
Case 2010-07 Brian & Christine Benoit Appeal of Admin Decision & 674:41 Exception

Town of Jackson Board of Adjustment

Summary of Issues, Findings of Fact, and Decision in re

Application for a Variance, an Appeal of an Administrative Decision, and a Request for an Exception Under RSA 674:41 by Brian and Christine Benoit

Case No. 2010-07

August 17, 2010

1 Background

1.1 The Town of Jackson Zoning Ordinance requires, for any structure or building, a 25 ft. setback from an abutter property line, a 50 foot setback from the sideline of any public or Private Road right-of-way, and a 50 ft. setback from the near bank of any year-round stream or body of water which is a property boundary (sec 4.3.1.2 and 4.3.2.3). There are additional requirements in the River Conservation District. Under certain limited circumstances, the Board of Adjustment may grant a Variance from this requirement.

1.2 The Jackson Zoning Ordinance provides, in part, in Section 2.2.3 that "A Non-Conforming Structure or Building may be moved, enlarged, altered, restored, or replaced within the boundaries of the lot it occupied at the time this ordinance took effect, providing that the change does not make the structure more non-conforming in any way." The Zoning Ordinance defines "Non-Conforming Structure or Building" in Section 3.25 as follows: "...means a structure or building the size, dimensions or location of which was lawful prior to the adoption, revision or amendment to the zoning ordinance, but which fails by reason of such adoption, revision or amendment to conform to the present requirements of the zoning district."

1.3 State statute RSA 674:41 prohibits, in part, the erection of a building or the issuance of a building permit for the erection of a building where the sole access to the lot is via a private easement or right-of-way, unless (a) such easement is a street on a street or subdivision plat approved by the Planning Board or (b) such easement is a private road for which the Selectman, after consultation with the Planning Board, has voted to authorize the issuance of building permits for the said private road. The Board of Adjustment may grant an exception to this requirement in certain limited circumstances. RSA 674:41 supersedes any more lenient frontage requirements in local zoning ordinances.

1.4 Brian W Benoit and Christine A. Benoit (the 'Applicant') acquired the property at map V09-Lot 18 (17 Thorn Hill Road) in June 2010. This property has the an easement for access from Thorn Hill Road over the property of Charles Meserve along a 14' wide easement. The Benoit property is in the Village District.

1.5 The structure on the Applicant's property encroaches into the 25' setback from Meserves' property boundary. The intrusion into the setback at the foundation is approximately 15'6" on the northwest side of the structure and 15' 4" on the Southwest side closest to

Meserves' garage. The intrusion measured from the projection of the roof overhang is more, approximately 10-11 ft on the Northwest side and 14 ½ ft on the Southwest side. Testimony during the public hearing indicated that these encroachments predated the adoption of the Zoning Ordinance in November 1971.

1.6 A prior owner of the Applicant's property, Gurry, constructed a deck and poured a concrete slab in the front of the house in a U shaped courtyard without a building permit. The Town of Jackson sued in Superior Court and Gurry eventually agreed to pay significant fines and court costs for building without a permit. A permit was granted in November 2007 covering the aforementioned construction and substantial additional work, including the conversion from a flat roof to a pitched roof and the addition of space in the courtyard. Little or none of this additional work was performed.

1.7 The Applicant's permit application to add new pitched roofs and a second floor addition was denied by the Selectman on June 17, 2010 and notified in a June 21, 2010 letter. The June 21 letter indicates that the reasons for the Selectman's denial were that "you own a non-conforming lot and the project increases the non-conformance of the building. Also your lot does not have road frontage (see Jackson Town Ordinance 4.3.2.4)." The June 21, 2010 letter also references the Building Inspector's (Andy Chalmers) memo of June 3, 2010 recommending denial which references the Zoning Ordinance section 4.3.2.4 indicating "Each lot shall have frontage of no less than 150 ft. on a public or Private Road right-of-way." The Chalmers memo goes on to reference State Statute RSA 674:41 which disallows the use of a private easement or right-of-way as the sole access to the lot. Finally, Chalmers indicates that the proposed roof would increase the building volume and the eave overhangs (2 ft.) would further encroach into the set-backs. Chalmers letter also mentions that the unpermitted additions to the existing structure encroach into the front and side setbacks from the neighboring property and suggests an Equitable Waiver may be required.

1.8 The Applicant has filed with the Board of Adjustment applications for

1.8.1 A Variance to allow the addition of pitched roofs with a 24" overhang on the portion of the property in the setback.

1.8.2 An Equitable Waiver that appears to seek an exception from RSA 674:41. This waiver was withdrawn in favor of the following.

1.8.3 An Appeal of an Administrative Decision regarding the applicability of RSA 674:41, seeking of an exception from RSA 674:41 under RSA 674:41-II if the former is found to be applicable, and also referencing Section 4.3.2.4 of the Zoning Ordinance in regard to frontage requirements.

2 Issues Raised

2.1 The proposed project requests roof overhangs of 24" which encroach further into the setback than the existing roof overhangs. The Applicant has provided little evidence of hardship or other reasons as to why this variance should be granted.

2.2 The Jackson Zoning Ordinance (Sec 2.2.3) allows for the increase in the volume of a non-conforming structure by altering the pitch of a roof where (a) the change is dictated by

considerations of safety, snow disposal, or building code requirements and (b) the change does not result in an increase in the interior floor space within the structure of the building. The Applicant proposes a new pitched roof which will have new interior floor area above the garage and porch with a height of 3 to 3 ½ ft. under the ridge beam. The question raised is whether the proposed floor area in this project should be considered 'interior floor space' for the purposes of Section 2.2.3 of the ordinance?

2.3 The Jackson Zoning Ordinance requires Frontage of no less than 150 feet on a public or Private Road right-of-way in the Village District. Frontage is defined as the width of a lot measured along its common boundary with a Class V or better public road or Planning Board approved Private Road right-of-way. A Non-Conforming Lot is defined as a lot that was lawful prior to the adoption of the zoning ordinance but fails to conform to the present requirements. As such, the Benoit property is a Non-Conforming Lot within the meaning of the Jackson Zoning Ordinance. However, since the house was originally built in the 1950s and the Jackson Zoning Ordinance was adopted on November 16, 1971, does Section 2.2.3 exempt the structure or building from the restrictions of Section 4.3.2.4, i.e., is the structure or building grandfathered?

2.4 If the structure or building is "grandfathered" under Section 2.2.3, is it proper for the Building Inspector and the Board of Selectmen to apply the restrictions of Section 4.3.2.4 in rejection of an application for a Building Permit to modify the property?

2.5 Can the Zoning Board of Adjustment review the Board of Selectmen's finding of the applicability of RSA 674:41, and if it cannot, can the Zoning Board decide if Applicant has met the requirements for the granting of an "Exception" under the provisions of RSA 674:41-II?

2.6 Does the Applicant meet the criteria under RSA 674:41 for the Board of Adjustment to grant an exception, which can include the imposition of conditions, which includes all of the following:

2.6.1 Circumstances of the case do not require the building, structure, or part thereof to be related to existing or proposed streets

2.6.2 Enforcement would entail practical difficulty or unnecessary hardship,

2.6.3 The erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.

2.6.4 The erection of the building or issuance of the permit will not increase the difficulty of carrying out the master plan.

3 Findings of Fact: The Jackson Board of Adjustment finds the following:

3.1 The Applicant has not met the statutory requirements for a variance under RSA 674:33 with respect to the proposed expanded overhangs which will encroach further into the setback area. The Applicant has not clearly demonstrated any unnecessary hardship with relation to the proposed additional encroachment of the roof overhangs into the setback, nor has the

Applicant demonstrated how there are special conditions to this property that distinguish it from others. The abutter has also argued that the value of her property will be diminished without any rebuttal by the Applicant, and based on the testimony, the Board finds that that the surrounding property would be diminished in value by further encroachment into the setback. The Board also finds that granting such a variance would be contrary to the public interest as there is harm to neighbors; that granting such a variance would be contrary to the spirit of the ordinance as setbacks would be further encroached, and granting the variance would not result in substantial justice being done.

3.2 The floor area under a new pitched roof over the garage and part of the living space, if less than four feet in floor to ceiling (or floor to the lower surface of the ridge beam and rafters) should not be construed as 'interior floor space' when left unfinished, unheated, and practically not accessible from the home except for a small service hatch, for the purposes of the Zoning Ordinance Section 2.2.3. Consequently, no variance under RSA 674:33 is necessary with respect to this issue.

3.3 RSA 674:41-III states that "This section shall supersede any less stringent local ordinance, code, or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section..."; however the Building Inspector and the Board of Selectman have given no indication that this is the path they have followed. The Applicant is left with no explanation as to why Section 2.2.3 is not applicable, why the structure or building is not grandfathered, whether the officials are using 674:41-III to trump Section 2.2.3 of the Zoning Ordinance. However, The Board of Adjustment finds that Section 2.2.3 of the Zoning Ordinance exempts Applicant from the provisions of Section 4.3.2.4 due to grandfathering. Therefore the invocation of Section 4.3.2.4, in isolation, by the Building Inspector and the Board of Selectman to reject Applicant's request for a Building Permit is reversed.

3.4 The Board of Adjustment has authority to "Hear and decide appeals if there is an alleged error... in the enforcement of any zoning ordinance..." {RSA 674:33-I}, but we find that the Board of Adjustment has no authority to hear and decide appeals alleging an error in the interpretation of an RSA by the Board of Selectman, as argued by the Applicant. Therefore this Board takes no position on the applicability of RSA 674:41 to the facts in this appeal. We believe there are issues as to whether RSA 674:41 applies to buildings and structures erected prior to the enactment of RSA 674:41 in 1983.

3.5 Turning to the request for an Exception under RSA 674:41-II in the event the Board of Selectman adheres to rejection of the application for a Building Permit under RSA 674:41, this Board finds that it presently has authority to grant an Exception under RSA 674:41-II. We find, notwithstanding the 1,111 sq ft increase in floor area, the reduction in the number of bedrooms from three to two and the installation of a fire sprinkler system in this project does not increase the requirements of the existing structure to be related to the existing streets (beyond the existing level of relatedness to existing streets).

3.6 Prohibition of a building permit relying on the provisions of RSA 674:41 for the planned addition by the Applicant would be a practical difficulty because the existing building is in need of repair and the proposed improvements will increase the safety of the home and its ability to shed snow in the winter.

3.7 The addition proposed by the Applicant will not cause incremental hardship (beyond the current situation) to future purchasers or undue financial impact on the municipality given the applicant's plans to reduce the number of bedrooms and install sprinkler systems.

3.8 The addition proposed by the Applicant will not cause incremental difficulty in carrying out the master plan (beyond the current situation).

4 Decision:

4.1 The Board of Adjustment denies the Applicant's variance request with respect to the increased encroachment of the roof overhangs into the proscribed setback.

4.2 The Board of Adjustment finds that the increased floor area over the garage and certain living areas as described by Applicant and that fall within the side setback is not "interior floor space" for the purposes of the last sentence of Section 2.2.3 of the Zoning Ordinance. Thus, no variance is required.

4.3 The Board of Adjustment takes no position on the applicability of RSA 674:41 to this appeal as it is beyond the jurisdiction of the Board.

4.4 If the Board of Selectman adheres to its application of RSA 674:41 to this fact situation, the Board of Adjustment grants an exception under 674:41-II as requested under the Appeal of an Administrative Decision with the following conditions:

4.4.1 Before granting of the building permit a certification generally along the lines of the attached Exhibit 'A' and approved by the Board of Selectman must be filed and recorded with the registry of deeds that certifies that the Town assumes no responsibility for maintenance of access nor liability for damages resulting from the use of the access road. Further, the Town assumes no responsibility for the provision of emergency services and may, at times, be unable to provide police, fire, and ambulance service.

4.4.2 The existing dwelling and any improvements thereto will have a fire sprinkler system meeting NFPA standard 13-D installed and maintained by the Applicant.

4.4.3 The dimensions of the vehicle turnaround at the end of the driveway on the Applicant's property be no smaller than is current proposed by the Applicant on the drawing submitted to this Board on July 27, 2010 titled 'Existing Site Model' and which bears the caption in the lower right had corner 'Existing Eaves and Driveway Scope Added Date 07/26/2010'.

Voting in Favor: Joan Aubrey, Frank Benesh, Joan Davies, Gino Funicella, and David Urey.

Opposed: None

Dated: August 17th, 2010

EXHIBIT 'A'

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Case No. 2010-07

August 17, 2010

AGREEMENT AND RELEASE REGARDING

BUILDING PERMIT for CLASS VI /PRIVATE HIGHWAY

NOW COMES _____, (hereinafter referred to as "Owner") of County of Carroll, State of New Hampshire, and the Town of Jackson, New Hampshire, (hereinafter referred to as "Town") a municipal corporation existing under the laws of the State of New Hampshire, and agree and stipulate as follows:

WHEREAS OWNER is the owner of certain real property, Tax Map_____, Lot_____, situated at _____ Road, as stated in a Deed recorded at Book_____, Page_____, at the Carroll County Registry of Deeds: WHEREAS the relevant portion of said _____ Road upon which OWNER'S real property fronts is [a Class VI Highway or Private Road as classified by New Hampshire Revised Statutes Annotated 229:5/] a private way not currently a municipal highway.

THEREFORE, the TOWN and OWNER on behalf of themselves, their heirs, legal representatives, successors and assigns, covenant and agree as follows:

1. The TOWN shall allow OWNER to construct a residence pursuant to a building permit issued by the TOWN on the OWNER's property on _____ Road;
2. The Town neither assumes responsibility for maintenance, including snow plowing, nor liability for any damages resulting from use of _____ Road.
3. OWNER, individually or through a neighborhood association, shall be responsible for maintaining access to the subject property and does hereby forever release and discharge the TOWN, its officers, agents, and employees from the obligation of maintaining _____ Road, and from any claim of any nature, whether in tort or otherwise, which OWNER might have against the TOWN for any loss, damage or personal injury, including those incurred through failure to provide municipal services, including police, fire and ambulance services, arising out to the condition of the roadway from the point wherein the _____ Road is a Class VI Highway/private road;
4. OWNER assumes responsibility for transporting any children to the nearest regular school bus stop;
5. OWNER agrees to install and maintain a fire sprinkler system in the all structures on this lot that meets the standards of NFPA 13-D.

6. OWNER assumes responsibility for the maintenance and repair of _____ Road, and agrees that at their expense or at the expense of themselves and other owners of property similarly located on _____ Road, to clear and maintain the said _____ Road, to a suitable width for travel, and to repair and maintain the traveled portion of _____ Road, in a good and passable condition.

Witness Owner

Co-Owner

TOWN OF JACKSON

Witness

By: (Its Duly Authorized Representative(s))