonders if Jackson's driveway standards are up to addressing a driveway that is more a road than a driveway. If this met the road standards then that would have tighter requirements. He believes if a fire truck can make that fifteen percent grade then it is okay.

Alan McLane lives on Iron Mountain Road. He'd like to know if it can be assumed that the Couture and the Samson property both would not be able to be subdivided in the future. Chairman Benesh noted that cannot be assumed; the ability to subdivide is up to the Planning Board; the driveway would have to meet town road standards for a subdivision to be approved. Alan was concerned that meant the driveway would be made a town road but it was clarified the road would have to be brought up to town standards not made a town road unless a petitioned request is voted in by the legislative body. In order to divide a larger property into multiple lots the Subdivision Regulations describe criteria that must be met which includes the road meeting

town standards. Alan thought if more than two homes were on one driveway then it has to become public access. Chairman Benesh reiterated the road would be a private road but would have to meet town road standards. In order to build more than one home the property would have to be subdivided which is the Planning Board's purview. Alan noted another property in the vicinity, the seventy acre Diehl property which now has a yurt on it, had a specification that it can't be subdivided. Chairman Benesh noted even if that condition were placed on the Couture property that would not have any effect on the Sampson property. Alan is assuming the Sampsons gave up the ROW in the interest of gaining access to their property. Chairman Benesh noted the Board does not know the motivation for granting that easement.

Brian Byrne noted it is also his concern that this driveway is not being built to town road standards. Chairman Benesh agreed that is the case; this is not a road; it's a driveway and it's being built to town driveway standards. The maximum grade is twelve percent for a driveway but the road standard is six to ten percent; there are all sorts of criteria for a road that this won't meet. A sixty foot ROW would be required to meet road standards; Mr. Couture could go back and amend the easement; the amount of money necessary to build a road in order to have lots up there would be quite expensive but possible. Brian believes the lots could be at the bottom.

Chairman Benesh asked Peter Benson, as a member of the Fire Department, how a fire would be fought up there. Peter noted he's not speaking in any official capacity but the Fire Department trucks in water as often as it uses a hydrant; they can pump water up the hill; it's not ideal and this location would be a challenge. It was reiterated that Jackson's Fire Chief approved the driveway permit. Engineer Phillips noted the Evans are putting in sprinklers as a way to avoid needing to build a bridge that a fire truck could get over

There being no further input from the public or the applicant, Chairman Benesh would like the Board to begin deliberations at this time. He is keeping the Hearing open.

David Matesky noted, in general, the Supreme Court doesn't look kindly at taking the value of somebody's land away. If owners were required to meet the letter of the law then there would be a lot of land that's worthless. Chairman Benesh reviewed the case that went to the Supreme Court.

Dave Mason looked at the statute; he can't see how maintaining the denial of the building permit meets the purpose of the statute. He feels the Board has no other choice but to grant the exception; it can't do anything else.

Gino Funicella supports this reversal; the property has been sold and lost; if Mr. Couture wants to build on it, let him build on it.

Chairman Benesh's concern with this particular driveway is what it means to be connected to the street system; it meets town driveway standards but it is unusual in terms of length and vertical gain. He wonders if there's anything the Board can do to mitigate that. Dave Matesky believes if Mr. Couture meets the standards for a driveway then the Board has to grant the permit. Chairman Benesh noted Fire Chief/Road Agent Henry seems to think this is appropriate so Chairman Benesh's concern about emergency access is answered. Jerry noted Fire Chief/Road Agent Henry looked at this driveway extensively, Sonny is willing to address issues as they occur. He feels there is a practical difficulty that would allow the Board to grant an exception. Chairman Benesh wondered if it is sufficiently "attached" given the length. Jerry noted Fire

Chief/Road Agent Henry can impose any requirements he feels necessary; he approved the driveway permit; he may have felt constraint; Jerry asked the Board to give Fire Chief/Road Agent Henry or the Building Inspector the power of final approval. Dave Matesky suggested asking Fire Chief/Road Agent Henry if there's anything more he would do to mitigate this situation. Jerry noted the only concern is whether there should be a deed restriction with a municipal lien waiver. Chairman Benesh noted this is a given and will include any additional conditions the Board wants to apply. Jerry believes this application meets the standard to grant an exception.

Chairman Benesh noted the Board will be meeting again soon; it is clear the majority is leaning toward granting the permit with restrictions from Fire Chief/Road Agent Henry and during the next three weeks the Board can see if he would add anything else.

Martha Benesh wondered if the Board should discuss fire systems at this time; Chairman Benesh thinks the Board should talk to the Fire Inspector first. The town's insistence on sprinklers has been upheld in the court system.

The Board agreed to go through the work sheet.

The Board agrees the fact that Mr. Couture owns the land and can't build on it comes close to creating an unnecessary hardship given the purpose of the statute.

The circumstances require connection to the street. Chairman Benesh noted this is where Fire Chief/Road Agent Henry could add conditions and/or restrictions. If there is enough connection for emergency vehicles to make it up and back that should be enough; the Board doesn't think the building has to be more related than it already is.

The Board agrees erection of the building will not distort the official town map or make the Master Plan harder to carry out.

The Board agrees it will not cause hardship to future purchasers as long as the lien waiver is recorded and Fire Chief/Road Agent Henry is satisfied.

Chairman Benesh noted that unofficially the Board is in agreement that the permit should be issued subject to the lien waiver and additional conditions the Fire Chief/Road Agent and/or Building and/or Fire Inspector set for reasonable requirements. Chairman Benesh will reach out to the various enforcement officials and will circulate their input to the Board.

There being no further discussion, Chairman Benesh will continue the Public Hearing to Wednesday, May 21, 2014 at 7 p.m.

Dave Mason, seconded by David Matesky, made a motion to adjourn at 8:26 p.m. The motion passed unanimously (Benesh, Walker, Dougherty, Mason and Matesky).

Respectfully submitted by:

Martha D. Tobin

Recording Secretary

