

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 Daren J. 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 **VARIANCE** is requested from Sections 9.2 of the zoning ordinance to permit:

The approval of the historic accessory apartment on the subject property subject to all of the other conditions of Section 9 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.
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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. Granting the variance would not be contrary to the **public interest**: The approval of the accessory apartment results in not only 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, and imposes the condition of Section 9.12 of the ordinance upon this property restricting any future separate conveyance under RSA 356-B:5.

2. The **spirit of the ordinance** is observed because: The spirit of Section 9 of the Zoning Ordinance is to allow accessory apartments in a manner which limits size (9.3 and 9.4), use (9.5) and most importantly separate conveyance (9.12) which would otherwise be permitted under RSA 356-B:5 and *Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222, 229 (2009)*. (See recent condominium conversion by Myles and Christine Crowe). Whether intended by the drafters of Section 9 or inadvertently included, by the inclusion of Section 9.2, there is no benefit to the property owner in obtaining an approval for an accessory apartment under Section 9 since the

property must have sufficient density to support two dwellings, and thus by a simple unit subdivision plan, such an applicant would have no limitations on the size, use, and separate conveyance by condominium or otherwise of the accessory apartment. In reality, by including Section 9.2 in the ordinance, the spirit and intent of Section 9 has been eliminated.

3. Granting the variance would do **substantial justice** because: 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 variance just allows the status quo to continue with a better septic system.

4. For the following reasons, the **values of the surrounding properties** will not be diminished: Since the status quo is continuing there is no effect on the abutting properties.

5. Owing to the special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in **unnecessary hardship** because:

a. no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because: As explained above the inclusion of Section 9.2 seems to be working at cross purposes with the remaining provisions of Section 9.

b. The proposed use is a reasonable one because: Allows what has been a use recognized by the Town since at least 1995.

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 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 NO
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 in 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.

