

**APPLICATION FOR A VARIANCE
BOARD OF ADJUSTMENT
PO Box 268, Jackson, N.H. 03846
01/2010**

Do not write in space below:

Case No. _____ **Date Filed** _____

ZBA Signature _____ **Public Hearing** _____

Decision _____

Applicant Signature Dan Levitt **Date** 1/5/11

TAX LOT NUMBER: Map R 12, Lot 100B

Name of applicant Daren and Melanie Levitt

Address P.O. Box 307, 25 Meserve Hill Road, Jackson, NH 03846

Owner Daren and Melanie Levitt

Location of property 155 Ridge Road
(street, number, sub-division)

Acres 1.4 or Sq. Ft. _____

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on separate pages if the space provided is inadequate.

A **equitable waiver** is requested from Sections 9.2 of the zoning ordinance to permit:

The historic accessory apartment on the subject property that has existed in excess of ten years without a notice of violation, and is in violation of the density requirements of Section 9.2, 2.1 and 4.1.2 of the Zoning Ordinance.

Facts supporting this request:

The following are the background facts:

1. The property had been owned by Paul and Judith Collins.
 2. On July 13, 1982, Mr. and Mrs. Collins obtain a NHDES Approval for Construction of Waste Disposal System (Approval # 98570) for a four bedroom house. (Exhibit 1 attached).
 3. On October 23, 1984, Mr. and Mrs. Collins obtain a NHDES Approval for Construction of Waste Disposal System (Approval # 116212) for a three bedroom house. (Exhibit 2 attached)
 4. The current three-bedroom house and septic system were constructed in 1984.
 5. On March 20, 1987, Mr. and Mrs. Collins apply for a building permit to construct a 36' x 28' barn, without plumbing. (Exhibit 3 attached).
 6. On April 13, 1987, a building permit is issued for a 36' x 32' Barn for Cottage Industry - Heating and Air Conditioning. The Carriage House is constructed in 1987. (Exhibit 4 attached).
 7. Sometime between 1987 and 1995, Mr. and Mrs. Collins constructed an apartment on the second floor of the Carriage House.
-

8. In 1995, Mr. and Mrs. Collins sell the property to Daren and Melanie Levitt. At the time the second floor of the Carriage House is an apartment. (Exhibit 5 attached).
 9. From 1995 to 2010, Mr. and Mrs. Levitt use the first floor of the Carriage House for various uses, and rent the second floor apartment.
 10. From 1995 to 2010, the Town of Jackson taxes the property for both a 3-bedroom home, and for the Carriage House with an apartment. (Exhibit 6 attached)
 11. After a fire in the Carriage House in May, 2010, when seeking the requisite approvals to repair the Carriage House, these facts are discovered and disclosed to the Town.
 12. On August 18, 2010, Mr. Levitt obtains a Building Permit for "repairs/renovations to fire damages art studio & garage only". The permit specifically notes, "Repairs to fire damage art studio & garage only; prior to occupancy applicant shall present state approved septic plan reflecting number of bedrooms served by system and applicant shall apply and obtain approval for accessory apartment." (Exhibit 7, Building Permit, and Exhibit 8, Minutes of August 19, 2010 attached).
 13. On September 19, 2010, Mr. Levitt obtains a Building Permit which "certifies that Levitt, Daren J. has permission to create an accessory apartment at 25 Merserve Hill Road, a/k/a 155 Ridge Road (911 address for apartment)." The permit specifically notes, "All work must comply with state of NH Building Codes. Will need to have state approval for expanding to four bedroom septic plus comply with zoning ordinance in regards to adequate parking before certificate of occupancy will be issued." (Exhibit 9, Building Permit, Exhibit 10, Minutes of September 2, 2010, and Exhibit 11, Minutes of September 16, 2010 attached).
 14. By a letter dated November 3, 2010 with attached exhibits (See Exhibit 12 attached), as required by RSA 495-A:32 the Applicants provided a copy of their septic plan to the Board of Selectmen for certification for compliance with all local government requirements as relate to water supply and sewage disposal prior to submission to NHDES. On November 4, 2010, the Board of Selectmen refused to accept that material as not being complete. (See Exhibit 13 attached).
 15. By letter dated December 13, 2010 (See Exhibit 14 attached) with attached plan (Exhibit 15 attached), the Applicant resubmitted the septic plans reserving the right to challenge the jurisdiction of the Board of Selectmen to re-address any zoning compliance issue with respect to accessory apartment as approved by the Building Inspector on September 20, 2010.
 16. On December 16, 2010, the Board of Selectmen refused to approve/certify the septic plans, with the denial based upon the requirements of Sections 2.3 and 4.1.2 of the Zoning Ordinance. (See Exhibits 16 (Minutes) and 17 (Denial Letter) attached.)
 - I. That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value (RSA 674:33-a(I)(a)). See Section V below.
 - II. That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority (RSA 674:33-a(I)(b)). See Section V below.
-

III. That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property (RSA 674:33-a(I)(c)). The approval of the equitable waiver subject to a four- bedroom septic system under current NHDES standards improves what was until recently discovered a septic system of insufficient capacity for the four bedrooms connected to the system, imposes the condition of Section 9.12 of the ordinance upon this property restricting any future separate conveyance under RSA 356-B:5, and maintains the status quo which has had not adverse effect on the other properties in the neighborhood.

IV. That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected (RSA 674:33-a(I)(d)). The cost of correction in this case requires the removal of the accessory apartment, with there is virtually no public benefit to be gained from requiring such a removal.

V. In lieu of the findings required by the board under subparagraphs I and II above, the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected (RSA 674:33-a(II)). As outline in the facts above, both the Applicants and the Town had for over sixteen years assumed that the current accessory apartment was fully permitted.

The following additional information must be completed regarding the property in question:

Is any Use of or Structure on the subject property currently Non-Conforming? YES X NO _____

If yes, explain in detail:

When the Applicants acquired the subject property in 1995 it included both their current residence (three bedrooms) and the Carriage Building that included an apartment (with one bedroom) on the second floor. Since that date, the apartment has been rented to third persons, and, the Town of Jackson has assessed and been paid real estate taxes for that apartment. When the Carriage House was partially destroyed by fire, it was discovered by the Applicants and openly disclosed to the Town of Jackson that the previous septic approval by their predecessors in title was only for three bedrooms, and no specific building permit had been approved for the accessory apartment. Thus strictly speaking, leaving aside issues of fairness and/or municipal estoppel, the subject property with its accessory apartment does not comply with the minimum lot size requirements of the Town of Jackson, and, given that limitation, does not qualify for a Section 9, Accessory Apartment.

In addition, the well location preexisted the adoption of Section 4.1.7.

Does the subject property, including all existing or proposed buildings, signs, driveways, and septic systems meet Jackson Zoning Ordinance requirements and all applicable state regulations? YES X NO X

If no, explain in detail:

It is difficult to answer this issue one way or the other. First, the septic system as designed does comply with NHDES regulations with the only exception being the Town of Jackson RSA 485-A:32 certification for compliance with all local government requirements as relate to water supply and sewage disposal. It is the applicants position that the only part of the Zoning Ordinance that addresses water supply and sewage disposal are Section 4.1.4 and 4.1.7. Since the well location pre-existed Section 4.1.7, the only legitimate issue for review by the Board of Selectmen under RSA 485-A:32 is compliance with Section 4.1.4.

Additionally, as acknowledged above, the lot as it presently exists has insufficient size under Sections 2.3 and Section 4.1.2 and Section 6 to comply with the Section 9.2 requirement for an accessory apartment. As noted

within the concurrent Appeal of Administrative Decision, however, it is the position of the Applicant that neither the Selectmen and nor the ZBA had any jurisdiction with to review compliance with the requirements of Sections 2.3 and 4.1.2 of the Zoning Ordinance. The Board of Selectmen's/Town of Jackson RSA 485-A:32 certification is limited by statute to a review of compliance with all local government requirements relate to water supply and sewage disposal. It is the applicants position that the only part of the Zoning Ordinance that addresses water supply and sewage disposal are Section 4.1.4 and 4.1.7. Since the well location pre-existed Section 4.1.7, the only legitimate issue for review by the Board of Selectmen under RSA 485-A:32 was compliance with Section 4.1.4. Compliance with the requirements of Sections 2.3 and 4.1.4 are zoning issues for review under Section 16.1 and 16.2 of the Zoning Ordinance. In that the the Building Inspector issued a Building Permit for the Accessory Apartment pursuant to §16.2.3 of the Zoning Ordinance on September 19, 2010, and no appeal was taken from that decision by any abutter or by the Board of Selectmen within thirty days pursuant to Section 9.2 of the By-Laws of the Jackson Zoning Board of Adjustment and the provisions of RSA 676, neither the Board of Selectmen nor the ZBA had jurisdiction to revisit that issue.

ADDITIONAL INFORMATION: Summarize below any information from preliminary discussions with any state agency personnel in regard to the case. In addition, attach copies of any correspondence from state agencies, or Jackson officials and boards pertaining to the property.

Attach all pertinent document and correspondence.

IMPORTANT NOTICE : Board of Adjustment By-Laws state that information from the applicant and/or his representatives must be provided to the Board no less than 7 calendar days prior to the date of the public hearing.

CONDITIONS AS PART OF AN APPROVAL: The Board of Adjustment is authorized to place conditions on a variance and failure to comply with those conditions may be a violation. If conditions are included as part of an approval, they must be recorded with or on the plat.

