

Town of Jackson Board of Adjustment  
Notice of Decision

Case 2015-02: Application for a Variance to allow construction of a deck and roof within the proscribed setback at 200 Tin Mine Road, (parcel V10 Lot 33A).

Decided April 15, 2015, Decision Published April 21, 2015

Background

- 1) David A. Caldwell Jr. and Christina R. Caldwell (the "Applicant") are the owners of a approximately 0.36 acre parcel at 200 Tin Mine Road, (parcel V10 Lot 33A), per deed dated 4/26/2013 and recorded at Book 3074 Page 315.
- 2) Building Permit #2013000012 was issued on 4/24/20013 to Frank Delbene & Gwyn Burdel of Dedham MA (prior owners), with David Caldwell listed as contractor, to construct a 28 ft x 30 ft two bedroom home with a 18 ft. x 28 ft deck. A Building Permit for the same project was re-issued in the name of David A. Caldwell as owner and as contractor on 5/24/2013 as #2013000024.
- 3) Building Permit #2014000015 was issued on 5/29/2014 to David A. Caldwell as owner and Jeff Mallett as contractor, providing for an one year extension of the prior permit. The scope of the project was unchanged, identified as a 28 ft x 30 ft two bedroom home with a 18 ft. x 28 ft deck. Access to the deck was via stairs with 3 steps.
- 4) An inspection of the site by Building Inspector Kevin Bennett on 10/24/14 revealed that in addition to the permitted 18 ft x 28 ft deck on the North side of the house, a 19 ft. x 6 ft. deck and roof was being constructed on the East side of the house fronting on Tin Mine Road. The additional 19 ft. x 6 ft. deck appeared to be almost entirely within the proscribed 50 ft. setback from a road per Section 4.3.1.2 of the Town of Jackson Zoning Ordinance. As this deck was not included in the permitted work, the Building Inspector gave an oral stop work order and requested the deck be removed or submit a variance request to the Board of Adjustment.
- 5) Work continued and Building Inspector Kevin Bennett issued a written Stop Work Order on Friday, 11/7/14 for work being done on the deck and roof that is within the proscribed setback.
- 6) Discussion with the contractor Jeff Mallet revealed he was building to a set of plans that included the 19 ft. x 6 ft. deck, differing in that material respect from the plans held by the building inspector. The Board of Adjustment did not attempt to determine whether the plans with the deck were prepared before or after the issuance of the building permits and there was no testimony by the applicant concerning how or when this discrepancy occurred.
- 7) An application for a variance to allow the deck in the proscribed setback was received on 1/14/15 from Attorney Christopher Meier of Cooper Cargill Chant on behalf of the Applicant. Said application was supplemented with a plot plan on 1/26/15, included below. A public hearing was held on 2/4/15.
  - a) Said variance application requested a variance due to hardship based on the special conditions of the "unique slope and angles" of the property necessary to facilitate solar shingles. Alternatively, the applicant requested a variance pursuant to RSA 674:33, V as the Owner's mother suffers from Parkinson's and skin cancer and the the 19 ft. x 6 ft. deck & roof would allow shaded outdoor space on the East side of the house.
  - b) At the request of the Applicant, the hearing was continued to 2/25 and further continued to 3/25 to give an opportunity to provide additional filings concerning hardship. A memorandum on hardship was filed by the Applicant on 2/27, arguing - in part - that the lot is burdened differently from other lots as it is

unbuilt and other neighboring properties were developed prior to the adoption of the Zoning Ordinance.

- c) At the conclusion of the 3/25 hearing, the Board of Adjustment (the "Board") chose to continue the hearing to 4/15 to provide an opportunity to consult with counsel. On 4/10, the Applicant amended the application with revised plans showing the the 19 ft. x 6 ft. deck modified to be a ramp in support of the RSA 674:33, V. application.
- 8) In separate individual site visits by 4 members of the Board, individual members concluded that the applicant has the option of easily constructing a ramp on the side of the permitted 18 ft x 28 ft deck on the North side of the house without violating the proscribed setback or doing so in a deminimus manner. Those Board members included a registered architect and a separate member who holds a graduate degree in architecture.

### Findings

- 1) The Board finds that granting a variance for a 19.6 ft deck (or ramp) would not alter the essential character of the neighborhood nor would it threaten the public health, safety, or welfare. The board thus finds that
  - a) The requested variance would not be contrary to the public interest by a vote of 4 to 1
  - b) The spirit of the ordinance would be observed by a vote of 4 to 1.
- 2) The Board finds the the loss to the applicant, if the variance were denied, does **NOT** outweigh the gain to the public from enforcement of the setback provisions of the zoning ordinance as adopted by the Town of Jackson.
  - a) In the case of the proposed 19 ft. x 6 ft. deck in the proscribed setback, the Board finds the loss to the applicant is deminimus given the permitted 18 ft x 28 ft partially roofed deck on the North side of the house. Moreover, the applicant has the room to more than double the size of the permitted 18 ft x 28 ft deck further to the North.
  - b) In the case of the 19 ft. x 6 ft. deck reconfigured as a ramp in the proscribed setback, the board finds the loss to the applicant is deminimus given the essentially equivalent option available to the applicant for a ramp on the side of the permitted 18 ft x 28 ft partially roofed deck on the North side of the house.
  - c) Accordingly, by a vote of 4 to 1, the Board finds that the granting of the variance would **NOT** result in substantial justice being done.
- 3) Based on the absence of testimony to the contrary and the Board's own opinion, the Board finds that the values of the surrounding properties are not diminished.
- 4) By a vote of 5-0, the Board finds that the applicant has failed demonstrate that, owing to special conditions of the property that distinguish it from others in the area, no fair and substantial relationship exists between the general public purposes of the setback provision of the ordinance and the specific application of that provision to the property. This is based on the following findings concerning the absence of special conditions.
  - a) The subject property is similarly burdened as several nearly identical adjoining parcels. Those parcels are nearly identical as to size, slope, and configuration.
  - b) The applicant's initial Jan. 14 argument concerning orientation of the solar shingles on the house may be relevant to the South facing roof on the house, but no evidence was introduced why this is relevant to the East facing 19 ft. x 6 ft. roof and deck that is the subject of the variance request.
  - c) The applicant's Feb 27th argument also fails as
    - i) it attempts to limit the comparison of the special conditions of this property to other properties in the area solely to other unbuilt properties. We find no basis to impose this limitation in our analysis.

Importantly, the Jackson Zoning Ordinance measures compliance with setbacks as to both the footprint and also the volume of an existing non-conforming structure. As the setback requirements also apply to modifications of existing properties those properties are equally burdened as an unbuilt parcel. We note that the majority of the variance requests facing this board involve modifications of existing non-conforming structures as to both their height and/or footprint.

- ii) even if we did impose such a limitation, the applicant only suggests it is burdened differently but provides no specific evidence. The Board is aware of several other similarly small unbuilt parcels in this area, the former Tyrol ski area. Indeed, we note that the Jackson Zoning Ordinance was amended in 2006 with the addition of Section 2.3 to allow the building of a 2 bedroom house, regardless of lot size, specifically in recognition of the many small lots in the this part of Town, the site of a former ski area.
- iii) the argument that the location of the traveled way within the right of way is different from adjoining properties fails as it does not recognize the ability of the Town to move the traveled way. Nor does it specify how much of a difference is present. Judging by the site plan it does not appear to be significant in the context of this porch.
- iv) finally, the Board does not find that wetlands may have once existed on this lot but no longer exist (possibly due to development upslope) represents a special condition.

5) With regard to the requested application of RSA 674:33, V to accommodate a physical disability,

- a) The Board, by a vote of 5 to 0, finds that the Applicant's mother, Virginia Caldwell, has a "recognized physical disability", namely late stage Parkinson's.
- b) The Board, by a vote of 5 to 0, finds that the Applicant's mother, Virginia Caldwell, would regularly use the premises,
- c) The Board by a vote of 5 to 0, finds that the accommodation of a 19 ft. x 6 ft. ramp and roof within the proscribed setback is **NOT** a reasonable accommodation that is necessary, as the Applicant has the ability to construct a ramp on the side of the permitted 18 ft x 28 ft partially roofed deck that would provide equivalent access to a disabled individual.

### Decision

In summary, the Board finds that

- 1. granting this variance would **NOT** result in substantial justice being done,
- 2. that there are **NOT** special conditions that distinguish this property from others in the area and thus that there is a fair and substantial relationship between the general public purposes of the setback provision of the ordinance and the specific application of that provision to the property.
- 3. That the the accommodation of a 19 ft. x 6 ft. ramp and roof within the proscribed setback is **NOT** a reasonable accommodation that is necessary.

Given the findings cited above, by a vote of 5 to 0, the Board of Adjustment **denies** the variance requested by the Applicant.

This decision may, for 30 days, be subject to a motion for a rehearing from any party of interest or the Selectmen. It should not be considered final until lapse of that period. Copies of this decision are provided to the Applicant, the Planning Board, Board of Selectmen, Town Clerk, Assessor, and Building Inspector.

Frank Benesh, Chairman, Board of Adjustment

tax map v-10/33A

