

Town of Jackson Zoning Board of Adjustment
In the matter of: Katherine and David McNeil’s Appeal of the Select Board
Administrative Decision (Case 2025-2)

The Zoning Board of Adjustment’s Findings and Decision

INTRODUCTION

On September 9th, 2025, Katherine and David McNeil (“Applicants”) filed an appeal to this Board concerning the Jackson Select Board’s Zoning Ordinance Violation Order dated August 12, 2025 (“Order”). A public hearing on the Applicant’s appeal was held on October 16, 2025, during which oral statements and testimony were received from the Applicants’ counsel, Donald M. Ekberg, Esq, Town Engineer Burr Phillips and Town Code Enforcement Officer Kevin Bennett. The Board also received into evidence before and during the hearing the following materials (in addition to numerous other exhibits, photos, and documents):

- September 10 and 19, 2025 memoranda (with attached exhibits) from Applicants’ counsel;
- Septic Plan Design Drawing, revision dated June 23, 2024 with the Town of Jackson’s (“Town”) endorsed “approved as noted” dated July 8, 2024 (containing a condition to not relocate the drainage culvert and pit and also containing the Town’s site disturbance requirements set out in Section 4.1.6 of the Town’s Zoning Ordinance (as amended through March 10, 2015);
- The Town’s Select Board order dated August 12, 2025 regarding “Site Disturbance Zoning Ordinance Violation“ and its assessment of a \$275.00 fine (“Order”);
- A September 26, 2025 email from Burr Phillips which included (as point #5) his recollections of his May 13, 2025 site visit on the Applicant’s property in which he observed “that the road culvert discharge had been relocated from the middle of the lot to the south side (above Goodine’s home), and had changed from being spread out to a concentrated discharge.

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- The Applicants' Exhibit Package containing Exhibit Nos. 1-32.

Thereupon, upon consideration thereof, the Board conducted a public deliberation at a October 16, 2025 Public Hearing during which the Board AFFIRMED the Select Board's Order's finding that the Applicants had violated Section 4.1.6 of the Zoning Ordinance (as amended through July 11, 2025) , but REVERSED the Order's assessment of a fine against the Applicants in the amount of \$275.00 for reasons which follow.

FINDINGS OF FACTS

- 1) On or about July 8, 2024, the Town and the State of New Hampshire approved the Applicants' septic plan prepared by Robert Eich (NH Designer #1750) (dated 6/23/2024) which included a "culvert or swale to direct water outflow" from a Middle Mountain Road culvert, extending along the southern property line of the Applicants' lot for approximately sixty feet from the eastern property line and then terminating "in a stone pit to lessen impact on abutting lots." According to the approved septic plan, the stone pit was to be located approximately at the middle of the southern property line. This is approximately 10 feet southwest of a line extending from the plane of the front facade of the Applicants' proposed dwelling as shown on the approved septic plan.
- 2) The approved septic plan incorporated Section 4.1.6 of the Town's Zoning Ordinance, *Site Disturbance (added 3/10/2009; amended 3/10/2015) which stated as follows:* "Any Site Disturbance, Land Development, or activities that alter watercourses shall be designed and performed reasonably to prevent increased rate of run-off, soil loss, or Erosion from the site or lot."

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- 3) The Notes accompanying the Town's "approved as noted" stamp on the approved septic plan (dated July 8, 2024) contained the following: "Do not change the stormwater discharge direction from the property unless written permission is granted from those impacted." The "Notes" also state: "Any changes or deviations from the Plan may require revised or amended plans and resubmitted for approval".
- 4) The Applicants' State of New Hampshire Application for Individual Sewage Disposal System Approval Owner Certification was signed on 6/13/24 by Katherine McNeil included the requirement "The system must be constructed in strict accordance with the approved plans and specifications"
- 5) In Burr Phillips' email dated September 26, 2025, he states "I reviewed the site initially on 5/13/25, as requested by Town Code Enforcement Officer Kevin Bennet and with him. I have no written notes, but the key takeaway was that the road culvert discharge had been relocated from the middle of the lot to the south side (above Goodine's home), and had changed from being spread out to a concentrated discharge. I had observed the existing conditions during the septic system design review that showed a ditch from the culvert to the middle of the lot, where it hooked north across the contours and effectively created a level spreader."
- 6) During the October 16th hearing, the Applicants' counsel (not the Applicants, who were present at the hearing but did not testify) did not rebut the observations expressed by Burr Phillips in his September 26, 2025 email, nor did he provide any explanation as to why the culvert and discharge pit design contained in the approved septic plan had been modified without Town approval nor why the Applicants had not applied to the Town for a site plan modification.

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- 7) Applicants' counsel acknowledged that the Town had not made any misrepresentations in the septic permit. Furthermore, Building Inspector Kevin Bennett testified that the Certificate of Occupancy he issued for the Applicant's Property only stated that the "structure" (i.e. dwelling) had been inspected for compliance with various codes, but it had nothing to do with compliance with the drainage or septic system requirements.
- 8) In addition, during the October 16th hearing, one of the Applicants' contractors, Tom Rozek from Elevated Excavation in Berlin, NH, testified that he performed site work relating to the culvert and the pit. He acknowledged that the culvert and pit were changed by him from the design contained in the approved septic plan. His work was performed under contract with the Applicants' contractor, Boris Builders of Glen, NH. Mr. Rozek testified that he was unaware if Boris Builders or anyone else had obtained approval for the changes he made in the septic and pit design. He admitted that he himself had not obtained such approval.
- 9) Applicants' Exhibit No. 22 titled "Difference Between Plan & Actual" in evidence contains a handwritten overlay showing that the culvert did not terminate with a stone pit as shown on the approved septic plan. Instead, the culvert extended "approximately twenty feet longer than as shown in the approved septic plan" and terminated near the end of the southwest portion of the property line. The Board found that, according to the approved septic plan, the contour lines on Exhibit 22 (and on the approved septic plan) show that, as designed, the stone pit should have been installed at approximately elevation 96 and that culvert (without any stone pit) ended at approximately elevation 91; an elevation drop of approximately five feet over approximately 35 feet.

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Decision of the Board

1) Ordinance Violation: The Board determined that the changes in the drainage and stone pit contained in the approved septic plan eliminated the stone pit intended "to lessen impact on abutting lots" resulted in a concentrated discharge and violated Section 4.1.6 of the Zoning Ordinance since the "as-built" culvert and the deviation from the approved septic plan was no longer "performed reasonably to prevent increased rate of run-off, soil loss, or Erosion from the site",

2) The Board also determined that the operative provision in Section 4.1.6 of the Zoning Ordinance¹ is contained in both versions of Section 4.1.6 amended as of March 10, 2015 and as amended as of March 11, 2025. The Board further determined that the additional provisions in the March 11, 2025 version were administrative provisions that do not bear on the issues presented in this appeal.

3) As the failure to construct the drainage as specified in the approved septic plan is sufficient make the above finding of a violation of Section 4.1.6 of the Zoning Ordinance, the Board makes no finding on other matters raised in the appeal that do not bear on the violation, are not covered by the Zoning Ordinance, and/or are outside the jurisdiction of the Board, including:

- The contribution of the McNeil's actions and property development to the cause of the flooding of the Goodine property,
- The potential impact on the flooding of development uphill of the McNeil property,
- The extent to which the unbuilt stone pit in the approved plan would have partially mitigated or eliminated any impact on abutters, and,

¹ "Any Site Disturbance, Land Development or activities that alter water courses shall be designed and performed reasonably to prevent increased rate of run-off, soil loss, or Erosion from the site or lot,"

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- Claims concerning municipal estoppel. See *Diembiec v. Town of Holderness*, 167 N.H. 130 (2014) (“The plain language of the pertinent statutes do not confer general equitable jurisdiction upon a zoning board.”)

4) Assessment of Fines. RSA 676:17 provides for a “civil penalty of \$275 for the first offense, and \$550 for subsequent offenses, for each day that such violation is found to continue afterthe date on which the violator receives written notice from the municipality that the violator is in violation.... Each day that a violation continues shall be a separate offense.”

5) Adequacy of Notice: The Board finds that the Select Board's Order did not provide adequate written notice of the nature of the Zoning Ordinance violation. (*Vote 4-0*)

- The Order cites a violation conflict with Section 4.1.6 and cites the abutter complaint, but offers no other explanation of what actions the Applicant's did or did not do that caused a violation of Section 4.1.6
- The New Hampshire Supreme Court has held that the notice must be reasonably calculated to give the defendant actual notice of the issue.... See *Town of Swanzey v. Liebeler*, 140 N.H. 760, 763 (1996).

6) The Board determined that

- As there were no prior written notices to the McNeil's or their contractors before the 8/12/25 violation letter, and,
- The assessment of the fine was included in Order, which was issued contemporaneously with the notice of violation, and, consequently, 7.
- Consequently the assessment of the \$275 fine is rescinded. (*Vote 4-0*)

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Subsequent Actions

- 1) This decision should be construed as adequate notice, consistent with *Swanzy v. Liebler* to the Applicant's of the rationale and nature of their Zoning Ordinance violation.
- 2) After publishing this decision (*satisfying the notice required under RSA 676:17*), the Select Board may, in their discretion, impose fines or take other actions as they deem appropriate.
- 3) The Board observes that any additional remediation of Applicant's property would presumably include a Site Disturbance (as defined in the zoning ordinance) and require compliance with the current (2025) version of the Site Disturbance section of the zoning ordinance.
- 4) Within 30 calendar days of the date of this vote on the Decision, the Select Board or any party to the proceedings may apply for a rehearing in respect to any matter determined in the decision that is unlawful or unreasonable (RSA 677:2 and 677:3). If the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend a timely motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed. Members of the Board of Adjustment may also move for reconsideration during the same appeal period.

Frank Benesh, Chairman Jackson Zoning Board of Adjustment.