

**Town of Jackson Board of Adjustment**  
**Decision dated December 21, 2011 regarding**  
**Motion for a Rehearing submitted November 23<sup>rd</sup> by the Board of Selectman**  
**Regarding**  
**Variance granted November 16<sup>th</sup> to Kevin and Patricia Dickie**  
**Concerning 63 Main Street**  
**Case No. 2011-06**

The Jackson Board of Adjustment granted a variance from section 2.23 (expansion of non-conforming structures into proscribed setbacks) allowing the 2<sup>nd</sup> floor dormers to extend 2 feet further into the setback and allowing a deck to be expanded into the side and rear setback.

The Jackson Board of Selectman filed a motion requesting a rehearing on this matter citing several grounds on which the Selectman believed this decision was unlawful or unreasonable.

The application materials, decision, and the Selectman's motion may be found on the ZBA portion of the town's website at

[http://www.jacksonvillage.net/public\\_documents/JacksonNH\\_ZBAMinutes/](http://www.jacksonvillage.net/public_documents/JacksonNH_ZBAMinutes/)

The Selectman's motion for a rehearing was considered and denied by the Board of Adjustment at a meeting on December 21<sup>st</sup>.

Before reviewing the Selectman's motion, it is useful to restate the basis of the variance. The variance was granted as the Board of Adjustment found that there were

special conditions of the property (nearly the entire 0.1 acre parcel is within the proscribed setback of 25 feet from Rte 16A or from abutter property lines permitting no expansion of use)

such that

no fair and substantial relationship exists between the general public purpose of the zoning ordinance and the specific application of the ordinance to the subject property.

The Board of Adjustment also found that the proposed changes were (a) reasonable and (b) so modest in scope that they were not contrary to the public interest and the spirit of the zoning

ordinance is observed. In granting the variance, the board also determined that the potential loss to the applicant was not outweighed by the general public interest.

It is also useful to point out that the Board of Adjustment has granted variances in similar situations in prior years, allowing very modest expansions of non-conforming structures in situations where the proscribed setbacks were equally severe and thus avoiding situations where the literal enforcement of the ordinance would result in an unnecessary hardship. These variances include

- a) The February 2007 grant of a variance to Wayne Peterson to allow construction of an 18 inch above ground bulkhead access to the basement on a dwelling that was within the setback from Black Mountain Road right of way. Other alternatives would have violated other setbacks and/or easements. The enlargement of the nonconforming use was modest as it was only 18" high and not visible from the street.
- b) The September 2008 grant of a variance to McCleary regarding a 20 ft by 20ft lot to allow an expansion of a pump house serving 4 houses to install additional filtration equipment. If the ordinance were literally enforced there would be no allowable building area on the lot.
- c) The July 2010 grant of a variance to Healy allowing a screened deck to be constructed on an existing deck on a dwelling at 65 Thorn Hill Road. This 0.6 acre property was extremely long and narrow, with the entire permitted building area within the proscribed setbacks being only 15ft in depth. The deck faced wetlands that were likely not to be built upon and the other properties in the area were substantially larger. There were conditions attached that do not allow conversion of the screened porch into year round living space.
- d) The December 2009 grant of a variance to Brian Bryne for a property at 57 Green Hill Road. The lot is 77 ft wide and the existing house was entirely within the setback. The variance allowed the eaves to be raised to allow the ceiling height to be 84" and the replacement of the concave roof with one of greater pitch.
- e) The July 2009 variance granted to Larry Garland for property at 143 Ridge Road to allow the replacement of a flat roof on a shed entrance with a pitched roof. The shed entrance was entirely within the setback.

In all of these cases the requested variances were viewed by the Board of Adjustment as permitting very modest changes where the setbacks were particularly constraining and for purposes that often had compelling safety issues and for which there was negligible public impact. In no way does the Board mean to suggest that variances would be granted for more

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substantial incursions into the proscribed setback or for construction representing a proportionately larger increase in volume or floor area on properties with less significant setback constraints and less compelling safety concerns.

Turning to the statements in the Board of Selectman's ('BOS') motion,

*The proposed volume increase is not required to meet considerations of safety, snow disposal, or State Building Code requirements and the change does increase the interior livable floor space within the structure of the building.*

The BOS statement refers to paragraph 1.4 of our decision where we indicated "that Section 2.2.3 allows a volume increase when the change is dictated by safety, ... ". In this paragraph the ZBA was referring solely to the ability of the applicant to increase the height of the structure by reframing the roof from the existing 2x4 rafters and make other improvements in framing within the building to improve the safety and soundness of the structure. (Paragraph 1.5 of our decision refers to the entirely separate issue of the increasing the floor space.)

*The proposed windows are not required by the State Building Code and do not have to meet emergency egress standards.*

This BOS statement refers to paragraph 1.5 of our decision where we indicate that the applicant requested a variance to permit the second floor dormer to extend 2ft closer to the street and 2ft closer to the rear property line. Whether the larger windows are required by the state building code and have to meet egress requirements is beside the point; the Board of Adjustment agreed with the applicant that larger windows would be desirable to facilitate and improve emergency egress, notwithstanding whether they were required by the State Building Code or the particular windows were of a sufficient size. The desirability of larger windows was one of the factors in the Board of Adjustment granting the variance to allow the extension of the dormer further into the proscribed setback. Without this variance, such an expansion would not have been permitted.

*The State Building Code does not require a second means of egress off the rear of the building onto the deck.*

This BOS statement refers to paragraph 1.6 of our decision where we indicate the applicant has requested extending the rear deck. We made no reference to the State Building Code in this paragraph, but again agreed with the applicant that a means of egress off the deck and from

the rear of the building is desirable and promotes safety. This benefit was one of the factors in our decision granting the variance to extend the deck.

*The existing building is not required to meet current building codes and further it is possible to provide for a safe 2<sup>nd</sup> means of egress from the building to the ground without making the building more conforming.*

This BOS statement refers to Section 3.2 of our decision where we made a finding that the existing building does not meet current building codes and did not provide for a proper egress from the 2<sup>nd</sup> floor or a safe second means of egress from the building to the street. Our finding does not suggest that the building must be brought up to current codes, only that it does not meet those codes. We do believe it is in the public interest that the applicant is voluntarily improving the structure's compliance with current practices.

While our finding in Section 3.2 did not state the building must be brought up to codes, in discussion of the BOS motion, the point was made that since the entire second floor was removed and rebuilt, that portion of the building (and the necessary supporting structure) probably did have to meet current codes.

*The standards used to grant this variance could be applied to many other homes in Jackson and that would have the effect of changing the Zoning Ordinance, therefore, is contrary to the public interest*

This BOS statement refers to paragraph 3.4 where we make the finding that this is not contrary to the public interest. In making this statement, the BOS are not giving consideration to the finding in paragraph 3.1 where we clearly indicate that this property is essentially entirely within the proscribed setback which distinguishes it from most other properties. For that reason, we believe that that most other properties in Jackson would NOT meet the facts used to grant this variance.

*The proposed changes are not necessary in order to be in compliance with the State Building Code and result in a volume increase that does violate the spirit of the ordinance.*

This BOS statement refers to paragraph 3.5 where we make a finding that "the proposed changes are being driven by safety and building code considerations and overall do not violate the spirit of the ordinance. The original footprint of the building is preserved and no additional rooms, floors, or spaces are created. " The BOS's statement ignores that our finding was based

on safety and public interest concerns and not just compliance with the State Building code. The proposed changes and resulting increased incursion in the setback were so modest that there is no meaningful change in the character of surrounding area.

*The proposed changes are not requirements of the State Building Code.*

This BOS statement refers to paragraph 3.6 where we make a finding that substantial justice is done “by striking a balance between the challenge of addressing current building codes and the issue of increasing the volume of a non-conforming structure located entirely within the setback.” Here we unfortunately imply that compliance with current building codes was the sole reason this variance was granted. As indicate in prior paragraphs the public interest considerations of safety and the structural improvements to the building, whether they are strictly required by the State Building Code or not, were important factors in our decision that there was substantial justice. Importantly, we felt there was little demonstrable public interest in denying this variance and, in fact, clear public interest concerns in granting the variance.

*Means of egress could be addressed by changes that would not make the building more non-conforming.*

This refers to paragraph 3.8 of our decision where we find failure to grant this would result in unnecessary hardship. Here we are explicitly balancing the private property interests of the Applicant with the public interest expressed in the zoning ordinance. While they may well be other methods of addressing egress from the building, the topography of the site and that fact that nearly the entire building is within the proscribed setback provide for very limited options. Our finding is that the topography and setbacks in combination unfairly burden this applicant in prohibiting improvements they seek to make in their property, given the modest scope of those improvements.

Frank Benesh

Chairman