

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE
MONDAY, March 6, 2023
7:00 PM**

MEMBERS PRESENT: Dan Nash, Jeremy Katz, Dave Newlove, Paul McDonough, Catherine Hembree (Alt), Jennifer Barkley (Alt)

MEMBERS ABSENT: Chair William Koppenheffer

STAFF PRESENT: Tim Corwin – Senior Planner and Zoning Administrator

1. CALL TO ORDER

Vice Chair Jeremy Katz called the meeting to order at 7:02 PM.

2. APPROVAL OF MINUTES

A. February 6, 2023

Ms. Barkley and Ms. Hembree were given voting privileges for this motion. Mr. McDonough abstained from voting.

Mr. Nash MOVED to approve the February 6, 2023, Minutes as presented in the March 6, 2023, packet with amendments.

Seconded by Mr. Newlove.

Amendments: One spelling correction and correction of the location of the meeting.

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

3. PUBLIC HEARING ITEMS

- A. KS & LP, 3 Union Street (Tax Map 92, Lot 185), zoned R-2 Class 1:** Applicant proposes to construct an attached carport to an existing dimensionally non-conforming structure. Applicant requests a 12' right-side yard setback variance pursuant to section §801.2 Variances of the Zoning Ordinance to construct the proposed carport +/- 3 ft from the right-side lot line where the minimum required setback is 15' as required by Section §309.3 of the Zoning Ordinance.
ZB2023-07-VAR - Application to be postponed to the April 3, 2023 meeting

4. DELIBERATION

- A. Cote Swenson & Samantha Medina, 397 Dartmouth College Highway (Tax Map 111, Lot 9), zoned RL-2:** The property has two principal uses: a produce stand and a contractor's yard. Applicants request a Special Exception pursuant to Section 313.2 and Section 702 of the Zoning Ordinance to allow a portion of the contractor's yard to be used as storage for the produce stand.
ZB2022-30-SE – Continued from February 6, 2023

Ms. Hembree was given voting privileges for this hearing.

Vice Chair Katz reminded everyone that the public hearing is closed. Staff prepared a document summarizing the facts and conclusions for this hearing. A document was distributed to Board members and was previously provided to the Board.

Mr. McDonough pointed out that the farmstand is open more than a seasonal enterprise, but it is not clear that it is open all 12 months of the year. The times of operation have not been fully stated by the applicants, but it is noted that it is not a seasonal operation and that seasonal is not defined.

Mr. Katz explained that the applicants are requesting to expand the use of the nonconforming contractor's yard to include use by the farm stand. It is the responsibility of the applicants to show there are no violations that would not be remedied by the Special Exception. He reviewed the alleged violations and the violations that were seen during the site walk. It was apparent that the issuance of the Special Exception would not remedy the violations. There are more than 10 problems that would not be remedied. The applicant cannot carry their burden of proof and therefore it is recommended the Special Exception would fail.

Vice Chair Katz MOVED on December 5th 2022, at a duly-noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared Samantha Medina and Cote Swenson on behalf of their application regarding 397 Dartmouth College Highway (Tax Map 111, Lot 9), zoned RL-2. Applicants request a special exception pursuant to Section 313.2 and Section 702 of the Zoning Ordinance to allow a portion of the contractor's yard to be used as storage for the produce stand. ZB2022-30-SE.

At the December 5th regularly scheduled Zoning Board meeting a motion was made and passed to conduct a site walk to be performed at 10 AM on December 17th, 2022, and the remainder of this matter to be completed at the January 3, 2023, regularly scheduled Zoning Board meeting. Due to inclement weather the December 17th, 2022, site walk meeting was canceled.

At the January 3rd, 2023, regularly scheduled Zoning Board meeting, Samantha Medina and Cote Swenson attended, and the previously canceled site visit was rescheduled to January 7, 2023, at 10:00 am, and the public hearing continued thereafter until Monday, February 6 at 7:00 PM.

At the February 6th, 2023, regularly scheduled Zoning Board meeting, Samantha Medina and Cote Swenson did not attend, and the public hearing was concluded and closed.

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 property at 397 Dartmouth College Highway (Tax Map 111, Lot 9) contains two uses, a Contractor's Yard permitted under a Zoning Board approval on January 20th, 2009, and a temporary greenhouse and stand permitted under a Zoning Board approval on May 6th 1991.
2. The Applicants testified that they are seeking approval to use both the interior (garage) and exterior (yard) of the contractor yard part of the property to store inventory and material belonging to the produce stand business.
3. In all special exception applications, the burden of proof is upon the applicant to demonstrate that each and every one of the requirements of §801.3. are met.

4. Much of the hearings were devoted to the investigation of §801.3.C. Specifically, the applicant bears the burden of proof in demonstrating that there are no existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy.
5. The applicants testified in the December 5th hearing that a violation relating to the fence issue had been resolved and that they were aware of no additional violations.
6. Abutters appeared and testified at the December 5th hearing that they believed multiple violations existed on the property that would not be remedied through the granting of the special exception that has been requested. Abutter Linda Wadleigh testified to violations related to fencing and landscaping. Abutter Chris Childs testified relative to violations of overnight parking, vehicular maintenance, landscaping and screening. Abutter Marylou Childs presented photographic evidence of violations and also testified regarding nuisance created by excessive commercial light.
7. Upon questioning, the Abutters testified that their grievances center upon the outdoor contractor's yard and the violations relative to the condition on the grounds on that yard. The Abutters confirmed they are not aggrieved by contents of the produce stand being stored in the interior of the garage.
8. Based upon the December 5th testimony received, a site walk was scheduled so that the Board and Staff would be able to view the conditions on the property. The site walk was performed on January 7, 2023, and was attended by 5 members of the public, including several abutters who had testified in the December 5th hearing. The site walk exclusively focused on the exterior grounds of the property, and no structures were entered. As stated above, the Applicants were invited to the site walk but were not present at the site walk.
9. Limited testimony was allowed at the February 6th meeting to discuss what was seen during the site walk. Applicants did not attend the February 6th meeting and did not submit testimony to refute the abutter's statements or submissions.
10. Four violations were alleged of the May 6th, 1991 Zoning Board Decision relative to the Produce Stand, as follows:
 - a. Violations Pursuant to the May 6th, 1991, Zoning Board Decision:
 - i. "This will be a temporary structure." – Multiple permanent and unpermitted greenhouses and structures currently exist on the land.
 - ii. "The greenhouse will 48 feet long [sic] with a surrounding fence, both of which are portable." – Multiple permanent greenhouses appear on the lot. There is no fence, temporary or otherwise, surrounding the greenhouses.
 - iii. "This is a seasonal business." – There is evidence that the farm stand business is operational year around.
 - iv. "[T]his is a temporary structure and shall not be attached to earth in any manner." – Multiple unpermitted permanent structures exist on the property.

However, the Board notes that these violations have been rendered moot by virtue of the Board's decision #ZB2020-22SE issued on October 19, 2020, reading in relevant part: "...the Board finds that the produce stand at this location, operating with greenhouses on the site, is a lawful conforming use..." [Paragraph 6] and "Since we determine that a produce stand with several greenhouses on the site is already a lawfully conforming use..." [Paragraph 7]

Provided that the Produce Stand use is within the confines of the use footprint and intensity that existed as of the October 19, 2020, decision, this Board finds no violations of the May 1991 order as those restrictions were superseded by the more recent decision.

11. However, the Zoning Board finds the testimony of the abutters credible, and personally viewed in the site walk, evidence of the following Zoning Violations on the property that would not be remedied through the granting of the requested Special Exception. The following violations are noted:

- a. Violations Pursuant to the January 20th 2009 Zoning Board Decision:
 - i. “The building will remain a non-heated, unoccupied storage building.” – It was observed that a heating stove chimney has been installed in the building. The heating stove appears to have been installed without the benefit of building or zoning permits.
 - ii. “The entire developed portion of the property will comply with the City’s commercial landscaping ordinance, as subdividing the property has not occurred other than for bounds of contractor’s yard.” – Landscaping has not been installed pursuant to the approval.
 - iii. “At no time will storage of box trailer, or shipping containers be permitted.” – Multiple storage devices including a trailer are present on the site.
 - iv. “No vehicle maintenance will occur on site.” – Credible testimony was received from the neighbors that vehicle maintenance is routinely performed on site.
 - v. “All outside storage to conform to the boundaries set forth in a supplemental site plan submitted to this board and said storage to be screened by a 6’ – 0” privacy fence.” – A 6 ft. privacy fence is not provided as required; there is unpermitted and unscreened storage throughout the site both inside of the limits of operation and outside the limits of operation as defined by the approved 2009 site plan. There is storage of items both for the contractor’s yard and the farm stand throughout the site and in areas not permitted.
 - vi. “Operating hours to be limited to between 6:30 AM and 8:30 PM” – Testimony from the neighbor states that lights remain on all night and the buildings are regularly used past 8:30 PM and / or before 6:30 AM.
 - vii. “Trucks would not be park there overnight [sic], nor any maintenance performed.” – There is credible evidence and testimony that vehicles were parked on site overnight.
- b. Additionally, Violations Pursuant to the General Zoning Provisions:
 - i. Zoning Ordinance Section 608.8.C.3 (for failing to remove a legal nonconforming sign) – Unpermitted signs remain on the property.
 - ii. Zoning Ordinance 608.2(B) for installing a freestanding sign on the Property without obtaining a sign permit.
 - iii. Zoning Ordinance Section 702.5(A) for expanding the use of the produce stand in several ways without a special exception.
 1. The storage of junk, waste material, piles of dirt, mulching materials and various items is present throughout the site.
 2. Unpermitted signs which state, “Bark Mulch” and “mulch for sale” appear to be an unpermitted expansion of the contractor’s yard into a retail operation.
 3. There is evidence of produce stand items being used and stored in the contractor’s yard as a part of an active operation to grow and store items in the yard.
 - iv. Building Code Section 36-2(A) for installing a wood stove in the produce stand without a Zoning Board approval or a building permit.

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 Special Exception criteria set forth in §801.3 of the Zoning Ordinance:

1. The Special Exception is authorized by §314.2 of the Zoning Ordinance. (§801.3.A)
2. There are no special conditions/requirements applicable. (§314.2)
3. There **are** existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy. (§801.3.C)

Specifically, the applicants have not met their burden of proof in demonstrating that there are no existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy. To the contrary, the abutters presented large amounts of credible testimony as to the existence of violations and the Board directly viewed this evidence during the site walk.

4. The character of the area **will** be adversely affected. (§801.3.D)
Abutters have presented credible testimony that expansion of the outdoor storage area that is already non-compliant with its obligations will diminish the character of the area.
5. A hazard and nuisance **has** been and will be created. (§801.3.E)
Abutters have presented credible testimony that the expansion of the outdoor storage area, especially in conjunction with other evidenced violations, will create and/or exacerbate a nuisance and diminish their quality of life.
6. The capacity of existing or planned community facilities and services (including streets and highways) **will not** be adversely affected. (§801.3.F)
7. The granting of the Special Exception **will not** result in undue municipal expense. (§801.3.G)
8. The proposed Special Exception **will not** be developed in a manner compatible with the spirit and intent of the ordinance. (§801.3.H)
9. The general welfare of the City **will not** be protected. (§801.3.I)

III. DECISION

Now therefore be it resolved, that the Lebanon Zoning Board of Adjustment, on this **6th** day of **March 2023**, hereby **DENIES** the requested relief, subject to testimony, plans, and materials submitted.”

Seconded by Mr. Newlove.

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

5. STAFF COMMENTS

NONE

6. ADJOURNMENT

***Mr. Nash MOVED to adjourn the meeting at 7:26 PM.
Seconded by Mr. Newlove.***

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

Respectfully submitted,
Linda Billings
Recording Secretary