



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

-
- 1. Call to Order**
 - 2. Approval of Minutes**
 - A. August 1, 2022
 - 3. Election of Officers**
 - A. Election for Vice-Chair
 - 4. Public Hearing Items**
 - A. **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 - Continued from August 1, 2022 per the applicant's request**
 - B. **ABC 6 Homes, LLC, 18 Granite Street (Tax Map 91, Lot 82), zoned R-3:** Applicant requests a Special Exception per Section 310.2 of the Zoning Ordinance to convert a one-family dwelling to a two-family dwelling. **ZB2022-20-SE**
 - 5. Rehearing Request**
 - A. **Irving Oil Marketing, Inc. (applicant) and Cobalt Properties NH Corp (property owners), 206 South Main Street (Tax Map 115, Lot 1), zoned GC:** Motion by applicant to rehear a request for a Variance from Section 608.4.A.4 of the Zoning Ordinance to allow two (2) freestanding signs on the property where only one (1) is permitted. The Variance application was denied on July 5, 2022. **ZB2022-14A-VAR**
 - 6. Staff Comments**
 - 7. Adjournment**

The order of agenda items is subject to change.

Meetings are open for in-person and remote attendance. Members of the public that wish to attend remotely may do so by going to LebanonNH.gov/Live where you will find instructions on how to enter the meeting. Members of the public will be able to participate and ask questions through the City's virtual platform or by phone. Please note:

Lebanon Zoning Board of Adjustment Agenda
September 6, 2022

Should technical difficulties occur during the meeting that disrupts virtual or phone connection(s), the meeting will continue without remote access capabilities.

If you have any questions or would like to view the files for the application identified above, please contact the Planning & Development Department by sending an e-mail to planning@lebanonnh.gov, or by calling 603-448-1457, or by visiting the Planning and Development Office located in City Hall during regular work hours, Monday through Thursday, 7AM to 5PM. The application materials will also be posted to the City's website at LebanonNH.gov/Agendas.

**Agenda
Zoning Board of Adjustment
September 6, 2022**

**Agenda Item #2A
Approval of Minutes**

August 1, 2022

DRAFT

**LEBANON ZONING BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE
MONDAY, August 1, 2022
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Dan Nash, Paul McDonough (Alt)

MEMBERS ABSENT: Vice Chair Jennifer Mercer, Jeremy Katz, Dave Newlove, Jennifer Barkley (Alt)

STAFF PRESENT: Tim Corwin – Senior Planner and Zoning Administrator

1. CALL TO ORDER

Chair Koppenheffer called the meeting to order at 7:00 PM.

2. APPROVAL OF MINUTES

Mr. McDonough was given voting privileges for this meeting.

A. July 5, 2022

Mr. Nash MOVED to approve the July 5, 2022, Minutes as presented in the August 1, 2022, packet with amendments.

Seconded by Mr. McDonough.

Amendments: Page 11, Line 44; Remove ‘flood plain’ and Add ‘existing grade.’ Page 11, Line 50; Remove ‘flood plain’ and Add ‘existing grade.’

**The Vote on the Motion was unanimous (3-0).*

3. PUBLIC HEARING ITEMS

- A. 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 - Continued from June 6, 2022 - Request by applicant to postpone until September 6, 2022 , 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 - Continued from June 6, 2022**

Mr. Nash MOVED to continue this Item to September 6, 2022 meeting.

Seconded by Mr. McDonough.

1 **The Vote on the Motion was unanimous (3-0).*

2
3 **B. REVISED NOTICE - Steven Davis, 12 Excelsior Street (Tax Map 93, Lot 89, Plot 400),**
4 **zoned R-3:** Applicant proposes to construct a home on the vacant lot. A Variance per Section
5 310.3 of the Zoning Ordinance is requested to allow the home to be located +/-8 ft. from the
6 side lot line where a minimum of 15 ft. is required. **ZB2022-15-VAR - Continued from July**
7 **5, 2022**

8
9 Steven Davis appeared on behalf of the application. The Chair discussed the drawing on the application
10 and asked for clarification of the distance from the side lot line. The applicant said the shape of the lot is
11 quirky, so they hope to square up the location of the home on the lot. In the original application the
12 hardship said the lot size and shape make it nearly impossible to build and market a normally desirable
13 home. If the house is not square, the rooms would be oddly shaped.

14
15 The Board discussed that an odd-shaped house is difficult to build. The applicant's request is reasonable.

16
17 **Chair Koppenheffer opened the Public Hearing.**

18
19 Molly Witmer, a next-door neighbor, appeared to ask about where the 8'6" set back would be. The
20 setback is against the rail trail.

21
22 Linda Rondeau, a neighbor, asked how the drainage would impact her property, due to the configuration
23 behind the houses. Once the back yard was filled in, it no longer drained toward the rail trail. It puts
24 water and melted snow in their back yards. Previously the drainage went toward the lot line. Now that
25 the land has been filled, it is flowing toward the neighbors' properties.

26
27 Mr. Davis said the drainage culvert goes to the rail trail. The culvert that was installed may not be
28 effective due to the additional fill that was put in. Mr. Davis did not put in the fill, he bought the
29 property that way.

30
31 **Hearing no one else, the Public Hearing was closed.**

32
33 *Mr. Nash MOVED that on June 6, 2022, July 5, 2022, and August 1, 2022, at duly-noticed meetings of*
34 *the Lebanon Zoning Board of Adjustment, there appeared Steven Davis and Kristen Connors of*
35 *Vermod Homes regarding 12 Excelsior Street (Tax Map 93, Lot 89, Plot 400), zoned R-3. Applicant*
36 *proposes to construct a home on the vacant lot. A Variance per Section 310.3 of the Zoning Ordinance*
37 *is requested to allow the home to be located +/-8 ft. from the side lot line where a minimum of 15 ft. is*
38 *required. ZB2022-15-VAR*

39
40 **I. FINDINGS OF FACT**

41
42 Based on testimony given, application materials presented, and supporting documents submitted, the
43 Lebanon Zoning Board of Adjustment makes the following findings of fact:

- 44
45 1. The property is a vacant lot located at the end of the improved section of Excelsior Street and
46 abuts the Northern Rail Trail to the south. At +/-0.12 acres (according to the City's Assessor's
47 records), the property is non-conforming to the 10,000 sq. ft. minimum lot size required for Class
48 1 lots in the R-3 District.
49

2. The applicant proposes to construct a one-family dwelling on the property, which is a permitted use in the R-3 District. The home is proposed to be located 8 ft. from the side lot line shared with the rail trail, whereas a minimum unobstructed side yard of 15 ft. is required.
3. In the R-3 District, Class 1 lots (i.e. lots that are served by municipal sewer) must maintain a minimum side yard (i.e. a space unobstructed by buildings and structures) of 15 ft. See Section 310.3 of the Zoning Ordinance. Therefore, a Variance is required to permit construction of the proposed home, which will encroach approximately seven (7) ft. into the minimum required 15 ft. side yard.
4. To obtain the requested Variances, 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). The applicant has submitted testimony addressing the Section 801.2 Variance criteria in an application received by the Planning and Development Department on May 18, 2022.
5. Per an e-mail sent on June 1, 2022 to the City of Lebanon, the New Hampshire Department of Transportation requested that “a fence or other physical delineation be installed along NHDOT property line to maintain NHDOT’s 49.5 ft wide ROW from the centerline of the rail corridor be added to the zoning approval letter.”
6. Molly Witmer, 10 Excelsior Street questioned the location of the requested setback variance.
7. Linda Rondeau, 8 Excelsior expressed concern regarding drainage in backyards.

II. CONCLUSIONS OF LAW

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):

The lot is odd shaped and substandard size.

 - 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)

1 **III. DECISION**

2
3 Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **1st day of August, 2022**,
4 hereby **GRANTS** the requested Variance from Section 310.3 of the Zoning Ordinance, as set forth above
5 and per testimony, plans, and materials submitted, and per the following conditions:

- 6
7 1. The applicant shall obtain a building permit.
8
9 2. The applicant shall install a fence along the NHDOT “Rail Trail” boundary.
10
11 3. The applicant shall limit fill at the NHDOT property so as to not aggravate drainage issues.
12

13 *Seconded by Mr. McDonough.*

14
15 **The Vote on the Motion was approved (3-0).*

- 16
17 C. **New England Sports Park and Carter Community Building Association, 1 Taylor Street**
18 **(Tax Map 92, Lot 25), zoned LD:** The subject property is located in the Floodplain District.
19 Applicants request a Variance pursuant to City Code Chapter 74-18 to allow a proposed +/-
20 160 sq. ft. storage building to be placed below the base flood elevation, whereas City Code
21 Chapter 74-21.B requires that the lowest floor of a structure located in the Floodplain District
22 be elevated to the level of the base flood elevation. **ZB2022-19-VAR - Continued from July**
23 **5, 2022**
24

25 **This application was withdrawn by the applicant.**

26
27 **4. STAFF COMMENTS**

28
29 An election of the New Vice Chair will take place at the September meeting.
30

31 **5. ADJOURNMENT**

32
33 *Mr. McDonough MOVED to adjourn the meeting at 7:30 PM.*

34 *Seconded by Mr. Nash.*

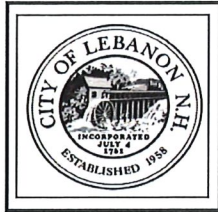
35
36 **The Vote on the Motion was approved (3-0).*

37
38 Respectfully submitted,
39 Linda Billings
40 Recording Secretary

**Agenda
Zoning Board of Adjustment
September 6, 2022**

**Agenda Item #4B
Public Hearing Item**

**ABC 6 Homes, LLC, 18 Granite
Street (Tax Map 91, Lot 82), zoned
R-3
ZB2022-20-SE**



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

ZONING BOARD OF ADJUSTMENT

September 6, 2022 Meeting

Staff Memorandum – ZB2022-20-SE

APPLICATION INFORMATION

Agenda Item: 4.B

Application Type:

Special Exception per Section 310.2 to convert a one-family dwelling to a two-family dwelling

Location:

18 Granite Street (Tax Map 91, Lot 82)

Applicant/Property Owner:

ABCG Homes, LLC

Zoning District:

Residential Three (R-3)

Property Size: 0.27 acres (+/-

11,761) sq. ft. (conforming to the minimum required 10,000 sq. ft. lot size required for Class 1 lots in the R-3 District per Section 310.3)

Existing Use: +/-999 sq. ft. (finished), +/- 3,426 sq. ft. (gross) two-story one-family dwelling constructed in 1840, per the City's assessing records (a conforming use in the R-3 District)

Proposed Use: Two-family dwelling

Overlay Districts: none

Previous ZBA Action (since 1995):
none

Other Approvals Required:

Building Permit

Attachments:

Application (4 pages total)

HEARING NOTICE

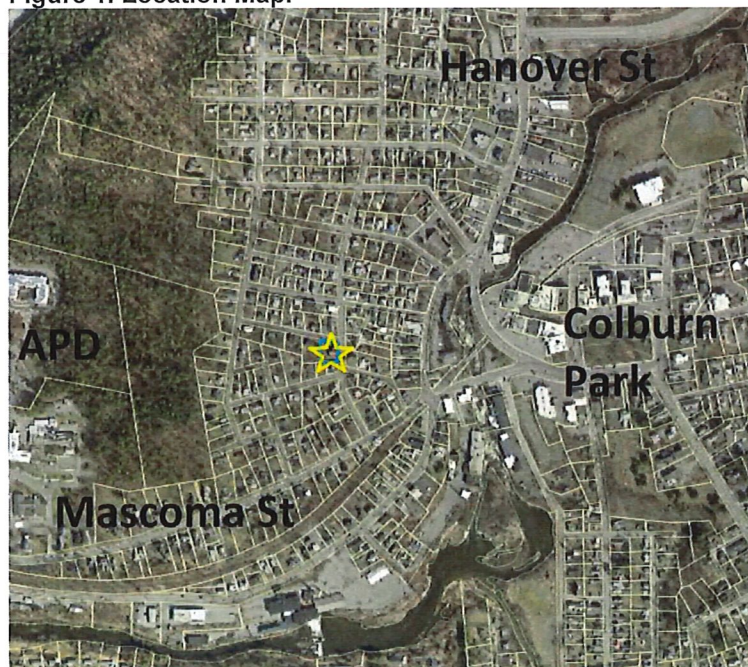
ABCG Homes, LLC, 18 Granite Street (Tax Map 91, Lot 82), zoned R-3: Applicant requests a Special Exception per Section 310.2 of the Zoning Ordinance to convert a one-family dwelling to a two-family dwelling. ZB2022-20-SE

SUMMARY OF REQUEST

The property is a +/-0.27 acre lot located at the southwestern corner of Granite and Child Streets, and is improved with a 999 sq. ft. (finished) one-family dwelling constructed in 1840 (according to the City's assessing records). An existing driveway provides access to Child St.

The applicant proposes to convert the existing one-family dwelling into a two-family dwelling. Floor plans have not been provided, but according to the application materials, the applicant proposes to renovate a currently vacant structure attached to the back of the home that was formerly occupied by a commercial use, and proposes to regrade the back yard in connection with the proposed renovation. The application materials also indicate that 4-6 on-site parking spaces are available in the driveway.

Figure 1. Location Map.



STAFF MEMORANDUM

ZB2022-20-SE
18 Granite St (91- 82)
September 6, 2022 ZBA Mtg
Agenda Item 4.B
Page 2 of 3

Figure 2. Google Street View – from Child Street (July, 2013)



Figure 3. Bird's Eye View of subject property (looking east).



©2021 Eagleview (image taken 4/4/2021)

STAFF MEMORANDUM

ZB2022-20-SE
18 Granite St (91- 82)
September 6, 2022 ZBA Mtg
Agenda Item 4.B
Page 3 of 3

ZONING ORDINANCE REQUIREMENTS

“Two-family dwelling by conversion of existing one-family dwelling” is a use permitted by **Special Exception** in the R-3 District per Section 310.2 of the Zoning Ordinance. To grant the requested Special Exception, the Board must determine that the proposal meets the general Special Exception criteria, set forth in Section 801.3 as follows:

- A. The Special Exception is specifically authorized by a provision of this Ordinance.
Note: The Special Exception is authorized by Section 310.2 of the Zoning Ordinance.
- B. All special conditions required of the special exception have been met.
Note: There are no special conditions required for a conversion of a one-family dwelling to a two-family dwelling in the R-3 District.
- C. There are no existing violations of this Ordinance on the property that the granting of this special exception would not remedy.
Note: Staff is not aware of any Zoning Ordinance violations on the property.
- D. The character of the area shall not be adversely affected.
- E. No hazard or nuisance will be created.
- F. The capacity of existing or planned community facilities and services (including streets and highways) will not be adversely impacted.
- G. Granting the special exception will not result in undue municipal expense.
- H. The proposed special exception will be developed in a manner compatible with the spirit and intent of the Ordinance.
- I. The general welfare of the City will be protected.

The applicant has submitted testimony addressing the Section 801.3 criteria in an application received by the Planning and Development Department on August 11, 2022 (see attached).

STAFF COMMENTS

Section 607 of the Zoning Ordinance requires a minimum of two (2) parking spaces per dwelling unit. Therefore, the proposed conversion to a two-family dwelling requires a minimum of four (4) off-street parking spaces. As noted above, the application materials also indicate that 4-6 on-site parking spaces are available in the driveway.

Absent abutter testimony to the contrary, and other than staff's concern with respect to Section 201.7, the proposed conversion does not appear to be inconsistent with any of the applicable criteria set forth in Section 801.3.

Attachment

cc: ABCG Homes, LLC, property owner (via e-mail)
File

**CITY OF LEBANON
APPLICATION FOR**

SPECIAL EXCEPTION	☒	☐	SITE PLAN REVIEW
VARIANCE	☐	☐	SUBDIVISION
MOTION FOR REHEARING	☐	☐	LOT LINE ADJUSTMENT
APPEAL OF AN ADMIN. DECISION	☐	☐	CONDITIONAL USE PERMIT

☐ OTHER _____

PROPERTY OWNER (APPLICANT):

NAME: ABC 6 Homes LLC TEL.#: 603-443-3149
 MAILING ADDRESS: 13 Houghst. Lebanon NH, 03766
 E-MAIL ADDRESS: brendan@ironp.nh.realty.com

CO-APPLICANT, AGENT, OR LESSEE:

NAME: _____ TEL.#: _____
 MAILING ADDRESS: _____
 E-MAIL ADDRESS: _____

PROJECT LOCATION:

TAX MAP #: 91 LOT#: 82 PLOT #: _____ ZONE: R3
 STREET ADDRESS OF PROJECT: 18 Granite St Lebanon NH 03766
 IS THIS PROPERTY LOCATED IN THE: WETLANDS ☐ YES ☒ NO HISTORIC DISTRICT ☐ YES ☒ NO
 FLOOD PLAIN ☐ YES ☒ NO

SCOPE OF PROJECT:

Single family conversion to 2 family
One family and add a second unit to Empty structure
Existing on Back of House. Former Location of a Commercial Space

TYPE OF OCCUPANCY:

EXISTING ☐ VACANT ☒ ONE FAMILY ☐ TWO FAMILY ☐ MULTI-FAMILY ☐ COMMERCIAL ☐ INDUSTRIAL
 PROPOSED ☐ VACANT ☐ ONE FAMILY ☒ TWO FAMILY ☐ MULTI-FAMILY ☐ COMMERCIAL ☐ INDUSTRIAL
 IF USE IS COMMERCIAL OR INDUSTRIAL, PLEASE NOTE SPECIFIC
 USE: _____

SIGNATURE BLOCK: B. P. Clark, Member

FOR PLANNING BOARD APPLICATIONS ONLY: I, the undersigned, hereby submit this application on the date noted below with the knowledge and understanding that the Planning Board shall determine if the submitted application is complete according to its regulations at its next regularly scheduled meeting on September 6, 2022, unless I personally request, in writing, that the Board delay its determination of completeness to a later date.

PROPERTY OWNER: ABC 6 Homes LLC, B. P. Clark DATE: 8/4/22

NOTE: IF, AS OWNER, YOU WISH TO DESIGNATE AN AGENT TO ACT ON YOUR BEHALF, PLEASE READ THE FOLLOWING AND SIGN BELOW: I hereby designate the person listed above as my agent for the purpose of procuring the necessary local permits for the proposed work as described herein. Representations made by my agent may be accepted as though made by me personally, and I understand that I am bound by any official decision made on the basis of such representation.

PROPERTY OWNER: _____ DATE: _____

DATE RECEIVED	FILE # (MAP/LOT)	APPLICATION #	FEE - \$ AMOUNT	DATE PAID	VOUCHER #
<u>8-11-2022</u>	<u>91-82</u>	<u>282022-</u> <u>20-SE</u>			

(Last Revised 4/04/18)

**CITY OF LEBANON, NEW HAMPSHIRE
SUPPORT STATEMENT FOR A SPECIAL EXCEPTION**

One cover application, one abutters list, a filing fee and ten copies of the site plan must accompany this support statement.

I (we) hereby request a Special Exception as provided for in Article(s) 982.3 & 8,
Section(s) 310.1, 801.3, of the Lebanon Zoning Ordinance.

PROJECT DESCRIPTION (Please provide your plans for the property with as much detail as possible with respect to your proposed. You can respond in the space provided, or attach a separate statement.)

The plan would be to add a residential unit to the
currently attached and vacant structure. Add to and ~~separate~~ ^{secure}
structural footings. Add Electrical, Framing, Buildout Existing
plumbing. Add HVAC Independent of main house. New roof
for full perimeter. New siding, New fencing. Grading to
back yard. Add kitchen, Bath rooms, and Bedroom for a
2 Bedroom 1.5 Bath unit.

In order to grant a Special Exception, the Zoning Board of Adjustment must make affirmative findings of certain conditions. Those conditions are listed below:

(You can respond in the space provided, or attach a separate statement. Please be prepared to address the conditions with the Board during your public hearing. You must show that you have met all the conditions.)

SECTION 801.3 Special Exceptions - To hear and decide special exceptions to the terms of this ordinance upon matters which the Board is required to pass under this ordinance. In passing upon any application for a special exception, the Board shall make each of the following findings:

- A. That the special exception is specifically authorized by a provision of this ordinance:
801.3 Two family dwelling by conversion
of existing one family dwelling
- B. That all special conditions required of the special exception have been met:
yes
- C. That there are no existing violations of this ordinance on the property that the granting of this special exception would not remedy:
Correct

CITY OF LEBANON, NEW HAMPSHIRE
SUPPORT STATEMENT FOR A SPECIAL EXCEPTION
Page 2

D. That the character of the area shall not be adversely affected:
No Changes

E. That no hazard or nuisance will be created:
No

F. That the capacity of existing or planned community facilities and services (including streets and highways) will not be adversely impacted:
No

G. That granting the special exception will not result in undue municipal expense:
No

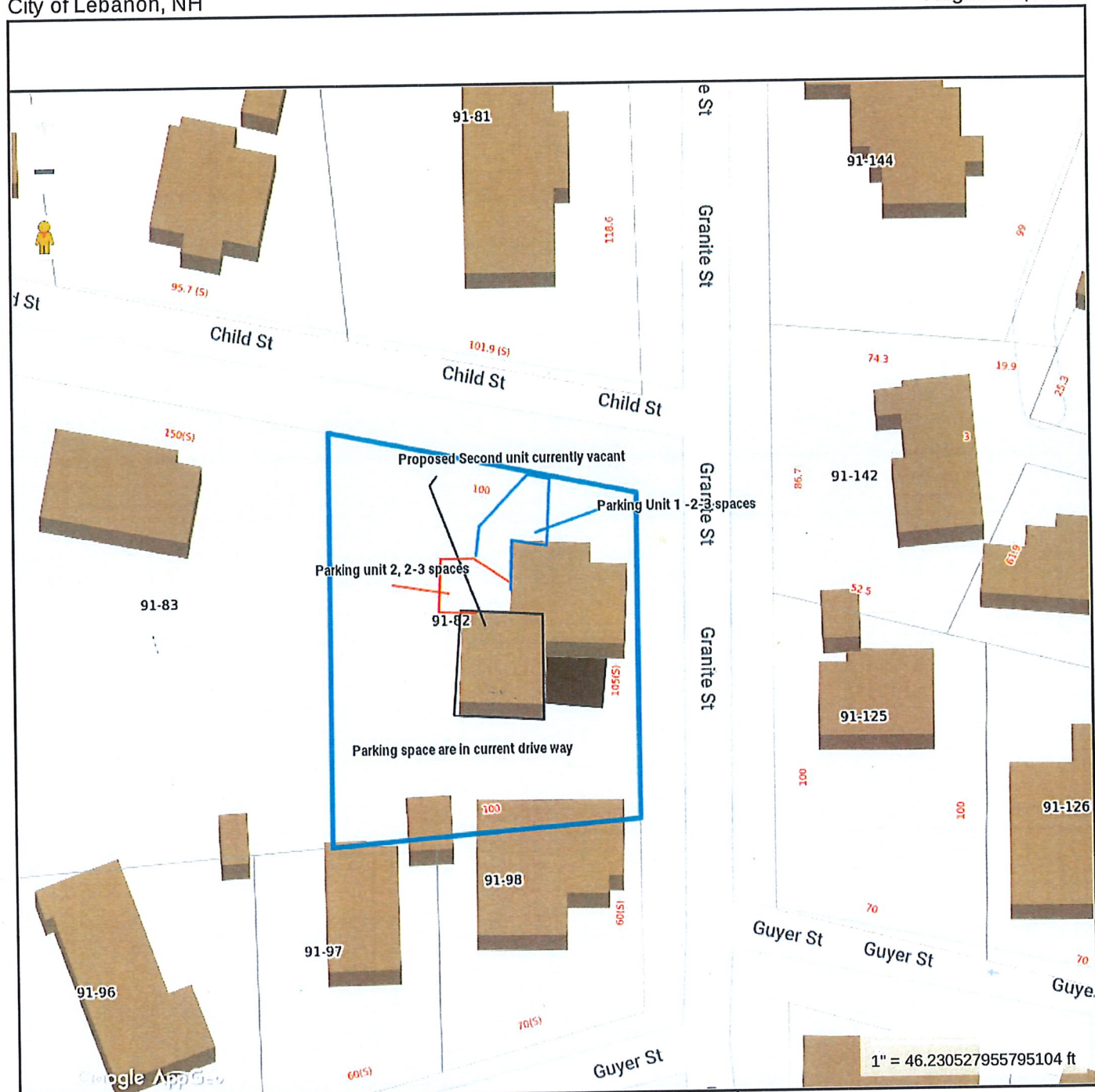
H. That the proposed special exception will be developed in a manner compatible with the spirit and intent of the ordinance:
yes

I. That the general welfare of the City will be protected:
I love the City, yes

Please Note:

Pursuant to Section 802.4B, "Special Conditions", the Board may attach whatever conditions it deems necessary in order to assure compliance with the purposes of this ordinance.

A special exception shall expire if: (1) the use is not in place within two years of the date of issuance of a zoning permit or approval by the Zoning Board of Adjustment for a special exception or, (2) if the use is discontinued for any reason for more than two (2) years. In such cases, a new application for a special exception must be completed.

**Property Information**

Property ID 91-82
 Location 18 GRANITE ST
 Owner SWIFT, CANDICE L

**MAP FOR REFERENCE ONLY
 NOT A LEGAL DOCUMENT**

City of Lebanon, NH makes no claims and no warranties, expressed or implied, concerning the validity or accuracy of the GIS data presented on this map.

Geometry updated 12/29/2021
 Data updated 11/18/2018

Print map scale is approximate.
 Critical layout or measurement activities should not be done using this resource.

**Agenda
Zoning Board of Adjustment
September 6, 2022**

**Agenda Item #5A
Rehearing Request**

**Irving Oil Marketing, Inc.
(applicant) and Cobalt Properties
NH Corp (property owners), 206
South Main Street (Tax Map 115,
Lot 1), zoned GC
ZB2022-14A-VAR**



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

ZONING BOARD OF ADJUSTMENT

September 6, 2022 Meeting

Staff Memorandum – ZB2022-14A-VAR

APPLICATION INFORMATION

Agenda Item:

5.A

Application Type:

Request to rehear denial of Variance from §608.4.A.4 of the Zoning Ordinance to allow two (2) freestanding signs on the property

Location:

206 South Main Street (Tax Map 115, Lot 1)

Applicant/Property Owner:

Irving Oil Marketing, Inc. /
Cobalt Properties NH Corp

Zoning District:

GC

Other Approvals Required:

Site Plan Approval
Building Permit

Attachments:

- July 5, 2022 Notice of Action for ZB2022-14-VAR
- Motion/Request to Rehear (14 pages total)
- Excerpts of 6/6/22 and 7/5/22 ZBA Mtg Mins (10 pages)
- 2020 NH OSI ZBA Handbook, rev March 2021(excerpt, 4 pages)

AGENDA NOTICE

Irving Oil Marketing, Inc. (applicant) and Cobalt Properties NH Corp (property owners), 206 South Main Street (Tax Map 115, Lot 1), zoned GC: Motion by applicant to rehear a request for a Variance from Section 608.4.A.4 of the Zoning Ordinance to allow two (2) freestanding signs on the property where only one (1) is permitted. The Variance application was denied on July 5, 2022. ZB2022-14A-VAR

STAFF NOTES

On July 5, 2022, the Zoning Board of Adjustment approved a motion to deny the applicant's request for a Variance from Section 608.4.A.4 of the Zoning Ordinance as set forth in above-referenced application (ZB2022-14-VAR). On August 1, 2022, the applicant submitted the attached Request for Rehearing to the Planning and Development Department. The rehearing request was filed within 30 days following the Board's decision and, therefore, is considered timely (note that the handwritten notation on the application indicating that it was received on August 11th is an error). Attached for reference is the Board's Notice of Decision and the minutes of the meetings at which the Variance application was heard.

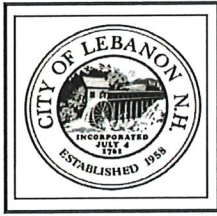
The Board's consideration of the motion for rehearing occurs at a public meeting, not a public hearing, and no testimony is taken at this time. If the motion is granted, the rehearing itself would be held at a subsequent meeting after providing required public notice. The Board's decision to either grant or deny the request is based solely on the contents of the applicant's submitted letter.

Staff recommends that the Board review each point raised in the request and determine if a rehearing is warranted based on the criteria set forth in Section 802.5 of the Zoning Ordinance: "A rehearing shall be granted only if: (1) the petitioner has new, relevant evidence to submit; (2) the petitioner raises new, relevant legal issues that were not considered at the original hearing; or (3) the Board feels it may have made a prejudicial technical or legal error in its original decision."

cc: Cobalt Properties NH Corp (via e-mail)
Irving Oil Marketing, Inc. (via e-mail)
Maria Dolder, Esq. (via e-mail)

STAFF MEMORANDUM

ZB2022-14-VAR
206 S Main St (115-1)
June 6, 2022 ZBA Meeting
Agenda Item 3.C
Page 2 of 2



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

NOTICE OF DECISION LEBANON ZONING BOARD OF ADJUSTMENT ZB2022-14-VAR

At its regular meeting on July 5, 2022, the Lebanon Zoning Board of Adjustment approved the following motion made by Jeremy Katz, seconded by Dan Nash, by a vote of 3-2:

"On June 6, 2022, and July 5, 2022, at duly noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Maria Dolder, Esq., Nicole Duquette and Jennifer Daigle on behalf of on behalf of Irving Oil Marketing, Inc. (applicant) and Cobalt Properties NH Corp (property owner) regarding 206 South Main Street (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 one of the freestanding signs to be located +/-80 ft. from the freestanding sign on the adjoining property where a minimum separation of 150 ft. is required. ZB2022-14-VAR

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 applicant proposes to redevelop 206 South Main Street and the front portion of 200 South Main Street with an Irving convenience store and a vehicle refueling facility (i.e., as described by the applicant, a "retail service station canopy"). The convenience store will be located at 200 South Main Street, whereas the "retail service station canopy" will be located at 206 South Main Street. Although both 200 South Main Street and 206 South Main Street were identified in the hearing notice, it is only the latter property (206 South Main Street) that is in fact the subject of this application.
2. Applicant proposes to use the large structure presently on the property for a freestanding sign to advertise the retail service station. The structure exceeds the maximum permitted freestanding sign height of 25 ft., and the proposed sign is greater than 130 sq. ft. in size, thereby exceeding the maximum permitted freestanding sign area of 64 sq. ft. To allow use of the existing freestanding sign structure, the applicant requests a Variance from Section 608.8 to permit an existing non-conforming freestanding sign to remain on the property. This Board has also investigated whether, pursuant to Section 608.4.A.4. an additional variance is required to allow the structure to be utilized as a freestanding sign in order to allow the freestanding sign to exceed the maximum permitted height and size (this is referred to as Variance Request "A").

NOTICE OF DECISION

ZB2022-14-VAR
206 S Main St (115-1)
July 5, 2022
Page 2 of 5

3. The applicant proposes to install a second freestanding sign on the property and, therefore, requests a Variance from Section 608.4.A.4 to allow two (2) freestanding signs on the property where only one (1) is permitted (hereinafter referred to as Variance Request "B").
4. To obtain the requested Variances, the applicant must demonstrate compliance with each of the five variance criteria as set forth in Section 801.2 and NH RSA 674:33, I(b). The applicant has submitted testimony addressing the Section 801.2 Variance criteria in an application received by the Planning Board on May 17, 2022, which has been supplemented with additional written information in advance of the July 5, 2022, hearing.
5. Regarding the existing structure, the Board makes the following finding of fact:
 - i. The existing structure was a sign that was installed sometime around 1988 and at the time it was installed it conformed with all applicable rules and regulations.
 - ii. In 2010, the gas station on the premises was closed pursuant to a taking for which the Landowner received compensation from [the state of New Hampshire].
 - iii. In May of 2013, approximately 3 years after the gas station was closed, the Applicant applied for and was issued a building permit to replace the "Irving" copy on the sign with a white blank vinyl material. The Applicant's support statement specified "Refacing Existing HWY sign" on it.
 - iv. Carmela Hennessy, the City Zoning Administrator, approved the permit, noting in the in-house review form "no change in size or location (non-conforming sign) – just want to blank out now – will pull permit when ready to re-face.
 - v. Applicant spent thousands of dollars to perform the work described in the permit. The work was performed with the expectation that the sign would be refaced in the future.
 - vi. The 2009 and 2013 Ordinances, which were in effect at the time of the gas station shut down and the sign refacing, imposed obligations regarding non-conforming signs losing their protected status in Section 608.10(B), and of note section 3, which states: "A legal non-conforming sign shall lose its non-conforming status if: (3) the sign is abandoned based on circumstances indicative of an intention to abandon the use and vested rights.
 - vii. The Ordinance was changed in 2018, and the relevant section now is 608.8(C)(3) which states: "Removal of a legal non-conforming sign by a property owner is required when: The use of the sign or the lot on which it is located, has ceased, become vacant, or been unoccupied for a period of 180 consecutive days or more.
 - viii. Applicant has not engaged in any act after 2018 that is in any way different than its behavior prior to 2018.
6. Relative to the variance request to add a second sign, Applicant provided testimony in favor of its request, notably in its initial support statement, presented to the Board at the June 6, 2022, hearing. Pages 8-12 of this statement focus on the applicant's contention that an unnecessary hardship exists at the property. Applicant contends that an unnecessary hardship exists for the following reasons:

NOTICE OF DECISION

ZB2022-14-VAR
206 S Main St (115-1)
July 5, 2022
Page 3 of 4

- i. A NH DOT taking between 2008 and 2010 that decreased the size of the property by 1,649 square feet and required site closure.
 - ii. The existence of a free-standing sign that has existed on the site since 1988.
 - iii. The existence of a median later installed on Route 12A that precludes traffic making left hand turns into the site.
7. The Board additionally notes that, prior to 2017, the Ordinance provided for the addition of additional signage by special exception – most recently in 2013 by section 608.9. The 2017 ordinance has deleted this ability.

II. CONCLUSIONS OF LAW

Variance Request "A"

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 Variance Request A.

1. Section 608.8(C)(3) requires the removal of a legal nonconforming sign when "the use of the sign or the lot on which it is located, has ceased, become vacant, or been unoccupied for a period of 180 consecutive days or more." This Board believes that the proper reading of this section is for actions taken by landowners related to periods after the enactment of the restriction, in 2018.
2. In this specific case, the Applicant's property became vacant and unoccupied more than a decade ago. Years after it became vacant, the Applicant received an affirmative written confirmation of the sign's legal nonconforming status from the City Zoning Administrator and invested a substantial sum to re-face sign with the explicit representation that it would be re-faced again in the future.
3. At the time of the implementation of the 2018 Ordinance, the use of the lot had already been unoccupied for a period greatly exceeding 180 days. This is distinguishable from other sites that may have uses discontinued or lots vacated after 2018. All lots, including this one being considered, are subject to Section 608.8(C) to the extent actions taken after August 15, 2018, trigger the requirements of removal.
4. As a result, the Variance relief to re-face the existing and lawfully nonconforming sign is not required, and the Applicant may file a building permit to re-face the existing highway sign.

Variance Request "B"

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)

NOTICE OF DECISION

ZB2022-14-VAR
206 S Main St (115-1)
July 5, 2022
Page 4 of 5

2. The spirit of the ordinance is not observed. (Section 801.2.A.2)

The ordinance seeks to avoid visual clutter or distraction and promote an aesthetically pleasant experience in order to meet the community's expressed desire for quality development. The evolution of the City's regulatory scheme on signage has been to reduce clutter by restricting signage to one freestanding sign per property and is evidenced by the 2017 Ordinance having deleted section 608.9 which previously allowed additional signage by special exception.

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 not 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):

- i. Applicant has not met its burden of showing that there are special conditions on this property that present an unnecessary hardship, and the Board finds that there are no such special conditions. Applicant has presented that it already has one sign, which happens to already exceed presently allowable height and coverage dimensions, as an unnecessary hardship. However, the presence of one freestanding sign is not distinguishable from other properties in the neighborhood, which carry the burden of the similar restriction. The fact that some properties have lawfully conforming, and others have lawfully nonconforming signs is a distinction without a difference, as the Ordinance fairly provides each property with one freestanding sign. Furthermore, the fact that other landowners may have taken advantage of more generous sign provisions by developing under previous ordinances does not create a unique and differentiated hardship for this property.
- ii. Applicant additionally presented information regarding the loss of land from a compensated taking more than a decade earlier. While this change in the dimensions of the property was relevant to a different variance request for a canopy setback (which was withdrawn by Applicant prior to the July 5th, hearing) there is no attribute of a compensated taking more than a decade earlier that indicates an unnecessary hardship in the enforcement of the sign ordinance related to the limitation of one freestanding sign. Furthermore, with regards to the median on Route 12A, there are multiple other properties within the immediate neighborhood that are bound by the same restriction as the applicant.

6. There is 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)

The Ordinance strikes a fair balance between promoting commercial speech and reducing clutter. There is a fair and substantial relationship between those general purposes and the specific application on the property.

7. The proposed use is a reasonable one. (Section 801.2.A.5.a.ii)

NOTICE OF DECISION

ZB2022-14-VAR
206 S Main St (115-1)
July 5, 2022
Page 5 of 5

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this 5th day of July 2022, hereby determines that no variance determination is required for Variance Request A, for the legal reasons set forth above; and DENIES Variance Request B."

Notice of Decision prepared by: Tim Corwin, Senior Planner, July 27, 2022

NOTE: (NH RSA 677:2) Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that 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 the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed.

**CITY OF LEBANON
APPLICATION FOR**

SPECIAL EXCEPTION	☐	☐	SITE PLAN REVIEW
VARIANCE	☐	☐	SUBDIVISION
MOTION FOR REHEARING	☒	☐	LOT LINE ADJUSTMENT
APPEAL OF AN ADMIN. DECISION	☐	☐	OTHER ()

PROPERTY OWNER (APPLICANT):			
NAME: Irving Oil Properties NH Corp/ Rancho Lebanon, LLC TEL.#: 506-202-7378/ 858-450-6886			
MAILING ADDRESS: 10 King Square South, Saint John, New Brunswick E2L 0G3 Canada/ 476 Broadway, Chula Vista, CA 91910			
E-MAIL ADDRESS:			
CO-APPLICANT, AGENT, OR LESSEE:			
NAME: Irving Oil Marketing, Inc. TEL.#: 506-343-1996			
MAILING ADDRESS: 190 Commerce Way, Portsmouth, NH 03801			
E-MAIL ADDRESS: Jennifer.Daigle@irvingoil.com			
PROJECT LOCATION: (Tax Maps 115-1 and 114-5)			
TAX MAP #:	115/114	LOT#:	1/5
PLOT #:		ZONE:	GC
STREET ADDRESS OF PROJECT: 200 & 206 South Main Street			
IS THIS PROPERTY LOCATED IN THE: WETLANDS ☐ YES ☒ NO HISTORIC DISTRICT ☐ YES ☒ NO			
FLOOD PLAIN ☒ YES ☐ NO			
SCOPE OF PROJECT:			
To establish a retail motor vehicle service station and convenience store on the properties located at 200 & 206 South Main Street.			
TYPE OF OCCUPANCY:			
EXISTING	☐ VACANT	☐ ONE FAMILY	☐ TWO FAMILY
PROPOSED	☐ VACANT	☐ ONE FAMILY	☐ TWO FAMILY
	☐ MULTI-FAMILY	☒ COMMERCIAL	☐ INDUSTRIAL
	☐ MULTI-FAMILY	☒ COMMERCIAL	☐ INDUSTRIAL
IF USE IS COMMERCIAL OR INDUSTRIAL , PLEASE NOTE SPECIFIC USE: retail motor vehicle service station and convenience store			
SIGNATURE BLOCK:			
<i>Maria Dolder, Esquire</i>		DATE: August 1, 2022	
PROPERTY OWNER			
NOTE: IF, AS OWNER, YOU WISH TO DESIGNATE AN AGENT TO ACT ON YOUR BEHALF, PLEASE READ THE FOLLOWING AND SIGN BELOW: I hereby designate the person listed above as my agent for the purpose of procuring the necessary local permits for the proposed work as described herein. Representations made by my agent may be accepted as though made by me personally, and I understand that I am bound by any official decision made on the basis of such representation.			
<i>J. Daigle</i>		DATE: 8/01/2022	
PROPERTY OWNER			

DATE RECEIVED	FILE # (MAP/LOT)	APPLICATION #	FEE - \$ AMOUNT	DATE PAID	VOUCHER #
8/11/2022	115-1 + 114-5	2B2022- 14A VAR	NA	NA	NA

(12/07/07)

**CITY OF LEBANON, NEW HAMPSHIRE
APPLICATION AND INSTRUCTIONS FOR THE FILING OF A
MOTION FOR REHEARING**

Within 30 days after any order or decision of the zoning board of adjustment, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, **specifying in the motion for rehearing the ground therefor**; and the board of adjustment, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application.

Lebanon Zoning Ordinance Section 802.5 - Rehearings and Appeals - "A rehearing shall be granted only if:

- (1) the petitioner has new, relevant evidence to submit;
- (2) the petitioner raises new, relevant legal issues that were not considered at the original hearing; or
- (3) the Board feels it may have made a prejudicial, technical or legal error in its original decision.

The Board shall either grant or deny a rehearing within thirty (30) days of receiving the request or may suspend the order of decision complained of pending further consideration. Appeals to the NH Superior Court may be taken pursuant to NH RSA 677:4, as amended, within thirty (30) days after the action complained of has been recorded."

I HAVE READ THE ABOVE, AND HEREBY FILE THIS MOTION FOR REHEARING AND HAVE ATTACHED MY WRITTEN STATEMENT (MOTION) CONCERNING THE FOLLOWING:

I am requesting a rehearing concerning the following zoning board decision:

Variance Request of Irving Oil Marketing, Inc.

The decision was rendered by the Zoning Board on: July 5, 2022

Signature of person(s) requesting rehearing:

Maria Dolder, Esquire, Dated: August 1, 2022

_____, Dated: _____

(For office use only)

Date Motion was filed on: _____ Date motion is scheduled to be heard by the
Zoning Board: _____ The Zoning Board granted / denied motion.

**CITY OF LEBANON
ZONING BOARD OF ADJUSTMENT**

**Application of Irving Oil Marketing, Inc.
Application for Variance**

**REQUEST FOR REHEARING OF THE DECISION OF THE CITY OF LEBANON
ZONING BOARD OF ADJUSTMENT PURSUANT TO RSA 677:2**

NOW COMES Irving Oil Marketing, Inc., by and through its attorneys, Hebert & Dolder, P.L.L.C., and hereby submits the following request for rehearing of the decision of the City of Lebanon Zoning Board of Adjustment (the "ZBA"), pursuant to RSA 677:2, and in support thereof, states as follows:

1. Irving Oil Properties NH Corp is the owner of property located at 206 South Main Street, known as Tax Map 115, Lot 1 (the "Irving Property") and Rancho Lebanon, LLC is the owner of property located at 200 South Main Street, known as Tax Map 114, Lot 5 (both parcels collectively the "Premises").
2. Irving Oil Marketing, Inc. (the "Applicant") is proposing to re-develop the Premises as a retail motor vehicle service station and convenience store, a use permitted by right in the zoning district. In connection with such re-development, on or about May 17, 2022, the Applicant submitted a request from the ZBA for several variances related to the project (the "Variance Application").
3. The Variance Application included four variance requests, one to allow a second freestanding sign on the Premises, one to allow such freestanding sign to be located within 80 feet of an existing sign and one to allow for an internal setback encroachment. The fourth variance request involved an existing freestanding sign which the Applicant argued

was grandfathered, but submitted the variance request in the event that the ZBA disagreed.

4. At its meeting on June 6, 2022, the Applicant presented a portion of its presentation in connection with its Variance Application to the ZBA and then the application was agreed to be continued in order to allow the Applicant to provide further information in connection with questions raised by the ZBA.
5. Among the items raised by the ZBA were to take another look at the proposed location of the second freestanding sign that was being requested and to provide further information to the ZBA in connection with the legal requirements to advertise gasoline prices to the public.
6. At the June 6, 2022 meeting, there was a lengthy discussion and numerous comments raised by the ZBA in connection with the location of the proposed second freestanding sign on the Irving Property. Accordingly, the Applicant requested its engineers to re-design a portion of the proposed project in order to address the concerns raised by the ZBA. In doing so, the Applicant was able to withdraw two of its variance requests, specifically the location of the freestanding sign within 80 feet of another freestanding sign and the internal setback encroachment.
7. Similarly, in performing the requested research in connection with the existing freestanding sign on the Irving Property, which involved an in depth review of the files relating to the high rise sign, it was discovered that the City of Lebanon issued a sign permit to the Applicant to replace the hi-rise sign facade with a white blank vinyl material. Accordingly, the Applicant argued that no variance was needed in connection with the existing freestanding sign and the ZBA ultimately agreed.
8. As a result of the re-design and additional information provided, the only variance that

remained before the ZBA at its meeting on July 5, 2022, was to place an additional freestanding sign on the Irving Property (the "Sign Variance"). The Sign Variance is the subject of this Motion for Rehearing. It is important to note that although the proposal includes two parcels of property, the ZBA found that since the requested sign is to be located entirely on the parcel at 206 South Main Street, the application before the ZBA only concerns the Irving Property.

9. At the public hearing on July 5, 2022, the Applicant presented the additional information requested by the ZBA, answered further questions regarding the matter and finished its original presentation in connection with the Sign Variance.
10. No abutters nor members of the general public spoke at either of the public hearings on the Applicant's request.
11. After its deliberations, a Motion to Grant the requested Sign Variance was made and seconded. After a lengthy discussion, said Motion failed with a vote of 2 to 3. Consequently, a Motion to Deny the requested Sign Variance was made, seconded and passed with a vote of 3 to 2.
12. In denying the Sign Variance, the ZBA determined that the Applicant satisfied three of the five variance requirements, specifically that the variance would not be contrary to the public interest, substantial justice would be done by granting the variance and the values of the surrounding properties would not be diminished. The ZBA determined, however, that the variance would not observe the spirit and intent of the ordinance, nor would its denial result in an unnecessary hardship. Accordingly, those are the only two requirements that are addressed within this Motion for Rehearing.
13. It was clear during deliberations and in the actual voting that the ZBA members were in

disagreement over the characterization of the facts presented and how they related to the variance criteria.

14. As a general rule, a request for rehearing should be granted by the ZBA upon a showing that the board committed technical error or that there is new evidence that was not available at the time of the first hearing. *See* Loughlin, New Hampshire Practice Series, Section 21.16.
15. Pursuant to Section 802.5 of the City of Lebanon Zoning Ordinance, a rehearing may be granted if in the opinion of a majority of the Board there is good reason therefor, such reasons including, but not limited to: (1) the petitioner has new, relevant evidence to submit; (2) the petitioner raises new, relevant legal issues that were not considered at the original hearing; or (3) the Board feels it may have made a prejudicial technical or legal error in its original decision.
16. For all of the reasons set forth herein, the Applicant contends that the ZBA failed to properly consider the specific details of the Applicant's request and how the Irving Property is uniquely impacted and as such, the ZBA's decision denying the variance was unreasonable and/or unlawful and hereby requests a rehearing pursuant to RSA 677:2.
17. In looking at the question of whether or not the proposal would observe the spirit of the Ordinance, the ZBA appears to have based its decision entirely on the position that the Zoning Ordinance seeks to avoid visual clutter by restricting signage to one freestanding sign per property, evidenced by the change in the Zoning Ordinance in 2017.
18. In fact, in its decision, the ZBA acknowledged that there is an express community desire for quality development, but failed to properly balance or consider this interest. Instead, the ZBA focused on the literal wording of the Zoning Ordinance and its changes.
19. One of the stated purposes of the sign provisions within the zoning ordinance itself is to

avoid excessive levels of visual clutter or distraction that are potentially harmful to property values, business opportunities, and community appearance. (Emphasis added). There was no evidence or testimony presented that the sign being proposed by the Applicant would lead to an excessive level of clutter nor was there any evidence that it would be harmful to property values, business opportunities, or community appearance. In fact, the ZBA found just the opposite when it determined that it was not contrary to the public interest, would result in substantial justice and would not diminish property values in the area.

20. Not only does the decision fail to take into consideration the specific details of the Applicant's request, the thoughtful design proposed by the Applicant in order to re-develop a deteriorated site and the unique circumstances of the Applicant's proposal which requires the additional signage, but under the argument presented in the decision, no variance for a second freestanding sign could ever be granted by the ZBA. This is clearly an error of law and contrary to the statutory scheme which allows for variances to be granted.
21. The decision made by the ZBA also fails to take into account the public benefit of allowing consumers the ability to comparison shop for the best fuel price. This is an especially important public benefit in the gasoline industry and with the wide fluctuations of prices amongst competitors.
22. At the ZBA hearing on July 5, 2022, the Applicant provided the ZBA with significant information concerning the need to advertise its gasoline prices to consumers prior to having them enter the station. Specifically that, in this case, the Premises is located along a busy street where a safety hazard could be created if motorists are trying to view the price signs on the dispensers prior to entering the site. This potential hazard is further

exacerbated by the fact that there is a raised median strip in front of the Premises which significantly limits access to the site. In fact, if a consumer is taking a left hand turn into the site, he/she will need to turn at the lighted intersection and drive into the mall plaza before entering the Premises. As a result, consumers will not be able to make a decision about entering the site to purchase gas without creating a potential issue along the busy highway or causing unnecessary inconvenience to the public.

23. The Applicant presented further evidence that there was an article written in the Concord Monitor back in March 2022 about gas price signage. Even in that article, it was detailed that consumers ultimately require roadway signs showing gasoline prices. It was further presented that in the article, there was a quote from John Shaer of the New England Convenience Store and Energy Marketers Association where he stated that he thinks it is a red flag for most motorists if the signs aren't posted. The article went on to state that even if all signs are not a regulatory mandate, they are a competitive mandate required by consumers and born from decades of habit.
24. The ZBA was also presented with evidence that after hearing the comments concerning the location of the second freestanding sign by the ZBA during the June 6, 2022 meeting, the Applicant specifically engaged its engineers to re-design a portion of the project in order to locate the second freestanding sign in a location which would not conflict with any existing freestanding signs. As a result, the Applicant was able to move the proposed sign in excess of the required 150 feet from another freestanding sign, thereby, alleviating any "clutter" of signage along the frontage while still being able to provide a quality development. This clearly balances the spirit of the zoning ordinance as stated in the ZBA's decision.
25. Furthermore, although the ZBA talked about the goal in the Zoning Ordinance of reducing

clutter from signage, the ZBA did not discuss nor take into account the physical layout of the proposed project. Specifically, the fact that the pre-existing freestanding sign on the Irving Property was off set from both the requested secondary sign and the road itself. In fact, given the design of the project, the existing sign is located behind the canopy, not along the roadway. Thus, a further example that the ZBA failed to consider the actual circumstances of the Applicant's proposal, but instead focused on the mere fact that the Zoning Ordinance prohibits two freestanding signs.

26. Although it is clear that all five variance criteria must be met and that each criteria is distinct, in the case of *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, the NH Supreme Court stated that the requirement that the variance is not contrary to the public interest is related to the requirement that it be consistent with the spirit of the ordinance. *See Harborside v. Parade*, 162 NH 508, 514 (2011). The Court went on to state that since the provisions of a zoning ordinance declare the public interest, "any variance would in some measure be contrary thereto" and that a mere conflict with the terms of the ordinance is not sufficient. *Id.*
27. The NH Supreme Court went on to detail that in order to determine that a variance is not contrary to the public interest and is consistent with the spirit of the ordinance, the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. *Id.*
28. It is important to note that, in this case, the ZBA found that granting the variance would result in substantial justice. In presenting its case for substantial justice, the Applicant utilized the criteria outlined in the *Harborside* case and argued that in order to be contrary to the public interest, the variance must unduly, and in a marked degree conflict with the

ordinance such that it violates the ordinance's basic zoning objectives. The Applicant went on to argue that to ascertain whether granting the variance would violate basic zoning objectives you must examine whether it would alter the essential characteristics of the neighborhood or would threaten the public health, safety or welfare of the public. Based on its decision, it appears that the ZBA agreed that the Applicant's Sign Variance did neither.

29. With that said, as stated above, the ZBA then went on to vote that the Sign Variance was contrary to the spirit of the Ordinance solely on the basis that the Zoning Ordinance seeks to avoid visual clutter by restricting signage to one freestanding sign per property per the change in the Zoning Ordinance in 2017. This reasoning is inconsistent with the rationale and legal standard as set forth in the *Harborside* case and therefore, is an error of law. *Id.*
30. It is clear that the use of the Premises itself is not only permitted by right within the zoning district, but it was previously established on the Irving Property. The general area surrounding the property is all commercial in nature, along a busy street. In fact, there is another retail service station located directly across the street from this site that has two freestanding signs similar to that which was requested in the Sign Variance.
31. Although it appears that the signs for the Sunoco gas station located across the street may be grandfathered, the ZBA failed to consider that the Sunoco gas station was not impacted in the same manner as the Irving Property when the NH DOT took a portion of the Irving Property by eminent domain in 2010. Specifically, the area of the taking caused the Applicant to not only lose 1,649 square feet in frontage, more or less, but more importantly, it resulted in the removal of the second freestanding sign that was located on the property prior to the taking, the canopy, the pipes and the tanks, all of which caused the closing of the site. This circumstance is truly unique to the Irving Property.

32. In its decision, the ZBA also commented that the Applicant should have taken advantage of the earlier zoning ordinance to re-establish the second freestanding sign on the site.
33. However, as was presented in great detail by the Applicant and outlined in the additional materials submitted to the ZBA on or about June 29, 2022, after the taking by the NH DOT, the Applicant has been actively pursuing a reasonable plan to re-develop the site in its smaller configuration and taking the raised median strip into account, which significantly limited access to the Irving Property. To that end, the Applicant has been in continuous contact with the previous owners of the abutting lot to obtain the right to utilize a portion of its property as part of the re-development in order to provide for a proper layout and to minimize the zoning relief that would be needed. It was only approximately two and a half years ago, when the then-owner (DIV South Main Street, LLC) agreed to lease a 27,897 square foot portion of the abutting lot to the Applicant. The parties then spent those two and a half years negotiating the terms. On or about December 29, 2021, the parties finally entered into a formal lease agreement, which has since been assigned to the current owner, Rancho Lebanon, LLC. As a result, the Applicant is now able to re-develop the site in a reasonable fashion and ultimately, with only one variance required to support the re-development.
34. In making its determination that the Applicant failed to meet the legal requirements for unnecessary hardship, the ZBA overlooked the extenuating circumstances that make the Irving Property truly unique.
35. In its decision, the ZBA seemed to separate each argument made by the Applicant in connection with unnecessary hardship and determined that such arguments in and of themselves were not enough to support the Sign Variance. In doing so, the ZBA failed to

recognize that the unnecessary hardship suffered by the Applicant was not the result of only one particular argument, but was caused by the combination of all of the expressed factors.

36. Although it may be correct that other properties in the area have a raised median in front of their site, it cannot be said that those other properties suffered a loss of frontage by a NH DOT eminent domain taking, which caused the removal of the existing second freestanding sign, the canopy, the pipes, the tanks, and ultimately lead to the closure of the site. Similarly, it cannot be said that those other properties had to then try to re-develop a smaller site while attempting to obtain full access into its property as a result of the raised median which only allowed for right turns in and right turns out. The ZBA failed to recognize that it is the totality and combination of these factors which make the Irving Property truly unique.
37. The ZBA decision also seems to focus on the fact that the Applicant has an existing non-conforming freestanding sign on the Irving Property and that the Applicant should be forced to make a decision between which sign it shall use as part of its development.
38. This argument fails to recognize the extensive testimony and documentation that was provided to the ZBA not only showing that the City of Lebanon issued a sign permit to the Applicant in 2013 permitting this non-conforming sign, but that the Applicant has expended a significant amount of money to maintain this sign on the Irving Property. There was evidence presented that the Applicant not only paid the sign permit fee to the City of Lebanon, but that it spent a significant sum of money to replace the sign facade and has been paying taxes on the sign to the City of Lebanon every year. It will cost the Applicant a substantial amount of money now to take down the permitted sign in order to establish the required secondary sign to advertise its gasoline prices. After all of the money that it has already spent in order to maintain this sign, such a requirement in and of itself creates an

additional unnecessary hardship to the Applicant. Similarly, such a decision forces the Applicant to abandon a sign that it clearly values and took affirmative steps to protect. This is not reasonable.

39. After the many years that it has taken the Applicant to finally design a reasonable re-development of the Irving Property, the denial of the Sign Variance is a significant setback which will cause further delays in the ability of the Applicant to move forward with the project.
40. Without having any reasonable justification for doing so, the ZBA is forcing the Applicant to not only choose between a sign that it values enough to have spent a significant amount of money on to secure its legal status and a sign it needs in order to be competitive, but also to incur substantial additional expenses to now remove the permitted sign.
41. The ZBA decision goes on to state that the Ordinance strikes a fair balance between promoting commercial speech and reducing clutter. As stated above, the decision does not take into account the unique circumstances of this particular property or the specific needs related to gasoline price advertising. Also see the further arguments presented in number 25 herein.
42. During its deliberations, the ZBA also makes mention that if it were to grant the Sign Variance, then all property owners who have an existing freestanding sign would want a second one. Once again, as stated above, under such an argument, the ZBA would never be permitted to grant a variance for an additional freestanding sign. This is clearly an error of law and contrary to the statutory scheme which allows for variances to be granted.
43. In fact, such an argument once again fails to take into account the specific details of the Irving Property, its unique circumstances and the very particular needs of the use of the site.

44. Although the ZBA made a comment that the Irving Property does not need to be developed as a gas station, it is clear that the Irving Property has remained in the ownership of an Irving entity and that the Applicant has expended a substantial amount of money in order to retain ownership of the site. Since the ZBA went on to determine that the use of this property is a reasonable one, this argument does not justify a denial of the Sign Variance.
45. Although the arguments made herein may be categorized under one specific criteria, all arguments within this Motion are incorporated and are not to be deemed limited to support only one of the criteria, but are to be considered as applicable to the Applicant's position that the decision of the ZBA was unlawful and unreasonable.
46. For all of the reasons stated herein, the Applicant contends that the decision of the ZBA was both an error of law and was unreasonable given the circumstances and evidence presented and respectfully requests a rehearing on the Sign Variance application.

Respectfully submitted,

Irving Oil Marketing, Inc.

By Its Attorneys

HEBERT & DOLDER, PLLC

Date: August 1, 2022

By:

Maria Dolder, Esquire

Maria T. Dolder, Esquire
95 North State Street, Suite 4
Concord, New Hampshire 03301
(603) 717-0380

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 Vermont 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.

is shown on the materials previously submitted. This requires a different approach and new materials to make these corrections.

Mr. Katz opened the Public Hearing.

Mr. Nash *MOVED to continue this hearing until the August 1, 2022, meeting.*
Seconded by Mr. McDonough.

This hearing will have to be re-noticed.

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

- B. Irving Oil Marketing, Inc. (applicant), Rancho Lebanon, LLC (property owner), 206 South Main Street (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 one of the freestanding signs to be located +/-80 ft. from the freestanding sign on the adjoining property where a minimum separation of 150 ft. is required. **ZB2022-14-VAR - Continued from June 6, 2022**

Maria Dolder-attorney on the project, Nicole Duquette-GPI engineer on the project, and Jennifer Eaigle-Irving Oil, appeared on behalf of the application. Irving will have a 40-year lease, which is a 20 year lease with options for extensions up to 20 additional years.

In the update that was provided additional information was supplied from Irving files. In 2013 there was an application for the sign permit that was approved. There were no conditions on the approval and no end dates. They believe they have a valid permit to use the existing sign. They blanked out the sign and are now ready to reface it, which they believe this is permitted. It will be a static sign that will be internally lit.

The high rise sign was approved in the 1980s. The service station was removed in 2010. The application to reface the sign was made in 2013 and is said to cost approximately \$15,000. The applicants do not believe they would have spent that money if they did not intend to use the sign.

In terms of the second sign, the legal rational is that gas prices have to be posted in several ways in order to comply with the statutes. Prices have to be visible from both sides, and given the location, it is difficult to visually see the price of gas. They believe the prices should be visible without coming onto the property. With the raised median it is difficult to get into the location, which will make it even more difficult for consumers to see the prices. The new materials provided for this meeting relocates the proposed sign. It is now more than 150 feet from the Target sign. The variance criteria were reviewed. The hardship is the uniqueness of the property, where it was diminished by the DOT taking. This impacts how the property can be accessed. The sign would comply with the height and size requirements. From a competitive standpoint, not being able to advertise prices would be disadvantageous.

Mr. Nash asked why the extra signage is needed for the Irving gas and convenience store. They replied that it is for the Irving identity.

Mr. Katz opened the discussion to the public and no one commented. The Public Hearing was closed.

Mr. McDonough thinks the competitive mandate is compelling. Mr. Newlove thought the presentation was well done. Ms. Barkley understands there are legal requirements for pricing. Mr. Nash sees the argument for the prices, but not the argument for additional signage. Mr. Katz thinks it is clear they have maintained the use of the high rise sign. He does not believe there is anything about the site that distinguishes it from other properties in the area. Prior to 2017 they could receive second signs by special exception. At this time, signs are not to be proliferated.

Mr. McDonough MOVED, on June 6, 2022, and July 5, 2022, at duly noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Irving Oil, in particular Maria Dolder, Nicole Duquette, and Jennifer Eaigle, on behalf of Irving Oil Marketing, Inc. (applicant) and Cobalt Properties NH Corp (property owner) regarding 206 South Main Street (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 one of the freestanding signs to be located +/-80 ft. from the freestanding sign on the adjoining property where a minimum separation of 150 ft. is required. ZB2022-14-VAR. ZB2022-14-VAR

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 applicant proposes to redevelop 206 South Main Street and the front portion of 200 South Main Street with an Irving convenience store and a vehicle refueling facility (i.e., as described by the applicant, a “retail service station canopy”). The convenience store will be located at 200 South Main Street, whereas the “retail service station canopy” will be located at 206 South Main Street.
2. A large structure – which formerly supported a freestanding sign – is located at the subject property. Applicant proposes to use the structure for a freestanding sign to advertise the retail service station. The structure exceeds the maximum permitted freestanding sign height of 25 ft., and the proposed sign is greater than 130 sq. ft. in size, thereby exceeding the maximum permitted freestanding sign area of 64 sq. ft. To allow use of the existing freestanding sign structure, the applicant requests a Variance from Section 608.8 to permit an existing non-conforming freestanding sign to remain on the property. However, to allow the structure to be utilized as a freestanding sign, a Variance from Section 608.4.A.4.a (rather than Section 608.8) is required to allow the proposed freestanding sign to exceed the maximum permitted height and size (*hereinafter referred to as Variance Request “A”*).

3. Finally, the applicant proposes to install a second freestanding sign on the property and, therefore, requests a Variance from Section 608.4.A.4 to allow two (2) freestanding signs on the property where only one (1) is permitted (*hereinafter referred to as Variance Request "B"*).
4. To obtain the requested Variances, the applicant must demonstrate compliance with each of the five variance criteria as set forth in Section 801.2 and NH RSA 674:33, I(b). The applicant has submitted testimony addressing the Section 801.2 Variance criteria in an application received by the Planning and Development Department on May 17, 2022 (see attached).
5. The applicant had requested a Variance from Section 305.3 to permit construction of the retail service station canopy within the minimum required 20 ft. side yard. However, prior to the July 5th hearing, the applicant submitted a revised plan relocating the canopy in compliance with the minimum required side setback. Consequently, the applicant withdrew this Variance request as it is no longer required. Also, as part of Variance Request "B", the applicant had requested a Variance from Section 608.4.A.4 to allow the new freestanding sign to be located +/-80 ft. apart from the freestanding sign located on 200 S. Main Street, where a minimum 150 ft. separation is required. However, prior to the July 5th hearing, the applicant submitted a revised plan relocating the sign in compliance with the 150 ft. separation requirement. Consequently, the applicant also withdrew the Variance request from the 150 ft. separation requirement as it too is no longer required.
6. No one from the Public spoke for or against the application in this matter.

II. CONCLUSIONS OF LAW

Variance Request "A"

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):

It is located on a part of 12A that restricts traffic because of the median strip restrictions, allowing traffic heading in a northbound direction to turn directly into the gas station.

The preexisting status of the sign addressed by the City as far back as 2013 permits to the Board to find that it would be appropriate to allow that sign to continue to be utilized.

- 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)

Variance Request “B”

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):

The competitive nature of the sale of gasoline requires customers to have easy access to prices being offered by the applicant.

- 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. That is to say it is appropriate for this to be granted. (Section 801.2.A.5.a.i)
- ii. The proposed use is a reasonable one. (Section 801.2.A.5.a.ii)

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **5th day of July 2022**, hereby **GRANTS** Variance Request A and **GRANTS** Variance Request B, as set forth above and per testimony, plans, and materials submitted, and per the following conditions:

1. The applicant shall obtain a sign permit as may be required by Section 608 of the Zoning Ordinance.

Seconded by Mr. Newlove.

Ms. Barkley believes by not granting this, Irving would have to invest in tearing down the first sign to permit a different sign. Mr. Nash is in opposition as previously stated. Mr. Katz believes the hardship is legally erroneous on three levels. There are medians along Route 12A and it is not unique to this property. Nearly all properties have preexisting signs and if this was approved others would want a second sign. Lastly, although gas is competitive, the choice to use the land in this way does not differentiate it from other properties. Therefore, it does not require variance relief. Yes, developing this property with a service station is a good idea, but legal conditions have not been met.

**The Vote on the Motion was (2-3).*

Mr. Newlove and Mr. McDonough voting yea.

Ms. Barkley, Mr. Nash, and Mr. Katz voting nay.

Mr. Katz MOVED, on June 6, 2022, and July 5, 2022, at duly noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Maria Dolder, Esq., Nicole Duquette and Jennifer Daigle on behalf of Irving Oil Marketing, Inc. (applicant) and Cobalt Properties NH Corp (property owner) regarding 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 service station and convenience store (i) 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 (ii) Section 608.4.A.4 to allow two (2) freestanding signs on the property where only one (1) is permitted.ZB2022-14-VAR

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 applicant proposes to redevelop 206 South Main Street and the front portion of 200 South Main Street with an Irving convenience store and a vehicle refueling facility (i.e., as described by the applicant, a “retail service station canopy”). The convenience store will be located at 200 South Main Street, whereas the “retail service station canopy” will be located at 206 South Main Street. Although both 200 South Main Street and 206 South Main Street were identified in the hearing notice, it is only the latter property (206 South Main Street) that is in fact the subject of this application.
2. Applicant proposes to use the large structure presently on the property for a freestanding sign to advertise the retail service station. The structure exceeds the maximum permitted freestanding sign height of 25 ft., and the proposed sign is greater than 130 sq. ft. in size, thereby exceeding the maximum permitted freestanding sign area of 64 sq. ft. To allow use of the existing freestanding sign structure, the applicant requests a Variance from Section 608.8 to permit an existing non-conforming freestanding sign to remain on the property. This Board has also investigated whether, pursuant to Section 608.4.A.4. an additional variance is required to allow the structure to be utilized as a freestanding sign in order to allow the freestanding sign to exceed the maximum permitted height and size (*this is referred to as Variance Request “A”*).
3. The applicant proposes to install a second freestanding sign on the property and, therefore, requests a Variance from Section 608.4.A.4 to allow two (2) freestanding signs on the property where only one (1) is permitted (*hereinafter referred to as Variance Request “B”*).
4. To obtain the requested Variances, the applicant must demonstrate compliance with each of the five variance criteria as set forth in Section 801.2 and NH RSA 674:33, I(b). The applicant has submitted testimony addressing the Section 801.2 Variance criteria in an application received by the Planning Board on May 17, 2022, which has been supplemented with additional written information in advance of the July 5, 2022, hearing.
5. Regarding the existing structure, the Board makes the following finding of fact:
 - i. The existing structure was a sign that was installed sometime around 1988 and at the time it was installed it conformed with all applicable rules and regulations.

- ii. In 2010, the gas station on the premises was closed pursuant to a taking for which the Landowner received compensation from [the state of New Hampshire].
 - iii. In May of 2013, approximately 3 years after the gas station was closed, the Applicant applied for and was issued a building permit to replace the “Irving” copy on the sign with a white blank vinyl material. The Applicant’s support statement specified “Refacing Existing HWY sign” on it.
 - iv. Carmela Hennessy, the City Zoning Administrator, approved the permit, noting in the in-house review form “no change in size or location (non-conforming sign) – just want to blank out now – will pull permit when ready to re-face.
 - v. Applicant spent thousands of dollars to perform the work described in the permit. The work was performed with the expectation that the sign would be refaced in the future.
 - vi. The 2009 and 2013 Ordinances, which were in effect at the time of the gas station shut down and the sign refacing, imposed obligations regarding non-conforming signs losing their protected status in Section 608.10(B), and of note section 3, which states: “A legal non-conforming sign shall lose its non-conforming status if: (3) the sign is abandoned based on circumstances indicative of an intention to abandon the use and vested rights.
 - vii. The Ordinance was changed in 2018, and the relevant section now is 608.8(C)(3) which states: “Removal of a legal non-conforming sign by a property owner is required when: The use of the sign or the lot on which it is located, has ceased, become vacant, or been unoccupied for a period of 180 consecutive days or more.
 - viii. Applicant has not engaged in any act after 2018 that is in any way different than its behavior prior to 2018.
6. Relative to the variance request to add a second sign, Applicant provided testimony in favor of its request, notably in its initial support statement, presented to the Board at the June 6, 2022, hearing. Pages 8-12 of this statement focus on the applicant’s contention that an unnecessary hardship exists at the property. Applicant contends that an unnecessary hardship exists for the following reasons:
- i. A NH DOT taking between 2008 and 2010 that decreased the size of the property by 1,649 square feet and required site closure.
 - ii. The existence of a free-standing sign that has existed on the site since 1988.
 - iii. The existence of a median later installed on Route 12A that precludes traffic making left hand turns into the site.
7. The Board additionally notes that, prior to 2017, the Ordinance provided for the addition of additional signage by special exception – most recently in 2013 by section 608.9. The 2017 ordinance has deleted this ability.

II. CONCLUSIONS OF LAW

Variance Request “A”

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 Variance Request A.

1. Section 608.8(C)(3) requires the removal of a legal nonconforming sign when “the use of the sign or the lot on which it is located, has ceased, become vacant, or been unoccupied for a period of 180 consecutive days or more.” This Board believes that the proper reading of this section is for actions taken by landowners related to periods after the enactment of the restriction, in 2018.
2. In this specific case, the Applicant’s property became vacant and unoccupied more than a decade ago. Years after it became vacant, the Applicant received an affirmative written confirmation of the sign’s legal nonconforming status from the City Zoning Administrator and invested a substantial sum to re-face sign with the explicit representation that it would be re-faced again in the future.
3. At the time of the implementation of the 2018 Ordinance, the use of the lot had already been unoccupied for a period greatly exceeding 180 days. This is distinguishable from other sites that may have uses discontinued or lots vacated after 2018. All lots, including this one being considered, are subject to Section 608.8(C) to the extent actions taken after August 15, 2018, trigger the requirements of removal.
4. As a result, the Variance relief to re-face the existing and lawfully nonconforming sign is not required, and the Applicant may file a building permit to re-face the existing highway sign.

Variance Request “B”

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 not** observed. (Section 801.2.A.2)

The ordinance seeks to avoid visual clutter or distraction and promote an aesthetically pleasant experience in order to meet the community’s expressed desire for quality development. The evolution of the City’s regulatory scheme on signage has been to reduce clutter by restricting signage to one freestanding sign per property and is evidenced by the 2017 Ordinance having deleted section 608.9 which previously allowed additional signage by special exception.

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 not** 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):
 - i. Applicant has not met its burden of showing that there special conditions on this property that present an unnecessary hardship, and the Board finds that there are no such special conditions. Applicant has presented that it already has one sign, which happens to already exceed presently

allowable height and coverage dimensions, as an unnecessary hardship. However, the presence of one freestanding sign is not distinguishable from other properties in the neighborhood, which carry the burden of the similar restriction. The fact that some properties have lawfully conforming, and others have lawfully nonconforming signs is a distinction without a difference, as the Ordinance fairly provides each property with one freestanding sign. Furthermore, the fact that other landowners may have taken advantage of more generous sign provisions by developing under previous ordinances does not create a unique and differentiated hardship for this property.

- ii. Applicant additionally presented information regarding the loss of land from a compensated taking more than a decade earlier. While this change in the dimensions of the property was relevant to a different variance request for a canopy setback (which was withdrawn by Applicant prior to the July 5th, hearing) there is no attribute of a compensated taking more than a decade earlier that indicates an unnecessary hardship in the enforcement of the sign ordinance related to the limitation of one freestanding sign. Furthermore, with regards to the median on Route 12A, there are multiple other properties within the immediate neighborhood that are bound by the same restriction as the applicant.
- 6. There is 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)
- 7. The proposed use is a reasonable one. (Section 801.2.A.5.a.ii)

The Ordinance strikes a fair balance between promoting commercial speech and reducing clutter.

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this 5th day of July 2022, hereby: **Determines that no variance determination is required for Variance Request A, for the legal reasons set forth above;** and **DENIES** Variance Request B.

Seconded by Mr. Nash.

**The Vote on the Motion was (3-2).*

Ms. Barkley, Mr. Nash, and Mr. Katz voting yea.

Mr. Newlove and Mr. McDonough voting nay.

- C. **Max Seidman & Angela Zhang, 53 Winter Street (Tax Map 77, Lot 83), zoned R-3:**
Applicants request a Special Exception per Section 201.9 of the Zoning Ordinance to erect a solar array to be located +/-9 ft. from the rear property line where a minimum of 30 ft. is required. **ZB2022-18-SE**

Ms. Zhang and Mr. Seiman appeared on behalf of the application. They are working with a solar company and would like to install a solar array. Due to tree coverage the proposed area is the best location for the array. A solar array is permitted within a setback. Due to the location of the septic system and the leach field there are no other locations that get enough sunlight. It would be a static array.

Mr. Katz opened the Public Hearing. Hearing no one, the Public Hearing was closed.

Chapter IV: APPEAL FROM A BOARD'S DECISION

REHEARING

RSA 677:2 Motion for Rehearing of Board of Adjustment, Board of Appeals, and Local Legislative Body Decisions

Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefore is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that 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 the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed. If the decision complained against is that made by a town meeting, the application for rehearing shall be made to the board of selectmen, and, upon receipt of such application, the board of selectmen shall hold a rehearing within 30 days after receipt of the petition. Following the rehearing, if in the judgment of the selectmen the protest warrants action, the selectmen shall call a special town meeting.

RSA 677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body

- I. A motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.
- II. Upon the filing of a motion for a rehearing, the board of adjustment, a board of appeals, or the local legislative body shall within 30 days either grant or deny the application, or suspend the order or decision complained of pending further consideration. Any order of suspension may be upon such terms and conditions as the board of adjustment, a board of appeals, or the local legislative body may prescribe. If the motion for rehearing is against a decision of the local legislative body and if the selectmen, as provided in RSA 677:2, shall have called a special town meeting within 25 days from the receipt of an application for a rehearing, the town shall grant or deny the same or suspend the order or decision complained of pending further consideration; and any order of suspension may be upon such terms and conditions as the town may prescribe.

Within 30 days after the board of adjustment has made an initial decision, any person affected directly by the decision has the right to appeal. The 30-day window within which a motion for rehearing must be submitted is mandatory and strictly enforced. The 30-day period will be counted in calendar days beginning with the date *following* the date of the board vote. Absent a provision in the Rules of Procedure to the contrary, a Motion for Rehearing must be filed during normal business hours in the office of the board. See *Cardinal Development v. Town of Winchester*, 157 N.H. 710 (2008).

However, if it can be shown that the minutes and written decision were not filed within 5 business days of the vote pursuant to RSA 676:3, II, the person applying for the motion for rehearing shall have the right to amend the motion within 30 days after the date on which the written decision was actually filed. Therefore, it is most important for the board to make sure that the minutes and decision of every case are timely filed and made available to the applicant and the public to avoid motions being amended at a later date. A motion for rehearing must describe why it is necessary and why the original

decision may be unlawful or unreasonable.

The board must decide to grant or deny the rehearing within 30 days. See [RSA 677:3, II](#).

If the last day for filing an appeal falls on a Saturday, Sunday or legal holiday, they will be deemed timely filed if received by the next business day. See [Steve Trefethen & a. v. Town of Derry](#), 164 N.H. 754 (2013), and [RSA 21:35, II](#) which allows filing at the “next business day” if the deadline falls on a weekend or legal holiday.

The board may reconsider their decisions provided it is done within the statutory 30-day appeal period of the original decision. “...we believe that municipal boards, like courts, have the power to reverse themselves at any time prior to final decision if the interests of justice so require. We hold that belief because the statutory scheme established in RSA chapter 677 is based upon the principle that a local board should have the first opportunity to pass upon any alleged errors in its own decisions so that the court may have the benefit of the board’s judgment in hearing the appeal.” [74 Cox St., LLC v. City of Nashua](#), 156 N.H. 228 (2007). It is recommended that the board include a by-law provision allowing for board-initiated reconsiderations.

In order to submit a motion for rehearing, a person must have “standing” – i.e., the legal right to challenge the board’s decision. Abutters, persons who own property close enough to the land in question to demonstrate that they are affected directly by the board’s action (i.e., a person aggrieved), and the Board of Selectmen all have standing to appeal a ZBA decision. (See [Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment](#), 149 N.H. 63 [2003].) The board should evaluate the potential impact of ZBA action on the person requesting the rehearing to determine if they are aggrieved and have standing to file the motion. The motion should not be granted if the person requesting the rehearing is not impacted differently than the public at large. See [Weeks Restaurant Corp. v. City of Dover](#), 119 N.H. 541 (1979).

When a Motion for Rehearing is received, the board must decide to either grant the rehearing or deny it within 30 days.

Since this is a board decision, the board must meet to consider the motion and act to grant or deny it. This is a public meeting subject to the minimum posting requirements of the Right to Know Law but is not necessarily a public hearing and no formal notice is required to either the applicant or abutters (or the moving party) unless required by the board’s Rules of Procedure.

If the board decides to grant the rehearing, a new public hearing is scheduled with new notice to everyone and the process moves forward. If the board decides not to grant the rehearing, their work is done. All they must do is inform the petitioner that the rehearing was denied and the petitioner then has 30 days to challenge that decision by appealing to superior court. [RSA 677:4](#).

If the board decides to grant a rehearing, they must set the date for the new hearing. It is recommended that the rehearing be held within 30 days of the decision to grant the rehearing provided notice fees and an updated abutters list have been received from the party requesting the rehearing and that the Rules of Procedure outline the rehearing process. (See the draft Rules of Procedure in Appendix A.)

There is no statutory requirement that the petitioner actually attend the rehearing. In the event someone requests a rehearing, then asks that it be delayed or postponed, the board may honor that request at their discretion. However, if the petitioner continually asks for delays and postponements, the board may proceed with the hearing (after proper notice to all) even if the petitioner does not

attend. The chair of the ZBA also has the authority to compel witnesses to attend. See [RSA 673:15 Power to Compel Witness Attendance and Administer Oaths](#).

If in its review of the motion for rehearing the board feels compelled to add additional reasons for denial beyond those issues raised in the motion, they should grant the motion, hold a new hearing, and include their additional reasons in a new denial decision. This would allow the moving party to file a new motion for rehearing and, if appealed to superior court, bring forth all the reasons the ZBA denied the application. See *McDonald v. Town of Effingham ZBA*, 152 N.H. 171 (2005).

It is recommended that the meeting to consider a Motion for Rehearing not be a *public hearing* and that no testimony is taken. It is a *public meeting* and anyone has the right to attend but all the board is acting on is the motion in front of them (what has been submitted) and should not involve comments by the applicant, petitioner or abutters. If the board believes there are sufficient grounds to reconsider their original decision, the motion should be granted; if not, the motion should be denied.

Standing exists only when relevant factors lead the board to conclude that the plaintiff has a sufficient interest in the outcome of the proposed zoning decision. Where the only adverse impact that may be felt by the plaintiffs is that of increased competition with their businesses, there is not sufficient harm to entitle plaintiffs' standing to appeal. See *Nautilus of Exeter, Inc. v. Town of Exeter and Exeter Hospital*, 139 N.H. 450 (1995).

If the motion for rehearing cites as a reason for the request the failure of the board to adequately explain its decision, i.e., not address all five criteria for a variance, the board could use the rehearing process to complete its records:

"The... rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the courts." *Fisher v. Boscaawen*, 121 N.H. 438 (1981).

A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time.

If the board reverses a decision at a rehearing, a new aggrieved party results and that party then has 30 days in which to appeal for a rehearing on the new decision. "This triggered the need for plaintiff to apply for a rehearing as a precondition to appeal. This does not mean, as defendants suggest, that boards of adjustment will be forced to consider an endless series of rehearing applications, for it is only when the board reverses itself at a rehearing - thus creating new aggrieved parties - that the statute comes into play." *9 v. City of Manchester*, 118 N.H. 158 (1978). See *Dziama v. City of Portsmouth*, 140 N.H. 542 (1995).

It is assumed that every case will be decided, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.

