

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE
MONDAY, June 6, 2022
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Vice Chair Jennifer Mercer, Jeremy Katz, Dan Nash, Paul McDonough (Alt), Jennifer Barkley (Alt),

MEMBERS ABSENT: Dave Newlove

STAFF PRESENT: Tim Corwin – Senior Planner and Zoning Administrator

1. CALL TO ORDER

Chair Koppenheffer called the meeting to order at 7:01 PM.

2. APPROVAL OF MINUTES

A. May 2, 2022

Mr. Nash MOVED to approve the May 2, 2022, Minutes as presented in the June 6, 2022, packet with amendments.

Seconded by Mr. Katz.

Mr. McDonough was given voting privileges for this motion.

Amendments: Page 5, Line; Remove ‘The property is zoned RL-3 that has water, sewer, and electric services, and road access.’ Page 8, Line 18-20; Remove ‘non-‘.

****The Vote on the Motion was approved (4-0-1).***

Vice Chair Mercer abstained because she was not present for the meeting.

3. PUBLIC HEARING ITEMS

- A. Upper Valley Mountain Bike Association (applicant), Dartmouth College Trustees (property owner), 0 Mascoma Street (Tax Map 74, Lot 8, Plot 200), zoned RL-3:** Applicant proposes to construct a +/-800 sq. ft. picnic pavilion, to be located within the 100 ft. high-value wetland buffer established by Section 401.2.B of the Zoning Ordinance. Applicant requests (i) a Special Exception pursuant to Section 314.2 to allow an outdoor recreational facility, (ii) a Special Exception pursuant to Section 401.5 to construct the pavilion within the wetland buffer, and (iii) a Variance from Section 314.3 to allow the pavilion to be located 10 ft. from the side lot line where a minimum of 50 ft. is required.
ZB2022-09-SEVAR - Continued from May 2, 2022

Mr. Nash recused himself from this hearing.

Ms. Barkley and Mr. McDonough were appointed voting privileges for this hearing.

John Criswell appeared on behalf of the application. At the meeting last month, the Board asked about the onsite parking as it pertains to the structure. The setback is maintained, with the supporting structure

having an overhang that intrudes into the setback, but that is allowed. He provided a picture that shows 16 parking spaces. The ratio of parking is .33 spaces per seat, with a maximum need of 8 parking spaces needed. He believes he has addressed the parking needs. The goal is to eliminate parking from the wetland buffer.

The Board asked about the entrances to this recreational area. It is not within the buffer, but it is close to the setback. They are hoping to keep the structure closer to the north as it is middle ground between the use recreational use area, the parking area and the trail head. There is no other place for it to be located that is outside of the wetland area and outside of the setback.

Chair Koppenheffer asked if there are any additional questions from the public

Harrison Bourne spoke in support of the gazebo. He does not believe there is any negative impact on the area, and it would facilitate public use.

Hearing no additional comments, Chair Koppenheffer closed the Public Hearing.

Mr. Katz MOVED on May 2, 2022 and June 6, 2022, at duly-noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Jon Criswell on behalf of the Upper Valley Mountain Bike Association (applicant) and Dartmouth College Trustees (property owner), regarding 0 Mascoma Street (Tax Map 74, Lot 8, Plot 200), zoned RL-3. Applicant proposes to construct a +/-800 sq. ft. picnic pavilion, to be located within the 100 ft. high-value wetland buffer established by Section 401.2.B of the Zoning Ordinance. Applicant requests (i) a Special Exception pursuant to Section 314.2 to allow an outdoor recreational facility, (ii) a Special Exception pursuant to Section 401.5 to construct the pavilion within the wetland buffer, and (iii) a Variance from Section 314.3 to allow the pavilion to be located 10 ft. from the side lot line where a minimum of 50 ft. is required. ZB2022-09-SEVAR

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Lebanon Zoning Board of Adjustment makes the following findings of fact:

1. The subject property is a +/-17.1-acre undeveloped parcel located in the Rural Lands Three (RL-3) zoning district and currently utilized for biking trails. The biking trail network constitutes an “outdoor recreational facility” which is a use allowed by Special Exception in the RL-3 District. A substantial portion of the property is located within the Wetlands Conservation District which consists of the wetlands themselves as well as a 100 ft. buffer (established by Section 401.2.B of the Zoning Ordinance). The buffer extends from those wetlands that the City has identified as being of high or very high value.
2. The applicant proposes to construct a +/-800 sq. ft. picnic pavilion as an accessory building to the existing outdoor biking trail network recreational facility. The applicant’s desired location would place the pavilion 10 ft. from the side lot line and partially within the wetland buffer, as shown on the plan dated April 5, 2022, submitted with the application materials (the “Preferred Option”). The Preferred Option requires a Special Exception to allow a structure to be constructed in the wetland buffer as well as a Variance from the minimum required 50 ft. side setback.
3. In the alternative, the applicant requests a Special Exception to place the pavilion entirely within the wetland buffer, in compliance with the 50 ft. setback as shown on the plan dated March 19, 2022, submitted with the application materials (the “Alternative Option”). The Alternative Option requires a Special Exception to allow the pavilion to be constructed in the wetland buffer.

4. Under Section 314.2 of the Zoning Ordinance, “outdoor recreational facility” is a use allowed in the RL-3 District by Special Exception. “Outdoor recreational facility” is defined in Appendix A of the Zoning Ordinance as follows:

Outdoor recreational activities, including such facilities as outdoor tennis courts, swimming pool, golf courses, play fields, and similar uses. No buildings shall be allowed except for the necessary related uses such as restrooms and maintenance facilities, other than those accessory to a dwelling.

5. The proposed pavilion is a “necessary related use” to the existing biking trail network outdoor recreational facility.
6. In order to grant the requested Special Exception per Section 314.2 (required for both the Preferred Option and the Alternative Option), the Board must determine that the proposal meets the Special Exception criteria set forth in Section 801.3.
7. Both the Preferred Option and Alternative Option require a Special Exception to allow an accessory building to the existing outdoor recreational facility.
8. In the RL-3 District, a minimum side yard (i.e. a space unobstructed by buildings and structures) of 50 ft. must be maintained per Section 314.3 of the Zoning Ordinance. Therefore, a Variance is required to allow the Preferred Option which places the pavilion 10 ft. from the side lot line.
9. To obtain the requested Variance from Section 314.3, the applicant must demonstrate compliance with each of the five variance criteria as set forth in Section 801.2 of the Zoning Ordinance and NH RSA 674:33, I(b).
10. Section 401.5 of the Zoning Ordinance permits the Zoning Board of Adjustment to allow the construction of a structure within the 100 ft. wetland buffer by Special Exception. In order to grant the requested Special Exception to allow construction of the pavilion within the wetland buffer (required for both the Preferred Option and the Alternative Option), the Board must determine that the proposal meets the applicable criteria in Section 401.5 of the Zoning Ordinance.
11. As required by Section 401.7.D of the Zoning Ordinance, a copy of the application was forwarded to the Conservation Commission and was discussed at their April 14, 2022 meeting. Following discussion with the applicant, the Conservation Commission approved the following motion (as set forth in the draft April 14, 2022 meeting minutes):

[The Conservation Commission recommends] that the proposed pavilion be located farther from the buffer, as far east and south as possible, to minimize or eliminate impacts to the wetland buffer. Also, the Commission requests that the Zoning Board and Administrator examine the creep of the parking area into the wetland buffer area, and request that the parking area be delineated by wildlife friendly fencing or boulders outside of the wetland buffer, in order to eliminate impacts to the wetland buffer. Further, the Commission requests that the Zoning Board examine waste and sanitation items, and that a dry well maintenance program be discussed.

12. Daniel Justynski, Director of Real Estate for Dartmouth College, spoke in favor of the application.

13. Devora Gronauer, a representative of the Jewish Cemetery Committee expressed concern with respect to trash removal and parking. Susan Painter and Sarah Riley also expressed concern with respect to the adequacy and location of parking. Jewish community member Roberta Berner expressed concern with respect to the application.
14. In response to comments from the public made at the May 2, 2022 hearing and in response to questions from the Board, the applicant revised the Preferred Option with the submission of a plan dated May 23, 2022, depicting parking spaces to the north and south of the pavilion with the parking spaces to the north separated from the wetland buffer by large boulders.
15. On June 6, 2022 Harrison Bourne spoke in support of the application.

II. CONCLUSIONS OF LAW

A. Special Exception pursuant to Section 314.2 to allow an accessory building for the existing outdoor recreational facility (required for both the Preferred Option and the Alternative Option) This is exclusively the preferred option.

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the Special Exception criteria set forth in §801.3 of the Zoning Ordinance:

1. The Special Exception is specifically authorized by §314.2 of the Zoning Ordinance. (§801.3.A)
2. There are no special conditions/requirements applicable to the proposed use. (§801.3.B)
3. There **are no** existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy. (§801.3.C)
4. The character of the area **will not** be adversely affected. (§801.3.D)
5. **No** hazard or nuisance will be created. (§801.3.E)
6. The capacity of existing or planned community facilities and services (including streets and highways) **will not** be adversely impacted. (§801.3.F)
7. The granting of the Special Exception **will not** result in undue municipal expense. (§801.3.G)
8. The proposed Special Exception **will** be developed in a manner compatible with the spirit and intent of the ordinance. (§801.3.H)
9. The general welfare of the City **will** be protected. (§801.3.I)

B. Variance from Section 314.3 to allow the pavilion to be located 10 ft. from the side lot line (required for the Preferred Option only)

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the Variance criteria set forth in Section 801.2 of the Zoning Ordinance:

1. The variance **will not** be contrary to the public interest. (Section 801.2.A.1)
2. The spirit of the ordinance **is** observed. (Section 801.2.A.2)
3. Substantial justice **is** done. (Section 801.2.A.3)
4. The values of surrounding properties **are not** diminished. (Section 801.2.A.4)
5. Literal enforcement of the provisions of the ordinance **would** result in an unnecessary hardship. Owing to **[the following]** special conditions of the property that distinguish it from other properties in the area (Section 801.2.A.5.a):

There is substantial presence of wetlands and the obligation to develop honoring the setback which essentially makes it unfeasible to develop the property without the granting of the variance.

- i. There **is not** a fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property. (Section 801.2.A.5.a.i)
- ii. The proposed use **is** a reasonable one. (Section 801.2.A.5.a.ii)

C. Special Exception pursuant to Section 401.5 to construct the pavilion within the wetland buffer (required for both the Preferred Option and the Alternative Option)

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the Special Exception criteria set forth in §401.5 of the Zoning Ordinance:

1. The use for which the exception is sought **cannot** feasibly, after consideration of all alternatives, be carried out on a portion or portions of the lot which are outside the Wetlands Conservation District. (§401.5.A)
2. Due to the provisions of the Wetlands Conservation District, as applied to the particular characteristics, setting and environment of the property, the lot **cannot** reasonably be used for any of the uses permitted or allowed by special exception, without some form of special exception under this section. (§401.5.B)
3. The design and construction of the proposed use **is** consistent with the purpose and intent of §401.1 (A), (B) and (C) of the Zoning Ordinance, and adequate conservation measures **will** be taken to mitigate the detrimental effects of the proposed use on the natural function of the wetlands (§401.5.C)
4. The criteria set forth in §401.5.D relates to pipelines, powerlines, and other transmission of lines and, therefore, is not applicable.
5. The proposed use **will not** create a hazard to individual or public health, safety and welfare due to the loss of wetland, the contamination of ground water, or any other reason. (§401.5.E)
6. The project **is** capable of complying with all State and Federal wetlands and wetlands permitting requirements. (§401.5.F)

7. The project is capable of conforming to all existing best management practices, as referenced in Appendix A of the Zoning Ordinance, and will be implemented in a way which conforms to those practices (§401.5.G)\

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **6th day of June, 2022**, hereby:

- A. GRANTS the requested Special Exception per to Section 314.2 to allow the pavilion in the RL-3 District;
- B. GRANTS the requested Variance from Section 314.3 to allow the pavilion to be located 10 ft. from the side lot line where a minimum of 50 ft. is required; and
- C. GRANTS the requested Special Exception per Section 401.5 to construct the pavilion within the wetland buffer;

and, therefore, approves the applicant's PREFERRED OPTION as set forth above and per testimony, plans, and materials submitted, and per the following conditions:

1. The applicant's Preferred Option is approved as depicted on and pursuant to the site plan submitted for the June 6, 2022 hearing, dated May 23, 2022, and depicting 16 parking spaces.
2. The applicant shall obtain site plan review and a building permit. The Board requests that the body reviewing the site plan give due consideration to the comments of the Conservation Commission as set forth in the Commission's motion.
3. The project shall be completed substantially in conformance with the proposal.

Second by Vice Chair Mercer.

****The Vote on the Motion was unanimously approved (5-0).***

Hearing 3F has been withdrawn. There will be no hearing on that matter this evening.

Mr. Nash returned to the meeting.

- B. **Song Lin & Min Du, 101 Maple Street (Tax Map 59, Lot 78), zoned R-3:** An appeal of an administrative decision that the property is used as a three (3) unit multi-family dwelling in violation of Section 310.3 of the Zoning Ordinance (the R-3 District Table of Uses). **ZB2022-13-AAD**

Song Lin and his wife Min Du, owners, appeared on behalf of the appeal. Mr. Corwin said the building and fire inspector inspected the building and they observed there is at least one living quarter in the basement that has been added. A violation exists, because there is an approved variance for two living area, not three. With any administrative decision, an appeal is allowed. And if there is an error, that is within the jurisdiction of the Zoning Board.

The Board asked if the appellant understands the administrative decision. The applicant asked for clarification about the issue. The owner agrees there are three apartments in the building. The tenant has been asked to move out. He believes the remodeling was approved and allowed, but he is willing to make it into only two dwellings. The owner collects rent from three apartments and all the people living in the apartments are unrelated. The issue of who created the three apartments is irrelevant to the Board. There is concern that three apartments exist.

Mr. Katz discussed the early March letter. Jurisdiction of the Board is allowed only if an appeal is filed within 30 days of when the administrative decision was made. Regardless of this discussion, there is not subject matter jurisdiction.

The Board discussed the correspondence surrounding the administrative decision. The date constraints were provided to the appellant. Based on the dates and the date of the appeal, it is the Boards decision to determine if the appeal is appropriate

***Mr. Katz moved to dismiss this appeal due to subject matter jurisdiction.
Second by Ms. Mercer.***

The motion was withdrawn.

***Mr. Katz moved to dismiss this appeal on the basis that it was not timely filed.
Second by Chair Koppenheffer.***

****The Vote on the Motion was unanimously approved (5-0).***

- C. Irving Oil Marketing, Inc. (applicant), Rancho Lebanon, LLC & Irving Oil Properties NH Corp (property owners), 200 & 206 South Main Street (Tax Map 114, Lot 5 & Tax Map 115, Lot 1), zoned GC:** Applicant requests Variances from the following sections of the Zoning Ordinance in connection with the proposed construction of a retail motor vehicle service station and convenience store: (i) Section 305.3 to allow a retail service station canopy to be located +/-9 ft. from the side property line where 20 ft. is the minimum required, (ii) Section 608.8 to permit an existing non-conforming freestanding sign to remain on the property, and in the alternative Section 608.4.A.4.a to allow a freestanding sign to exceed the maximum permitted height and size, and (iii) Section 608.4.A.4 to allow two (2) freestanding signs on the property where only one (1) is permitted and to allow the freestanding signs to be located +/-80 ft. apart where a minimum of 150 ft. separation is required. **ZB2022-14-VAR**

There is a presentation available regarding this application at Lebanon.live which allows the public and the Board to see the presentation.

Maria Dolder, attorney on the project, Nicole Duquette with GPI and Jennifer Eaigle appeared on behalf of the application. The site plan and the sign plan are in the Board's packet.

Ms. Duquette explained the site plan. The site is a former Irving site that has not been in use due to the DOT taking land. They are proposing leasing the laundromat portion of the plaza site to give them additional land. They intend to raze the existing building and the laundromat and replace it with a new fueling area and a convenience store. It would have 10 fueling stations. It is located in the commercial district. One variance is being asked for a canopy over the fueling area to cover an internal lot line between the owned property and the leased area. The other variances pertain to the signage.

There is sufficient area to allow landscaping, but there is not the required length between their sign and the Target sign. Irving is required to have two signs posting the prices of fuel.

Irving was paid adequately and agreed to take that sum paid by the DOT to take the land. The characteristics of the land changed due to the taking. DOT took the front of the property, which made the property smaller. Also, the new raised median on the street limits access going into that site. Irving is required to allow adequate storage space due to the flood limitations and allow for drainage. It requires additional area from the plaza to make it a viable property. The applicants would do a traffic study to determine how the median impacts access to the property. They believe they are adding a lot of

improvements to the area; and asking for a minimal variance to redevelop this site under the best scenario.

The applicants believe there is a preexisting sign that is grandfathered, and they do not need a variance to use that sign. The sign ordinance was discussed. The structure has not communicated a sign since the Irving station left the property. The use of the sign has ceased to be used for 180 days or more, then the sign must not be used as a sign. The applicants said yes, it has been unoccupied, but they did not have the intent to abandon the use of that property. There has been no requirement to remove it. The existing sign is about 65 feet tall. The criteria for the variance were discussed and elaborated.

The second freestanding sign is required by the law to show the prices of fuel. The second sign cannot be put on the leased property, per the lease. That means the sign has to be about 80 feet instead of within 150 feet of the existing Target sign. They believe the existing sign should be allowed because they never abandoned it. The actual structure would not be within the setback, it is just the overhang on an internal property line. They have a 20-year lease, but according to the lease, a sign on the leased property is not allowed. The Board asked if the second sign could fit anywhere within their own property. The applicants could not find a place to place it.

The applicants stated that they have made many attempts to negotiate to lease the extra property and have come to the City several times over the years. They believe they showed intent to redevelop the property and use the sign.

Mr. Corwin discussed the concept of abandonment in regard to a nonconforming use. The Board can approve the use, and the concept of intent is significant for the approval. The discussed putting the prices on the existing sign. Irving has to be able to change the prices on the signs.

The Board took a recess at 8:53 until 9:06. The Board determined they would like additional information and requested scheduling a special meeting for this hearing to be the only hearing.

The Board would like some additional information. What is driving the requirement of pricing changes? Is there any documentation that indicates working with the City over the years? What is the information about compensatory storage that they are referencing? Can they provide evidence of continuing discussion about using the property? Also, relative to the old sign and the new sign, if in fact there is a conclusion that the sign was abandoned, would they still need a variance?

Mr. Katz MOVED to continue this hearing until June 16, 2022 at 7:00 PM.

Seconded by Mr. Nash

****The Vote on the Motion was unanimously approved (5-0).***

- D. Steven Davis, 12 Excelsior Street (Tax Map 93, Lot 89, Plot 400), zoned R-3:** Applicant proposes to construct a home on the vacant lot. A Variance per Section 310.3 of the Zoning Ordinance is requested to allow the home to be located +/-11 ft. from the side lot line where a minimum of 15 ft. is required. **ZB2022-15-VAR**

Christine Connors, part owner of Vermod that would be building on the lot and Steven Davis, owner of the lot, appeared on behalf of the application. When they designed the house, it looked odd putting it on an angle and they would like to make it more buildable to straighten the building, which would require moving it into the side lot line. The applicants showed the proposed lot plan and the Board asked for the proposed building plan and footprint. The Chair asked for a copy of the floor plan and a representation of how the house would look on the lot without the variance, and how it would look with a variance.

***Vice Chair Mercer MOVED to the hearing until the July 5, 2022 meeting.
Second by Mr. Katz.***

Ms. Barkley was appointed to vote on this motion.

****The Vote on the Motion was unanimously approved (5-0).***

- E. Chiplin Enterprises, Inc., 18 South Street (Tax Map 107, Lot 18), zoned R-2:** Applicant proposes to subdivide the property into two (2) lots. To allow the proposed subdivision, the applicant requests Variances from the following: (i) Section 202 of the Zoning Ordinance (prohibiting the reduction of lot area to less than the minimum required), (ii) Section 309.3 (requiring a minimum lot size of 10,000 sq. ft. for Class 1 lots in the R-2 District and an additional 3,000 sq. ft. for every additional dwelling unit after two); and (iii) Section 309.3 to allow an existing building to be located +/- 12 ft. from the proposed side lot line where a minimum of 15 ft is required. **ZB2022-16-VAR**

Victoria Carver, Gayle Bercahr, Ethen Gilmore, and Nicklas Burke appeared on behalf of the application. Chiplin Enterprises owns the property. There are several buildings on the property. On the property is one older multi-family apartment building. Ms. Carver would like the option to sell the older building or the newer buildings as separate properties. The subdivision does not meet the criteria, but it does follow the natural contours of the land and is a logical split. To accommodate the existing driveway, they need a variance to the setback.

The criteria were discussed. There is no change to how the property is currently being used. Separating the properties, to allow them to be sold separately requires the variances due to lot sizes.

Ms. Barkley was appointed a voting member for this hearing.

Mr. Katz asked about the parking for each of the buildings. This is a non-conforming use in many ways in the District. Mr. Nash asked if the variance for the small building, does it allow more room for the other lot to allow more dwellings on the larger area, which is against the spirit of the law. He believes that the property can be split differently and questions the parking.

The boundary for the small lot is influenced by the topography of the sites. It goes down steeply and drops off. Mr. Nash also asked about the property line and how it allows for a vegetative buffer.

Ms. Mercer asked why the driveway cannot be moved 3 feet and then a variance would not be required. He asked why not a more natural boundary line and grant an easement to the next property.

The applicants were asked what the hardship is that is preventing selling one of the four buildings on that existing lot. These are very distinct properties and differ from one another. From the application, the three lower buildings were built around 1982 and one is far older. One building had a fire and was rebuilt around 2000. Hardship law indicates that a person cannot create their own hardship and cannot ask for a variance based on what they created. The nature of the hardship has to be a physical characteristic of the property. If the ground where the older building is built extended further and the topography was such that they could create a larger lot, they would not need a variance. It is the topography that limits them.

Attorney Burke was asked to confirm that there is not enough land to subdivide the property to be conforming based on the number of units in each area. If in theory the lots have been consistent over time, the property was built out to maximize the number of units possible on the land.

A variance cannot be determined without a parking plan. But if the Board is not inclined to grant a variance, then a parking plan is not required. The topography should be further reviewed.

Chair Koppenheffer opened the Public Hearing.

The Board was told that Harrison Bourne, a neighbor, has indicated that he has no intentions to prohibit the proposed lot division.

Mr. Katz MOVED to continue this hearing until August 1, 2022.

Second by Vice Chair Mercer.

***The Vote on the Motion was unanimously approved (5-0).**

- F. Immersion Montessori School (applicant), Centurion Properties, Inc. (property owner), 434 North Main Street (Tax Map 2, Lot 15), zoned R-3:** The property is improved with an office building, which is a non-conforming use in the R-3 District. Applicant requests Special Exceptions per Section 310.2 and Section 604 of the Zoning Ordinance to convert a portion of the building to a group day care facility, and per Section 702.1 to convert a portion of the building to an educational facility, which is not a permitted use in the R-3 District. **ZB2022-17-VAR**

This application was withdrawn.

4. STAFF COMMENTS

None.

5. ADJOURNMENT

Mr. Nash MOVED to adjourn the meeting at 9:53 PM.

Seconded by Mr. Katz.

***The Vote on the Motion was approved (5-0).**

Respectfully submitted,
Linda Billings
Recording Secretary