



COOPER
CARGILL
CHANT
ATTORNEYS AT LAW

November 4, 2010

Jackson Board of Selectmen
P. O. Box 268
Jackson NH 03846

Re: Property of Daren J. Levitt
Map R12, Lot 100, Sublot B
File Nr. 9875.004

Dear Selectpersons:

Please be advised that this office represents Daren J. Levitt with respect to the remaining municipal review necessary to complete the "legitimization" of the accessory apartment in the Carriage House with a 911 address of 155 Ridge Road.

The following are my understanding of the facts:

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

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EXHIBIT

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8. In 1995, Mr. and Mrs. Collins sold the property to Daren and Melanie Levitt. At the time the second floor of the Carriage House was both constructed as and used as an apartment.
9. From 1995 to 2010, Mr. and Mrs. Levitt used the first floor of the Carriage House for various uses, and rented the second floor apartment.
10. From 1995 to 2010, the Town of Jackson taxed the property for both a 3-bedroom home, and for the Carriage House with an apartment.
11. After a fire in the Carriage House in May, 2010, when seeking the requisite approvals to repair the Carriage House, Mr. Levitt discovered the gap in approvals with respect to the apartment, disclosed it to the Town.
12. On August 18, 2010, Mr. Levitt obtained 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."
13. On September 19, 2010, Mr. Levitt obtained 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."

In accordance with the note/condition of the September 20, 2010 building permit, Mr Levitt is in the process of obtaining NHDES approval for expanding to a four bedroom septic system. He has been told that his septic design plan must be reviewed and approved by the town, specifically its consulting engineer, who has requested that "lot size" calculations for a subdivision (§6.1 of the Zoning Ordinance) be included on the septic design plan.

I enclose with this letter copies of the septic design plan as required by the September 20, 2010 building permit. As discussed below, we are of the opinion that the Town of Jackson does not have the authority to review septic design plans, and even if such a review was authorized, the review would be limited to those specific regulatory requirements of the town that specifically relate to water supply and sewage disposal.

This plan does not include any calculations relative to minimum lot size as if this plan was to be reviewed for compliance with §9.2.2 of the Zoning Ordinance. The administrative decision with respect to whether or not my client is allowed to retain the pre-existing accessory apartment on his property was made by the building inspector pursuant to §16.2.3 of the Zoning Ordinance on



September 20, 2010 when the building permit was issued granting “permission to create an accessory apartment at 25 Merserve Hill Road, a/k/a 155 Ridge Road (911 address for apartment).” No appeal was taken from that administrative decision within a reasonable time pursuant to the provisions of RSA 676:5, and as such it is not appealable and is final.

In submitting a septic design plan and application to NHDES, the requirements of RSA 485-A:32 apply.

485-A:32 Prior Approval; Permits. –

I. No person shall construct any building from which sewage or other wastes will discharge or construct a sewage or waste disposal system without prior approval of the plans and specifications of the sewage or waste disposal system by the department. Nothing herein shall be construed to modify or lessen the powers conferred upon local authorities by other statutes; provided, however, that in all instances the requirements contained in this chapter shall be considered as minimum.

II. Any person submitting an application and plans for construction approval shall also certify in writing that he has complied with all local government requirements as relate to water supply and sewage disposal which must be complied with prior to application to the department of environmental services in those municipalities where regulations require prior local approval; and, at the same time, a copy of the certification shall be sent to the board of selectmen of the town or the city council of the city. (Emphasis added).

This statute, which was effective July 1, 1996, requires the person seeking construction approval from NHDES to certify in writing that:

“he has **complied with all local government requirements as relate to water supply and sewage disposal** which must be complied with prior to application to the department of environmental services in those municipalities **where regulations require prior local approval...**”

The NHDES website includes a list of “Communities that Require Local Approval Prior to RSA 485-A:32, I & II”, with that list including the Town of Jackson.

It is my belief that the inclusion of the Town of Jackson on that list was due to a June 28, 1977 Selectmen’s Regulation adopted as the town health officers, a copy of which I attach. At that point, the only substantive requirement by the selectmen was the distance between leach fields and wells, with the septic plans to be submitted for “review and comment”, not approval. As you can see on the copy of the regulation there is a note “Early 1990’s abolished as creating too many waiver situations relative to state requirements.” There is presently no regulation that requires such a review.

The current Town of Jackson Zoning Ordinance does have a setback provision for leach fields (§4.1.4) that is more stringent than the NHDES regulation (Env-Wq 1008.04), and, does have a



well radius provision (§4.1.7) that is similar to the NHDES regulations (Env-Wq 1008.06 - .12). There is not, however, any current provision in the Zoning Ordinance requiring local approval prior to application to NHDES for construction approval. Similarly there is no such requirement in the subdivision regulations, and oppositely, §7.01(7)(b) of the Subdivision Regulations requires only a certification “accompanied by a duplicate copy of all data submitted to the state.”

The only current document in which “prior local approval” is mentioned is in the Building Permit Application, which notes in the check list: “A State Septic Approval for Construction number for a system designed for the use that is being proposed. **The town needs to approve septic designs before submission to NH DES for approval...**”, and in the application itself, under Septic System, notes, “New septic loads may not be added to any existing structure without an **approved town** and state septic system design.” These provisions are in all likelihood left overs from the 1977 selectmen’s regulation.

Even if the 1977 regulation is still in effect¹, by its terms, it was only addressing the distance between wells and septic systems. Presently that local review would be limited to “local government requirements as relate to water supply and sewage disposal...”, which in this case would be §§ 4.1.4 and 4.1.7 of the zoning ordinance, and it would also be limited to a comment, not an approval.

As the enclosed plans indicate, the proposed septic system expansion is not within 150 feet of any year round stream or body of water, thus it complies with § 4.1.4 of the ordinance. And since § 4.1.7 of the ordinance was adopted on March 14, 2006, since my client’s well pre-existed the adoption of this section, it may continue as such pursuant to §2.2.1 of the ordinance.

I would appreciate the Board of Selectmen (or its consulting engineer) confirm that the proposed septic system design plans conform to “local government requirements as relate to water supply and sewage disposal...,” so that my client may proceed with obtaining NHDES approval.

Thank you for your attention to this matter, and if you should have any questions, please do not hesitate to call.

¹ It is doubtful that the regulation is still in effect, given the note on the regulation, and its lack of posting on the website, or even its general knowledge in the town. In the intervening years, the issue being addressed was in fact inserted in the zoning ordinance, which is part of the review before a building permit is issued.

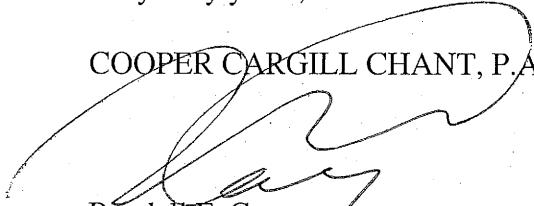


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Very truly yours,

COOPER CARGILL CHANT, P.A.



Randall F. Cooper
rcooper@coopercargillchant.com

RFC
enclosure(s)
cc: Client

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TOWN OF JACKSON
JACKSON, NEW HAMPSHIRE
NOTICE OF REGULATION
WATER POLLUTION CONTROL

Early 1990's - abolished as
creating too many waiver
situations relative to state
requirements...



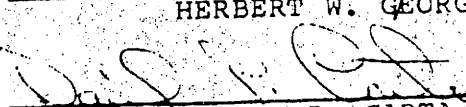



Notice is hereby given that the Board of Selectmen has approved the following regulation at its meeting of 27 June 1977, to be effective forthwith pursuant to RSA 147:1.

"Resolved by the Board of Selectmen of the Town of Jackson, New Hampshire acting pursuant to the powers vested in them by RSA 147:1 and all other powers in order to protect water supplies in the Town of Jackson particularly in areas of poor soil conditions and/or steep slopes that:

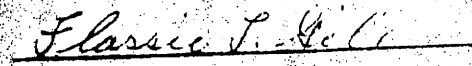
1. In any area where either severe soil limitations for sewage or waste disposal (as defined by the Soil Conservation Service, United States Department of Agriculture) or ground surface slope exceeds 8% (for the downhill side from the leach field) the minimum separation distance between the leach field shall be 150 feet for domestic wells and 300 feet for community wells.

2. All plans and specifications required for the alteration of existing or installation and construction of new sewage or waste disposal systems will be submitted (with a fee to be determined at the time of submission) to the Board of Selectmen for their review and comment prior to submission to the New Hampshire Water Supply and Pollution Control Commission for approval.

3. Compliance with this regulation is necessary before any building permit will be approved by the Board of Selectmen."

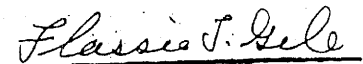

HERBERT W. GEORGE 

DAVID P. CARTA 

OLIVER W. NELSON 

Board of Selectmen, Town of Jackson,
New Hampshire


Flossie T. Gile
Town Clerk

6-28-1977

A true Copy attest:


Flossie T. Gile
Town Clerk