

DRAFT

LEBANON BUILDING CODE BOARD OF APPEALS
MONDAY, April 18, 2024 7:00 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 7:06 PM by Vice Chair Katz.

Michael Morris was originally given full voting privileges for this hearing and continues during this meeting.

Mr. Reichert gave the Right to Know, RSA91A public announcement.

2. APPROVAL OF MINUTES

A. April 1, 2024

Mr. McDonough MOVED to approve the April 1, 2024, Minutes as presented in the April 18, 2024, packet.

Seconded by Mr. Newlove.

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

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 – Continued from 4/1/2024 Meeting

The previous meeting left off with Attorney Decker and Mr. Hunnewell, representing the City, presenting at the end of the meeting. Documents have been submitted since the last meeting by Attorney Hastings.

Previously the Board asked for additional briefing on the interpretation of the meaning of work and the meaning of Section 105.5 of the code. Both attorneys looked for case law and decisions and were unable to find further case law for 105.5. This brings the City back to the rules of statutory construction and what is the meaning subscribed for the plain and ordinary meaning of the work and Section 105.5. They say the intent is to discern the meaning of the legislature regarding work on the

site by such permit. The state the code means actions occurring on the site and not elsewhere, and actions pursuant to the permit or actions that could not be taken without a permit. Attorney Decker also presented relevant sections of the 2009 code. He concluded that the building code refers to actions on the site, not to things that could be done without a permit, such as writing contracts and meetings. The City believes they have tried to address the interpretation and they are not taking an overly strict interpretation. Six months is a long time and requiring the performance of work on the site is not a high bar. They are not overly restrictive of any work that was performed. There have been extensions allowed in the past.

An extension of the permit was not requested at this time. A new permit can be applied for, but there are mitigating circumstances. XYZ Dairy intends to build the project to meet or exceed the 2018 code, therefore there would not be a significant challenge to comply with a new permit. The cost is unique because so much time has transpired since the original permit. There is no allowance for intent to abandon a permit. A building permit is not entitled to that level of protection. An applicant does not lose a property right; a new permit can be applied for and reissued. There is mandatory language in the code and it has mandatory directives for the building inspectors to follow code. This ensures that current codes are followed.

The storm pipe is still a problem and prevents work. The timeline does not indicate that a solution is imminent. Reasonable solutions have been offered by the City on either a permanent or temporary basis. There are requirements that the City needs in order to address storm runoff. It appears to be an impasse between the parties. The inference is there is no resolution so there is no prospect of construction beginning soon.

The City is saying that shovels in the ground refer to work. There were also follow-up written communications from the City that described examples of things that would be evidence of work that would show that work was proceeding. But over the last 180 days there has not been any work on the site. The supporting activities were the only efforts and they do not unto themselves constitute work authorized by the permit or that would require a permit.

The City does not see that applying for a new permit would be a significant delay. The waterpipe needs time to be resolved. It does not appear that there was justifiable cause that would have allowed approval of an extension. The storm water issue has been ongoing since November 2022 and there still is no solution.

There is no written document from the City that states there is no evidence of work; there is not a requirement of the City to do so. And given the ongoing issues and back and forth between the parties, it is a reasonable assumption on the part of the building inspector that a reminder was not required to be given to the appellant because there have been ongoing issues between the City, the Planning Board and the appellant. A permit is something that is applied for, paid for, and there is a right to pursue. A building permit is granted, and it does expire. Permit holders are always on constructive notice. It is not a permanent property right that is lost. It is not a punishment or a reality that a permit would not be reissued once requirements are met.

Vice Chair Katz asked the public if they wished to speak. Mr. Nash addressed the Board saying he supports the appeal. No one is harmed by allowing this permit to continue. He believes engineering the storm pipe is not a problem. He feels revocation harms business in general. There are many considerations that have to be reviewed for this large project and it would take a long time.

No one else from the Public spoke.

Attorney Hastings spoke on behalf of the appellant and said they do not want to belabor their points. He feels a building permit is a property right and the City has the burden of proving that a permit has been abandoned. He is concerned about the difficulty of reissuing a new permit. They contend that the City has misinterpreted numerous things regarding the law.

Mr. Clem was asked to come forward and was asked what he thought the City did to prevent commencement of the work. He replied that they have communicated several times about alternative solutions to the storm drain, a temporary and a permanent solution. They have sent a \$40,000 solution and a \$100,000 solution. They attempted to commence using the temporary solution so they could continue work. Mr. Clem outlined all the exchanges they did regarding a solution to the storm drain.

Since July 2023 they have paid over \$200,000 for activity that occurred in July 2023. All the expense was incurred before they received notice that the permit was expired. There was \$378,000 of materials delivered and paid for prior to July 2023. There is also activity for another \$650,000 financial obligation, for engineering that was incurred since July 2023.

Vice Chair Katz said they have jurisdiction to opine on the meaning of work and the meaning of suspend. The logic of the application will follow after the meanings are determined.

Hearing no one else from the Public, the Public Hearing was closed. The Board moved into deliberations. Vice Chair Katz offered to draft a motion to grant the appeal.

Mr. McDonough MOVED to continue this hearing until May 6, 2024, Building Code Board of Appeals meeting.

Seconded by Mr. Newlove.

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

4. STAFF COMMENTS

None.

5. ADJOURNMENT

Ms. Barkley MOVED to adjourn the meeting at 8:55 PM.

Seconded by Mr. Morris.

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

Respectfully submitted,
Linda Billings

Recording Secretary