

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE
MONDAY, December 4, 2023
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Vice Chair Jeremy Katz, Dave Newlove (remote), Paul McDonough, Jennifer Barkley

MEMBERS ABSENT: Michael Morris (alternate)

STAFF PRESENT: Nathan Reichert – Zoning Administrator; Shaun Mulholland – City Manager

1. CALL TO ORDER

Chair Koppenheffer called the meeting to order at 7:02 PM. It was noted that Mr. Newlove was attending via Zoom and that Michael Morris (alternate) was unable to attend this evening.

2. APPROVAL OF MINUTES

A. November 6, 2023

Mr. Katz MOVED to defer review of the November 6, 2023, Minutes to the January meeting. Seconded by Ms. Barkley.

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

3. PUBLIC HEARING ITEMS

A. M.A. Mendez & K.O. Kristiansen, TTEES, 1 Dartmouth Avenue (Tax Map 49, Lot 17), zoned R-1: Applicant requests a Variance from Section 308.3 of the Zoning Ordinance to construct a deck +/- 4 ft. from the lot line shared with 7 Dartmouth Avenue (Tax Map 49, Lot 16), where a minimum side yard of 15 ft. is required. ZB2023-17-VAR

Marissa Mendez, and Karl Kristiansen presented to the Board. Mr. Karl Kristiansen explained that a variance was sought approximately a year ago to build a single-family house on 1 Dartmouth Avenue. The deck, as approved at 30'x15', does not meet the back door of the house. This is a prefab, modular home and it was not known until the pieces were placed on the lot that this was an issue. This involves a requested amendment to the previously approved variance. This will be close to the lot line of 7 Dartmouth Avenue. A portion of Dartmouth Avenue travels through the yard, which adds to this unique situation.

There were no questions from the Board at this time.

There was no public comment at this time.

The hearing was closed, and the Board discussed the proposal. Chair Koppenheffer stated that the testimony seems to address all five requirements for the requested variance.

Mr. Katz MOVED on December 4th 2023, at a duly noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared Marissa Mendez, Karl Kristiansen, and Leland Kristiansen regarding 1 Dartmouth Ave. (Tax Map 49, Lot 17) Zoned R-1. The applicant requests an 11' side yard dimensional variance from Section 308.3 to construct a deck approximately 4' from the property line with 7 Dartmouth Ave.

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 is improved with a one-family dwelling constructed in 2023. At 15,246 sq. ft., the lot is conforming to the 10,000 sq. ft. minimum lot size required for Class 1 lots in the R-3 District.
2. The applicants propose to construct a deck. The deck is proposed to be located 4 ft. from the rear yard lot line shared with the abutting property at 7 Dartmouth Avenue (Tax Map 49, Lot 16) where a minimum unobstructed side yard of 15' is required.
3. In the R-1 District, Class 1 lots must maintain a minimum rear yard unobstructed by buildings and structures of 15' pursuant to Section §308.3 of the Zoning Ordinance. Therefore, an 11' dimensional variance is required to permit construction of the proposed deck, which will encroach approximately 11' into the minimum required 15' side yard.
4. To obtain the requested Variance from section §308.3, the applicants must demonstrate compliance with each of the five variance criteria as set forth in Section 801.2 and NH RSA 674:33, I(b).
5. The applicants have submitted testimony addressing the section §801.2 Variance criteria in an application received by the Planning and Development Department on November 14th 2023.
6. No one from the Public spoke for or against the application.

II. CONCLUSIONS OF LAW

A. Variance

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 property fronts on three streets, the lot is narrow and irregular, and has a City street crosses the property, and there is an additional difficulty due to the water table discovered during construction that requires an additional accommodation.

6. 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)

7. 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 **4th day of December 2023**, hereby **GRANTS** the requested Variance from Section 308.3 of the Zoning Ordinance, to allow the construction of a 26'x10' deck approximately 4' from the rear yard abutting the property at 7 Dartmouth Avenue, where a minimum unobstructed side yard of 15' is required, as set forth above and per testimony, plans and materials submitted, and per the following conditions:

1. The applicant shall obtain a building permit.

Seconded by Mr. McDonough.

****The Roll Call Vote on the Motion was Koppenheffer - aye, Katz - aye, Newlove - aye, McDonough - aye, and Barkley – aye; (5-0-0).***

- B. AAM Lebanon Residences, LLC, 25 Foothill Street (Tax Map 24 Lot 14, Plot 100), zoned IND-L:** The subject property is located within the Altaria Planned Unit Development (PUD) and is currently improved with a hotel which the applicant proposes to convert to a 120-unit multi-family dwelling. Per Section 501.4.D of the Zoning Ordinance, the Altaria PUD may include a maximum of 34 dwelling units, 33 of which have been constructed at 18 Merchant Street. To allow the proposed change of use at 25 Foothill Street, the applicant requests a Variance from Section 501.4.D of to allow 119 additional dwelling units, whereas only one (1) additional dwelling unit is allowed pursuant to the permitted residential density for the Altaria PUD.

ZB2023-16-VAR - Continued From 11/6/2023 Meeting

Tom Chesnard, attorney for the applicant with Cleveland, Waters, & Bass, and Craig Pfannenstiehl, AAM Lebanon Residences, addressed the Board. The property is approximately 2.6 acres of land located in the Light Industrial Zone and is part of the industrial planned unit development, Altaria PUD, approved in 2013 for eight lots and six buildings. This is an 83,284 s.f. building, built in 2014 and operated as the Element Hotel prior to being damaged by a fire. In 2021, Altaria Hotel sought a variance from the Board and the Board to change the utilization of the property from a hotel use with an average length of tenancy of 11 days, to a micro-

apartment/residential use, with a proposed average length of tenancy of 60-90 days. The Board issued a decision dismissing the requested variance on the basis that Altaria was already approved for a hotel use and the use proposed by Altaria is defined by the Ordinance as a hotel use, provided that the stays are transient in nature and do not exceed 184 days. It was determined that no relief was required for the proposed use to commence.

Attorney Chesnard stated that, in 2022, the applicant acquired title to the property and operated the building as a hotel with short term rentals and lease terms not exceeding 184 days. From the time of the fire, up until the Board hearing in 2021, the building sat vacant until it was acquired by the applicant. Since that time, the applicant/current owner has unfortunately learned that this approach, with lease terms not exceeding 184 days, is not the best use of the property. This is not the most reasonable use, and the applicant has been experiencing a vacancy rate generally at or above 15%. While the decision from 2021 appears to have been the result of cooperation and good intentions between the applicant and the Board, once put into practice for approximately a year, it appears that this use results in consistently high vacancy rates and is not the most reasonable use of the property. A letter of support for this variance application from the Assistant Vice President for Dartmouth Hitchcock Medical Center and Clinics in Lebanon described a well-documented need for additional housing in the City. The letter states that longer term leases would help to ensure Dartmouth employees have a safe, convenient living situation, close to Dartmouth facilities. Also, as of September, a residential building located within the same PUD, containing over 30 dwelling units was at 0% vacancy.

Attorney Chesnard stated that the applicant is seeking to convert the 120 hotel units with a 184-day lease term limit on the property, to 120 dwelling units. The request is for a variance from Section 501.4.D of the Zoning Ordinance, which limits the density of residential uses allowed in the Altaria PUD. A separate existing lot, 18 Merchant Street, within the Altaria PUD already consumes most of these units, leaving only one remaining unit, which is 119 short of what the applicant is seeking. The proposed project will require new building additions to the existing building but will use the size and current layout of the existing building. Regarding the required number of parking spaces, the number of parking spaces needed to convert the use to 120 dwelling units already exists. As the property was approved and constructed prior to the City's adoption of the electric vehicle parking requirement set forth in Section 607.8 of the Zoning Ordinance, it is lawfully nonconforming in that respect, and only one EV parking space is presently installed on the property. Rather than seek an additional variance from those requirements, the applicant tends to fully comply with that Section and will provide eight EV installed spaces, 29 EV ready spaces and 94 EV capable spaces. Upon the issuance of a variance from Section 501.4.D of the Zoning Ordinance, the applicant will seek approval from the Planning Board for modification of the previously approved plan to reflect the proposed EV plan.

Attorney Chesnard explained that there is a clear need for additional housing, and this is a unique opportunity to address it quickly. Mr. Pfannenstiehl stated that this project could be completed fairly quickly, if approved. Attorney Chesnard stated that the applicant contacted DOT regarding the driveway permit and was informed that the proposed change would not create a concern regarding traffic.

Mr. McDonough asked how the residential ratio being above the 25% allowed for the Industrial PUD is acceptable through this proposal. Attorney Chesnard explained that there is room for mixed uses in the Industrial PUD. One objective of the Industrial PUD is for the most efficient use of the space. As times have changed, it has become clear that the existing use is not the most efficient use. Also, a major employer in the area has stated that the proposed use would be a good one. Mr. Pfannenstiehl explained that he does not believe the proposal will not change the character of the neighborhood. This is effectively workforce housing.

It was noted that most traveling nurses have 13-week contracts, which would likely be less than the existing 184-day leases. Attorney Chesnard stated that Dartmouth Hitchcock is not the only party interested in this change. Altering the lease terms would allow for more stability and a less transient nature to the building.

There was discussion regarding the argument being made that a hotel use is not the highest and best use for a hotel property.

The Board noted that the essential nature of the area currently has 33 residential units and a hotel. The applicant was asked how this proposal does not alter this essential nature. Attorney Chesnard stated that there are similar uses to the proposal close to this area, which is why this would not change the essential nature. This is not an area where residential uses are not permitted. 18 Merchant Way did not require a variance.

The Board noted that in this PUD 34 residences are permitted in total and 33 are occupied. In the past, residential use of some intensity was deemed to be reasonable, and the proposal would be a multiple of the amount deemed to be reasonable. This seems to be a tremendous increase in intensity for the area. Attorney Chesnard stated that the proposed use would not be much different in intensity than the existing use. The uses are of a similar nature, reducing the intensity effect.

There was discussion regarding the proposed hardship argument for this application. Attorney Chesnard stated that the hardship speaks to if there are special conditions of the property. In this case, the property contains a huge building, greater than most of the surrounding lots. This building is also already suitable for the proposed use. In light of the special conditions, the proposed use is also a reasonable one. The proposed use does not alter the character of the area, as the use already exists within this PUD. In light of the housing need in Town, the proposed use is reasonable.

The Board noted that the applicant has spoken to the highest and best use for the property being to turn the units into residential units. However, the law does not require the Zoning Board to grant a variance due to there being a different higher and better use of the property. Attorney Chesnard stated that the proposed use will address a need in the area. The Board explained that need has nothing to do with granting a variance. The original developer wanted to turn the six lots into a PUD and was allowed to build a hotel and residences. Dwelling units are almost an afterthought in the PUD ordinance. The applicant is trying to send a message to all other PUDs that residential units could be included, but this was not

part of the PUD ordinance intention. The building was built in 2014 and ran successfully until the fire. The applicant bought the building, knowing it was zoned as a hotel. It is unclear what the hardship is. The previous owner requested 270-day leases from the Board, and it was determined that, per State law, hotel room leases can go up to 184 days. Mr. Pfannenstiehl stated that he believes other hotels have people that stay for longer than 184 days and it would be a hardship to not allow this for his property. The Board explained that a property is not considered as a hotel by the State, as a Meals & Rooms Tax is not collected if someone stays for more than 184 days.

In response to a question from the Board, Mr. Pfannenstiehl explained that the nearby 33 residential units are 98% occupied currently and the former hotel is 85% occupied.

The Board asked how converting this property to dwelling units would be different than an extended stay hotel. Mr. Pfannenstiehl stated that it would eliminate the lease requirement of a maximum of 184 days.

The Board noted that a hotel is for transient occupants, and multifamily housing is for permanent occupants. This proposal is for a change in use moving from transient occupants to permanent occupants. Mr. Pfannenstiehl agreed that he wants to be able to allow for 30 days, 90 days, or two years, which a multifamily designation would allow. This is not only to be used for traveling nurses.

Sherry Boschert, Lebanon Energy Advisory Committee and Chair of the EV Subcommittee, urged the Board to require compliance with the codes for EV charging, if it decides to approve this variance.

Kirun Sankaran, Lebanon resident, noted that, of the five criteria for granting a variance, a failure to grant a variance would violate three including contrariness to the public interest as there is a desperate need for more long-term housing in the City, that the gains to the general public are in the interest of substantial justice and it is unclear that there would be any losers to granting this variance, and regarding the fair and substantial relationship, that a failure to grant this variance breaks the relationship between the Zoning Ordinance purpose to ensure the PUD has its best and most efficient use in the public interest by making it much harder for this land to be used in the public interest. Per the Zoning Code criteria, there are good reasons to grant this variance and the concerns raised by the Board are meretricious.

There was no additional public comment at this time. The public hearing was closed, and the Board moved to deliberations.

Ms. Barkley stated that she understands the need for long-term housing in the City, but she is struggling with the hardship piece for this case.

Mr. Newlove stated that he does not support a variance in this case. His stance has not changed since 2021 and he does not see a hardship.

Mr. McDonough stated that the proposal will not likely change the use of the area. Regarding the hardship issue, this building is significantly larger than others nearby. The existing owners are trying to run this business as productively as possible. He is in favor of the variance request.

Mr. Katz stated that there has to be a difference between a multifamily use and a hotel use. The Ordinance distinguishes the two. In order to change from a hotel to a multifamily use, there must be a hardship that makes the strict application of the Ordinance improper. It is unclear if a very large building size is a hardship that distinguishes it from the burdens. He does not currently see a specific hardship.

Chair Koppenheffer stated that the applicant did not inherit this property; it was specifically purchased as a large hotel, which was deliberately built by the original developers. There is nothing he can see that would impose a hardship as a result of the condition of the land.

Mr. Katz recommended continuing this item in order to allow for a draft motion to be created. The Board agreed. Mr. McDonough agreed to draft a motion in favor of the variance and Mr. Newlove agreed to draft a dissenting motion.

Mr. Katz MOVED to continue this hearing to January 2, 2024, in order for draft motions to both approve and deny the variance to be presented, the former by Mr. McDonough and the latter by Mr. Newlove.

Seconded by Ms. Barkley.

****The Roll Call Vote on the Motion was Koppenheffer - aye, Katz - aye, Newlove - aye, McDonough - aye, and Barkley – aye; (5-0-0).***

The order of the meeting was changed.

4. OTHER BUSINESS

A. Ethics and conflict of interest policy review

City Manager Mulholland completed an ethics and conflict of interest policy review with the Board, on behalf of the City Council.

5. STAFF COMMENTS

Mr. Reichert noted that there is a new Associate Planner on the Staff. There are still two open alternate positions on the Board to be filled.

6. ADJOURNMENT

Mr. Katz MOVED to adjourn the meeting at 9:01 PM.

Seconded by Ms. Barkley.

****The Roll Call Vote on the Motion was Koppenheffer - aye, Katz - aye, Newlove - aye, McDonough - aye, and Barkley – aye; (5-0-0).***

Respectfully submitted,
Kristan Patenaude, Recording Secretary