



**LEBANON ZONING BOARD OF ADJUSTMENT
JULY 8, 2024 - 7:00 PM
MEETING ROOM 1, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE**

-
- 1. Call to Order**
 - 2. Approval of Minutes**
 - A. None
 - 3. Public Hearing Items**
 - A. **Oakes Storage LLC & Oakes Real Estate SPE LLC, 92 Riverside Drive (Tax map 111, lot 16), zoned RL-1:** The applicant requests 3 Variances from Sections 608.4.B.2, 608.4.B.1.b, and 608.4.B, pursuant to Section 801.2 of the Zoning Ordinance, to allow the installation of a single-sided sign that is 32 sq ft sign where 4 sq ft is allowed, 6 ft tall where 4 ft is allowed, and to be internally illuminated where illumination is not allowed. **ZB2024-14-VAR - Continued from 7/1/2024 meeting**
 - B. **Lebanon Housing Authority, 31 Romano Circle (Tax map 101, lot 20), zoned R2:** The applicant requests a Special Exception from Section 309.2, pursuant to Section 702.5 of the Zoning Ordinance, and a Variance from section 702.5.D to allow the expansion of the existing non-conforming use via construction of a new 2-story, 3,882 sq ft office building for use in connection with the existing multi-family development. **ZB2024-15-SEVAR - Continued from 7/1/2024 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).

SHEEHAN PHINNEY

Boston • Concord • Manchester • Portsmouth • Upper Valley

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Manchester, NH 03101

VIA EMAIL (Nathan.Reichert@lebanonnh.gov)

June 14, 2024

City of Lebanon
Zoning Board of Adjustment
c/o Nathan Reichert
City Hall
51 North Park Street
Lebanon, NH 03766

**RE: 31 Romano Circle, Lebanon, NH
Variance Application**

Dear Mr. Reichert and Members of the Zoning Board of Adjustment,

As you know, this firm represents Lebanon Housing Authority (the “Applicant”).¹ Please accept this letter as a supplemental submission on behalf of the Applicant in support of the variance application it submitted on May 13, 2024 in relation to its property at 31 Romano Circle, Tax Map 101, Lot 20 (the “Property”). Specifically, at the request of the Board, the Applicant hereby submits additional information in relation to whether the size of a lot can be properly considered to be a “special condition” of the property for purposes of the unnecessary hardship criterion. In addition, based on commentary from Board members at the Board’s June 3, 2024 meeting, the Applicant respectfully submits additional information to support that a decision to grant the requested variance will not diminish the value of any surrounding property.

I. Lot Size/Unnecessary Hardship

As the Board is aware, in order to demonstrate that denial of a requested variance would result in an unnecessary hardship, an applicant must show that “owing to special conditions on the property that distinguish it from other properties in the area: [n]o fair and substantial relationship exists between

¹ There were a number of questions raised at the Board’s June 3, 2024 meeting regarding the Applicant’s relationship to the City of Lebanon. In further response to those questions, the Applicant was created pursuant to RSA 203:4. The Applicant is also a party to a payment in lieu of taxes (“PILOT”) agreement with the City pursuant to which it contributes to the cost of municipal services.

the general public purposes of the ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one.” RSA 674:33, I(b)(1) (internal numbering omitted). In the alternative, unnecessary hardship may be found “if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.” RSA 674:33, I(b)(2). It is important to note that the Applicant is not required to satisfy the test set forth in RSA 674:33, I(b)(1) and the test set forth in RSA 674:33, I(b)(2); rather, the unnecessary hardship criterion is satisfied provided that the Applicant can satisfy one of those standards and demonstrate that the proposed use is a reasonable one. Here, the Applicant relies on the standard set forth in RSA 674:33, I(b)(1); accordingly, the Applicant does not, and need not, argue that the property cannot be reasonably used in strict conformance with the ordinance.

Instead, the Applicant argues that owing to special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and the proposed use is a reasonable one. In order to satisfy this standard, “[A]pplicants no longer have to show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is reasonable, considering the property’s unique setting in its environment.” Rancourt v. City of Manchester, 149 N.H. 51, 53-54 (2003).

Here, the Applicant has argued that the special conditions of the property include, among others identified in the Applicant’s Support Statement, its size. Specifically, the Property is significantly larger than other properties in the area. This is relevant to the unnecessary hardship standard because, to the extent Section 702.5(D) is intended to prevent overcrowding as a result of the expansion of nonconforming uses into separate structures, that purpose can be achieved even without strict enforcement of Section 702.5(D) owing to the size of the Property.

The New Hampshire Supreme Court has found that lot size can be a special condition for purposes of this analysis. Specifically, in Rancourt v. City of Manchester, 149 N.H. 51 (2003), the Supreme Court reviewed a Superior Court decision to uphold a decision by the City of Manchester’s zoning board to grant a variance in order to allow the property owners to maintain livestock (specifically horses) on their property. Id. at 52. In upholding the ZBA and Superior Court determinations, the Supreme Court reasoned:

Evidence before the ZBA showed that **the intervenors’ lot was larger than most of the surrounding lots** and was uniquely configured in that the rear portion of the lot was considerably larger than the front. The ZBA also had evidence that there was a “thick wooded buffer” around the proposed paddock area. Further, the area

in which the intervenors proposed to keep the two horses constituted an acre and a half, which, according to the city's zoning laws, was more land than required to keep two livestock animals.

Id. at 54 (emphasis supplied). The Supreme Court went on to conclude that “[t]he trial court and the ZBA could logically have concluded that these special conditions of the property made the proposed stabling of two horses on the property ‘reasonable.’” Id. Similarly, the large size of the Property at issue in this matter, coupled with other special conditions (including a similar wooded buffer between the proposed site for the New Office and the neighboring property), make the construction of the New Office reasonable. A copy of Rancourt is appended to this letter as **Exhibit A**.

The Superior Court, in Fogarty v. City of Rochester, 2009 N.H. Super. LEXIS 88, Docket No. 08-E-248 (Feb. 27, 2009), similarly found the size of a lot to be a special condition for purposes of the unnecessary hardship standard. In Fogarty, the Superior Court reviewed the Rochester Zoning Board's decision to deny a requested area variance based on its determination that there were no special conditions of the property that resulted in an unnecessary hardship. Id. at 3. The Superior Court agreed with the property owner that the ZBA acted unlawfully and unreasonably in reaching that conclusion. Specifically, the Superior Court found that the applicant's lot contained special conditions, including the fact that it was “considerably larger than most of the surrounding lots.” Id. at 6-7. A copy of Fogarty is appended to this letter as **Exhibit B**.

In addition to the foregoing, the Applicant respectfully reminds the Board that it identified other special conditions of the Property—mainly that the existing non-conforming use is a multi-family development, and the fact that it already features an accessory office use. To the extent the purpose of 702.5(D) is to prevent an increase in the impacts of the prohibited use, that purpose will be achieved even if a variance to allow the New Office is granted, because the New Office will not increase the impacts of the prohibited multi-family use. To the extent the purpose of 702.5(D) is to prevent an increase in the intensity of a use, the construction of the New Office is consistent with that purpose because it reflects a relocation—but not an increase in the intensity—of the existing accessory office use. The intensity of the office use will remain the same regardless of whether the variance is granted.

In light of all of the foregoing, special conditions of the Property make it such that no fair and substantial relationship exists between the general public purposes of 702.5(D) and the specific application of that provision to the property. For the reasons set forth in the Applicant's previously submitted Support Statement, the proposed use is a reasonable one.

II. Impact on Property Values

There is no evidence to support that construction of the New Office will diminish the value of any surrounding property. Notably, no abutters appeared at the Board's June 3 meeting to express a concern regarding the impact that the New Office may have on their property values. In fact, at least one abutter whose property is situated most closely to the proposed location for the New Office supports the project. See **Exhibit C**.

Many of the structures surrounding the Property are tenured commercial, such that they are consistent with the New Office. See **Exhibit D**. In addition, there are a number of other low-income rental housing units along South Main which are consistent with the use of the property as a low-income multi-family development. **Id.** Those surrounding properties will not be negatively impacted by the New Office, which will represent a significant improvement to the Applicant's property. As noted during the Board's June 3 meeting, the New Office will be well-constructed, energy efficient, and well-maintained. The lawn will be mowed weekly by a landscaping company.

In addition, as noted, the New Office will be shielded from view from neighboring properties by an existing tree buffer. The buffer in question is approximately 20 feet wide and 280 feet long (measuring from the corner of the Existing Office to South Main Street). While the Applicant does not own all the trees in the buffer, the buffer is also a steep slope, rising in elevation by approximately 42 vertical feet over the course of its 20 foot width. This elevation change renders it undevelopable.



In addition to the undevelopable nature of the area making it unlikely that the neighboring property owner would want to remove trees on his/her side of the lot line, the steep slope would make it exceedingly difficult to do so. Moreover, slope makes the New Office even less visible from the neighboring property. Attached as **Exhibit E** are screenshots of the Town's GIS Maps showing the wooded and steep nature of the area in question.

Put very simply, there is no evidence in the record to support a determination by the Board that the New Office will negatively impact neighboring property values, and the overwhelming weight of the evidence supports the opposite conclusion.

III. Conclusion

The Applicant thanks the Board for its consideration of the Application and this supplemental submission, and looks forward to discussing the Application with the Board further at its meeting on July 1, 2024.

Sincerely,

/s/ Megan C. Carrier

Megan C. Carrier

Enc.



101-20

101-22

101-23

12A

101-21

S Main St

101-27

Doc Pl

Romano Cir

Romano Cir

Romano Cir

12A

101-28

101-17

101-18-100

101-14

Waterman Ave

101-16

101-15

Waterman Ave

101-18-200

S Main St

101-29

101-30

101-19



101-20

Doc Pl

Doc Pl

Romano Cir

Romano Cir

Romano Cir

12A

S Main St

S Main St

Waterman Ave

Waterman Ave

Waterman Ave

101-14

101-16

101-15

101-17

101-18-100

101-18-200

101-29

Rancourt v. City of Manchester

Supreme Court of New Hampshire

November 21, 2002, Submitted ; January 10, 2003, Opinion Issued

No. 2002-0208

Reporter

149 N.H. 51 *; 816 A.2d 1011 **; 2003 N.H. LEXIS 2 ***

8 BONNITA RANCOURT & a. v. CITY OF
MANCHESTER Submitted:

Subsequent History: [***1] Released for Publication
March 14, 2003. The Docket Number of this Case has
been Corrected May 9, 2003.

Prior History: Hillsborough-northern judicial district.

Disposition: Affirmed.

Core Terms

variance, intervenors, unnecessary hardship, special
condition, zoning ordinance, horses, zoning, reasonable
use, superior court, ordinance, hardship, stable, acres,
rear, board of zoning adjustment, zoning district,
accessory use, trial court, neighborhood, deprivation,
livestock, build, front, barn

Case Summary

Procedural Posture

Defendant zoning board of adjustment (ZBA) granted
intervenor property owners a variance to build a barn on
their property. Plaintiff land abutters sought review and
the Superior Court, Hillsborough-northern judicial district
(New Hampshire), affirmed. The land abutters appealed.

Overview

When the property owners bought the lot, the zoning
ordinance permitted them to stable horses there. Later,
however, when they applied for the permit, the
ordinance had been amended to prohibit horses. The
appellate court ruled that, for an unnecessary hardship
for variance purposes, an applicant needed to show that
the zoning restriction interfered with the reasonable use
of the property, considering the unique setting of the
property in its environment. "Special conditions" were
referred to as the property's unique setting in its

environment. Both the trial court and the ZBA could
rationally have found that the zoning ordinance
interfered with the property owners' reasonable
proposed use of their property, considering its unique
setting. The lot was in a country setting, was larger than
most of the surrounding lots, and was uniquely
configured. There was also evidence that there was a
thick wooded buffer around the proposed paddock area,
and that the lot was large enough to keep two horses.
The trial court and the ZBA could logically have
concluded that these special conditions of the property
made the proposed stabling of two horses on the
property "reasonable."

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of
Review > General Overview

[HN1](#) Appeals, Standards of Review

An appellate court will uphold the superior court's
decision on appeal unless it is not supported by the
evidence or is legally erroneous.

Real Property Law > Zoning > Judicial Review

[HN2](#) Zoning, Judicial Review

A superior court shall not set aside or vacate the
decision of a zoning board of adjustment except for
errors of law, unless the court is persuaded by the
balance of probabilities, on the evidence before it, that

said order or decision is unreasonable. [N.H. Rev. Stat. Ann. § 677:6](#) (1996). To the extent the zoning board of adjustment made findings upon questions of fact properly before the court, those findings are deemed prima facie lawful and reasonable.

Business & Corporate Compliance > Real Property > Zoning > Administrative Procedure
Real Property Law > Zoning > Administrative Procedure

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Business & Corporate Compliance > Real Property > Zoning > Ordinances
Real Property Law > Zoning > Ordinances

Real Property Law > Zoning > Variances
Business & Corporate Compliance > Real Property > Zoning > Variances

[HN3](#) **Zoning, Administrative Procedure**

[N.H. Rev. Stat. Ann. § 674:33](#), I(b) (1996) authorizes a zoning board of adjustment to grant a variance if the following conditions are met: (1) the variance will not be contrary to the public interest, (2) "special conditions" exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, (3) the spirit of the ordinance shall be observed, and (4) "substantial justice" will be done.

Business & Corporate Compliance > Real Property > Zoning > Ordinances
Real Property Law > Zoning > Ordinances

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Real Property Law > Zoning > General Overview

Real Property Law > Zoning > Variances
Business & Corporate Compliance > Real Property > Zoning > Variances

[HN4](#) **Zoning, Ordinances**

To establish "unnecessary hardship," an applicant for a variance must show that: (1) a zoning restriction applied

to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment, (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property, and (3) the variance would not injure the public or private rights of others. Applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment.

Real Property Law > Zoning > Variances
Business & Corporate Compliance > Real Property > Zoning > Variances

[HN5](#) **Zoning, Variances**

In New Hampshire, in the first prong of the Simplex test, "special conditions" are referred to as the property's unique setting in its environment.

Counsel: Bossie, Kelly, Hodes, Buckley & Wilson, P.A., of Manchester (David E. LeFevre on the brief), for the plaintiffs.

Thomas R. Clark, city solicitor, of Manchester (Daniel D. Muller, Jr. on the brief), for the defendant.

Wadleigh, Starr & Peters, P.L.L.C., of Manchester (Paul L. Apple on the brief), for the intervenors.

Judges: BROCK, C.J. BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Opinion by: BROCK

Opinion

[*52] [1012]** BROCK, C.J. The plaintiffs, Bonnita Rancourt and other abutters to land in Manchester owned by the intervenors, Joseph and Meredith Gately, appeal the Superior Court's (*Barry, J.*) order affirming the decision of the defendant City of Manchester's zoning board of adjustment (ZBA), granting the intervenors a variance. We affirm.

The intervenors own a lot approximately three acres in size, located in an R-1A zoning district, a lower-density residential zoning district. The rear of the lot is much

larger than the front. The intervenors purchased the property [***2] in 2000, after having confirmed that the city's zoning ordinance permitted them to stable horses on the lot.

In May 2001, after contracting to build a single-family home on the lot, the intervenors applied for a permit to build a barn in which to stable two horses. The barn was [**1013] to be constructed on one and one-half acres located in the rear part of the lot. The permit was denied, however, because the city had recently amended its zoning ordinance to prohibit livestock, including horses, in an R-1A zoning district. Accordingly, the intervenors applied for a variance, which, following a hearing, the ZBA granted. The plaintiffs appealed to the superior court, and the superior court affirmed.

[HN1](#) [↑] We will uphold the superior court's decision on appeal unless it is not supported by the evidence or is legally erroneous. [Morgenstern v. Town of Rye, 147 N.H. 558, 565, 794 A.2d 782 \(2002\)](#). For its part, [HN2](#) [↑] the superior court [**53] shall not set aside or vacate the ZBA's decision "except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable." [RSA 677:6](#) (1996). "To the [***3] extent the ZBA made findings upon questions of fact properly before the court, those findings are deemed *prima facie* lawful and reasonable." [Morgenstern, 147 N.H. at 565](#); see [RSA 677:6](#).

[RSA 674:33, I\(b\)](#) (1996) [HN3](#) [↑] authorizes a zoning board of adjustment to grant a variance if the following conditions are met: (1) the variance will not be "contrary to the public interest"; (2) "special conditions" exist such that "a literal enforcement of the provisions of the ordinance will result in unnecessary hardship"; (3) "the spirit of the ordinance shall be observed"; and (4) "substantial justice" will be done. Only the second condition, "unnecessary hardship," is at issue in this appeal.

We recently articulated a new definition of "unnecessary hardship." See [Simplex Technologies v. Town of Newington, 145 N.H. 727, 731-32, 766 A.2d 713 \(2001\)](#). In so doing, we departed from our traditionally restrictive approach to this requirement. [Id. at 731](#).

Before *Simplex*, to establish "unnecessary hardship," an applicant for a variance had to show that a zoning ordinance unduly restricted the use [***4] of their land. [Id. at 730](#); see [Governor's Island Club v. Town of Gilford, 124 N.H. 126, 130, 467 A.2d 246 \(1983\)](#). For

hardship to exist, the deprivation resulting from applying the ordinance had to be "so great as to effectively prevent the owner from making *any* reasonable use of the land." [Governor's Island Club, 124 N.H. at 130](#) (emphasis added). The focus of the prior test was on "the uniqueness of the land, not the plight of the owner." [Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 243, 614 A.2d 1048 \(1992\)](#).

In *Simplex*, we held that our prior test was "too restrictive in light of the constitutional protections by which it must be tempered." [Simplex, 145 N.H. at 731](#). We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property. *Id.*

Under *Simplex*, [HN4](#) [↑] to establish "unnecessary hardship," an applicant for a variance must show that: (1) a zoning restriction applied to the property interferes with the applicant's "reasonable use of the property, considering the unique setting of the property in its environment"; (2) [***5] "no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property"; and (3) "the variance would not injure the public or private rights of others." [Id. at 731-32](#). Under *Simplex*, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. [Id. at 730-32](#). Rather, they must show that the use for which they seek a variance is [**54] "reasonable," [**1014] considering the property's unique setting in its environment. [Id. at 732](#).

The plaintiffs assert that the intervenors were not entitled to a variance because there were no "special conditions" that warranted it. See [RSA 674:33, I\(b\)](#). To support their argument, however, they mistakenly rely upon case law developed before *Simplex*. Whereas before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, see [Margate Motel, Inc. v. Town of Gilford, 130 N.H. 91, 94, 534 A.2d 717 \(1987\)](#), after *Simplex*, hardship exists when special conditions of the land [***6] render the use for which the variance is sought "reasonable." [HN5](#) [↑] In the first prong of the *Simplex* test, "special conditions" are referred to as the property's "unique setting . . . in its environment."

Both the trial court and the ZBA could rationally have found that the zoning ordinance precluding horses in an R-1A district interfered with the intervenors' reasonable proposed use of their property, considering its unique

setting. Evidence before the ZBA showed that the intervenors' lot was located in a country setting. Evidence before the ZBA also showed that the lot was larger than most of the surrounding lots and was uniquely configured in that the rear portion of the lot was considerably larger than the front. The ZBA also had evidence that there was a "thick wooded buffer" around the proposed paddock area. Further, the area in which the intervenors proposed to keep the two horses constituted an acre and a half, which, according to the city's zoning laws, was more land than required to keep two livestock animals. The trial court and the ZBA could logically have concluded that these special conditions of the property made the proposed stabling of two horses on the property "reasonable. [***7] "

The plaintiffs argue that a use is not "reasonable" unless it is established in the neighborhood or customarily associated with or consistent with established uses in the neighborhood. They cite no direct legal support for this argument, relying instead upon the law of accessory uses. We decline the plaintiffs' invitation to extend the law of accessory uses to variances.

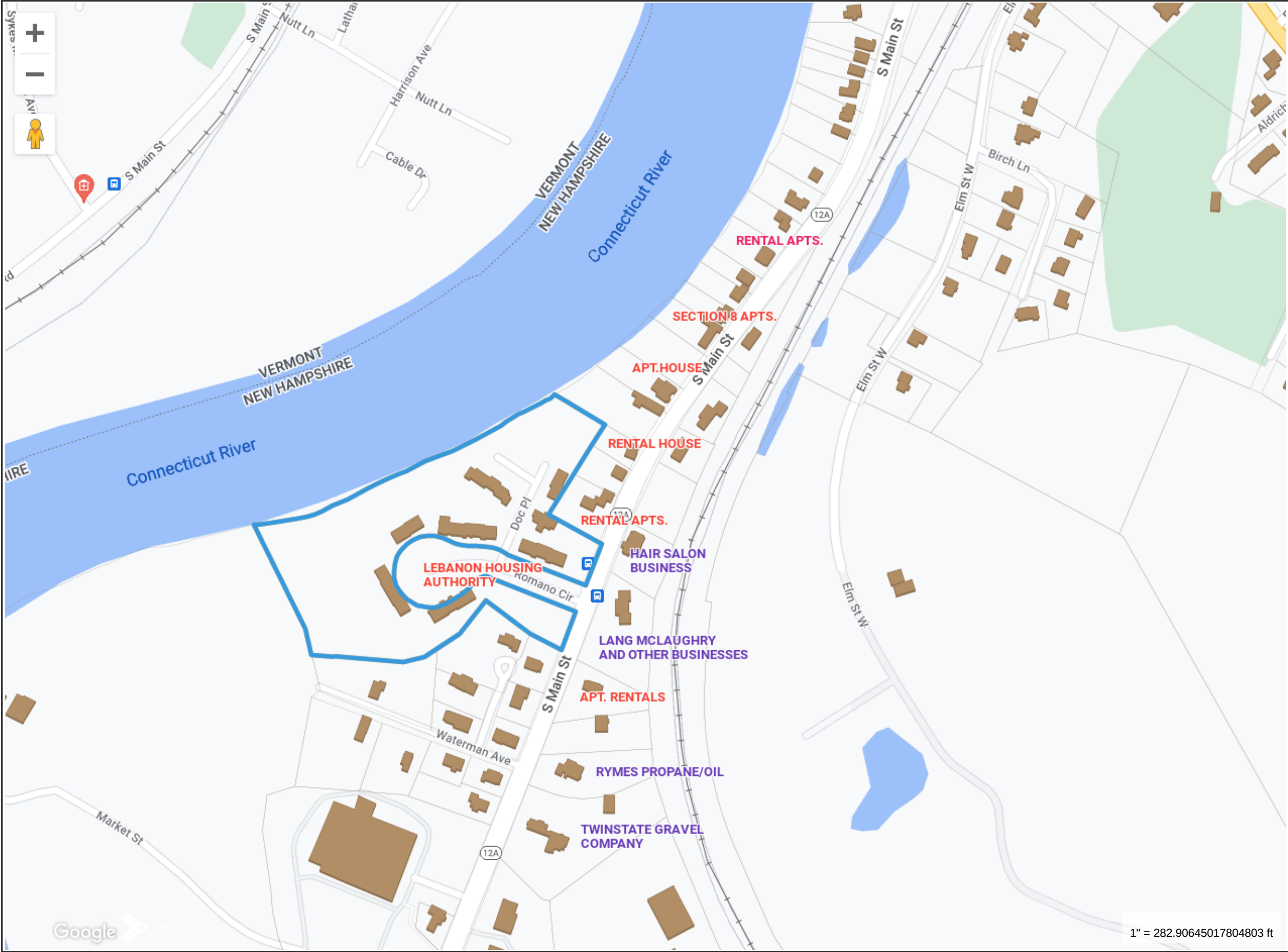
Because the plaintiffs do not otherwise challenge the trial court's rulings on the *Simplex* unnecessary hardship test on appeal, we do not address them.

Affirmed.

BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

End of Document

PROPERTIES SURROUNDING ROMANO CIRCLE



Property Information	
Property ID	101-20
Location	31 ROMANO CIR
Owner	LEBANON HOUSING AUTHORITY

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 05/18/2024
Data updated 11/18/2018

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

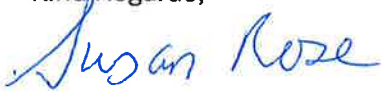
June 13, 2024

To Whom It May Concern:

I am writing this letter to show our support for the Lebanon Housing Authority. We have owned our home on 4 Waterman Avenue for 8 years now and in that time we have never had any issues with noise from Romano Circle or have never felt like we do not have privacy on our property. I feel like they have been great to have as neighbors. As a matter of fact, when we had the big snowstorm 3-4 years ago and I was unable to get back into Waterman Avenue, they were gracious enough to let me park my car on their property and let me keep it there until I was able to finally dig out from the snow and retrieve it, which I greatly appreciated!!

If you have any questions please do not hesitate to contact me.

Kind Regards;



Susan Rose

Fogarty v. City of Rochester

Superior Court of New Hampshire, Strafford County

February 27, 2009, Decided

Docket No.: 08-E-248

Reporter

2009 N.H. Super. LEXIS 88 *

Kerry Fogarty v. City of Rochester, NH and Rochester
Zoning Board of Adjustment

Notice: THE ORDERS ON THIS SITE ARE TRIAL COURT ORDERS THAT ARE NOT BINDING ON OTHER TRIAL COURT JUSTICES OR MASTERS AND ARE SUBJECT TO APPELLATE REVIEW BY THE NEW HAMPSHIRE SUPREME COURT.

Prior History: [Fogarty v. City of Rochester, 2008 N.H. Super. LEXIS 133 \(2008\)](#)

Core Terms

variance, special condition, unnecessary hardship, attorney's fees, area variance, square, zoning, costs

Judges: [*1] Kenneth C. Brown, Presiding Justice.

Opinion by: BROWN

Opinion

ORDER REVERSING AND REMANDING THE DECISION OF ZONING BOARD OF ADJUSTMENT

The petitioner, Kerry Fogarty ("Fogarty"), appeals the August 13, 2008 decision of the Rochester Zoning Board of Adjustment (the "ZBA") denying her application for a variance. The respondents, the City of Rochester (the "City") and the ZBA, object. The court held a hearing on this matter on January 8, 2009. After review of the record, the parties' arguments, and the applicable law, the court finds and rules as follows.

Fogarty owns a single-family house lot located at 9 First Street in Rochester, New Hampshire. (CR Tab 3.) Fogarty's lot is on the corner of First Street and Western Avenue. (*Id.*) Fogarty seeks to divide her lot into two

single-family house lots. (*Id.*) She applied for a variance to permit her to subdivide her lot into two lots with less than the required lot square footage, and with one of those lots having less than the required frontage. (*Id.*) On November 12, 2007, the ZBA denied the Fogarty's application finding: "no hardship is seen on this property; it appears the subdivision is purely for re-sale, no hardship for use." (CR Tab 7.) After the ZBA denied [*2] Fogarty's motion for reconsideration, Fogarty appealed the ZBA's November 12, 2007 decision to this court. On June 30, 2008, this court found that that Fogarty's application required an area variance and that the record was unclear as to the test the ZBA applied when it determined that Fogarty did not show unnecessary hardship. [Fogarty v. City of Rochester, Strafford Super. Ct., No.: 08-E-007, 2008 N.H. Super. LEXIS 133 \(June 30, 2008\)](#) (Order, Brown, J.). The court vacated the ZBA's November 12, 2007 decision and remanded to the ZBA to reconsider the evidence applying the *Boccia* test. *Id.*; see [Boccia v. City of Portsmouth, 151 N.H. 85.90, 855 A.2d 516 \(2004\)](#).

On August 13, 2008, the ZBA held a hearing to reconsider Fogarty's application and the evidence in light of the *Boccia* standard. (CR Tab 17.) Fogarty, through her attorney, provided that a variance is needed because there is no way to subdivide her property in a way that meets the area requirements. (*Id.*) Additionally, Fogarty explained that there was no other reasonably feasible way to achieve her proposed use. (*Id.*) Fogarty also reminded the ZBA that the abutters were not opposed to the subdivision. (*Id.*) No one spoke out against Fogarty's application. (*Id.*) The ZBA [*3] discussed city water and sewer, the age of the neighborhood, how the surrounding nonconforming lots were created, the size of the proposed lots, and other issues. (*Id.*) Subsequently, one board member moved "to deny the variance as there are no special conditions of this property that result in unnecessary hardship and warrant the variance." (*Id.*) The ZBA voted, three votes to two votes, to deny Fogarty's variance. (*Id.*) After the ZBA denied Fogarty's Motion for Rehearing, she filed

this appeal.

Standard of Review

"The superior court's review in zoning cases is limited." [*Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105, 920 A.2d 1192 \(2007\)](#). "Factual findings of the ZBA are deemed *prima facie* lawful and reasonable and will not be set aside by the superior court absent errors of law, unless decision is unreasonable." *Id.* The party seeking to set aside the ZBA decision bears the burden of proof in superior court. *Id.*

Analysis

Fogarty argues that the ZBA acted unlawfully and unreasonably when it denied her variance application because the ZBA did not correctly apply the *Boccia* test in determining that her application did not satisfy the hardship requirement. Additionally, Fogarty asserts that [*4] the ZBA's August 13, 2008 decision was contrary to the evidence submitted to the ZBA. The City and ZBA object. They argue that Fogarty failed, as a matter of law, to demonstrate the existence of unnecessary hardship.

An applicant seeking a variance must demonstrate that: (1) special conditions exist such that literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (2) granting the variance will not diminish the value of surrounding properties; (3) the variance will not be contrary to the public interest; (4) the variance is consistent with the spirit of the ordinance; and (5) substantial justice is done. [*Daniels v. Town of Londonderry*, 157 N.H. 519, 526, 953 A.2d 406 \(2008\)](#).

The court considers only whether the ZBA lawfully and reasonably satisfied the unnecessary hardship prong as the court remanded to the ZBA to reconsider the evidence against the *Boccia* test.

In *Boccia*, the Court established that two-factors should be considered in determining whether the unnecessary hardship prong for area variances is satisfied: "(1) whether an area variance is needed to *enable* the applicant's proposed use of the property given the special conditions of the property; and (2) [*5] whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance." *Id.* at 92

(emphasis in original) (quotation and citation omitted).

In *Boccia*, the Court explained that under the first factor an area variance might be necessary if the landowner's plans are for a permitted use but the special conditions of the property make it difficult to comply with applicable setbacks or other restrictions. *Id.* "'Special conditions' require[] that the applicant demonstrate that [her] property is unique in its surroundings." [*Malachy*, 155 N.H. at 107](#) (citing [*Garrison v. Town of Henniker*, 154 N.H. 26, 34, 907 A.2d 948 \(2006\)](#); see also [*Vigeant v. Town of Hudson*, 151 N.H. 747, 752-53, 867 A.2d 459 \(2005\)](#) ("the proposed project is presumed to be reasonable if it is a permitted use under the Town's applicable zoning ordinance . . . If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property"). In *Boccia*, the Court found the special conditions of the property, including the presence of wetlands and the shape of property, supported a finding that area variances were needed. In [*Rancourt v. City of Manchester*, 149 N.H. 51, 816 A.2d 1011 \(2003\)](#), [*6] a pre-*Boccia* case applying the more stringent *Simplex* test for use variances, the Court found that the property's unique setting, unusually large lot size, and unique configuration were special conditions of the property making it sufficiently unique when compared to its surrounding lots. *Id.* at 53-53; see [*Simplex Technologies v. Town of Newington*, 145 N.H. 727, 731-33, 766 A.2d 713 \(2001\)](#).

The ZBA denied Fogarty's application finding: "There are no special conditions of this property that result in unnecessary hardship." (CR Tab 19.) At the ZBA hearing on this matter, the five ZBA members filled out only the *Boccia* analysts hardship criteria section of their variance criteria worksheets. (CR Tab 17.) In addressing *Boccia*'s first factor, three ZBA members provided the following comments: "There is no special condition of this property. There will be inadequate square footage on the lots as proposed;" "True, however I fail to see the special conditions regarding their property;" and "No special condition apply." (CR Tab 18.)

Evidence before the ZBA showed that Fogarty's lot is considerably larger than most of the surrounding lots. Fogarty's lot contains 16,486 square feet and if divided into two equal [*7] lots of 8,243 square feet would be similar in size to approximately 117 other lots in the area. Additionally, evidence before the ZBA showed that Fogarty's lot is uniquely configured on a corner lot with the existing house located on the property's northern

border and a considerably larger side yard. The ZBA also had evidence that the surrounding neighborhood is densely populated. The court finds, as a matter of law, that Fogarty's property contains special conditions because it is unique in its surroundings. See [Rancourt, 149 N.H. at 54](#); compare [Garrison, 154 N.H. at 35](#) (upholding the trial court's decision that the property at issue was not unique under the unnecessary hardship requirement because it was not different from its surrounding lots). The court therefore finds that the ZBA's decision that Fogarty failed to show unnecessary hardship because her property did not contain special conditions was not supported by the facts in the record.

In addressing *Boccia's* second factor, requiring a determination of whether the applicant's proposal can be achieved by some other reasonably feasible method, the ZBA members comments include: "The lots as proposed will be too little square footage. [*8] No subdivision of the large lot should be allowed;" "Benefit as I see it is to divide to sell, thus enriching oneself at the expense of the neighborhood where surrounding owners desire some open space between structures;" and "Yes, but can build single family instead of 2 houses on not enough land." (Id.) The court finds that the ZBA improperly applied *Boccia's* second factor as their comments are unresponsive. Based on the evidence in the record, the court finds that Fogarty has no other reasonably feasible method to achieve her proposed benefit.

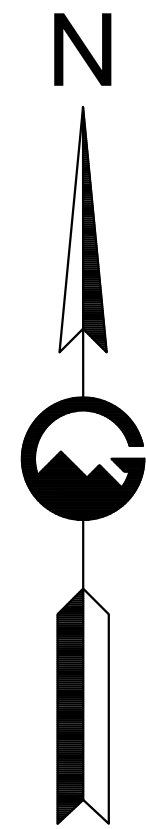
Accordingly, the court finds that the ZBA's August 13, 2008 decision denying Fogarty's variance was unlawful and unreasonable. For the foregoing reasons, the ZBA's decision denying the variance is **REVERSED**. This case is **REMANDED** to the ZBA, which is hereby ordered to grant the variance.

The court now addresses Fogarty's request for reasonable costs and attorney's fees. [RSA 677:13](#) provides: "Costs shall not be allowed against the municipality unless it shall appear to the court that the zoning board of adjustment acted in bad faith or with malice or gross negligence in making the decision appealed from." [RSA 677:13](#) (2008). The court finds that [*9] Fogarty is not entitled to costs. "Absent a statutory provision specifically authorizing attorney's fees, it is well recognized that each party to a lawsuit normally bears the costs of its own attorney's fees. See, e.g., [Daigle v. City of Portsmouth, 137 N.H. 572, 574, 630 A.2d 776 \(1993\)](#). There are, however, exceptions to this rule, including "where litigation is instituted or unnecessarily prolonged through a party's oppressive,

vexatious, arbitrary, capricious or bad faith conduct and cases in which parties are forced to litigate against an opponent whose position is patently unreasonable." *Id.* (internal quotations omitted); see [Keenan v. Fearon, 130 N.H. 494, 502, 543 A.2d 1379 \(1988\)](#); see also [Business Publications v. Finnegan, 140 N.H. 145, 149, 666 A.2d 932 \(1995\)](#); [RSA 507:15](#). The court finds that Fogarty is not entitled to attorney's fees under this exception. Accordingly, Fogarty's request for costs and attorney's fees is **DENIED**.

So Ordered.

End of Document



VERMONT
NEW HAMPSHIRE

CONNECTICUT RIVER

TAX MAP 86 LOT 1
70-72-78 SOUTH MAIN ST LLC
32 LEBANON ST
HANOVER, NH 03755

TAX MAP 101 LOT 23
KAUSHIK, BHAVNESH
82 S MAIN ST
WEST LEBANON, NH 03784

TAX MAP 101 LOT 22
DEVERS, MICHAEL S
84 S MAIN ST
WEST LEBANON, NH 03784

TAX MAP 101 LOT 21
KYOTO LLC
288 PLAINFIELD RD
WEST LEBANON, NH 03784

TAX MAP 101 LOT 27
DEJSS, LLC
89 SOUTH MAIN STREET
WEST LEBANON, NH 03784

TAX MAP 101 LOT 28
SOODSMA HOLDINGS LLC
PO BOX 111
HANOVER, NH 03755

TAX MAP 101 LOT 29
AMIR F PAPA
95 SOUTH MAIN STREET WEST
LEBANON, NH 03784

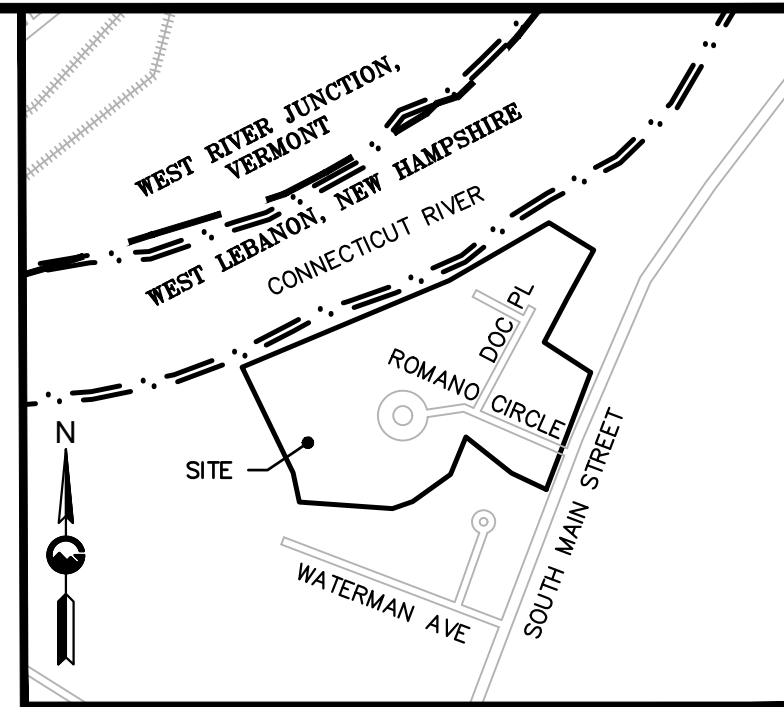
TAX MAP 101 LOT 17
MARK W AND SUSAN L ROSE
4 WATERMAN AVE
WEST LEBANON, NH 03784

TAX MAP 101 LOT 18-100
JEFFERIES, MARTIN (LF EST)
6 WATERMAN AVE
WEST LEBANON, NH 03784

TAX MAP 101 LOT 20
EXISTING PARCEL AREA: 7.92 AC
EXISTING ROW AREA: 1.34 AC
PROPOSED CONSOLIDATED AREA: 9.26 AC

TAX MAP 101 LOT 2
CITY OF LEBANON
51 NORTH PARK STREET
LEBANON, NH 03786

TAX MAP 101 LOT 17
MORSE, CHRISTOPHER
10 WATERMAN AVE
WEST LEBANON, NH 03784



VICINITY MAP
SCALE: 1"=500'

REFERENCE PLAN:

- EXISTING CONDITIONS PLAN FOR LEBANON HOUSING AUTHORITY TAX MAP 101 LOT 20, 31 ROMANO CIRCLE, LEBANON, GRAFTON COUNTY, NEW HAMPSHIRE, DATED APRIL 2024, PREPARED BY ROCKWOOD LAND SERVICES, LLC.
- "CITY OF LEBANON COMBINED SEWER SEPARATION" PLAN, CONTRACT NO. 13, ROMANO CIRCLE AREA, PREPARED BY WRIGHT-PIERCE, DATED AUGUST 2023

GENERAL NOTES:

- THE PURPOSE OF THIS PLAN IS TO ILLUSTRATE THE CONSTRUCTION OF A NEW ACCESSORY USE OFFICE BUILDING AND ADDITIONAL PARKING SPACES, AS WELL AS TO ILLUSTRATE THE DISCONTINUANCE OF THE ROMANO CIRCLE RIGHT-OF-WAY. ALL PROPOSED IMPROVEMENTS ARE LOCATED ON THE PROPERTY AT 31 ROMANO CIRCLE, IN LEBANON, NEW HAMPSHIRE.
- AREA OF EXISTING PARCEL = 7.92 ACRES.
AREA OF EXISTING ROW = 1.34 AC
PROPOSED CONSOLIDATED AREA = 9.26 AC
- OWNERS OF RECORD:
LEBANON HOUSING AUTHORITY
31 ROMANO CIR
WEST LEBANON, NH 03784
- THE SUBJECT PROPERTY IS LOCATED ENTIRELY WITHIN THE RESIDENTIAL TWO DISTRICT (R2) AND IS SUBJECT TO THE FOLLOWING DIMENSIONAL REGULATIONS:

TABLE OF ZONING REQUIREMENTS

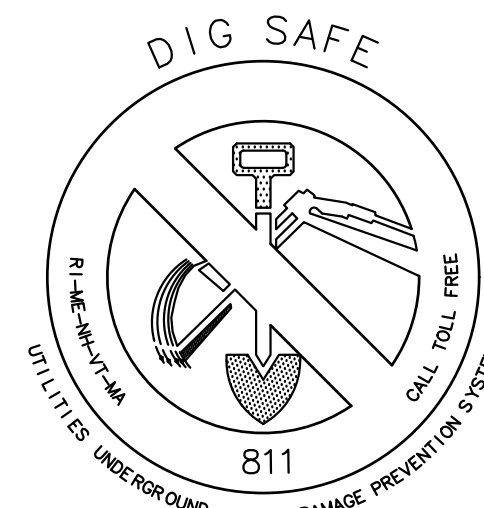
DESCRIPTION	REQUIRED	EXISTING	PROPOSED
MINIMUM LOT SIZE	*148,000 SF	344,983 SF	403,516 SF
MINIMUM LOT FRONTAGE	100	1459.46 FT	328.46 FT
FRONT YARD SETBACK	20	5.60 FT	47.71 FT
SIDE YARD SETBACK	15	15.00 FT	15.00 FT
REAR YARD SETBACK	20	40.73 FT	40.73 FT
MAXIMUM BUILDING COVERAGE	25%	8.87%	8.14%
BUILDING HEIGHT	<45 FT	<45 FT	<45 FT
MAXIMUM STORIES	2.5	2	2
MAXIMUM LOT COVERAGE	65%	19.1%	26.6%

*10,000 SF FOR FIRST 2 UNITS + 3,000 x NUMBER OF UNITS

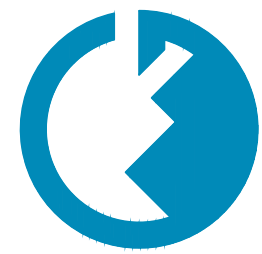
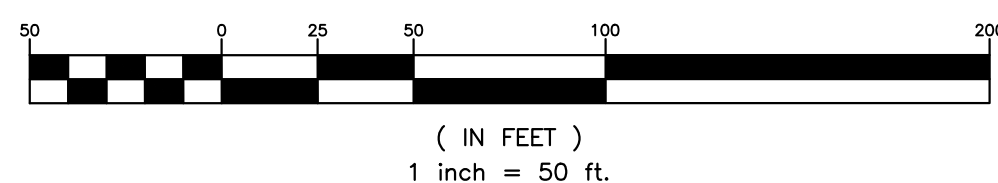
- SUBJECT PARCEL IS SERVICED BY CITY OF LEBANON WATERWORKS AND SEWER DEPARTMENT.
- EXISTING CONDITIONS INFORMATION TAKEN FROM PLAN REFERENCE NO. 1 AND AVAILABLE RECORD UTILITY PLANS AND GIS INFORMATION.
- PARKING CALCULATIONS:
EXISTING PARKING: 89 SPACES
PROPOSED BUILDING - OFFICE USE:
BASIS: 1 SPACE PER 250 SF OF GFA
REQUIRED: 3,882 SF / 250 = 16 SPACES
EXISTING/PROPOSED APARTMENTS:
BASIS: 1.5 SPACES/UNIT
REQUIRED: 46 * 1.5 = 69 SPACES
TOTAL PARKING REQUIRED: 85 SPACES
TOTAL PROVIDED: 101 SPACES
- LOCATION OF ANY UTILITY INFORMATION SHOWN ON THIS PLAN IS APPROXIMATE. GRANITE ENGINEERING, LLC MAKES NO CLAIM TO THE ACCURACY OR COMPLETENESS OF UTILITIES SHOWN. PRIOR TO ANY EXCAVATION ON SITE THE CONTRACTOR SHALL CONTACT DIG SAFE AT 811.
- THIS PLAN ASSUMES THE DISCONTINUANCE OF THE ROMANO CIRCLE R.O.W.

LEGEND

	LIGHT POLE
	UTILITY POLE
	WATER VALVE
	EX. SIGN
	SEWER MANHOLE
	TELEPHONE MANHOLE
	EX. BOLLARD
	CATCH BASIN
	ABUTTER LINE
	PROPERTY LINE
	FENCE
	EX. EDGE OF PAVEMENT
	PROP. EDGE OF PAVEMENT
	EXST. RETAINING WALL
	PROP. CURB
	EX. EASEMENT
	EXST. BUILDING
	PROP. BUILDING
	100-YEAR FLOOD ZONE
	R.O.W. TO BE DISCONTINUED
	PROP. CONCRETE



GRAPHIC SCALE



**GRANITE
ENGINEERING**
civil engineering
land planning
municipal services

REVISIONS

OWNER/APPLICANT:
LEBANON HOUSING AUTHORITY
31 ROMANO CIR
WEST LEBANON, NH 03784

GRANITE ENGINEERING

civil engineering • land planning •
municipal services

150 Dow Street, Tower 2, Suite 424
Manchester,
New Hampshire 03101
603.518.8030

www.GraniteEng.com

STAMP:

LOCATION:

TAX MAP 101 LOT 20
31 ROMANO CIRCLE
WEST LEBANON, NEW HAMPSHIRE
03784
GRAFTON COUNTY

PROJECT:

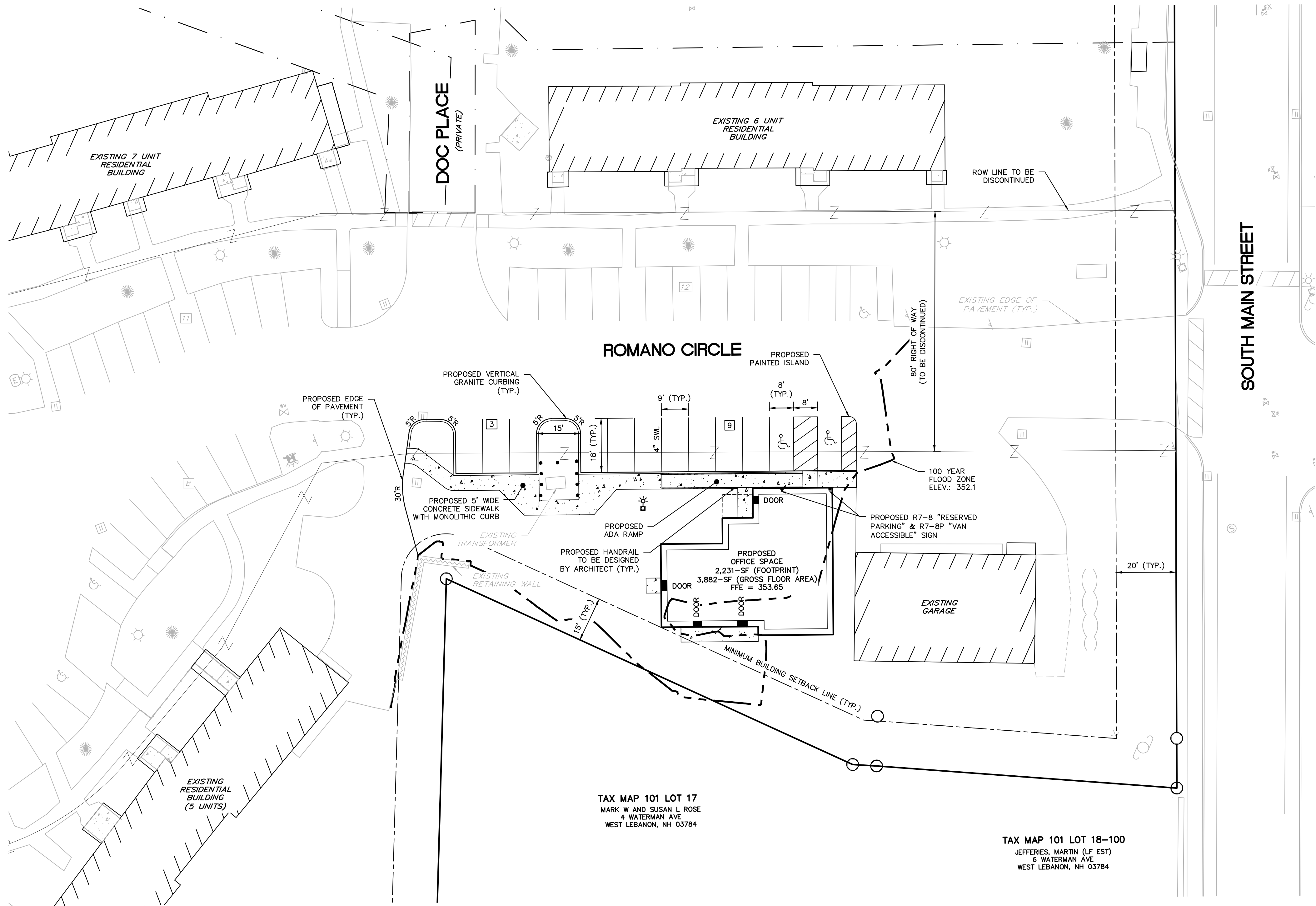
**LEBANON
HOUSING AUTHORITY**

TITLE:

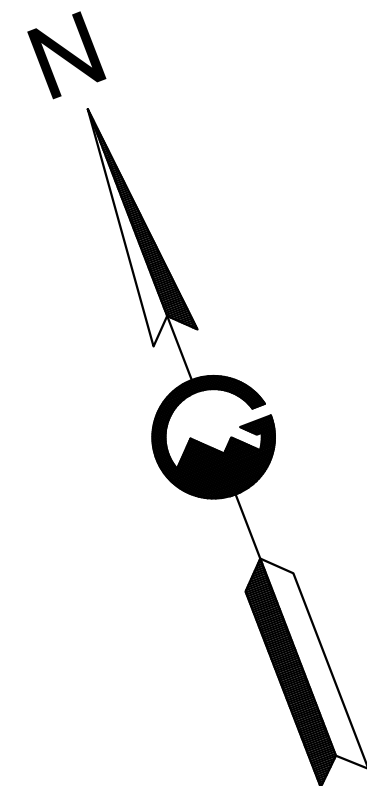
**ZBA
OVERVIEW PLAN**

PROJECT No. | DATE:
23-05081-1 | MAY 13, 2024
SHEET:
1 OF 2

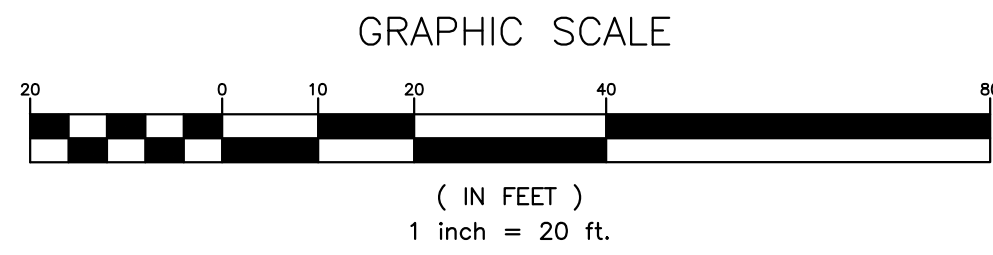
SCALE:
HORIZ.
1"=50'



SEE SHEET 1 FOR REFERENCE
PLANS AND NOTES



- LEGEND**
- EX. LANDSCAPING
 - LIGHT POLE
 - UTILITY POLE
 - WATER VALVE
 - SIGN
 - SEWER MANHOLE
 - TELEPHONE MANHOLE
 - EX. BOLLARD
 - CATCH BASIN
 - ABUTTER LINE
 - PROPERTY LINE
 - FENCE
 - EX. EDGE OF PAVEMENT
 - PROP. EDGE OF PAVEMENT
 - EXIST. RETAINING WALL
 - PROP. CURB
 - EX. EASEMENT
 - EXIST. BUILDING
 - PROP. BUILDING
 - 100-YEAR FLOOD ZONE
 - R.O.W. TO BE DISCONTINUED
 - PROP. CONCRETE



**GRANITE
ENGINEERING**
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REVISIONS	
No.	DATE
0	05/13/24
COMMENTS	
ZBA SUBMITTAL	

OWNER/APPLICANT:
LEBANON HOUSING AUTHORITY
31 ROMANO CIR
WEST LEBANON, NH 03784

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Manchester,
New Hampshire 03101
603.518.8030

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STAMP:

LOCATION:

TAX MAP 101 LOT 20
31 ROMANO CIRCLE
WEST LEBANON, NEW HAMPSHIRE
03784
GRAFTON COUNTY

PROJECT:

**LEBANON
HOUSING AUTHORITY**

TITLE:

ZBA SITE PLAN

PROJECT No.	DATE:	SCALE:
23-05081-1	MAY 13, 2024	HORIZ. 1"=20'
SHEET:		
2 OF 2		