

# Town of Jackson Board of Adjustment

## Notice of Decision

### Case 2013-06

Decided December 4, 2013, Published December 17, 2013

#### Background

The Town of Jackson pre-approves septic designs before submission to the State DES. The pre-approval includes required compliance with town ordinances. Burr Phillips, Town Engineer, denied Town of Jackson's pre approval of a 5 bedroom septic design for the parcel located at Map V-2 Lot 53 citing noncompliance with section 2.3 "Non Conforming Lots" of the Town of Jackson Zoning Ordinance, in a letter dated September 26, 2013 from the Board of Selectmen to Ammonoosuc Survey. As agent for the owner Ralph W Schoennagel and Anne K. Schoennagel, Robert Tafuto of Ammonoosuc Survey )"the Applicant" filed an Appeal from an Administrative Decision on October 25, 2013.

In 2013 the Town of Jackson informed the prior owners of potential safety issues at the property, including the septic system. Schoennagel purchased the property from Thorn Mountain Trust in 2013 and intends to use it as a single family residential Dwelling Unit. The Applicant acknowledges the current septic system is in failure and needs to be replaced and has proposed a 5 bedroom design. The 19,829 sq. ft. lot is a '**Non Conforming Lot**' as defined by the Town of Jackson Zoning Ordinance (presuming NH DES approval can be obtained). The Zoning Ordinance Section 2.3 permits the construction of a Dwelling Unit of no more than 2 bedrooms on a Non Conforming Lot. This was added to the Zoning Ordinance in March 2006. The Town Engineer maintains that only a two bedroom septic design can be approved.

#### Findings of Fact

1. The structure was occupied as a single family dwelling unit from 1934 through 1952 with 6 rooms used as bedrooms (1 on the first floor and 5 on the second floor) as evidenced by the affidavit of C Elaine Farrugia (nee Elaine Smith).
2. As early as 1965 when the property was sold by Mabel Smith to Steinmeisters Realty Corp (and no later than 1978 when it was sold by Steinmeisters to Thorn Mountain Trust) the property was converted from use as a single family detached Dwelling Unit to a ski club. There is no record of any significant structural changes during this period.

3. The Board of Adjustment finds that a ski club is treated as a “**Lodging House**” in the Zoning Ordinance.
4. The Board of Adjustment finds that a change of use from “single family residential” to “Lodging House” occurred sometime between 1965 and 1978. As a Lodging House it operated in 1991 with 34 beds in the structure, 8 in one room on the first floor and 26 in five rooms on the second floor, as evidenced in a fire safety inspection in 1991.
5. The Board of Adjustment finds that the proposed use as a single family residential Dwelling Unit is a change of use as defined in in the Zoning Ordinance. Both uses are permitted uses in the Village District in the Zoning Ordinance.
6. Based on testimony at the hearing and the personal experience of the ZBA members as former Selectmen and members and Chairman of the Planning Board, the Board of Adjustment affirms that Section 6 “Minimum Lot Size” of the Zoning Ordinance is applied to both define the minimum lot size of subdivisions AND to control the number of bedrooms may be contained in a Dwelling Unit on a conforming lot.
7. Based on testimony at the hearing and the personal experience of the ZBA members as former Selectmen and members and Chairman of the Planning Board, the Board of Adjustment affirms that section 2.3 of the Zoning Ordinance both limits the construction of a Dwelling Unit on a **Non Conforming Lot** to no more than 2 bedrooms (as shown by plain text) but also prevents an existing house on a **Non Conforming Lot** from expanding the number of bedrooms. (in conjunction with Section 6).

## **Decision**

The Board of Adjustment must first decide if the owner had abandoned the non-conforming use of the structure as a 5 bedroom single family dwelling by an overt act (or failure to act) with carries the implication that the owner neither claims nor retains any interest in the abandoned use.

Next, if the board finds that the owner abandoned the non-conforming use, then the Board of Adjustment must then also decide if the change of a non-conforming use from a lodging house to a five bedroom single family dwelling qualifies as an allowed change or expansion of a nonconforming use by applying a three part test:

- (a) does the proposed change arise ‘naturally’ out of the grandfathered use,
- (b) will the change render the premises proportionally less adequate for the

use, in terms of the requirements of the ordinance, and

(c) will the change or expansion have a substantially different impact on abutting property or neighborhood.

Finally, if the board finds that the use has been abandoned and if the board finds that the change of use is not grandfathered, then the board must decide if Section 2.3 of the zoning ordinance applies to changes in use as well as new construction.

Abandonment: By a vote of 3-2, the Board of Adjustment finds that owner abandoned the use as a 5 bedroom single family house by the overt act of converting the use to a lodging house.

Change in Use: The Board of Adjustment finds

(a) the change from a lodging house back to a 5 bedroom single family house arises naturally out of the prior grandfathered use as a lodging house (by a vote of 3-2),

(b) the change does not make the premises proportionally less adequate for use (vote of 5-0),

(c) the change does not have a substantially different (more adverse) impact on abutting property or the neighborhood (vote of 5-0).

The decision that the change qualifies as an allowed change or expansion in a grandfathered non-conforming use means that the Board of Adjustment need not decide if Section 2.3 applies to changes in use.

Decision: Given the decision that the proposed change is an allowed change or expansion of a non-conforming use, the Board of Adjustment overrules the administrative actions of the Town Engineer and the Board of Selectmen in the application of Section 2.3 of the Zoning Ordinance in denying the approval of the septic design.

This decision is limited solely to the application of Section 2.3 of the Zoning Ordinance to the septic approval and does not apply to any other requirements necessary for said approval by the Town Engineer.

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