



**BUILDING CODE BOARD OF APPEALS
THURSDAY, APRIL 18, 2024 - 7:00 PM
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE**

1. Call to Order

- A. To participate in this meeting, please join live via Microsoft Teams or call 1-929-229-5356 (access code: 142 556 160#). If you have trouble accessing this meeting, please email nathan.reichert@lebanonnh.gov.

2. Approval of Minutes

- A. April 1, 2024

3. Public Hearing Items

- A. **XYZ Dairy, LLC, 1 River Park Dr (Tax Map 44, Lots 21-30 & Map 44, Lot 7), zoned R-3, CBD & IND-L:** Pursuant to City of Lebanon Code §36-13.A, Building Code Board of Appeals, an appeal of the Building Official's determination that Lebanon Building Permit #2016-00293 has expired and is deemed to be invalid. **BCBA2024-01** - Continued from 4/1/2024 meeting

4. Staff Comments

5. 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](https://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: 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](https://lebanonnh.gov/Agendas).

DRAFT

LEBANON BUILDING CODE BOARD OF APPEALS
MONDAY, April 1, 2024 7:30 PM
(Meeting Begins Immediately Following
Zoning Board of Adjustment)
Council Chambers, City Hall or
Remote Via Virtual Platform
LebanonNH.gov/LIVE

MEMBERS PRESENT: Vice Chair Jeremy Katz, Dave Newlove, Paul McDonough, Jennifer Barkley, Michael Morris (alternate)

MEMBERS ABSENT: Chair William Koppenheffer

STAFF PRESENT: Nathan Reichert – Zoning Administrator

1. CALL TO ORDER

The meeting was called to order at 8:45 PM by Vice Chair Katz.

Michael Morris was given full voting privileges for this meeting.

Mr. Reichert gave the Right to Know, RS 91A public announcement.

2. APPROVAL OF MINUTES

A. July 11, 2023

Mr. McDonough MOVED to approve the July 11, 2023, Minutes as presented in the April 1, 2024 packet.

Seconded by Mr. Newlove.

It was noted that the appellant requested changes to the minutes. The request was denied.

**The Vote on the Motion was approved (3-0-2).*

Mr. Morris and Ms. Barkley abstained as they were not present at the meeting.

3. PUBLIC REHEARING ITEMS

A. XYZ Dairy, LLC, 1 River Park Dr (Tax Map 44, Lots 21-30 & Map 44, Lot 7), zoned R-3, CBD & IND-L: Pursuant to City of Lebanon Code §36-13.A, Building Code Board of Appeals, an appeal of the Building Official's determination that Lebanon Building Permit #2016-00293 has expired and is deemed to be invalid. **BCBA2024-01**

Phillip Hastings, attorney, and Chet Clem, a principle of XYZ, appeared on behalf of the application. Attorney Hastings shared handouts with the Board summarizing key points of the appeal, supporting documents, and a timeline of the past filings.

The appeal is straight forward in that work has not been suspended or abandoned by the appellant. At one time the City questioned the validity of the building permit. Previously the permit was determined to be in effect. The applicant has continued to proceed diligently with work, operating under the building permit. The applicants protest that the build date has been interrupted by the City

1 and the building inspector. They state that under their interpretation of the laws, building is not
2 limited to physical activity on the site. Their recommended interpretation is that the applicant has not
3 abandoned or suspended work. Specifically, in order to be abandoned or relinquished, there must be
4 both, some intention to abandon the permit with some overt action or failure to act, and evidence of
5 that intent. They state there is no evidence of that intent in this case, and request that the building
6 inspector's interpretation be overturned.

7
8 Mr. Katz reviewed the powers of the BCBA under the code. An application for appeal should be
9 based on a claim that the true intent of the code or rules they are under has been incorrectly
10 interpreted. He asked for clarification of which section of jurisdiction this appeal falls under.
11 Attorney Hasting replied that the recommended interpretation is based on the facts presented, the
12 applicant has not abandoned or suspended work for 180 days. In fact, the applicant has never
13 abandoned or suspended work.

14
15 The applicants were asked to show what facts they could introduce that show that work has not been
16 abandoned. Page 3 and Page 4 of the slides presented in the packet this evening highlight the key
17 activities, the timeline of those activities, and the efforts that were undertaken. They believe they
18 have communicated to the City, and that in January Mr. Clem notified the City of what has been
19 happening within the 180 days allowed. They stated that the documents contain back up information
20 that shows written records of all their actions that they assert constitute work.

21
22 Mr. Katz clarified with the applicants that they define the 180 consecutive days are from July 11,
23 2023 through January 7, 2024. The applicants discussed court standards from other states that
24 indicate meetings and reengineering are tangible evidence of actions, that mental work, as well as
25 physical work should indicate there has not been abandonment. This would keep the permit active
26 and show there has been no behavior to relinquish the property right.

27
28 The applicants stated the contracts they reinstated and paid for, with contractors. Also meetings with
29 the Lebanon DPW. There were no engineers involved or expenses incurred in the meeting with the
30 DPW. In October an architectural firm was engaged, and expenses incurred. Additionally, they have
31 again made efforts to reestablish leasing arrangements with other parties.

32
33 Mr. Katz said he read every page that the appellants submitted and looked up every case that was
34 cited. He sees no one trying to make things difficult for anyone else. He asked the applicants what
35 they thought caused the City to determine that nothing was taking place and did they communicate
36 anything to the City of the actions they were taking. Mr. Katz suggested there may have been a lack
37 of good communication throughout the process between all parties involved.

38
39 The City was called to present. Mathew Decker, representing Calvin Hunnewell, and Calvin
40 Hunnewell appeared. The XYZ permit was approved under the 2009 Building Code. That building
41 code is set to have expired three times since then. There is a motion as of March 28, 2024, that the
42 Lebanon Building Code be updated to the 2021 IBC codes. As opposed to the 2009 code, under the
43 2018 or 2021 Building Code, it would be easier to inspect the building under the current code and
44 easier for contractors to construct the building under the current code. They suggest ending these
45 extensions. Issuing a new permit would be beneficial to everyone. They believe the appellants have
46 been given extended benefit of the doubt that building has continued since the original permit was
47 issued in 2009. The City disagrees with the appellants' interpretation of the code, that there is a need
48 to find an intention to abandon. That interpretation is not the standard in the building code. Excerpts
49 from the 2009 and 2018 building codes explain the case using statutory interpretation. They state that
50 the code defines work as physical work done on site.

1 The Board asked for clarification about the cost of a new building permit and if there was anything
2 being done by the parties toward getting a new building permit. The problem seems to be the
3 drainpipe that goes across the property and there has been no progress toward remedying that
4 drainpipe. That is what is holding up physical work. The City would apply the fees for the original
5 permit toward the cost of the new permit. There would be an additional expense for a new permit as
6 it is based on the cost of constructing, which is more expensive now. The standard expiration of a
7 building permit is a suspension of work for 180 days. A complete application can be processed rather
8 quickly. The clock does not start until the application is deemed complete by the City. A technical
9 review can be done 30-60 days after an application is complete.

10
11 Mr. Katz said he has heard testimony that continued investment was made during that 180 day time
12 period. He believes that investment logically indicates the intention to continue the project. To the
13 extent that the appellant would like to quantify their investment over the 180 days, it would be helpful
14 information for the Board. And to that point, he asks that the City show evidence that the
15 interpretation of work means physical work.

16
17 ***Mr. Katz MOVED to continue this meeting to Thursday April 18 at 7:00 PM.***

18
19 ***Seconded by Mr. Newlove.***

20
21 ****The Vote on the Motion was approved (5-0).***

22
23 **4. ADJOURNMENT**

24
25 ***Mr. Newlove MOVED to adjourn the meeting at 10:10 PM.***

26 ***Seconded by Ms. Barkley.***

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

28
29 Respectfully submitted,
30 Linda Billings
31 Recording Secretary

LYME PROPERTIES 2, LLC, AGENT FOR XYZ DAIRY, LLC

**In Re: Appeal of Administrative Decision of Building Inspector
River Park
West Lebanon, New Hampshire**

SUPPLEMENTAL STATEMENT OF FACTS AND LAW

This Supplemental Statement of Facts and Law is submitted on behalf of Lyme Properties 2, LLC, development agent for XYZ Dairy, LLC (together, the “Appellant”), the owner of Tax Map 44, Lot 21 at River Park in West Lebanon, New Hampshire (the “Property”), in connection with its appeal of an administrative decision of the Lebanon Building Inspector (the “Appeal”) and is intended to supplement the Statement of Facts and Law dated March 27, 2024 submitted on behalf of the Appellant (the “Initial Statement”) and the testimony and statements made by or on behalf of the Appellant at the initial hearing on this matter on April 1, 2024.

All additional testimony, statements, representations, evidence, plans, reports, studies, exhibits and other information submitted or to be submitted by or on behalf of the Appellant in connection with the Appeal at or prior to the public hearing on this Appeal (including but not limited to the Initial Statement) are incorporated by reference hereto. Except as otherwise set forth in this Supplement Statement of Facts and Law, capitalized terms herein shall have the same meaning as in the Initial Statement.

The Appellant requests that the Board approve the Initial Statement and this Supplemental Statement of Facts and Law as part of the specific findings required pursuant to RSA 676:3, I.

A. Additional Statements of Fact.

1. In connection with the activities the Appellant undertook in furtherance of the construction work authorized by the Building Permit subsequent to July 11, 2023 (*see, e.g.*, Building Code Board of Appeals, Agenda Packet for April 1, 2024 [“Agenda Packet”] at 59-107), the Appellant incurred direct costs of \$221,838, has paid \$378,600 in materials currently on-site for the project, and is contractually obligated to pay another \$652,303 (all exclusive of the Appellant’s overhead costs). *See* Affidavit of David Clem, dated April 17, 2024, a copy of which is attached hereto as Exhibit A.

2. The Building Inspector’s suggestion that the Appellant should seek a new building permit in accordance with the 2018 edition of the IBC as a remedy to the current situation is woefully inadequate to address the irreparable harm suffered by the Appellant due to the Building Inspector’s decision and will in no way restore the Appellant to its pre-decision status. Notwithstanding the Building Inspector’s offer to credit the fees paid for the expired permit against the new permit application, the evidence presented at the April 1 hearing demonstrates that a new

permit application would take months to process and add thousands of dollars to the cost of the Project.¹

3. The Building Inspector's suggestion that applying for a new building permit in accordance with the 2018 edition of the IBC would be beneficial to the City in several respects is a non sequitur. The Appellant intends to construct the building to the standards required in the 2018 edition of the IBC or better, as it was prepared to do previously and as was communicated to the Planning Department. This is part of work it has been doing in furtherance of the building permit includes a thorough code review by its consultants in 2019 and 2023 to ensure material compliance with current standards notwithstanding that the Building Permit was issued under a prior version of the IBC. *See* Agenda Packet at 79-82.

4. The Building Inspector's suggestion that the Appellant's temporary stoppages in on-site activities to deal with the municipal stormwater line on the property evidences Appellant's intent to abandon the project is belied by the fact that, in response to this condition, the Appellant repeatedly and expeditiously attempted to work with the City to resolve the issue. *See* Agenda Packet at 52-57.

5. The Building Inspector's reliance on an alleged lack of construction activity on site (as opposed to off-site activities and preparatory efforts) in determining that the "work" has been suspended or abandoned under Section 105.5 of the IBC is selective and inconsistent with the City's prior administrative interpretations in this case. For example, in its March 24, 2023 letter confirming that work had commenced under the Building Permit on November 29, 2022, the City wrote that "we agree that you have justified the preparation work you have been preparing with your construction partners constitutes commencement of work at 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293. *See* Agenda Packet at 14.

B. Board's Scope of Authority and Standard of Review.

6. The Board is authorized by RSA 674:34 to hear and decide appeals of orders, decisions, or determinations made by the building official relative to the application and interpretation of the state building code.

7. Although RSA 674:34 does not expressly set forth the standard of review to be applied, the Board's authority is comparable to the Zoning Board of Adjustment's authority to hear and decide appeals of decisions related to the interpretation of the zoning ordinance. *See* RSA 674:33. Accordingly, in these types of appeals, the Board stands in the shoes of the Building Inspector and has the authority to act as the Building Inspector on *de novo* basis without deference

¹ At the April 1 hearing, the City's Planning & Development Director acknowledged that the application fees for a new building permit would likely far exceed those fees paid for the Building Permit in 2019 and that the City's building permit approval process is not speedy. Even so, his estimate of how long it would take to get a new permit is overly optimistic based the Applicant's own recent experience. For example, in 2022, when the Applicant applied for a building permit to renovate a 1,200 square foot home, it took the City 99 days from the date of submission to issue the permit, including 70 days from the date the application was deemed complete. This is outside of the 30 days granted to a single-family home under Lebanon Building Code 36-5.

to the Building Inspector's findings or rulings. *Cf. Ouellette v. Town of Kingston*, 157 N.H. 604 (2008).

C. Constitutional Considerations.

8. The Building Inspector's interpretation of the term "work" for determining whether a permit has been abandoned or suspended as expressed at the April 1 hearing is unduly constrained and implicates the Appellant's fundamental rights to substantive due process and equal protection of the law under the United States and New Hampshire Constitutions.

9. These constitutional considerations underpin the New Hampshire courts' approach to cases involving the alleged abandonment of important rights in real property. While no published New Hampshire Supreme Court case has specifically addressed the abandonment question in the context of a building permit, this situation is not unlike those cases where municipalities have claimed that the right to a nonconforming use has been forfeited due to abandonment or that a developer's right to complete a project has not vested due to a period of inactivity.

10. In those types of cases, the courts tend to liberally construe the facts and law in favor of the property owner's rights and require a heightened burden of proof to show some overt act or failure to act on the part of the property owner evidencing an intention that it no longer retains any intention to exercise the right. *Cf. AWL Power, Inc. v. City of Rochester*, 148 N.H. 603, 606 (2002); *Lawlor v. Town of Salem*, 116 N.H. 61, 62 (1976); *Pike Industries v. Woodward*, 160 N.H. 257, 261 (2010).

11. In *Lawlor*, the Supreme Court considered whether an owner had abandoned a vested right in a nonconforming use. The Court found that:

"Abandonment depends upon the concurrence of factors: (1) an intention to abandon or relinquish the use, and (2) some overt or failure to act which carries the implication that the owner neither claims nor retains any interest in the use. The decisive test is whether the circumstances surrounding such cessation of use are indicative of an intention to abandon the use and vested rights therein." 116 N.H. at 62-63 (citations omitted).

12. In *Pike*, the Supreme Court rejected the argument that a nonconforming manufacturing use had been abandoned under a one-year abandonment provision in the local zoning ordinance. Although Pike had not physically produced asphalt for over a year, the Court took note of the other activities required to engage in the manufacturing of asphalt (e.g., maintain and repairing equipment, advertising, soliciting bids) to find that the use had not been abandoned. 160 N.H. at 263.

13. In these types of cases, it is accepted that the burden of proving abandonment rests with the person or municipality asserting abandonment. *See* 1 R. Anderson, *American Law of*

Zoning §6.65 at 683 (4th ed. 1996), *as cited in* Morgenstern v. Town of Rye, 2003 WL 254290080 (N.H. Super. 2003).

14. Similar approaches have been taken in other jurisdictions in the building permit context. *See, e.g.,* Morris Communications Corp. v. City of Bessemer City Zoning Board of Adjustment, 365 N.C. 152 (2011) (government restrictions on the use of land are “construed strictly in favor of the free use of real property”)²; Pappas v. Zoning Board of Adjustment of the City of Philadelphia, 527 Pa. 149 (1991) (in revoking a building permit, there must be an intention to abandon a use and “the burden of proof of abandonment is on the party asserting the same”).³

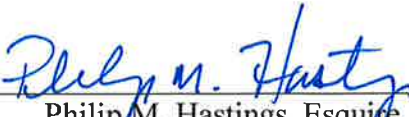
15. These considerations militate strongly against a finding in this case that the Building Permit has expired. The facts and circumstances presented here demonstrate that the Building Inspector has not met his burden of proof - at no point has the Appellant taken any action or failed to take any action indicative of an intention to abandon its plans to build 1 River Park pursuant to the Building Permit. To the contrary, the Appellant has consistently and at all times engaged in a variety of activities, on-site and otherwise, in furtherance of timely construction of the project.

16. The Building Inspector’s continued defense of its arbitrary, capricious, erroneous, unreasonable and unlawful decision compounds the significant harm of that decision on the Applicant.

The Appellant reserves the right to amend, modify and supplement this Supplemental Statement of Facts and Law.

Respectfully submitted,
on behalf of Lyme Properties 2, LLC,
development agent for XYZ Dairy, LLC
By Cleveland, Waters and Bass, P.A.

Date: April 17, 2024

By: 
Philip M. Hastings, Esquire
Two Capital Plaza, 5th Floor
Concord, NH 03302-1137
Telephone: (603)224-7761
Email: hastingsp@cwbp.com

4867-2465-9123, v. 3

² The parallel citation is 712 S.E. 2d 868.

³ The parallel citation is 589 A. 2d 675.

EXHIBIT A

AFFIDAVIT

I, David Clem, do depose and state that:

1. I am over 18 years of age, possess personal knowledge of the facts contained herein, and am competent to testify thereto.

2. I am the Manager of XYZ Dairy, LLC.

3. In connection with building permit issued by the City of Lebanon for the construction on the property of XYZ Dairy, LLC located at 1 River Park in West Lebanon, New Hampshire (Building Permit #2016-00293), since July 11, 2023, XYZ Dairy, LLC has incurred direct costs of \$221,838, has paid \$378,600 in materials currently on-site for the project, and is contractually obligated to pay another \$652,303. These expenditures do not include any of the overhead costs of XYZ Dairy, LLC or its affiliates.

I HEREBY SWEAR, under pains and penalties of perjury, that the contents of this affidavit are true and accurate to the best of my knowledge and recollection.

Date: April 17, 2024


David Clem

STATE OF NEW HAMPSHIRE
COUNTY OF GRAFTON

On this 17th day of April, 2024, before me, the undersigned officer, appeared David Clem, known to me (or satisfactorily proven) to be the person whose name appear above, and he subscribed his name to the foregoing instrument for the purposes contained therein.



Notary Public/Justice of the Peace

Name:

My Commission expires: TODD D. HESS, Notary Public
State of New Hampshire
My Commission Expires May 1, 2024