



**LEBANON PLANNING BOARD
FEBRUARY 24, 2025 - 6:30 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 929-229-5356 (access code: 893 107 843#). If you have trouble accessing this meeting, please [email tim.corwin@lebanonnh.gov](mailto:tim.corwin@lebanonnh.gov).

2. New Business

- A. Review Draft Update of Master Plan Chapter 6 (Economic Development)

3. Public Hearing Items

- A. **XYZ Dairy, LLC & Lyme Properties 2, LLC, River Park Drive (Tax Map 44, Lots 21 - 30 & 7), zoned CB, IND-L and R-3:** Applicant requests a two (2)-year extension of the River Park Site Plan approval (PB2010-25-SPR), as most recently amended on September 9, 2019 (PB2018-34-SPA) and extended on October 12, 2021 (PB2021-29-EXT). **PB2025-05-EXT - Continued from February 10, 2025**
- B. **Proposed Amendments to the Site Plan Review Regulations, Minor Site Plan Committee and Conceptual Review:** Public hearing for the purpose of receiving input and taking action on the following proposed amendments to the Site Plan Review Regulations: (1) Article III (Administration), Section 3.2, to modify the membership of the Minor Site Plan Committee; and (2) Article IV (Procedure), Section 4.3, to require conceptual review of certain projects and to establish related procedural requirements.

4. Committee Reports

- A. **City Council Subcommittees:**
--Class VI Roads Advisory Committee
--Lebanon Energy Advisory Committee
- B. **Other Subcommittees:**
--City Council Representative
--Heritage Commission
--Pedestrian & Bicyclist Advisory Committee
--Upper Valley Lake Sunapee Regional Planning Commission
--UV Subcommittee of the Connecticut River Joint Commissions
--Upper Valley Transportation Management Association
--Mascoma River Local Advisory Committee
--West Lebanon Revitalization Advisory Committee
- C. **Planning Board Subcommittees:**
--Planning Board Capital Improvement Program
--Planning Board Development Regulations Update
- D. Minor Site Plan Committee
- E. Housing Task Force

5. Study Items

- A. **Review & Comment on Proposed Zoning Map Amendment:** Rezone 24 Labombard Rd (Tax Map 51, Lot 12) from IND-L/RL-3 to GC-1/RL-3
- B. **Review & Comment on Proposed Zoning Ordinance Amendment:** Adding Research Laboratory to CB District Table of Uses (Section 306.2)
- C. **Strategic Plan** - Annual Goals and Workplan
- D. **Recap 2025 adopted Capital Budget, Commence 2026-2031 CIP process**

6. Other Business

- A. Planning Board process improvement/implementation of Rules of Procedure
- B. Planning Board Training

7. Approval of Minutes

- A. January 27, 2025

8. 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 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.

2/24/25 Planning Board Work Session - Agenda Item 2.A

6 | Economic Development

6 | A Vision & Purpose

The City of Lebanon shall promote high-quality economic development that provides safe, healthy working conditions, and rewarding careers and employment opportunities for residents of the City and region. In accordance with the “Residents-First” policy, economic development in Lebanon shall benefit our residents and enhance quality of life in the City. Our economic development strategy shall foster a vibrant and sustainable local economy by:

- Proactively encouraging and attracting enterprises that contribute to the total welfare of the City of Lebanon, while also recognizing Lebanon’s role as an employment center for the Upper Valley.
- Preserving and enhancing the natural and built environment of Lebanon, and promoting a high quality of life for those who live in, work in, or visit the City.
- Implementing economic development and redevelopment strategies that aim to avoid placing a greater tax burden on City residents.
- Striving to support a diverse mix of businesses from a variety of economic sectors to better protect our local economy from sudden shifts within a single industry, and to increase our resistance to and resilience from economic downturns and unsustained boom times.
- Adopting smart growth policies that encourage mixing synergistic uses (such as retail, residential, and office), redevelopment of existing non-residential sites, and infill development of existing lands zoned for non-residential use before extensively developing any additional lands for non-residential use.
- Maintaining and expanding the infrastructure needed to support economic development at high service levels, including fostering state-of-the-art communications infrastructure throughout the City.
- Encouraging new non-residential construction and renovation of existing non-residential structures to result in high-quality, flexible, and adaptable buildings.
- Supporting a full range of housing options, from affordable workforce units to market rate housing, for both rental and ownership, that will allow those working within the City at all income levels to also live in the City, while recognizing the impact on infrastructure and school budgets.
- Understanding that a strong economy requires a well-educated and skilled workforce and providing educational and workforce training opportunities for residents at all stages of life.
- Encouraging the retention and creation of adequate and affordable childcare opportunities to support employees, Lebanon residents, and employers.

6 | B Issues & Priorities

6 | B-1 Sustainable Economic Development

Sustainable economic development is more than just increasing the number of jobs, tax receipts and square footage of commercial/industrial space in the City. It means growth that is not driven by depleting our resources, but rather by renewing them. It means growing our economy while also enhancing quality of life in Lebanon and protecting environmental quality - making the City an even better place to live for the next generation. Sustainable economic development has a triple bottom line resulting in economic benefits, environmental benefits, and social benefits.

Top priorities for sustainable economic development in Lebanon include:

- Redevelopment of under-utilized commercial and industrial sites.
- A more diverse local economy that is not dependent on a single large employer or sector.
- Growth opportunities for existing businesses to maintain or allow for paying a livable wage.

Achieving sustainability will require a proactive approach to economic development. Given Lebanon's role as the economic center of the Upper Valley, the pressure for continued economic expansion will likely remain strong, and for this reason, the City must carefully plan for growth. The community must determine where and how much it will grow, and then it needs to implement strategies to appropriately guide economic and community development. If instead the City takes a passive approach, it may find itself overwhelmed with growth planning challenges and a division among City government, business, and residents that will stall proactive decision-making.

6 | B-2 Economic Diversity

As a former milling center, Lebanon needs only to look back to its own history to see the danger posed by a local economy dependent upon a single large employer or economic sector. During the past 60 years, the City's economy has become stronger and more diversified. Economic diversity means having both businesses from many different economic sectors and jobs of various levels and types.

The City needs to maintain and enhance economic diversity in order to be better insulated from contraction and downturns, whether within a particular industry or across all sectors. While the performance of a local economy will always be affected by the inevitable ups and downs of business cycles, a diversified economy will experience less dramatic change between the highs and lows.

A diverse economy also creates a variety of employment opportunities. This allows workers to more easily transition between jobs and change careers, remaining employed throughout their working lives without having to relocate to find work. A diverse economy requires a diverse workforce. Increased social diversity creates a more dynamic City and improves residents' quality of life.

Providing infrastructure, housing and educational opportunities can help support a diverse economy. In particular, an adequate supply of workforce housing and state-of-the-art communications infrastructure is necessary to continue to keep existing businesses and attract new employers.

6 | B-3 Quality of Life

Quality of life may seem a somewhat intangible concept, but for many companies it is a key consideration when deciding where to locate. Will the community be a place that employees will want to live? If not, the company may have difficulty attracting and retaining qualified workers or workers may be forced to commute from more distant communities, particularly if it must compete with other firms for highly skilled or educated employees.

The Upper Valley offers a quality of life that is very desirable - the region's communities have retained their small-town character while adding urban and cultural amenities. Lebanon benefits from the presence of DHMC and the associated health services it provides, as well as Dartmouth College next door in Hanover, which provides residents with access to world-class arts, culture and athletics. Within the City itself, the Opera House is a well-programmed entertainment venue and anchors a burgeoning downtown arts community. The City and neighboring communities have a thriving 'creative economy' that enriches the region. Additionally, the Upper Valley is only a short trip from major metropolitan areas, large tracts of wilderness, and a variety of recreation opportunities including ski slopes, hiking trails and ocean beaches.

6 | C Existing Conditions & Trends

6 | C-1 Role as Regional Center

Lebanon has historically been and continues to be a regional economic center for the Upper Valley due to:

- Transportation access (proximity to the junction of two interstate highways, a municipal airport and intercity bus service).
- Availability of land and supporting infrastructure for commercial and industrial development and redevelopment.
- A highly regarded medical center, community hospital, academic institutions and associated spin-off enterprises.
- Multiple decades of local and regional planning for community and economic development.
- Small-town feel with some urban amenities and conveniences.
- Abundant natural, scenic and historic resources of the City and region.
- Cultural and recreational attractions within the City and region.

Lebanon has remained a regional center while surviving financial panics, industrial collapse, fires, the Great Depression, and the flight of the cotton and woolen mills to the South. In each transition, new businesses have brought new opportunities and new residents. During the 1960s, the fortuitous routing of Interstate 89 and nearby Interstate 91 came just in time to breathe new life into the City after the collapse of the textile industry, making West Lebanon the retail center of the Upper Valley. The new highways also facilitated industrial and commercial business.

Dartmouth-Hitchcock Medical Center's (DHMC) move to Lebanon in the early 1990s, combined with Dartmouth College's role as an innovator in the technological revolution, has resulted in spin-off businesses locating in Lebanon. This has brought a new wave of bright, technically savvy and entrepreneurial people to the City while fostering Lebanon's emergence as a biomedical and high-tech hub on the cutting edge of research, innovation and manufacturing.

Lebanon currently maintains a diversified economic base including a variety of retail enterprises, healthcare businesses ancillary to DHMC and Alice Peck Day Memorial Hospital, and a vibrant high-tech / bio-tech base anchored by firms such as:

- Adimab (life science technology)
- Astronics / Luminescent Systems (aerospace industry manufacturing)
- Avitide (life science technology)
- Bio-X-Cell (life science technology)
- Creare / Edare (technology and product development)
- Fluent, Inc. / Ansys Inc. (fluid technology)
- Fujifilm Dimatix (printing technology)
- Hypertherm (plasma cutting technology)
- Mascoma Corporation (alternative fuels)
- Novo Nordisk (pharmaceutical manufacturing)
- Signal Quest (precision microsensors)
- Simbex (medical devices)
- Timken (aerospace industry manufacturing)

DHMC and other major employers in the region, such as Dartmouth College, United States Army Corps of Engineers' Cold Regions Research and Engineering Laboratory (CRREL), and the Veteran's Administrative Hospital have been relatively immune from economic recession. Having these industries in the region benefits the City immensely. They also contribute to the City's

economic well-being by attracting other businesses and service industries, which provide further employment opportunities.

6 | C-2 Land and Space for Non-Residential Uses

Lebanon's current zoning includes nine non-residential or mixed-use districts (Light Industrial, Industrial Rail Access, Heavy Industrial, General Commercial, General Commercial One, Central Business, Lebanon Downtown, Professional Business, and Medical Center). These districts provide opportunities for businesses of various types, sizes and intensities. Most of these districts have either land available for development, or sites suitable for redevelopment or infill.

Lebanon had about 900,000 square feet of non-residential space in 1959. In the six decades since, the space occupied by commercial, industrial, medical, government and other institutional uses has grown to more than 8.8 million square feet. The Lebanon Planning Board has approved, or is currently reviewing, approximately 2.5 million square feet of non-residential growth, which is projected to be built out during the coming years.

Commercial land uses make up a greater percentage of the tax base in Lebanon as compared to other Upper Valley municipalities. The City's broad tax base results in a reduced tax burden on residential property owners to fund local schools and municipal services.

6 | C-3 Employment and Wages

Roughly 20,000 people work in Lebanon. Approximately 47 percent of the City's resident workforce is employed in Lebanon (approximately 3,380 people) and more than 16,600 people commute into the City. Lebanon residents, and Upper Valley residents in general, enjoy relatively short commutes with an average travel distance to work less than 10 miles. The ability to live and work in close proximity is one of the factors that contributes to Lebanon's quality of life.

Lebanon has experienced job growth in the service sector, particularly education, healthcare, social services and retail, during the past 20 years similar to many communities across the country. However, the City has seen employment growth in management, professional and related occupations in recent decades as well. During the 2000s, employment in Lebanon grew by more than 2,600 jobs.

Lebanon's average annual unemployment rate was 2.5 percent in 2022. The unemployment rate in the City has consistently remained below four percent despite several intervening downturns in the U.S. economy. A four percent unemployment rate is usually considered "full employment." The unemployment rate in the Lebanon Labor Market Area (LMA) has been among the lowest in the state for some time.

Besides the unemployment rates, median household income provides another measure of economic health. The median household income in Lebanon in 2021 was \$80,619. Jobs in Lebanon are among the highest paying in the region and pay significantly better than the state average. Higher wages in Lebanon and the Upper Valley may be attributed in part to Dartmouth Hitchcock Medical Center and Dartmouth College, both of which directly pay relatively high wages and indirectly generate high-paying spin-off business and industry.

6 | C-4 Housing

Economic growth is dependent upon housing growth, particularly workforce housing. For more than a decade, several major employers in the Upper Valley have been expressing a need for additional workforce housing opportunities, and they have been working with organizations such as Vital Communities, Habitat for Humanity, and Twin Pines Housing Trust to find solutions. Although Lebanon has experienced approximately 16 percent housing unit growth during the 2000s, the City still may not be keeping pace with the demand resulting from both the continued

rate of growth in the non-residential sector, as well as past historical growth rate disparities between non-residential development and housing development.

Without an adequate supply of housing affordable for their workers, employers can experience challenges in both retention and attraction of employees. For employees, the shortage can result in the need to seek housing further away from the employment center, increasing commutes and associated adverse effects on the environment and transportation network.

In 2023, the Upper Valley Lake Sunapee Regional Planning Commission published the Regional Housing Needs Assessment report, which documented a severe shortage of housing and the resulting repercussions for workforce and public health in the region. This study, and the associated 2020 Keys to the Valley report, provide a clearer picture of how well the region is doing in meeting the housing needs of its workforce and what actions are needed in the future to maintain an adequate supply of workforce housing.

There is also a shortage of affordable single-family homes in Lebanon, which is a barrier to hiring and retention of professional / highly-skilled workers.

6 | D Future Challenges & Opportunities

6 | D-1 Sustainable Economic Development Strategy

Lebanon should develop a proactive strategy, identifying the community's economic assets and what types of businesses to encourage locating in the City. With a strategy in place, the City should then selectively recruit and/or support new businesses that can help the City attain its goals. The City must evaluate how much growth is sustainable; certain levels and types of new development could cause unforeseen changes to community character, infrastructure requirements, and the tax base.

It is essential to maintain a coordinated, respectful and cooperative working relationship with current City and regional enterprises, area economic development agencies, regional planning commissions, chambers of commerce, state agencies, and other concerned private and public sector entities that encourage managed growth. The City could consider expanding its Planning Department's mission to include a more active role in decisions related to economic development.

Technological advances have become a driving force - possibly the driving force - in the economy. New jobs in the "thought ware" sector include computer software, education, engineering, telecommunications, medicine, and the entrepreneurial, creative economy realm. To foster new economic opportunities in this sector, Lebanon must support high-speed digital capability (see Section D-5), keep up with ongoing technological advances, and invest in the labor force through support for continuing education and training.

6 | D-2 Central Business Districts

In spite of competition from the Route 12A commercial area, both West Lebanon Central Business District and the Lebanon Downtown District continue to see reinvestment and revitalization.

Lebanon's downtown pedestrian mall is now the home to many small professional and service businesses, restaurants and retail shops. These businesses, in combination with River Valley Community College, Ledyard Charter School, and the New England School of the Arts have made the mall a thriving place to visit and shop. Colburn Park is an active place in the summer with the farmers' market and summer concerts. The downtown Opera House, AVA Gallery, and Upper Valley Music Center are cornerstones of the City's arts scene, bringing people downtown and supporting surrounding restaurants and shops. The CCBA and New England Sports Complex attract crowds of activity with a variety of sporting options that help foster healthy

lifestyles for citizens of the City. Better health of City residents will help support a strong local economy.

West Lebanon Village has also shown improvement in recent years. The anchor of the village is the Kilton Library built in 2010. New businesses have arrived, and current ones have expanded. Restaurants have continued to bring traffic to the area. The River Park project, just north of the village, will bring research labs, office space, and associated retail and housing.

The City should encourage mixed uses of structures in both downtowns, for instance combining ground floor storefronts with upper-story residential units. Collocating compatible professional, residential and commercial uses encourages people to live where they work, fostering a vibrant downtown and healthy local economy.

6 | D-3 Redevelopment

As Lebanon grows, public services and infrastructure must be expanded cost effectively. Many of the impacts of such growth can be reduced by directing development toward existing built-up areas, which are already served by existing municipal services and infrastructure.

Inefficiently developed or underutilized properties, for example, along Route 12A, the “Miracle Mile,” (Mechanic Street/Route 4) and Main Street in West Lebanon represent opportunities for redevelopment or infill in the City. Recent examples of such infill development include the construction of new retail stores and restaurants within existing plaza parking lots, and the renovation of empty retail spaces into multiple new storefronts.

Existing developments should be evaluated to determine creative solutions for potential redevelopment (the plans proposed by a Dartmouth College architectural class several years ago offer one potential scenario for redevelopment). Many developed parcels and parking lots could be more intensely redeveloped with multi-use structures, multi-story buildings, shared and structured parking, and shallow setbacks from the roadway to achieve a “town center” look instead of the existing suburban strip malls and shopping plazas. Implementing access management retrofit plans on Route 12A, Miracle Mile, Main Street and Mechanic Street, as discussed in the transportation chapter of this plan, would be a step toward redevelopment efforts and aesthetic upgrades along with allowing flexibility of the parking requirements to meet the needs of the applicant and the traveling public.

When businesses expand, contract or close, they leave behind commercial and industrial space that can be redeveloped. Although such properties are usually privately owned, it is in the interest of the City to see that these locations are redeveloped in ways that are compatible with Lebanon’s Master Plan. Among the desired features are the following:

- Reconfiguring space to maximum density, for example, building up (higher - to appropriate scale) when possible, using underground and shared parking, and reducing building setbacks.
- Integrating residential and workforce housing near commercial, office, educational, research, medical, and compatible light industrial facilities.
- Constructing sidewalks and bus stops and providing landscaping.
- At riverfront properties, observing setback and water quality requirements, while taking full advantage of the aesthetic potential, for example, siting restaurants, residential apartments, and offices to face the river, rather than backing onto the river.
- The upcoming redevelopment and beautification of Main Street in West Lebanon offers a fantastic opportunity for both businesses and housing developers. Generous height limits in the downtown areas provide a unique opportunity for developers to increase density and maximize the cost effectiveness of projects.

6 | D-4 Quality of Life

Numerous studies on business location decisions have indicated that quality of life plays a key role in corporate decision-making. One of the greatest strengths of Lebanon's economy is that people like to live and work here. If Lebanon's historic, educational, environmental, scenic, recreational, and cultural assets are diminished or lost, then the City could suffer economically in the long run.

Lebanon's economic development strategy should support and strengthen the City's role in the creative economy, cultural and heritage tourism, and recreational sectors. More importantly, it should seek to balance its growth and development with protection of natural, scenic, and historic resources. Recent work on Zoning Ordinance revisions has addressed many of these goals of compatibility and sustainability.

6 | D-5 Public Services and Infrastructure

As Lebanon continues to grow, City government will continue to experience pressure to expand and extend public services and infrastructure. When making those decisions, the City needs to consider the cost to current residents and the impact on the natural environment. In accordance with the "Residents-First" policy, growth and economic development must not degrade the City's quality of life. The City should be seeking economic development that does not increase City taxes. It must be recognized, however, that public services and infrastructure will have to be maintained and expanded as growth occurs. Many of the undesirable impacts of growth can be reduced by directing development toward existing built-up areas already served by public services and infrastructure.

One means of limiting the demand on the water supply and wastewater treatment systems would be to establish an urban services boundary, beyond which such utilities would not be expanded. The establishment of such a limitation would permit the City to focus development in a more concentrated area. The City should also consider expanding the use of impact fees to finance infrastructure associated with new development. To expand its ability to generate revenue, the City should evaluate any means that would help offset the impacts of commercial development without negatively influencing business or commerce or putting additional tax burden on private home owners.

6 | D-6 Technological Advancement

Residents, businesses, and institutions increasingly depend on the Internet and electronic communications. Businesses of all sizes find a digital presence valuable, if not essential. To ensure that businesses in Lebanon will remain competitive, they must have access to dependable, affordable, high-speed digital services. Such services should be available in all parts of the City to enable residents to conduct home-based businesses and to promote telecommuting. This increased digital presence will also serve to aid in the promotion of training and education through "webinars" and other professional development tools.

With current technology, wired broadband is faster and more reliable than wireless. The most significant impediment to bringing wired high-speed digital service to all corners of the City is ownership and control of the poles. Because the poles are privately owned, customers are limited to the providers currently on the poles. Moreover, private-sector companies often balk at providing high-speed digital service to rural areas because they cannot make back their return on investment within their typical three-year time frame. In the last several years, Lebanon worked proactively with Comcast to provide high-speed internet access to the remaining under-served residential properties in the City.

6 | D-7 Lebanon Municipal Airport

Lebanon Airport is a key transportation asset, valued by the region's many businesses and

institutions, as well as by area residents attracted by the recent efforts of the City and Cape Air to expand scheduled airline service. Passenger enplanements or “boardings” have stabilized in recent years after declining during the early 2000s in comparison with the 1990s, which has strained the ability of the airport to limit the financial support received from the City’s General Fund.

During the Master Plan process, residents expressed the desire that the current status of the Lebanon Municipal Airport should change in one direction or the other; either become self-sufficient as a commercial airport providing scheduled flights for the general public, or convert to a general aviation airport. The scheduled 2012 completion of the Airport Master Plan, including an “Airport Summit” event will further illuminate future options or direction for the airport.

6 | E Outcomes & Strategies

OUTCOME 1 Seek sustainable growth that is not dependent on exhausting local resources to fuel economic expansion.

STRATEGIES

1. Encourage City government to take a more organized and active role in promoting sustainable economic development.
2. Promote and retain high quality employment opportunities.
3. Continue the progress of revitalizing the City’s two Downtown Districts.
4. Work with civic associations to engage business owners and generate citizen interest and commitment to the downtown areas.
5. Support the revitalization, infill, and increased mix of uses in existing non-residential, locations.
6. Seek a way for Lebanon Airport to pay for itself while better serving the needs of residents and businesses, both in Lebanon and throughout the region.
7. Continue efforts to expand regional and national passenger connections to and from Lebanon Airport.

ACTIONS

1. Develop a proactive strategy for sustainable economic development that identifies the City’s economic assets and what types of businesses Lebanon wishes to encourage.
2. Recruit and support businesses in accordance with the City’s sustainable economic development strategy.
3. Explore innovative financing techniques for building additional public parking in the West Lebanon Central Business District.
4. Evaluate the boundaries of the Central Business and Lebanon Downtown Districts.
5. Examine existing non-residential areas to identify opportunities for more intensive redevelopment or infill.
6. Continue to work with the Regional Planning Commission to develop and maintain an updated inventory of non-residential sites and buildings to facilitate expansion and relocation of businesses.
7. Review and amend the City’s Zoning Ordinance as needed to encourage more intensive redevelopment of existing residential and non-residential areas and to discourage development in undeveloped areas.
8. Establish an urban services boundary for water and sewer.
9. Maintain an impact fee schedule to support expanded infrastructure associated with new development.
10. Evaluate the cost of ending commercial service and, if warranted, convert Lebanon Airport to serve general aviation only if passenger enplanements fail to increase significantly.

OUTCOME 2 Maintain a diverse economy that is not dependent on a single large employer or economic sector.

STRATEGIES

1. Continue to encourage private companies to add or expand high-speed digital lines to locations within the City or explore alternatives via regional efforts to bring broadband to the Upper Valley.
2. Encourage City government to coordinate with governing bodies of other nearby towns and digital services providers to improve high-speed digital services throughout the region.

ACTIONS

1. Ensure that zoning regulations maintain and enhance the mix of downtown businesses, including basic goods and services.

OUTCOME 3 Recognize the importance of quality of life in attracting new firms to locate in Lebanon and in retaining well-educated, skilled workers.

STRATEGIES

1. Seek growth and development that preserves or, ideally, enhances Lebanon's quality of life.
2. Support the arts and culture (creative economy) as a distinctive and significant component of the local and regional economy.
3. Promote Lebanon's historic, environmental, scenic, recreational, and cultural assets.
4. Continue to strive for excellence in public education and municipal services, taking into account the impact on taxes levied to City residents.
5. Encourage housing in the upper floors of downtown buildings.

ACTIONS

1. Implement the zoning revision recommendations outlined in the City's Natural Resources Inventory to protect and enhance the most critical natural resources and open spaces.

6 | Economic Development

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- Implementing economic development and redevelopment strategies that ~~do not result in~~ aim to avoid placing a greater tax burden ~~for on~~ City residents.
- Striving to support a diverse mix of businesses from a variety of economic sectors to better protect our local economy from sudden shifts within a single industry, and to increase our resistance to and resilience from economic downturns and unsustained boom times.
- Adopting ~~land use~~ smart growth policies that encourage mixing synergistic uses (such as retail, residential, and office), redevelopment of existing non-residential sites, and infill development of existing lands zoned for non-residential use before extensively developing any additional lands for non-residential use.
- Maintaining and expanding the infrastructure needed to support economic development at high service levels, including fostering state-of-the-art communications infrastructure throughout the City.
- Encouraging new non-residential construction and renovation of existing non-residential structures to result in high-quality, flexible, and adaptable buildings ~~that can be reconfigured and adapted so that the same structure may serve different purposes over time.~~ [chip: understand how you could encourage renovations of existing not residential buildings but I am not sure how you can encourage design flexibility constraints on new construction.]
- Supporting a ~~variety of full range of~~ housing options, from affordable workforce units to market rate housing, for both rental and ownership, that will allow those working within the City, at all income levels, to also live in the City, while recognizing the impact on infrastructure and school budgets.
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- ~~Jobs that pay a livable wage.~~
- Growth opportunities for existing businesses to maintain or allow for paying a livable wage.

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- Transportation access (proximity to the junction of two interstate highways, a municipal airport and ~~rail~~ [intercity bus](#) service).
- Availability of land and supporting infrastructure for commercial and industrial development and redevelopment.
- A highly regarded medical center, community hospital, academic institutions, and [associated](#) spin-off [\(DC – need to define\)](#) enterprises.
- Multiple decades of local and regional planning for community and economic development.
- Small-town feel with some urban amenities and conveniences.
- Abundant natural, scenic and historic resources of the City and region.
- Cultural and recreational attractions within the City and region.

Lebanon has remained a regional center while surviving financial panics, industrial collapse, fires, the Great Depression, and the flight of the cotton and woolen mills to the South. In each transition, new businesses have brought new opportunities and new residents. During the 1960s, the fortuitous routing of Interstate 89 and nearby Interstate 91 came just in time to breathe new life into the ~~town~~ [City](#) after the collapse of the textile industry, making West Lebanon the retail center of the Upper Valley. The new highways also facilitated industrial and commercial business.

Dartmouth-Hitchcock Medical Center's (DHMC) move to Lebanon in the early 1990s, combined with Dartmouth College's role as an innovator in the technological revolution, has resulted in spin-off businesses locating in Lebanon. This has brought a new wave of bright, technically savvy and entrepreneurial people to the City, ~~and is while~~ fostering ~~Lebanon's the~~ emergence as a biomedical and high-tech hub on the cutting edge of research, innovation and manufacturing.

Lebanon currently maintains a diversified economic base including a variety of retail enterprises, healthcare businesses ancillary to DHMC and Alice Peck Day Memorial Hospital, and a ~~vibrant~~ [high-tech / bio-tech industrial](#) base anchored by firms such as:

- Timken (aerospace industry manufacturing ~~ball bearings and rollers~~)
- ~~TomTom (mapping data)~~
- Fluent, Inc. [/Ansys Inc.](#) (fluid technology)
- Mascoma Corporation (alternative fuels)
- Hypertherm (plasma cutting technology)
- [Novo Nordisk \(pharmaceutical manufacturing\)](#)
- [Adimab \(life science technology\)](#)
- [Avitide](#)
- [Bio-X-Cell](#)
- [Fujifilm](#) ~~Dimatix~~
- [Astronics/Luminescent Systems \(aerospace industry manufacturing\)](#)
- [Creare](#) [\(Hanover\)](#) / [Edare](#)
- [Signal Quest](#)
- [Simbex](#)

DHMC and other major employers in the region, such as Dartmouth College, United States Army [Corps of Engineers'](#) Cold Regions Research and ~~Environmental Engineering~~ Laboratory (CRREL), and the Veteran's Administrative Hospital have been relatively immune from economic recession. Having these industries in the region benefits the City ~~of Lebanon~~ immensely. They also contribute to the City's economic well-being by attracting other businesses and service industries, which provide further employment opportunities.

6 | C-2 Land and Space for Non-Residential Uses

Lebanon's current zoning includes ~~eight~~nine non-residential or mixed-use districts (Light Industrial, Industrial Rail Access, Heavy Industrial, General Commercial, General Commercial One, Central Business, Lebanon Downtown, ~~neighborhood commercial~~, Professional Business, and Medical Center). These districts provide opportunities for businesses of various types, sizes and intensities. Most of these districts have either land available for development, or sites suitable for redevelopment or infill.

Lebanon had about 900,000 square feet of non-residential space in 1959. In the ~~five~~six decades since, the space occupied by commercial, industrial, medical, government and other institutional uses has grown to more than 8.8 million square feet. The Lebanon Planning Board has ~~recently~~ approved, or is currently reviewing, approximately 2.5 million square feet of non-residential growth, which is projected to be built out during the ~~next 20~~coming years.

Commercial land uses make up a greater percentage of the tax base in Lebanon as compared to other Upper Valley municipalities. The City's broad tax base results in a reduced tax burden on residential property owners to fund local schools and municipal services.

6 | C-3 Employment and Wages

~~More than 19,000~~Roughly 20,000 people work in Lebanon. Approximately ~~61~~47 percent of the City's resident workforce is employed in Lebanon (approximately ~~5,000~~3,380 people) and more than ~~13,000~~16,600 people commute into the City. Lebanon residents, and Upper Valley residents in general, enjoy relatively short commutes with an average travel ~~time~~distance to work ~~for City residents that is~~ less than ~~15 minutes~~10 miles. The ability to live and work in close proximity is one of the factors that contributes to Lebanon's quality of life.

Lebanon has experienced job growth in the service sector, particularly education, health~~care~~, social services, and retail, during the past 20 years similar to many communities across the country. However, the City has seen employment growth in management, professional and related occupations in recent decades as well. During the 2000s, employment in Lebanon grew by more than 2,600 jobs.

Lebanon's average annual unemployment rate was ~~3.8~~2.5 percent in ~~2009~~2022. The unemployment rate in the City has consistently remained below four percent ~~since 1994~~ despite several intervening downturns in the U.S. economy. A four percent unemployment rate is usually considered "full employment." The unemployment rate in the Lebanon Labor Market Area (LMA) has been among the lowest in the state for some time.

Besides the unemployment rates, ~~average weekly wages~~median household income provides another measure of economic health. The ~~average weekly wage for a private sector worker~~median household income in Lebanon in ~~2009~~2021 was ~~\$1,048~~\$80,619. Jobs in Lebanon are among the highest paying in the region and pay significantly better than the state average. Higher wages in Lebanon and the Upper Valley may be attributed in part to Dartmouth Hitchcock Medical Center and Dartmouth College, both of which directly pay relatively high wages and indirectly generate high-paying spin-off business and industry.

6 | C-4 Housing

Economic growth is dependent upon housing growth, particularly workforce housing. For more than a decade, several major employers in the Upper Valley have been expressing a need for additional workforce housing opportunities, and they have been working with organizations such as ~~the Vital Communities~~Upper Valley Housing Coalition, Habitat for Humanity, and Twin Pines Housing Trust to find solutions. Although Lebanon has experienced approximately 16 percent housing unit growth during the 2000s, the City still may not be keeping pace with the demand resulting from both the continued rate of growth in the non-residential sector, as well as past historical growth rate disparities between non-residential development and housing development.

Without an adequate supply of housing affordable for their workers, employers can experience challenges in both retention and attraction of employees. For employees, the shortage can result in the need to seek housing further away from the employment center, increasing commutes and associated adverse ~~affects~~effects on the environment and transportation network.

In ~~2011~~2023, the Upper Valley Lake Sunapee Regional Planning Commission ~~initiated an effort to analyze housing availability in the Upper Valley, which will be an update to the 2002 Upper Valley Housing Needs Analysis report. When complete,~~published the Regional Housing Needs Assessment, which documented a severe shortage of housing and the resulting repercussions for workforce and public health in the region. ~~†~~This study, and the associated 2020 Keys to the Valley report, should provide a clearer picture of how well the region is doing in meeting the housing needs of its workforce and what actions ~~will be~~are needed in the future to maintain an adequate supply of workforce housing.

There is also a shortage of affordable single-family homes in Lebanon, which is a barrier to hiring and retention of professional / highly-skilled workers.

6 | D Future Challenges & Opportunities

6 | D-1 Sustainable Economic Development Strategy

Lebanon should develop a proactive strategy, identifying the community's economic assets and what types of businesses ~~it wishes~~ to encourage locating in the City. With a strategy in place, the City should then selectively recruit and/or support new businesses that can help the City attain its goals. The City ~~of Lebanon~~ must evaluate how much growth is sustainable; certain levels and types of new development could cause unforeseen changes to community character, infrastructure requirements, and the tax base.

It is essential to maintain a coordinated, respectful and cooperative working relationship with current City and regional enterprises, area economic development agencies, regional planning commissions, chambers of commerce, state agencies, and other concerned private and public sector entities that encourage managed growth. The City could consider expanding its Planning Department's mission to include a more active role in decisions related to economic development.

Technological advances have become a driving force - possibly the driving force - in the economy. New jobs in the "thought ware" sector include computer software, education, engineering, telecommunications, medicine, and the entrepreneurial, creative economy realm. ~~In order t~~To foster new economic opportunities in this sector, Lebanon must support high-speed digital capability (see Section D-5), keep up with ongoing technological advances, and invest in the labor force through support for continuing education and training.

6 | D-2 Central Business Districts

In spite of competition from the Route 12A commercial area, both West Lebanon Central Business District and the Lebanon ~~Central Business~~ Downtown District continue to see reinvestment and revitalization.

Lebanon's downtown pedestrian mall is now the home to many small professional and service businesses, restaurants and retail shops. These businesses, in combination with Lebanon River Valley Community College's downtown campus, Ledyard Charter School, and the New England School of the Arts have made the mall a thriving place to visit and shop. Colburn Park is an active place in the summer with the farmers' market and summer concerts, ~~and is a great place for families the gather~~. The downtown Opera House, ~~and~~ AVA Gallery, ~~and~~ Upper Valley Music Center are cornerstones of the City's arts scene, bringing people downtown and supporting surrounding restaurants and shops. The CCBA and New England Sports Complex attract crowds of activity with a variety of sporting options that help foster healthy lifestyles for citizens of the City. Better health of City residents will help support a strong local economy.

West Lebanon Village has also shown improvement ~~over the~~ in recent years. The anchor of the village is the ~~new~~ Kilton Library built in 2010. New businesses have arrived, and current ones have expanded. Restaurants have continued to bring traffic to the area. The ~~recently approved~~ River Park project, just north of the village, will bring research labs, office space, and associated retail and housing.

The City should encourage mixed uses of structures in both ~~CBDs~~ downtowns, for instance combining ground floor storefronts with upper-story residential units. Collocating compatible professional, residential and commercial uses encourages people to live where they work, fostering a vibrant downtown and healthy local economy.

6 | D-3 Redevelopment

As Lebanon grows, public services and infrastructure must be expanded cost effectively. Many of the impacts of such growth can be reduced by directing development toward existing built-up areas, which are already served by existing municipal services and infrastructure.

Inefficiently developed or underutilized properties, for example, along Route 12A, the “Miracle Mile,” (Mechanic Street/Route 4) and Main Street in West Lebanon represent opportunities for redevelopment or infill in the City. Recent examples of such infill development include the construction of new retail stores and restaurants within existing plaza parking lots, and the renovation of empty retail spaces into multiple new storefronts.

Existing developments should be evaluated to determine creative solutions for potential redevelopment (the plans proposed by a Dartmouth College architectural class several years ago offer one potential scenario for redevelopment). Many developed parcels and parking lots could be more intensely redeveloped with multi-use structures, multi-story buildings, shared and structured parking, and shallow setbacks from the roadway to achieve a “town center” look instead of the existing suburban strip malls and shopping plazas. Implementing access management retrofit plans on Route 12A, Miracle Mile, Main Street and Mechanic Street, as discussed in the transportation chapter of this plan, would be a step toward redevelopment efforts and aesthetic upgrades along with allowing flexibility of the parking requirements to meet the needs of the applicant and the traveling public.

When businesses expand, contract or close, they leave behind commercial and industrial space that can be redeveloped. Although such properties are usually privately owned, it is in the interest of the City to see that these locations are redeveloped in ways that are compatible with Lebanon’s Master Plan. Among the desired features are the following:

- Reconfiguring space to maximum density, for example, building up (higher - to appropriate scale) when possible, using underground and shared parking, and reducing building setbacks.
- Integrating residential and workforce housing near commercial, office, educational, research, medical, and compatible light industrial facilities.
- Constructing sidewalks and bus stops and providing landscaping.
- At riverfront properties, observing setback and water quality requirements, while taking full advantage of the aesthetic potential, for example, siting restaurants, residential apartments, and offices to face the river, rather than backing onto the river.
- The upcoming redevelopment and beautification of Main Street in West Lebanon offers a fantastic opportunity for both businesses and housing developers. Generous height limits in the downtown areas provide a unique opportunity for developers to increase density and maximize the cost effectiveness of projects.

~~6 | D-3 Redevelopment~~

~~As Lebanon grows, public services and infrastructure must be expanded cost effectively. Many of the impacts of such growth can be reduced by directing development toward existing built-up areas, which are already served by existing municipal services and infrastructure.~~

~~Inefficiently developed properties, for example, on Route 12A [chip: I think you should take out~~

~~reference to 12A. 12a is vibrant.. it might need improved intersection lighting but there are no obvious redevelopment targets.. only real issue is vacant Pennys is in a flood plain] and the "Miracle Mile," (Mechanic Street/Route 4) represent some of the best opportunities for redevelopment in the City. Existing developments should be evaluated to determine creative solutions for redevelopment (the plans proposed by a Dartmouth College architectural class several years ago could serve as a starting point). Many developed parcels and parking lots could be more intensely redeveloped with multi-use structures, multi-story buildings, shared and structured parking, and shallow setbacks from the roadway. Implementing access management retrofit plans on Route 12A [again I don't think 12a has real redevelopment potential], Miracle Mile, and Mechanic Street, as discussed in the transportation chapter of this plan, would be the first step in redevelopment efforts along with allowing flexibility of the parking requirements to meet the needs of the applicant and the traveling public.~~

~~When businesses expand, contract or close, they leave behind commercial and industrial space that can be redeveloped. Although such properties are usually privately owned, it is in the interest of the City to see that these locations are redeveloped in ways that are compatible with Lebanon's Master Plan. Among the desired features are the following:~~

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- ~~• Integrating residential and workforce housing near commercial, office, educational, research, medical, and light industrial facilities.~~
- ~~• Constructing sidewalks and bus stops, and providing landscaping.~~
- ~~• At riverfront properties, observing setback and water quality requirements, while taking full advantage of the aesthetic potential, for example, siting restaurants, residential apartments, and offices to face the river, rather than backing onto the river.~~

6 | D-4 Quality of Life

Numerous studies on business location decisions have indicated that quality of life plays a key role in corporate decision-making. One of the greatest strengths of Lebanon's economy is that people like to live and work here. If Lebanon's historic, educational, environmental, scenic, recreational, and cultural assets are diminished or lost, then the City could suffer economically in the long run.

Lebanon's economic development strategy should support and strengthen the City's role in the creative economy, cultural and heritage tourism, and recreational sectors. More importantly, it should seek to balance its growth and development with protection of natural, scenic, and historic resources. ~~Current~~ Recent work ~~towards a~~ Zoning Ordinance revisions ~~has~~ is addressed ~~ing~~ many of these goals of compatibility and sustainability.

6 | D-5 Public Services and Infrastructure

As Lebanon continues to grow, City government will continue to experience pressure to expand and extend public services and infrastructure. When making those decisions, the City needs to consider the cost to current residents and the impact on the natural environment. In accordance with the "Residents-First" policy, growth and economic development must not degrade the City's quality of life. The City should be seeking economic development that does not increase City taxes. It must be recognized, however, that public services and infrastructure will have to be maintained and expanded as ~~growth occurs~~ Lebanon grows. Many of the undesirable impacts of growth can be reduced by directing development toward existing built-up areas already served by public services and infrastructure.

One means of limiting the demand on the water supply and wastewater treatment systems would be to establish an urban services boundary, beyond which such utilities would not be expanded. The establishment of such a limitation would permit the City to focus development in a more concentrated area. The City should also consider expanding the use of impact fees to finance infrastructure associated with new development ~~and consider working with the state legislature to~~

~~establish a City sales tax.~~ To expand its ability to generate revenue, the City should evaluate any means that would help offset the impacts of commercial development without negatively influencing business or commerce or putting additional tax burden on private home owners.

6 | D-6 Technological Advancement

Residents, businesses, and institutions increasingly depend on the Internet and electronic communications. Businesses of all sizes find a digital presence valuable, if not essential. ~~In order to~~ ensure that businesses in Lebanon will remain competitive, they must have access to dependable, affordable, high-speed digital services. Such services should be available in all parts of the City, to enable residents to conduct home-based businesses and to promote telecommuting. This increased digital presence will also serve to aid in the promotion of training and education through “webinars” and other professional development tools.

With current technology, wired broadband is faster and more reliable than wireless. The most significant impediment to bringing wired high-speed digital service to all corners of the City is ownership and control of the poles. Because the poles are privately owned, customers are limited to the providers currently on the poles. Moreover, private-sector companies often balk at providing high-speed digital service to rural areas because they cannot make back their return on investment within their typical three-year time frame. In the last several years, Lebanon worked proactively with Comcast to provide high-speed internet access to the remaining under-served residential properties in the City.

~~Lebanon should advocate that high speed digital services be available throughout the Upper Valley, so that residents of nearby towns who are employed in Lebanon have the option of telecommuting, which would reduce congestion on Lebanon's roads.~~

6 | D-7 Lebanon Municipal Airport

Lebanon Airport is a key transportation asset, valued by the region's many businesses and institutions, as well as by area residents attracted by the recent efforts of the City and Cape Air to expand scheduled airline service. ~~However,~~ passenger enplanements or “boardings” have stabilized in recent years after declining during the early 2000s ~~declined~~ in comparison with the 1990s, which has strained the ability of the airport to limit the financial support received from the City's General Fund.

During the Master Plan process, residents expressed the desire that the current status of the Lebanon Municipal Airport should change in one direction or the other; either become self-sufficient as a commercial airport providing scheduled flights for the general public, or convert to a general aviation airport. The scheduled 2012 completion of the Airport Master Plan, including an “Airport Summit” event will further illuminate future options or direction for the airport.

6 | E Outcomes & Strategies

OUTCOME 1 Seek sustainable growth that is not dependent on exhausting local resources to fuel economic expansion.

STRATEGIES

1. Encourage City government to take a more organized and active role in promoting sustainable economic development.
(City has created 2 TIF districts; adopted 79-E program with districts in Lebanon and West Lebanon; nominated 6 ERZs for designation by NHBEA; constructed Airpark Road extension to enable new development in Airport Business Park 1-B and adjacent parcel; worked proactively with Comcast to provide high-speed internet access to remaining underserved residential properties)
2. Promote and retain high quality employment opportunities.
3. Continue the progress of revitalizing the City's two ~~Central Business~~ Downtown Districts.

- (Completed 2016 Downtown Visioning Study and 2020 West Lebanon Village Visioning Charrette; issued RFP for 20 Spencer Street redevelopment; issued RFI seeking interest and ideas for redevelopment of downtown surface parking lots; acquired 3 properties along Main Street and making them available for redevelopment; sought and obtained federal grant for WL Main Street improvements project; continuing to pursue potential acquisition of parts of Westboro Yard)
4. Work with civic associations to engage business owners and generate citizen interest and commitment to the downtown areas.
(City actively participates in UVBA to engage with local and regional businesses; created original WLRAC committee to spur citizen interest in WL revitalization)
 5. Support the revitalization, infill, and increased mix of uses in existing non-residential, locations.
(Updated zoning regulations to explicitly allow for mixed uses and multi-family residential uses in most non-residential districts; created new Lebanon Downtown zoning district based on results of 2016 Visioning Study; amended CBD zoning to mostly mirror downtown zoning in West Lebanon Village)
 6. Seek a way for Lebanon Airport to pay for itself while better serving the needs of residents and businesses, both in Lebanon and throughout the region.
(City has renegotiated tenant leases on airport property, including hangar space; established Airport-Tech Park TIF district and constructed Airpark Road extension to open up developable areas on airport property; actively marketing Airport 1B property for development opportunities with lease revenue accruing to airport; actively planning for construction of additional leasable hangar space; enacted higher landing fees as of 2024)
 7. Continue efforts to expand regional and national passenger connections to and from Lebanon Airport.
(City supported new ESA contract with Cape Air with service to Boston and NYC-Westchester)

ACTIONS

1. Develop a proactive strategy for sustainable economic development that identifies the City's economic assets and what types of businesses Lebanon wishes to encourage.
(EDC has discussed undertaking gap analysis in partnership with UVBA; UVBA has helped create and facilitate the UV Med-Tech Collaborative)
2. Recruit and support businesses in accordance with the City's sustainable economic development strategy.
3. Explore innovative financing techniques for building ~~structured~~ additional public parking in the West Lebanon Central Business District.
(Currently exploring potential for TIF district in WL Village; evaluated possibility of City designing and constructing parking areas behind Main Street properties with shared easements across multiple parcels)
4. Evaluate the boundaries of the Central Business and Lebanon Downtown Districts.
(Extended CBD/LD district along Spencer Street to facilitate sale of 4 Suzor Court to Geokon for parking; extended CBD district to 3 Seminary Hill to facilitate redevelopment of property; proposed expansion of CBD district along Bridge Street to facilitate redevelopment of property (not approved by Council))
5. Examine existing non-residential areas to identify opportunities for more intensive redevelopment or infill.
(Created new GC-1 district to facilitate development of new housing by D-H)
6. Continue to work with the Regional Planning Commission to develop and maintain an updated inventory of non-residential sites and buildings to facilitate expansion and relocation of businesses.
7. Review and amend the City's Zoning Ordinance as needed to encourage more intensive redevelopment of existing residential and non-residential areas and to discourage development in undeveloped areas.
(Created new Lebanon Downtown zoning district allowing taller and more intensive development based on results of 2016 Visioning Study; amended CBD zoning to mostly

- mirror downtown zoning in West Lebanon Village; amended zoning to require PUD-style for larger developments in Rural Lands areas;)
8. Establish an urban services boundary for water and sewer.
(Planning and DPW have evaluated potential for Urban Services District to focus intensive development into area already served by water and sewer)
 9. ~~Develop~~ Maintain an impact fee schedule to support expanded infrastructure associated with new development.
(Planning Department and Planning Board have established and regularly updated impact fee schedule and basis of assessment to support capital investment in infrastructure and facilities)
 10. Evaluate the cost of ending commercial service and, if warranted, convert Lebanon Airport to serve general aviation only If passenger enplanements fail to increase significantly.

OUTCOME 2 Maintain a diverse economy that is not dependent on a single large employer or economic sector.

STRATEGIES

- ~~1. Make high-speed digital services available throughout Lebanon.~~
(Completed: City worked proactively with Comcast to provide high-speed internet access to remaining underserved residential properties)
- ~~21.~~ Continue to encourage private companies to add or expand high-speed digital lines to ~~under-served~~ locations within the City or explore alternatives via regional efforts to bring broadband to the Upper Valley.
(City worked proactively with Comcast to provide high-speed internet access to remaining underserved residential properties)
- ~~32.~~ Encourage City government to coordinate with governing bodies of other nearby towns and digital services providers to improve high-speed digital services throughout the region.

ACTIONS

1. Ensure that zoning regulations maintain and enhance the mix of downtown businesses, including basic goods and services.
(Updated zoning regulations to explicitly allow for mixed uses and multi-family residential uses in most non-residential districts; created new Lebanon Downtown zoning district based on results of 2016 Visioning Study; amended CBD zoning to mostly mirror downtown zoning in West Lebanon Village)
- ~~2. Develop a long-range plan for digital high-speed telecommunications.~~

OUTCOME 3 Recognize the importance of quality of life in attracting new firms to locate in Lebanon and in retaining well-educated, skilled workers.

STRATEGIES

1. Seek growth and development that preserves or, ideally, enhances Lebanon's quality of life.
2. Support the arts and culture (creative economy) as a distinctive and significant component ~~(creative economy)~~ of the local and regional economy.
(2016 Downtown Visioning Study identified the arts community as a potential anchor for downtown revitalization; Arts & Culture Commission created as a result of 2016 Downtown Visioning Study)
3. Promote Lebanon's historic, environmental, scenic, recreational, and cultural assets.
4. Continue to strive for excellence in public education and municipal services, taking into account the impact on taxes levied to City residents.
5. Encourage housing in the upper floors of downtown buildings.

(Zoning ordinance amended to explicitly allow for mixed-use and upper story residential in downtown Lebanon and West Lebanon Village; need to address and resolve parking and building code requirements)

ACTIONS

1. Implement the zoning revision recommendations outlined in the City's Natural Resources Inventory to protect and enhance the most critical natural resources and open spaces.
(Amended zoning to require PUD-style for larger developments in Rural Lands areas, starting with identification and protection of most important/sensitive natural resources, and designing improvements around those)
- ~~2. Explore seeking authority from the state legislature to implement a City sales tax.~~



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

PLANNING BOARD

February 24, 2025 Meeting

Staff Memorandum – PB2025-05-EXT – *con't from 2/10/25*

APPLICATION INFORMATION

Agenda Item: 3.A

Application #: PB2025-05-EXT

Application Type: Extension

Property Location:
North Main Street, West Lebanon

Property Owner/Applicant:
XYZ Dairy, LLC

Property Size: +/-38.18 Ac.

Zoning District(s):

- Central Business (CB)
- Light Industrial (IND-L)
- Residential Three (R-3)

Overlay District:

- Wetlands Conservation
- Floodplain

Staff Attachments:

- E-mail correspondence between 6/25/24 and 2/19/25 between applicant's attorney and City staff
- Draft Phase 1 security agreement provided by applicant on 6/25/24 with staff comments provided on 7/25/24
- Notice of Action for PB2018-34-EXT dated September 9, 2019 (17 pages)
- Notice of Action for PB2021-19-EXT dated October 21, 2021 (2 pages)
- Notice of Action for PB2024-34-EXT dated November 12, 2024 (8 pages)

LEGAL NOTICE

XYZ Dairy, LLC & Lyme Properties 2, LLC, River Park Drive (Tax Map 44, Lots 21 - 30 & 7), zoned CB, IND-L and R-3: Applicant requests a two (2)-year extension of the River Park Site Plan approval (PB2010-25-SPR), as most recently amended on September 9, 2019 (PB2018-34-SPA) and extended on October 12, 2021 (PB2021-29-EXT). PB2025-05-EXT

APPLICATION MATERIALS

- Application form (1 page)
- Letter from Chet Clem, Lyme Properties, dated December 19, 2024 (3 pages)
- Letter from David Clem, XYZ Dairy, LLC and Lyme Properties 2, LLC, dated February 10, 2025 (3 pages)
- Slideshow (6 pages)
- Planning Board Rules of Procedure dated June 28, 2021, with highlights (9 pages)
- Certified Notification List (2 pages)
- Fee Schedule (2 pages)
- Additional miscellaneous documents provided by applicant (233 pages)

COMPLETENESS REVIEW

This application has been reviewed in accordance with the Lebanon Site Plan Review Regulations. The Planning and Development Department recommends that the Board find that the application is complete enough to accept jurisdiction and to commence review.

Although the application is complete with respect to the requirements of the Site Plan Review Regulations, note that per condition of approval #3 of the Planning Board's Notice of Action dated September 9, 2019 for PB2018-34-SPA, the applicant is required to provide an updated phasing schedule in connection with an extension request. An updated phasing schedule has not been provided.

APPLICATION OVERVIEW

The applicant's request is set forth in the attached letter dated December 19, 2024, from Chet Clem of Lyme Properties: "[...] XYZ hereby requests that a 2-year extension of all relevant dates in the Site Plan approval be granted in accordance with 'the extension standard set forth in the current Site Plan

Review Regulations [as] reflected in Condition #3 and #29 of the September 9, 2019 Planning Board Notice of Actions for PB2018-34-SPA.” (quoting the Board’s 11/12/13 Notice of Action for PB2024-34-EXT).

BACKGROUND

A. Subdivision Approval (*this information is provided for background purposes – the subdivision approval is not the subject of the current application*)

On October 11, 2011, the Planning Board granted subdivision approval for a 22-lot phased development known as River Park (PB2011-01-FMAJ). The development includes 11 residential lots located within the R-3 district at the southerly end of the property and two additional residential lots in the R-3 district at the northerly end of the site. Five parcels are located in the CBD district and 3 parcels are within the IND-L district, all of which will be served by a new development roadway. One additional lot was created to provide open space for the overall development along the river.

The Planning Board granted the applicant a two-year extension to the approved subdivision on September 9, 2013 (PB2013-21-EXT). Subsequently, the applicant requested and was granted an amendment to the subdivision approval on May 11, 2015 (PB2015-07-FMAJ). Additional extensions were approved by the Planning Board on November 9, 2015 (PB2015-33-EXT), November 14, 2016 (PB2016-28-EXT), and October 10, 2017 (PB2017-17-AAD). The River Park Subdivision plat was recorded on January 2, 2018 in the Grafton County Registry of Deeds, together with a Notice of Restriction. **Note that the January 2, 2018 date is the date from which the phasing deadlines extend.**

B. Site Plan Approval

On October 24, 2011, the Planning Board granted site plan approval for the River Park development (PB2010-25-SPR). As originally approved, the development would consist of eight (8) non-residential or multi-family residential buildings totaling 839,145 square feet plus two parking garages for 1,393 vehicles on the 7 parcels within the CBD and IND-L zoning districts.

The applicant was granted an extension to the approved site plan on September 9, 2013 (PB2013-22-EXT). On June 8, 2015, the applicant was granted a site plan amendment for the layout of Lot 1, which included changes to the building footprint, parking layout, vehicular circulation, loading location of the building, landscaping, lighting, and the drainage and engineering of the site (PB2015-10-SPA). On November 9, 2015, the applicant was granted additional time within which to obtain Building Permits for each approved development phase (PB2015-34-EXT). An additional extension was granted on November 14, 2016 (in connection with PB2016-28-EXT).

On September 9, 2019, the Planning Board approved an amendment to the site plan to, among other things, change the sequencing of the project phasing and increase the number of residential dwelling units from 80 to 125 in Building #8 (PB2018-34-SPA). The 2019 Notice of Action was written to supersede and replace all prior Notices of Action relating to the River Park site plan approval. On October 12, 2021, the Planning Board approved a request to extend the phasing deadlines (PB2021-19-EXT). A copy of the September 9, 2019 and October 12, 2021 Notices of Action are attached for reference.

On July 8, 2024, the applicant applied to the Planning Board for another extension, as described in a letter dated July 8, 2024, from Chet Clem of Lyme Properties, as follows:

Lyme Properties operating as the development agent for XYZ Dairy, LLC hereby requests a 2-year extension of the River Park West Lebanon Site Plan (#PB2010-25-SPR) and

Subdivision Approvals (#PB2011-01-FMAJ, October 11, 2011) as most recently amended on September 9, 2019 (#PB2018-34-SPA) and extended by this Board on October 12, 2021 (#PB2021-29-EXT).

In accordance with Section 4.10 of the Lebanon Site Plan Review Regulations, this extension request is due to delays ***attributable to unusual circumstances beyond the control of the Applicant.*** (emphasis in original)

On November 12, 2024, the Planning Board denied the applicant's extension request, as set forth in the attached Notice of Action for PB2024-34-EXT.

On December 19, 2024, the applicant submitted a new application to the Planning Board again requesting an extension of the River Park site plan approval (as discussed in the attached letters from Chet Clem dated December 19, 2024 and from David Clem dated February 10, 2025). At its meeting on February 10, 2025, the Board agreed to hear the new extension request on its merits and continued the hearing to the February 24, 2025 work session.

STAFF COMMENTS

1. **Imprecise Request.** The applicant has requested a "2-year extension" but has not specified what the "2-year extension" is relative to. It is particularly important that the applicant do so in this case given that the approvals are very old and extremely complex, and the history of the project is convoluted, confusing, and now the subject of ongoing litigation. None of the current Planning Board members were on the Board when the project was originally approved in 2011 nor were any of the current Board members on the Board at the time of the 2019 Site Plan amendment. Only two of the current Planning Board members were on the Board for the 2021 extension request. For these reasons, determining what exactly the applicant is requesting should not be left to the Board to guess.
2. **Standard of Review.** Per the 9/9/19 Notice of Action, the River Park Site Plan approval is subject to the Site Plan Review Regulations dated May 8, 1977, last revised November 9, 2009. Section 4.10 of the Site Plan Review Regulations last revised 11/9/09 provides as follows:

Section 4.10 - Expiration of Site Plan Approval

- A. Any approved site plan for which a Building Permit has not been obtained within one (1) year of the date of the original approval shall be considered void, unless the Board grants an extension for good cause. A request for an extension of the site plan approval shall be submitted by the applicant to the Planning Office prior to such expiration date. Requests for extension of the site plan approval received after the expiration date shall not be considered by the Board. An extension shall be for up to one (1) additional year beyond the original expiration date. The Board shall grant no more than one extension for any site plan. (NOTE: The expiration provisions of this paragraph shall not be waivable under the procedures set forth in Article VII - "Waiver Procedures" of these Regulations; however, the Planning Board may, for good cause stated in its written Notice of Action, specify some alternative expiration date.)
- B. For applications subject to both Site Plan and Subdivision review, expiration of Board approvals shall occur as set forth in the Subdivision Regulations.
- C. For approved phased developments, the deadlines for each phase, as stated in the approved phasing schedule, shall be substituted for the one-year limitation period set forth in Section 4.10(A).

As set forth in Section 4.10, the Board may grant an extension “for good cause.” (See Section 4.10.A above). Additionally, extension requests for the River Park development must also comply with and must be considered in light of the standards set forth in Conditions 3 and 29 of the 9/9/19 Notice of Action, which provide as follows:

- Condition 3: “In determining whether to grant any requested extensions, **the Board shall consider the totality of the circumstances, including the extent and complexity of the conditions-precedent, and whether the need for more time is attributable to circumstances beyond the control of the applicant, rather than to the applicant’s neglect or failure to proceed with reasonable promptness.**” (emphasis added)
 - Condition 29: “It is the intent and effect of this approval [...] that upon completion of the Phase 1 infrastructure improvements within 5 years of the final subdivision approval [...] the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II [...] provided that the applicant and its successors-in-interest continue to comply with all conditions of this approval and of the Planning Board’s approval of Final Major Subdivision application #PB2011-01-FMAJ, including the time limits set forth in the phasing plan, **unless such a limit is extended for good cause by the Planning Board**, acting upon an application submitted prior to the expiration of such limit.” (emphasis added)
3. Application Deficiency. Per condition of approval 3 of the 9/9/19 Notice of Action, the applicant must provide an updated phasing plan in connection with any extension request: “If the applicant anticipates being unable to meet any time deadline(s) set forth in this decision with respect to any phase(s), **the applicant shall submit an updated phasing schedule to the Planning Board for review and approval** in accordance with Section 4.9.E of the Site Plan Review Regulations.”¹ (emphasis added). An updated phasing plan as required by condition 3 has not been provided.

Unfortunately, there is no single phasing plan for the development as there should be. Rather, the components of the River Park phasing plan are scattered throughout the 17-page 9/9/19 Notice of Action, beginning with the chart titled “New Phasing Plan” on page 5. Staff recommends that the Board require the applicant to prepare and present a single and complete phasing plan so that it can be easily and clearly referenced and understood by all. *At a minimum, the phasing plan required to be submitted with the extension request application must include the following:*

- Commencement dates for each phase. [See condition 3: “For purposes of this decision, **the commencement dates referenced on the New Phasing Plan**² and in this decision

¹ Section 4.9.E from the Site Plan Review Regulations dated May 8, 1977, last revised November 9, 2009:

- E. If the applicant anticipates being unable to meet any time deadline(s) set forth in the approved phasing schedule with respect to any phase, he or she may apply to the Planning Board for an extension of up to one year, pursuant to Section 4.10 of these Regulations. The request for an extension shall be submitted to the Planning Office prior to the expiration of the deadline(s) involved.

If the applicant fails to meet any such deadline, or extension thereof, then the approval of that phase and all subsequent phases shall be considered void, and such phase(s) shall no longer be presumed “vested.” However, the applicant may resubmit the application for such phase(s) to the Board for further review and re-approval in light of changes in ordinances, regulations, or other material circumstances which have occurred in the City of Lebanon since the original approval.

² Commencement dates are included within the decision but not within the phasing plan itself. Note that requiring the “commencement date” for each phase is unique to River Park – there is no such requirement in the phasing plan requirements of Section 4.10 of the applicable Site Plan Review Regulations.

shall be deemed to be the date by which a Building Permit shall have been applied for[.] (emphasis added)]

- *Deadlines for the construction of improvements for each phase.* (See condition 29: “As set forth in Section 4.10(C) of those Regulations, the deadlines for the construction of improvements within each phase shall be as stated in the approved phasing plan[.]).”³

Staff also recommends that the Board require an updated phasing plan that conforms to all of the required phasing plan criteria as set forth in Section 4.9.C (it is not clear how the phasing plan was approved without compliance with the required criteria). The current phasing plan is deficient with respect to the bolded criteria below (i.e. 4.9.C.2, 3 and 4):

- C. The applicant shall submit with the application a proposed phasing schedule, which shall be included as part of any approval. The phasing schedule shall include the following information, for each phase:
 1. A specification of all improvements, on-site or off-site, to be installed as part of that phase;
 2. A deadline for the posting of any required security for that phase;
 3. A deadline for the completion of such improvements subsequent to the posting of such security, and;
 4. A date by which a Building Permit must be obtained to prevent the approval for that phase from being considered void pursuant to Section 4.10 of these Regulations.
4. Impact Fees. The River Park development is subject to the following condition as set forth in the October 12, 2021 Notice of Action:

In accordance with the City’s Impact Fee Ordinance fee schedule adopted on September 13, 2010, this application is exempt from impact fees for a period of 5 years from the date of the Planning Board’s final approval. Building permits obtained after the 5-year period shall be subject to impact fees in existence at the time of the Building Permit application submission. [Note: The River Park subdivision plat (#PB2011-01-FMAJ) was recorded on January 2, 2018, representing the final approval for the subdivision and starting the 5-year exemption period; ~~which.~~ **The 5-year exemption period** shall **now** expire on January 2, 2023 **2025.**]

The above-referenced condition was originally included as condition 25 in the 10/24/11 Site Plan approval Notice of Action. It is not clear why River Park was given a 5-year exemption from impact fees. Adoption of both the impact fee ordinance on 7/15/09 and the impact fee schedule on 9/13/10 predate the site plan completeness determination on 11/8/10. Perhaps the Site Plan legal notice predated 9/13/10. Nevertheless, it is not clear why the River Park development should still be exempt from impact fees when every other development in the City constructed since adoption of the 9/13/10 fee schedule has had to pay them. **Moreover, the Board has no legal authority**

³ Construction deadlines are included within the decision but now within the phasing plan itself.

to permit such an exemption⁴. Staff recommends that any extension approval be conditioned on payment of impact fees in compliance with Section 213 of the Zoning Ordinance and the current impact fee schedule.

5. Clarification of Approved Plan Set. In connection with the subdivision approval, the applicant's attorney provided staff with a Phase 1 infrastructure draft security agreement on 6/25/24. Staff reviewed and provided comments on 7/25/24 but have not received any substantive comments from the applicant in response, despite multiple requests. See attached e-mail correspondence between 6/25/24 and 2/19/25 between applicant's attorney and City staff, and the draft Phase 1 security agreement provided by the applicant's attorney on 6/25/24 with staff comments provided on 7/25/24.

Note that the draft security agreement references no less than 5 different plan sets. With respect to some of those, it is not clear how and by whom they were approved. ***Staff recommends that any extension approval clarify precisely what constitutes the approved plan set, and that the Board verifies it has in fact reviewed and approved whatever plan set is identified as the approved plan set.***

6. Conditions of Approval. Should the Board grant the requested extension, staff recommends that the Board require that all future determinations relative to the applicant's compliance with the Board's conditions of approval be made directly by the Planning Board (in lieu of staff making such determinations). Staff believes this arrangement would be beneficial to all parties.

Attachments

cc: Chet Clem, Lyme Properties (via e-mail)
David Clem, XYZ Dairy, LLC (via e-mail)
Matthew Decker, Esq., Drummond Woodsum (via e-mail)
File

⁴ This is acknowledged in Condition 29 of the 9/9/19 Notice of Action: "It is the intent and effect of this approval, subject to the satisfactory completion of the financial security requirements set forth in Condition #5 of the Final Major Subdivision approval (#PB2011-01-FMAJ) for the development, that upon completion of the Phase 1 infrastructure improvements within 5 years of the final subdivision approval, as set forth in Condition #14-2 above, the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II, and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect this phased development[.]" (emphasis added)

From: [Tim Corwin](#)
To: [Hastings Philip](#)
Cc: [Nathan Reichert](#)
Subject: FW: [EXTERNAL] River Park PB Subdivision Conditions
Date: Wednesday, February 19, 2025 6:48:17 PM
Attachments: [image001.png](#)
[Performance Bond Security Agreement.docx](#)

Hi Phil –

I'm checking in on the status of the Security Agreement. If you could please provide an update, I would greatly appreciate it.

Thank you, Tim

From: Tim Corwin
Sent: Thursday, January 23, 2025 5:58 PM
To: 'Philip Hastings' <hastingsp@cwbp.com>
Cc: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Hi Phil –

I'm following up from our exchange below. To keep things moving, I've gone ahead and prepared a blackline version of the draft security agreement. In doing so, I was reminded that I had asked several questions (4 on p 2, 2 on p 3, and 1 on p 5). If you could please review those questions and respond at your convenience, I'd greatly appreciate it. Once those are resolved, I believe the agreement will be ready for signatures.

Alternatively, if you'd prefer to work directly with the City's legal counsel to finalize the agreement, that would work as well. Just let me know.

I look forward to hearing from you.

Thanks, Tim

From: Tim Corwin
Sent: Thursday, January 9, 2025 7:41 PM
To: Philip Hastings <hastingsp@cwbp.com>
Cc: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Hi Phil –

I just realized that what you sent is the same document I sent you in July. I assume you intended to send something else? If not, then I'm not sure what you're asking. We already made our edits and changes. If you would like to make additional edits/changes to the agreement, please feel free to send those and staff can review and/or ask the City's legal counsel to review, as needed. Or if the agreement is ready, I'd be happy to convert it to a blackline and circulate for signatures. Just let me know.

Thank you, Tim

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Thursday, January 9, 2025 3:53 PM
To: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

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Happy New Year, Tim. Hope you are well.

Now that the Superior Court has reinstated XYZ Dairy's building permit and extended the deadline to complete the remaining Phase 1 infrastructure improvements to October 27, 2025, my client is gearing up for active construction on the improvements as soon as the weather permits in the spring. I am therefore turning back to the performance bond security agreement. In light of the court's order, are you able to review the revisions to that agreement you suggested last July (attached) and make whatever changes are appropriate? Let me know if you think a phone call would be useful to push this matter along to completion.

Philip M. Hastings

Shareholder/Director/President

CLEVELAND, WATERS AND BASS, P.A.

Affiliated with [Granite State Title Services, LLC](#)

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From: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Sent: Thursday, July 25, 2024 9:00 PM
To: Philip Hastings <hastingsp@cwbp.com>
Cc: Clem Chet (chet@lymeproperties.com) <chet@lymeproperties.com>; Brian Vincent <brian.vincent@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Phil –

I apologize for the delay in getting back to you. Please see attached redline. Happy to discuss – just let me know.

Regarding the definition of substantial completion, that would need approval by the Planning Board. If you like, we could tack that on to the extension request that will be heard on August 12th. We have to send the hearing notice to the paper first thing Monday morning so if you can let me know by then, I'd greatly appreciate it.

Thanks, Tim

TIM CORWIN, AICP
DEPUTY PLANNING AND DEVELOPMENT DIRECTOR
CITY OF LEBANON
(603) 448-1524 (OFFICE)
(603) 442-6127 (DIRECT)
TIM.CORWIN@LEBANONNH.GOV
[BOOK A TIME TO MEET WITH ME](#)

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Tuesday, July 16, 2024 9:23 AM
To: Brian Vincent <brian.vincent@lebanonnh.gov>; Tim Corwin <Tim.Corwin@lebanonnh.gov>
Cc: Clem Chet (chet@lymeproperties.com) <chet@lymeproperties.com>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

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Brian and Tim,

Can you let me know where things stand with performance bond/security agreement? When can we expect additional feedback from the City?

Philip M. Hastings
Shareholder/Director/President
CLEVELAND, WATERS AND BASS, P.A.

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From: Brian Vincent <brian.vincent@lebanonnh.gov>
Sent: Wednesday, June 26, 2024 1:39 PM
To: Philip Hastings <hastingsp@cwbp.com>
Cc: Clem Chet (chet@lymeproperties.com) <chet@lymeproperties.com>; Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Phil,

I see now. I'll review with Tim and get back to you.

Thanks,

Brian A. Vincent, PE

City Engineer

City of Lebanon
Department of Public Works
193 Dartmouth College Highway
Lebanon, NH 03766
603-448-3112 x 6252
brian.vincent@lebanonnh.gov

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Wednesday, June 26, 2024 1:31 PM
To: Brian Vincent <brian.vincent@lebanonnh.gov>
Cc: Clem Chet (chet@lymeproperties.com) <chet@lymeproperties.com>; Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

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I don't think so. I am adding Chet here for clarification as needed, but my understanding is that we are bonding for the North Main Street/Route 10 improvements within the urban compact (\$1,583,866), a segment of River Park Drive (\$1,198,541) and stormwater improvements (\$608,961). This was all broken down in Engelberth's excavation permit application (attached). Is the City only looking for a bond for the North Main Street/Route 10 improvements?

Philip M. Hastings

Shareholder/Director/President

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From: Brian Vincent <brian.vincent@lebanonnh.gov>

Sent: Wednesday, June 26, 2024 11:04 AM

To: Philip Hastings <hastingsp@cwbp.com>; Tim Corwin <Tim.Corwin@lebanonnh.gov>

Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Phil,

Confirming that the figure noted, just under \$3.4 million, is for on-site (site work) work only, correct? If so, I have no objection to that amount.

The off-site work would be bonded separately via the pending excavation permit, which is a 2-year bond.

Happy to discuss further as needed.

Thanks,

Brian

Brian A. Vincent, PE

City Engineer

City of Lebanon

Department of Public Works

193 Dartmouth College Highway

Lebanon, NH 03766
603-448-3112 x 6252
brian.vincent@lebanonnh.gov

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Wednesday, June 26, 2024 9:40 AM
To: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Cc: Brian Vincent <brian.vincent@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

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Thanks Tim. My understanding is that the figure stated in the agreement matches the information previously provided to and approved by Brian. Brian, please let me know if I have the wrong impression.

Philip M. Hastings

Shareholder/Director/President

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From: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Sent: Tuesday, June 25, 2024 9:49 PM
To: Philip Hastings <hastingsp@cwbp.com>
Cc: Brian Vincent <brian.vincent@lebanonnh.gov>
Subject: RE: [EXTERNAL] River Park PB Subdivision Conditions

Thank you Phil. I am out of the office tomorrow and Thursday, but will try to review on Friday.

Please note that the cost of improvements needs to be reviewed and approved by Brian Vincent, the City Engineer. I will need confirmation from Brian that he concurs with the figure you've provided in the draft agreement. Please coordinate with Brian to determine what information he'll need in order to conduct his review.

Thank you, Tim

TIM CORWIN, AICP
DEPUTY PLANNING AND DEVELOPMENT DIRECTOR
CITY OF LEBANON
(603) 448-1524 (OFFICE)
(603) 442-6127 (DIRECT)
TIM.CORWIN@LEBANONNH.GOV
[BOOK A TIME TO MEET WITH ME](#)

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Tuesday, June 25, 2024 9:05 AM
To: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Cc: Brian Vincent <brian.vincent@lebanonnh.gov>; Clem Chet (chet@lymeproperties.com) <chet@lymeproperties.com>; David Clem <dclem@lymeproperties.com>; Angela McCanna <angela@lymeproperties.com>
Subject: [EXTERNAL] River Park PB Subdivision Conditions

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Tim,

To partially follow up on your June 13 email to Chet, attached is our proposed Performance Bond/Security Agreement for the remaining River Park Phase 1 Infrastructure Improvements. Please confirm that this is acceptable to the City so that we can move forward with securing the bond.

Philip M. Hastings

Shareholder/Director/President

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RIVER PARK CITY OF LEBANON, NEW HAMPSHIRE
LEBANON SUBDIVISION REGULATIONS & CITY CODE CHAPTER 152-9
WEST LEBANON, NEW HAMPSHIRE

PERFORMANCE BOND/SECURITY AGREEMENT
[RIVER PARK PHASE 1 ON-SITE INFRASTRUCTURE IMPROVEMENTS AND
OFF-SITE IMPROVEMENTS] WITHIN THE CITY OF LEBANON RIGHT-OF-WAY

This Agreement is made this ____ day of _____, 2024 by and between the City of Lebanon (the "City") and XYZ Dairy, LLC ("XYZ Dairy").

Reference is made to the following:

A. XYZ Dairy is the developer of a 22-lot subdivision known as "River Park", located at North Main Street in West Lebanon, New Hampshire, as shown on plans titled "Subdivision Plans River Park, ~~River Park Drive, Lebanon, New Hampshire, Grafton County,~~" prepared by TF Moran Inc., dated ~~April 27~~ March 9, 2015, latest issue: July 15, 2016 (the "Subdivision Plan"), of which the cover sheet and sheets 2, 3, 7, 8, and 9 are ~~and~~ recorded in the Grafton County Registry of Deeds as Plan #15441 (~~the "Subdivision Plan"~~), and currently owns Lots 1 through 5, 7 through 11 and 30 as shown on the Subdivision Plan. ~~XYZ Dairy's wholly owned subsidiary, CAESD, LLC, currently owns Lots 24 and 29 as shown on the Subdivision Plan.~~ In connection with the recording of the Subdivision Plan, XYZ Dairy and the City entered into a Subdivision Agreement dated December 15, 2017, a copy of which is attached hereto as Exhibit "A" (the "Subdivision Agreement").

B. In addition to the Subdivision approval, River Park is also subject to a site plan approval. ~~XYZ Dairy intends to construct certain improvements within River Park as shown on the plans~~ (the "Site Plan") originally approved by the Planning Board on October 24, 2011 (#PB2011-01-FMAJ), ~~and as~~ amended on September 9, 2019 (#PB2018-34-SPA), and extended on October 12, 2021 (#PB2021-29-EXT). Pursuant to the Planning Board Notice of Action dated September 9, 2019 for PB2018-34-SPA, the approved Site Plan consists of the following:

- Plans titled "Site Plans – River Park" (Sheets numbered 1 through 5: D1 through D18; 1-1 through 1-16; 2-1 through 2-21; 3-1 through 3-16; 4-1 through 4-9; 5-1 through 5-7; 6-1 through 6-9; and 7-1 through 7-8), prepared by Holden Engineering & Surveying, Inc., issued for permitting: June 10, 2010, latest issue: May 2, 2011 ("Approved Plan Set").
- Plans titled "River Park, Proposed Amendment to Site Plan – Lot 1, West Lebanon, Grafton County, New Hampshire" prepared by Elkus/Manfredi Architects, dated April 13, 2015, and plans titled "Site Plans, River Park, River Park Drive, Lebanon, New Hampshire, Grafton County," prepared by TF Moran, dated May 26, 2015. [These plans sets supersede and replace Sheets 1-1 through 1-16 of the Approved Plan Set].

Commented [TC1]: To distinguish from state ROW improvements which will be handled separately through the DOT per condition 15 of the subdivision approval

Commented [TC2]: Not sure this is needed...?

C. ~~Such~~ The Subdivision Plan and Site Plan approvals and all related agreements, permits and approvals from, with or by the City, are sometimes referred to herein as the “River Park Approvals.”

D. Pursuant to the River Park Approvals, River Park is approved to be constructed in eight (8) phases (Phases 1, 1-A, 1-B, 2, 3, 4, 5, and 6). Portions of Phase 1 – including construction of Crafts Avenue and related infrastructure and the extension of water and sewer utilities to Lot 1 of the development – have already been completed. The remaining Phase 1 improvements are shown on (i) a plan set titled, “Phase 1 Site Plans for Lots 1 & 2 River Park,” prepared by TF Moran Inc., issued date: July 26, 2016, latest issue: January 8, 2020, and (ii) with respect to those improvements to Route 10 within the urban compact, a plan set titled “NH Route 10 Improvement Plans, River Park, Lebanon, NH,” 52 sheets, dated July 25, 2016, prepared by Vanasse Hangen Brustlin, on file with the New Hampshire Department of Transportation and re-submitted to the City in connection with XYZ Dairy’s excavation permit application dated June 7, 2024 (collectively, the “Phase 1 Plans”). The Subdivision Plan, Site Plan, and Phase 1 Plans are collectively referred to as the “River Park Plans”.

B. —

C-E. XYZ Dairy intends to construct all remaining “Phase 1” improvements as shown on the River Park Plans, and has applied for an excavation permit from the City of Lebanon to construct those portions of the Phase 1 improvements located within the City’s right-of-way. Pursuant to the terms of the River Park Approvals (specifically Conditions #5 and #15 as stated in the Notice of Action dated October 24, 2011 for PB#2011-01-FMAJ and paragraphs D.1 and K of the Subdivision Agreement) ~~and Condition #9 as stated in #PB2018-34-SPA and extended by #PB2021-29-EXT~~ and the applicable provisions of the City’s subdivision and site plan review regulations in effect with respect to the River Park Approvals (specifically Sections 7.10 and 14.5 of the Subdivision Regulations) and the applicable City regulations with respect to the issuance of the excavation permit (specifically Section 152-9 of the Code of the City of Lebanon ~~Code of Ordinances~~), XYZ Dairy is obligated to enter into this Agreement with the City for the construction of certain on-site and off-site infrastructure improvements located within the City’s right-of-way described as part of Phase 1 in the River Park Approvals and which have not yet been completed as of the date of this Agreement (collectively, the “Phase 1 Infrastructure Improvements”).

Accordingly, the City and XYZ Dairy agree as follows:

1. Purpose. This Agreement is given pursuant to RSA 674:36, III(b) and the City’s subdivision and site plan review regulations (and other applicable codes), as applicable, for the purpose of providing for and securing to the City the actual construction and installation of the Phase 1 Infrastructure Improvements.

2. Description of Improvements. For purposes of this Agreement and the River Park Approvals (specifically Condition #29 as stated in #PB2021-29-EXT), the Phase 1 Infrastructure Improvements consists only of the following:

(a) Those improvements to Route 10 within the urban compact as shown on the plan entitled “NH Route 10 Improvement Plans, River Park, Lebanon, NH,” 52 sheets, dated July

Commented [TC3]: It is not clear to me when or by whom the “Phase 1” plan set was approved. Can you please clarify?

Commented [TC4]: Same question

Commented [TC5]: Is this correct? It’s not clear to me how the various plan sets (there are 5 identified in this agreement) apply to Phase 1 (and how some of them were approved by the City as noted by my prior 2 comments)

Commented [TC6]: Can you explain the intent here? I’m inclined to take it out - I’m concerned that this language could be interpreted as meaning the Phase 1 infrastructure outside of the compact area does not need to be completed in order to achieve vesting.

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25, 2016, prepared by Vanasse Hangen Brustlin, on file with the New Hampshire Department of Transportation and re-submitted to the City in connection with XYZ Dairy's excavation permit application dated June 7, 2024 (the "Southerly Entrance Improvements");

(b) That portion of River Park Drive sufficient to access Lot 1 and associated improvements on Lots 2 and 3 as shown on the Subdivision Plan and Site Plan (the "River Park Drive Improvements"); and

(c) All storm drainage systems, erosion control, water and sewer lines, underground utility conduit, sidewalks, landscaping, and lighting described as part of Phase 1 in the River Park Approvals and which have not yet been completed as of the date of this Agreement.

For purposes of this Agreement, the Phase 1 Infrastructure Improvements do not include:

(i) Any off-site improvements to Route 10 located outside of the urban compact required to be constructed by XYZ Dairy pursuant to the River Park Approvals concurrently with Southerly Entrance Improvements, the performance security for which is being provided for under separate agreement between XYZ Dairy and the State of New Hampshire Department of Transportation; or

~~(ii)~~ Any infrastructure improvements described in the Performance Bond/Security Agreements by and between XYZ Dairy and the City dated December 15, 2017 and August 8, 2022, all of which improvements have been duly completed by XYZ Dairy and accepted by the City (including, without limitation, those improvements referred to as the "Crafts Avenue Sewer and Roadway Improvements," "Crafts Avenue Extension," and, imminently, the "Cross-Country Connector") and which agreements are null, void and no longer in force or effect on account of such completion and acceptance.

For clarity, the Phase 1 Infrastructure Improvements include all Phase 1 improvements shown on the River Park Plans other than those identified in paragraphs 2.i and 2.ii above.

The total estimated cost of the Phase 1 Infrastructure Improvements is \$3,391,368 (the "Phase 1 Infrastructure Improvements Cost").

3. XYZ Dairy's Obligations. XYZ Dairy shall, at its sole cost and expense, complete the Phase 1 Infrastructure Improvements in accordance with the terms and conditions of the River Park Approvals (the "Obligations"). All terms and conditions of the Subdivision Agreement, including the terms and conditions of the Notices of Action attached thereto, shall be considered incorporated herein and made a part hereof. This Agreement shall remain in full force and effect until one (1) year following the date XYZ Dairy completes the Obligations, in which event this Agreement shall terminate and be null and void and the parties shall have no further rights or obligations hereunder. Nothing in this Agreement shall be deemed to impair or affect XYZ Dairy's obligations to complete any other improvements as may be required by the River Park Approvals or otherwise comply with the terms and conditions thereof.

Commented [TC7]: I don't believe we've accepted the ccc line yet, but we're on track to do so

Commented [TC8]: It's not clear what this is intended to address. Can you provide an example?

4. Amount of Security and Form of Security. The Obligations shall be secured by an irrevocable standby letter of credit, a surety bond, or an escrow account or similar security acceptable to the City (the "Security Instrument"), in the initial amount of the Phase 1 Infrastructure Improvements Costs, to be attached as Exhibit B and made part of this agreement. The Security Instrument shall be incorporated into and become a part of this Agreement. XYZ Dairy shall be liable for the actual cost of the construction and installation of all required improvements regardless of the amount of the Security Instrument. The liability of any bank or financial institution issuing a Security Instrument, however, shall be limited to such and within the timeframe identified in the Notice of Action dated October 12, 2021 for PB2021-29-EXT estimated amount. XYZ Dairy reserves, in its sole discretion, the right to substitute one type of Security Instrument for any other type of Security Instrument, so long as the form of such Security Instrument satisfies the City's requirements for that type of Security Instrument (as determined by the City of Lebanon Planning & Development Department) and the amount of the Security Instrument remains the same.

5. Termination of Obligation: If XYZ Dairy on or before January 2, 2025 performs and completes the Phase I Infrastructure Improvements, the obligation under paragraph 3 of this Agreement will be null and void and the City shall provide written notice to XYZ Dairy that this Performance Bond/Security Agreement is null, void and canceled; otherwise the Agreement shall remain in full force and effect to be enforced by the City according to its terms.

Commented [TC9]: 7 years from date of recording of subdivision plat

~~5.6.~~ Reduction in the Amount of the Security. As the Phase 1 Infrastructure Improvements are substantially completed ~~(as described in Section 6),~~ the amount of the security provided hereunder shall be, at XYZ Dairy's request, reduced by the City so that the remaining security shall be sufficient to cover: (a) the estimated cost of completing the construction of all remaining Phase 1 Infrastructure Improvements; ~~plus~~ (b) the cost of repairs following completion of the Phase 1 Infrastructure Improvements in the amount required under the City's subdivision and site plan review regulations (and other applicable codes); and (c) pursuant to Lebanon City Code Section 152-9 and for a period of two (2) years from the date of completion of the Phase 1 Infrastructure Improvements located within the City's right-of-way, any repair, refilling or regrading that may be required as a result of the excavation to restore the surface of any affected public street to its condition prior to any construction affecting such street. The Subdivider shall be liable for the actual cost of the construction and installation of all required improvements regardless of the amount of the Performance Bond/Security Agreement. (including the estimated cost of any repairing, refilling or regrading required to restore the surface of any affected public street to its condition prior to any construction affecting such street pursuant to Lebanon Code of Ordinances, Section 152-9 (as in effect with respect to the River Park Approvals), for a period of one (1) year from the date of substantial completion of the Phase 1 Infrastructure Improvements).

Commented [TC10]: Replacement language not substantially different except to change the 1 yr timeframe to 2 yrs

7. Statutory Security: This Performance Bond/Security Agreement is given pursuant to RSA 674:44, III(d) and in compliance with the Subdivision Regulations for the purpose of providing for and securing to the City the actual construction and installation of the Phase I Infrastructure Improvements. The amount of the security is based on the estimated costs of the improvements, but such estimate shall not limit the liability of XYZ Dairy for the actual cost of the construction of the improvements. The amount of the security shall, however, limit the liability of any bank issuing an irrevocable letter of credit or a surety company issuing a surety bond to

Commented [TC11]: Partially redundant of paragraph 1, but this was a paragraph from the 2017 security agreement

secure the performance of XYZ Dairy hereunder. The City shall be entitled to payment of the security without any obligation to first seek payment from XYZ Dairy.

~~6. Substantial Completion. For the purpose of this Agreement and the River Park Approvals (specifically Condition #29 as stated in #PB2021-29 EXT), and in accordance with Section 14.1.B of the Lebanon Subdivision Regulations and NH RSA 674:39,III, the Phase 1 Infrastructure Improvements shall be deemed substantially complete when: (a) the off-site Southerly Entrance Improvements have been fully completed in accordance with the plan referred to in Section 1(a); (b) the River Park Drive Improvements have been completed to a minimum asphalt base (i.e. binder course) but otherwise in accordance with the plans referred to in Section 1(b); and (c) all storm drainage systems, erosion control, water and sewer lines, and underground utility conduit described in Section 1(c) have been installed in accordance with the approved plans. The parties expressly acknowledge and agree that, due to the phased nature of the River Park development, it would be impractical and inefficient to require XYZ Dairy, as condition of substantial completion of the improvements required in connection with this phase, to complete the construction of River Park Drive beyond a minimum asphalt base/binder course or to install finished sidewalks, landscaping and lighting along River Park Drive; provided, however, that, as the River Park Approvals stipulate, no Certificate of Occupancy shall be issued for any building on Lot 1 until such finished improvements are completed in accordance with the River Park Approvals or a separate performance security agreement is entered into by XYZ Dairy with respect to the completion of such finished improvements in accordance with Condition #9 as stated in #PB2018-34 SPA.~~

Commented [TC12]: This paragraph would require approval from the Planning Board. Condition 29 refers to just "completion" not "substantial completion". Even if we were to interpret condition 29 as referring to substantial completion, staff has no authority to alter the meaning of that term as set forth in the regulations. Nor do we have authority to alter condition 29.

8. Lot Transfer Restriction. Pursuant to the Performance Bond/Security Agreement by and between XYZ Dairy and the City dated December 15, 2017, a notice of lot transfer restriction dated December 15, 2017 has been recorded in the Grafton County Registry of Deeds at Book 4335, Page 749 ("Notice of Restriction"). Since the security to be posted under this Agreement only covers the remaining Phase 1 Improvements, the Notice of Restriction shall remain in effect and XYZ shall not sell or transfer any individual lots, sites, or units in any phase subsequent to Phase 1 until such time as a Performance Bond/Security Agreement and adequate performance security has been posted for each of the remaining phases. The restrictions set forth in this paragraph, however, shall not restrict or limit XYZ Dairy's right to transfer and convey title to: (a) the subdivision (or so much thereof as has not been previously released from the Notice of Restriction) in its entirety, so long as such transfer or conveyance is made subject to the foregoing restrictions as to individual lots, sites, or units; (b) any lots which have been released from the terms of the Notice of Restriction; (c) Lot 6 as shown on the plans, so long as such transfer or conveyance is made subject to the covenants and deed restrictions or conservation easement governing the common open space now or hereafter granted by the Subdivider pursuant to the conditions of the Planning Board approval; or (d) Lot 7 as shown on the plans, with respect to which no improvements are required to be constructed by the City.

Commented [TC13]: Perhaps one or both of these are moot?

~~7.9. Default. In the event that any of the Obligations are not completed in accordance with the terms and conditions set forth in the River Park Approvals and this Agreement (unless XYZ Dairy has obtained a modification thereof or an extension of any time period for performance of the Obligations in accordance with applicable law), then the City shall have the right to declare this Agreement to be in default and, following thirty (30) days' notice to XYZ Dairy, to demand~~

payment of the Security Instrument for the actual cost of the construction and installation of all required improvements to be then constructed by the City or its agents in accordance with the requirements of the River Park Approvals. Receipt by the City of such payment shall be deemed to constitute the City's assumption of the Obligations. ~~The City shall be entitled to payment hereunder without any obligation to first seek payment from XYZ Dairy. In the event of litigation to enforce this Agreement, the Court shall award to the prevailing party reasonable attorney's fees and court costs incurred in connection therewith.~~ The City shall be entitled to payment of the security without any obligation to first seek payment from XYZ Dairy. In the event of litigation to enforce this Agreement, if the City prevails then the Court shall award to the City reasonable attorney's fees and Court costs incurred in connection therewith.

10. Extension & Inspection Agreement: In accordance with the requirements of condition of approval #4 of the September 9, 2019 Notice of Action, condition of approval #17 of the October 11, 2011 Notice of Action, paragraph I.1 of the Subdivision Agreement, and Chapters 136 and 182 of the City Code, the applicant shall enter into a Water and Sewer Main Extensions and Infrastructure Improvements, Extension and Inspection Agreement with the City prior to the start of any construction activities for which construction inspection is required. The terms and conditions of the executed Water and Sewer Main Extensions and Infrastructure Improvements, Extension and Inspection Agreement shall be considered incorporated herein and made a part hereof.

~~8. — Partial Release of Lot Transfer Restrictions. Within ten (10) business days of the execution of this Agreement, the City shall record in the Grafton County Registry of Deeds an instrument evidencing the release of the Notice of Restriction referred to in Section 8 above with respect to Lots 1 and 2 as shown on the Subdivision Plan. Immediately upon the City's receipt of the Security Instrument required by Section 4 of this Agreement, the City shall execute, acknowledge and deliver to XYZ Dairy a release of the Notice of Restriction dated December 15, 2017 and recorded in the Grafton County Registry of Deeds at Book 4335, Page 749.~~

Dated as of the date first set forth above.

XYZ DAIRY, LLC

By: _____
David Clem, Manager
Duly Authorized

CITY OF LEBANON

By: _____
Sean Mulholland, City Manager
Duly Authorized

EXHIBIT A
SUBDIVISION AGREEMENT

EXHIBIT B
SECURITY INSTRUMENT



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

LEBANON PLANNING BOARD NOTICE OF ACTION #PB2018-34-SPA

Notice is hereby given that on **JANUARY 14, 2019**, the following action was taken by a majority of the Lebanon Planning Board in accordance with the City of Lebanon Site Plan Review Regulations:

Bruce Garland moved that the Lebanon Planning Board finds the application of **XYZ DAIRY, LLC** for a Site Plan Amendment, #PB2018-34-SPA, is complete enough to accept jurisdiction and commence review.

The motion was seconded by Gregory Schwarz. The vote on the motion was 8-0.

Notice is hereby given that on **SEPTEMBER 9, 2019**, the following action was taken by a majority of the Lebanon Planning Board in accordance with the City of Lebanon Site Plan Review Regulations:

Matthew Hall moved that the Lebanon Planning Board **APPROVE** waivers for the application of **XYZ DAIRY, LLC**, #PB2018-34-SPA, from the requirements of Article VI ("Design and Construction Requirements") of the Site Plan Review Regulations, Sections 6.2, 6.5, 6.6 and 6.7, to allow the construction of temporary parking facilities on Lots 3, 4 and 5 of the River Park development.

The motion was seconded by Matthew Cole. The vote on the motion was 5-2, with Ms. Monroe and Mr. Schwarz voting against the motion. Ms. Romano and Ms. Stavis recused themselves from hearing the application.

Notice is hereby given that on **SEPTEMBER 9, 2019**, the following action was taken by a majority of the Lebanon Planning Board in accordance with the City of Lebanon Site Plan Review Regulations:

Matthew Hall moved that the Lebanon Planning Board **APPROVE** the application of **XYZ DAIRY, LLC** for an amendment to the Site Plan approval for the River Park mixed-use development to (i) change the sequence of the project phasing, (ii) increase the number of proposed residential dwelling units from 80 to 125, (iii) relocate the proposed sewer line from Crafts Avenue Ext. across Lot 2, and (iv) allow temporary parking facilities on Lots 2, 3, 4, and 5 for the first three phases of the development, #PB2018-34-SPA, including any and all supplemental submissions and testimony provided for and during the public hearing, and per the conditions of approval noted below.

Approval of the River Park development is in accordance with the Lebanon Zoning Ordinance dated December 5, 1990, last revised July 21, 2010, and the Lebanon Site Plan Review Regulations dated May 9, 1977, last revised November 9, 2009. The phased

build-out of River Park shall be as shown on the map and described in the chart under the heading "NEW PHASING PLAN" on page 5 of this Decision¹ (the "New Phasing Plan"), and is projected to occur over a 15-year period, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.

This Site Plan approval is related to a subdivision plat for River Park that was originally approved by the Planning Board on October 11, 2011 (#PB2011-01-FMAJ), was revised on May 11, 2015 (#PB2015-07-FMAJ) and was recorded in the Grafton County Registry of Deeds on January 2, 2018.

PRIOR NOTICES OF ACTION

River Park, located at North Main Street, Tax Map 44, Lots 3 & 7 and Tax Map 58, Lot 27, in the CBD, IND-L and R-3 zones, was originally approved in 2011, and received extensions and modifications in 2013, 2015, and 2016. This Notice of Action is intended to consolidate and update all prior conditions of Site Plan approval for River Park and, therefore, is intended to supersede and replace the following Notices of Action:

- Notice of Action dated October 24, 2011, approving the site plan review application for XYZ DAIRY, LLC for a seven (7) phase development known as River Park, located at North Main Street, Tax Map 44, Lots 3 & 7 and Tax Map 57, Lot 27, West Lebanon, NH, in the CBD, IND-L and R-3 zones, #PB2010-25-SPR, as shown on plans titled "Site Plans – River Park" (Sheets numbered 1 through 5; D1 through D18; 1-1 through 1-16; 2-1 through 2-21; 3-1 through 3-16; 4-1 through 4-9; 5-1 through 5-7; 6-1 through 6-9; and 7-1 through 7-8), prepared by Holden Engineering & Surveying, Inc., issued for permitting: June 10, 2010, latest issue: May 2, 2011.
- Notice of Action dated September 9, 2013, approving the request of XYZ Dairy, LLC, for an extension of time in order to obtain Building Permits for each phase of a phased development known as River Park, located at North Main Street, Tax Map 44, Lots 3 and 7, and Tax Map 58, Lot 27, in the CBD, IND-L and R-3 zones, #PB2013-22-EXT.
- Notice of Action dated June 8, 2015, approving the application of XYZ DAIRY, LLC for a Site Plan Amendment to amend the layout of Lot 1, including changes to the building footprint, parking layout, vehicular circulation, loading location of the building, landscaping, lighting, and drainage and engineering of the site and associated site improvements, located at North Main Street, Tax Map 44, Lot 3, in the CBD district, #PB2015-10-SPA, plans titled "River Park, Proposed Amendment to Site Plan – Lot 1, West Lebanon, Grafton County, New Hampshire" prepared by Elkus/Manfredi Architects, dated April 13, 2015, and plans titled "Site Plans, River Park, River Park Drive, Lebanon, New Hampshire, Grafton County," prepared by TF Moran, dated May 26, 2015.
- Notice of Action dated November 9, 2015, approving the application XYZ DAIRY, LLC for an extension pursuant to the Site Plan Review Regulations for a 7-phase development known as River Park, located at North Main Street, Tax Map 44, Lots

¹ The New Phasing Plan replaces and supersedes the Master Phasing Plan (Sheet 5 of the Approved Plan Set).

3 and 7, and Tax Map 58, Lot 27, in the CBD, IND-L, and R-3 zones, #PB2015-34-EXT, as requested in a letter from David Clem of Lyme Properties.

- Notice of Action dated November 14, 2016, approving the request of XYZ DAIRY, LLC, for an extension of Site Plan Approval for a seven (7) phase development known as River Park, located at North Main Street, Tax Map 44, Lots 3 and 7, and Tax Map 58, Lot 27, in the CBD, IND-L, and R-3 zones, #PB2016-28-EXT.

The approval documented by this Notice of Action for #PB2018-34-SPA incorporates the following:

- The following approvals granted on October 24, 2011, as part of #PB2010-25-SPR:
 - A conditional use permit for the use of off-lot parking within the development in accordance with Section 607.5 of the Zoning Ordinance as set forth in the "Master Plan-Phasing Parking" table on Sheet 5 of the Approved Plan Set.
 - Waivers for Sections 5.2.A (Statement of Service from Utilities) and Section 7.3.C (Use of Landscape Architect) of the Site Plan Review Regulations for the overall development.
- Any and all supplemental submissions and testimony provided for and during the public hearings for #PB2010-25-SPR, #PB2013-22-EXT, #PB2015-10-SPA, #PB2015-34-EXT, #PB2016-28-EXT, and for the current application, #PB2018-34-SPA.

APPROVED SITE PLANS

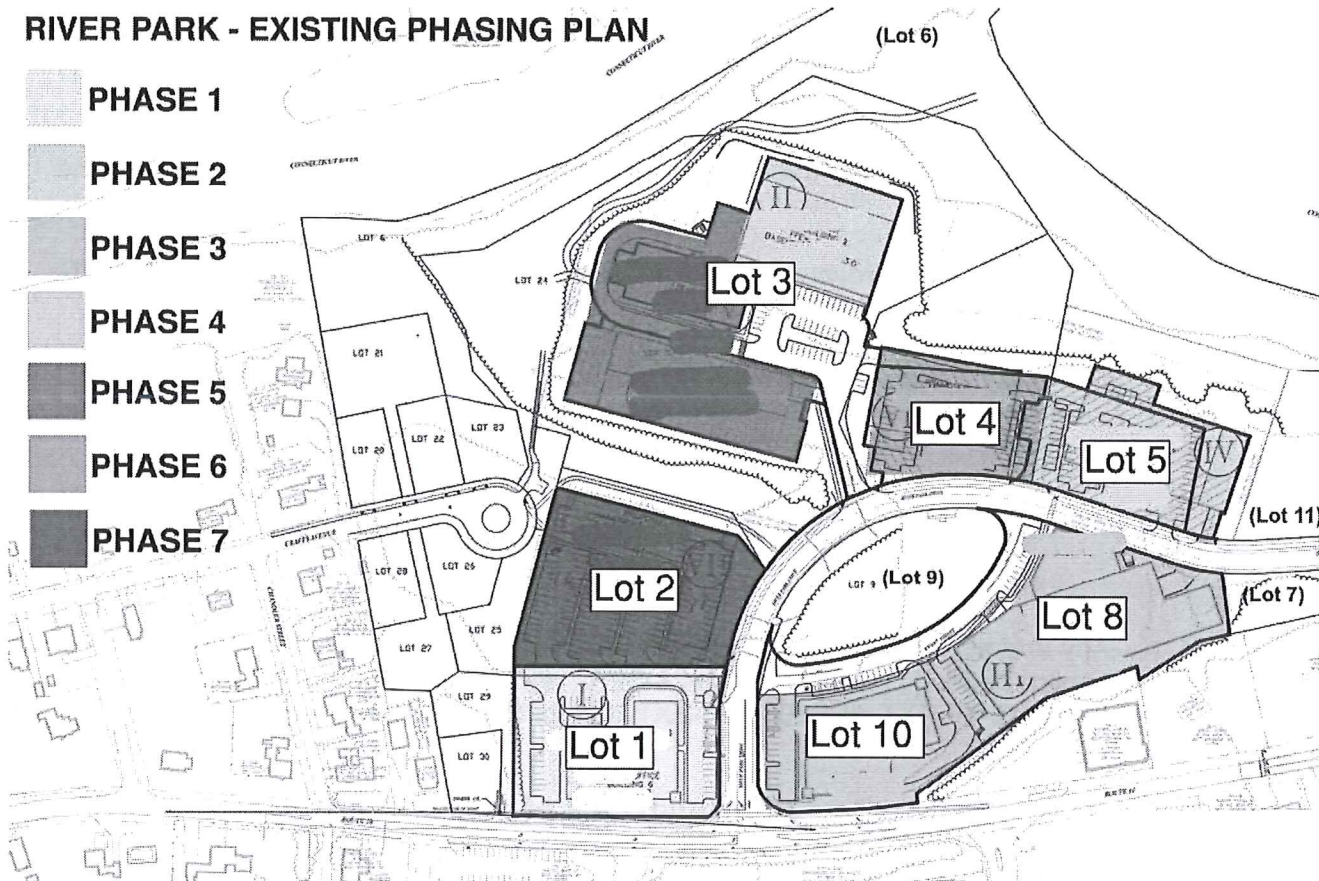
As set forth in the Notices of Action outlined above, the approved site plans for River Park consist of the following:

- Plans titled "Site Plans – River Park" (Sheets numbered 1 through 5; D1 through D18; 1-1 through 1-16; 2-1 through 2-21; 3-1 through 3-16; 4-1 through 4-9; 5-1 through 5-7; 6-1 through 6-9; and 7-1 through 7-8), prepared by Holden Engineering & Surveying, Inc., issued for permitting: June 10, 2010, latest issue: May 2, 2011 ("Approved Plan Set").
- Plans titled "River Park, Proposed Amendment to Site Plan – Lot 1, West Lebanon, Grafton County, New Hampshire" prepared by Elkus/Manfredi Architects, dated April 13, 2015, and plans titled "Site Plans, River Park, River Park Drive, Lebanon, New Hampshire, Grafton County," prepared by TF Moran, dated May 26, 2015. [These plans sets supersede and replace Sheets 1-1 through 1-16 of the Approved Plan Set].

[continued on following page]

PRIOR PHASING PLAN

River Park was originally approved as a seven (7) phase project as follows:

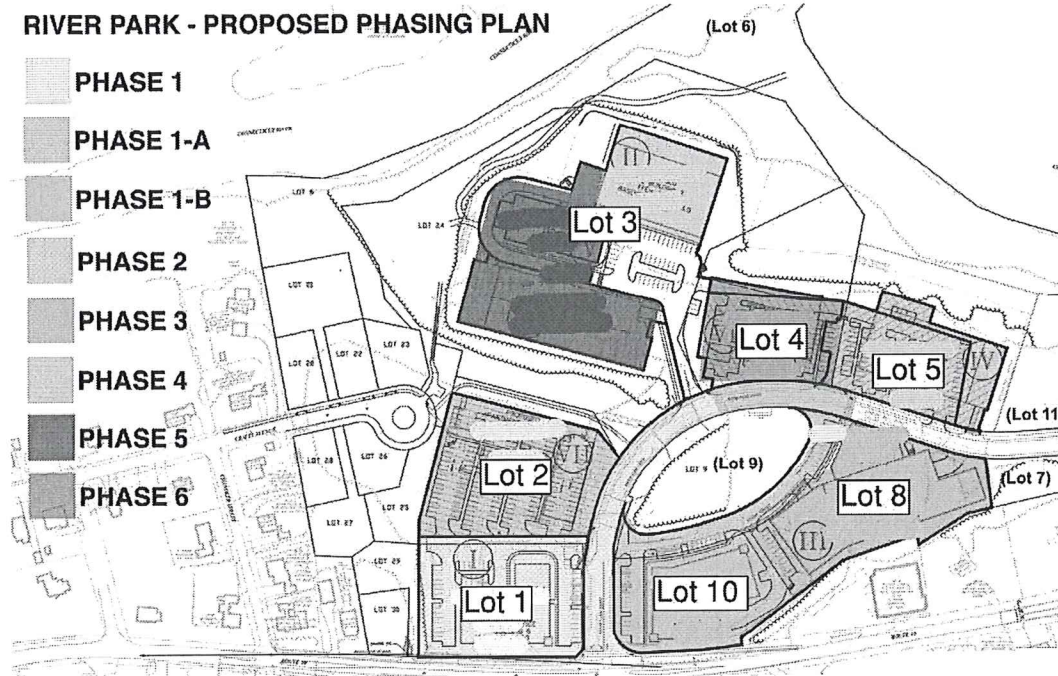
RIVER PARK - EXISTING PHASING PLAN

PRIOR PHASING -- APPROVED ON 10/24/11	
Phase	Improvements
1	48,750-square-foot building for office and retail use located on Lot 1 with temporary parking located on Lot 2. Phase 1 also includes construction of a portion of the development roadway sufficient to access the proposed building, the southerly development entrance intersection, the extension of Crafts Avenue, and the installation of water and sewer lines necessary for this portion of the site.
2	178,650-square-foot building for laboratory/office use located on Lot 3 with temporary parking located on Lots 4 and 5. Phase 2 also includes the construction of the remainder of the development roadway and the northerly access intersection.
3	95,800-square-foot building for office and retail use located on Lot 10; a 23,000-square-foot building for office and retail use and a 585-space parking garage located on Lot 8, and construction of proposed Lyman Street.
4	153,120-square-foot building for laboratory/office use located on Lot 5.
5	81,500-square-foot building for laboratory/office use and an 808-space parking garage located on Lot 3.
6	133,200-square-foot building for laboratory/office use located on Lot 4.
7	125,125-square-foot building for 80 units of multi-family housing located on Lot 2.

NEW PHASING PLAN

This Notice of Action approves the rephasing of the River Park development, as follows:

RIVER PARK - PROPOSED PHASING PLAN



NEW PHASING	
Phase	Improvements
1	46,925 ² -square-foot building for office and retail use located on Lot 1 with temporary parking located on Lot 2 and Lot 3. Phase 1 also includes construction of a portion of the development roadway sufficient to access Lot 3, the southerly development entrance intersection, the extension of Crafts Avenue, and the installation of water and sewer lines necessary for this portion of the site.
1-A	125,125-square-foot building for 125 units of multi-family housing located on Lot 2, and the construction of a temporary parking lot on Lot 3 and Lot 4. Phase 1-A also includes the extension of the development roadway and construction of proposed Lyman Street.
1-B	95,800-square-foot building for office and retail use located on Lot 10 with temporary parking on Lot 3, Lot 4, and Lot 5.
2	178,650-square-foot building for laboratory/office use located on Lot 3 with temporary parking located on Lot 3, Lot 4, and Lot 5. Phase 2 also includes the construction of the remainder of the development roadway and the northerly access intersection.
3	23,000-square-foot building for office and retail use and a 585-space parking garage located on Lot 8.
4	153,120-square-foot building for laboratory/office use located on Lot 5.
5	81,500-square-foot building for laboratory/office use and an 808-space parking garage located on Lot 3.
6	133,200-square-foot building for laboratory/office use located on Lot 4.

² Reduced from 48,750 sq. ft. per Notice of Action dated June 8, 2015, #PB2015-10-SPA. The applicant may apply to the Planning Board for a Site Plan Amendment to reallocate the 1,825 sq. ft. difference towards another building or buildings in the River Park development.

CONDITIONS OF APPROVAL

GENERAL CONDITIONS-PRECEDENT TO THE ISSUANCE OF A BUILDING PERMIT FOR EACH PHASE:

1. The applicant shall submit final designs, including construction drawings, of all infrastructure features associated with each phase, including proposed on- and off-site roadway and parking areas, sidewalks, water and sewer utilities, and storm drainage systems, to the City Engineer for approval, which shall not be unreasonably withheld.
2. The applicant has submitted sufficient site and building information to obtain Site Plan approval for development of the site. However, the applicant shall be required to submit updated site plans, building elevations, and phasing information sufficient to demonstrate compliance with the approval to the City for review and approval by the Planning Department, prior to the issuance of Building Permits for each phase and prior to the start of any construction activities for development shown or described in all remaining phases as depicted on the New Phasing Plan. For purposes of this decision, construction activities shall include any construction, excavation, or other site work associated with the construction or installation of buildings, roadways, parking, water, sewer, or storm drainage infrastructure. All such plans and information shall be in accordance with the Site Plan Review Regulations dated last revised November 9, 2009. Such Planning Department review shall be for the purpose of ensuring that the proposed building design and uses are in substantial conformance with the approved phased development project and with the Site Plan Review Regulations referenced above.
3. The applicant shall complete all required improvements for all approved phases in accordance with the New Phasing Plan and in accordance with this decision, except that the applicant, upon written notice to the Planning Board, may elect to commence Phase 3 (including the 585-space parking garage located on Lot 8) at any time prior to the date referenced in Condition #18-1. In so doing, the applicant may commence Phase 3 prior to any one or more of the phases preceding Phase 3 in the sequence set forth in the New Phasing Plan. For purposes of this decision, the commencement dates referenced on the New Phasing Plan and in this decision shall be deemed to be the date by which a Building Permit shall have been applied for with stamped construction drawings prepared by a licensed architect and engineer for that phase, pursuant to Section 4.9.C(4) of the Site Plan Review Regulations, and the phasing deadline is tolled until the Building Permit is issued. If the applicant anticipates being unable to meet any time deadline(s) set forth in this decision with respect to any phase(s), the applicant shall submit an updated phasing schedule to the Planning Board for review and approval in accordance with Section 4.9.E of the Site Plan Review Regulations. In determining whether to grant any requested extensions, the Board shall consider the totality of the circumstances, including the extent and complexity of the conditions-precedent, and whether the need for more time is attributable to circumstances beyond the control of the applicant, rather than to the applicant's neglect or failure to proceed with reasonable promptness.
4. Prior to the start of any construction activities for which construction inspection is required pursuant to this decision or any applicable ordinance or code for each phase of the project, the City shall retain the services of an independent 3rd party

inspector, for which the applicant shall be responsible for all inspection fees related to construction and installation of on- and off-site roadways, parking, sidewalks, water and sewer utilities, storm drainage, and erosion control, in accordance with Chapter 181 of the City Code and Section 14 of the Subdivision Regulations unless waivers have been granted. The applicant shall provide funding for inspection services in a form acceptable to the City. Third party engineer inspection reports and as-built drawings provided by the applicant (using NH State Plane Coordinate system), including tie sheets and Northing and Easting coordinates and elevations of underground utilities, shall be reviewed and approved by the City Engineer, prior to acceptance of any utility improvements by the City and all inspection reports shall be made available to the applicant.

5. Edge-of-Disturbance fencing shall be installed and maintained before and during any site work for each phase under construction, to be verified by the City Engineer or City's third-party inspector on site.
6. The applicant shall be required to have at least one fire hydrant operational within the development prior to the issuance of any Building Permit for structural improvements (excluding the building foundation) to the satisfaction of the Lebanon Fire Department. Note: the Lebanon Fire Department has approved the fire hydrant on Crafts Avenue extension as satisfaction of this condition.
7. Temporary parking facilities.
 - a. Temporary parking facilities are approved in accordance with the chart attached hereto as Exhibit "A".
 - b. Prior to the issuance of a building permit for any phase involving the construction of a temporary parking facility, the applicant shall provide the Planning & Development Department with plans for the proposed temporary parking facility, together with an operation and maintenance plan.
 - c. Each temporary parking facility shall be designed to ensure the safe movement of vehicles and pedestrians to the satisfaction of the Director of the Department of Public Works and the Director of the Planning Department, which shall not be unreasonably withheld. It shall be the responsibility of the applicant to maintain each temporary parking facility in accordance with the operation and maintenance plan.
 - d. The temporary parking identified in Exhibit A may be used until such parking is replaced by the permanent parking garage included in Phase 3 or December 31, 2038, whichever is earlier.

GENERAL CONDITIONS-PRECEDENT TO THE ISSUANCE OF CERTIFICATES OF OCCUPANCY FOR EACH PHASE:

Temporary Certificates of Occupancy:

8. A water flow test shall be completed on the new water main within the development as soon as the water main is substantially complete and prior to any occupancy of any new buildings within the subdivision. Such test is for the purpose of designing

fire suppression sprinkler systems for each building and shall be witnessed and approved by the Lebanon Fire Department.

- 8a. The subdivision plat shall be recorded in the Grafton County Registry of Deeds prior to any occupancy of any new buildings within the subdivision. Note: The River Park Subdivision plat was filed on December 27, 2017 and recorded on January 2, 2018 in the Grafton County Registry of Deeds.
- 9. Prior to the issuance of any Certificate of Occupancy for each phase, the applicant shall enter into a Performance Security Agreement, pursuant to Section 8.2 of the Site Plan Review Regulations for any unfinished and outstanding improvements, unless waivers have been granted, that are required for the current development phase, both on- and off-site, including, but not limited to: parking and sidewalk improvements, sewer and water utilities, storm drainage systems, landscaping, and lighting, in an amount considered adequate by the Department of Public Works, and in a form satisfactory to the City Attorney. The Performance Security Agreement shall be secured by a surety bond, a letter of credit, or an escrow account.
- 10. Prior to the issuance of any Certificate of Occupancy for each phase, the applicant shall be required to provide the City with a copy of a recorded deed or easement, a 99-year lease, or other legal instrument acceptable to an attorney representing the City for off-lot parking in accordance with Section 607.5.A(2) of the Zoning Ordinance to ensure that the occupants of each phase have adequate on-site or off-site parking at all times.

Final Certificates of Occupancy:

- 11. Prior to the issuance of a final Certificate of Occupancy for each phase, the applicant shall dedicate the completed water mains and hydrants within the current development phase, excluding service connections beyond the curb shut-off valves, to the City for ownership and maintenance, subject to any appropriate easements. Said conveyance and easements shall be approved by the City Attorney and the Department of Public Works and recorded in the Grafton County Registry of Deeds prior to acceptance of any utility improvements by the City.
- 12. Prior to the issuance of a final Certificate of Occupancy for each phase, the applicant shall comply with all other applicable provisions of Chapter 181 of the City Code, to the satisfaction of the Department of Public Works.
- 13. Prior to the issuance of a final Certificate of Occupancy for each phase, the applicant shall provide a digital as-built record drawing for each lot (Cad .dwg format using the NH State Plane Coordinate System).

SPECIFIC CONDITIONS FOR PHASE 1:

- 14-1. The Applicant shall ensure that all trees are a minimum of ten (10) ft. from the water and sewer mains when planted.
- 14-2. The construction of Phase 1 infrastructure improvements, which commenced in 2018, shall be completed within 5 years from the date of the Planning Board's final

subdivision approval, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.

- 14-3. This condition was originally Condition #14-2 in the October 24, 2011 Notice of Action, and was obviated by the Planning Board's Notice of Action dated June 8, 2015 (#PB2015-10-SPA). It is included below for historical purposes only:

Prior to the issuance of a Building Permit for Phase 1 of the development, the applicant shall provide two complete sets of revised plans to the Planning Department, depicting the following plan changes:

- a. Sheet 1 of the approved Site Plan sets shall be revised to include the tax map and lot number and abutter name and address for the adjacent islands within the Connecticut River, which are owned by the State of New Hampshire.
- b. Sheets 2 & 3 of the approved Site Plan sets shall be revised to eliminate the reference to "Lot 6" within the boundaries of proposed Lot 21.
- c. Sheet 3 of the approved Site Plan sets shall be revised to relocate the Surveyor's signature block and to properly label Lot 21.
- d. As proposed by the applicant in a letter to the Planning Board dated July 19, 2011, the Phasing Notes on Sheet 5 of the approved Site Plan sets shall be revised to push back by one year the dates of commencement for each phase of the overall development.
- e. Sheets 1-9 and 1-11, and any other applicable plan sheets, shall be revised to depict bollards or other safety measures around all propane tanks that are exposed to vehicle traffic to the satisfaction of the Lebanon Fire Department.

- 14-4. Prior to the issuance of a Building Permit for Phase 1 of the development, the applicant shall obtain all required State approvals including, but not limited to, the following:

- NHDES Alteration of Terrain Permit
- NHDES approval for Sewage Discharge

Note: this requirement has already been satisfied. Alteration of Terrain Permit #AoT-0994 dated October 6, 2015 and Sewage Discharge Permit #D2015-0802 dated September 10, 2015, have been issued by NH DES for Phase 1.

- 14-5. The requirements of Sections 6.2.B(1) of the Site Plan Review Regulations are waived for improvements on Lot 2 for Phase 1. See *also* Condition 15-3.

- 14-6. As proposed by the applicant, the southerly development entrance improvements shall be constructed as part of Phase 1 of the development. If a Traffic Signal Warrant Analysis for the southerly development entrance indicates that signalization of the intersection will be required during any phase of the development, the applicant shall be required to install and activate traffic signal improvements when actual traffic conditions warrant such implementation, pursuant to Condition 14-8 of this decision. Note: the applicant has provided a Traffic Signal Warrant Analysis as required by this condition.

- 14-7. As recommended in Phase "A" of the applicant's Traffic Impact and Site Access Study, prepared by Holden Transportation Engineering, dated August 17, 2010, the applicant shall be required to implement traffic signal timing optimization improvements at the intersection of Main Street/Bridge Street/Dana Street within 6 months following the issuance of any Certificate of Occupancy for Phase 1 of the development to the satisfaction of the Department of Public Works which shall not be unreasonably withheld. Prior to issuing any Certificate of Occupancy for Phase 1, the applicant shall provide the City with an acceptable performance security in an amount sufficient to guarantee the completion of the traffic signal timing update as required. Any performance security required under this condition for Phase 1 shall be separate from any performance security required by Condition 9 of this decision.
- 14-8. The applicant shall be required to monitor traffic volumes and distribution patterns at both the northerly and southerly development entrances to ensure the adequacy of proposed mitigation measures as outlined in the Traffic Impact and Site Access Study, prepared by Holden Transportation Engineering, dated August 17, 2010, and to determine when signalization of the southerly development intersection might be required, based on the Traffic Signal Warrant Analyses to be prepared by the applicant and provided to the City. Such monitoring shall be conducted within 6 months following the issuance of any Certificate of Occupancy for Phase 1 and for each later phase to the satisfaction of the Department of Public Works. The applicant shall be required to install and activate traffic signal improvements, to the satisfaction of the Department of Public Works, when actual traffic conditions warrant such implementation. Prior to issuing any Certificate of Occupancy for Phase 1 and for each later phase, the applicant shall provide the City with an acceptable performance security in an amount sufficient to guarantee the completion of the traffic monitoring as required. Any performance security required under this condition for Phase 1 and for each later phase shall be separate from any performance security required by Condition 9 of this decision. Note: the applicant has provided a Traffic Signal Warrant Analysis as required by this condition.
- 14-9. Prior to the issuance of a Building Permit, the applicant shall submit an updated Site Plan that reflects the correct and updated phasing schedule as approved as part of the Subdivision Amendment approved by the Planning Board May 11, 2015. Note: With the approval of the New Phasing Plan, this condition is no longer applicable.
- 14-10. Prior to the issuance of a Building Permit, the applicant shall submit an updated landscaping plan, to the satisfaction of the Planning Department, with a table indicating the proposed number, size, and species names of all the proposed plantings for Lot 1, as well as updating parking shading calculations for Lot 1 only. Note: the applicant has satisfied this condition.
- 14-11. Prior to the issuance of a Building Permit, the applicant shall submit an updated lighting plan showing the number of proposed light poles for Lot 1 and the location of any proposed lighting on the building façade, if applicable. The applicant shall also confirm that the lighting intensity on the residential lots to the south does not exceed 0.1 foot-candles, to the satisfaction of the Planning Department. Note: the applicant has satisfied this condition.

- 14-12. Prior to the issuance of a Building Permit, the applicant shall obtain approval from the Fire Department regarding the turning radius of the fire trucks and location of the proposed fire hydrants on Lot 1, and all plans shall reflect the final and approved details. Note: the applicant has satisfied this condition.
- 14-13. The applicant shall provide appropriate signage and/or pavement markings to identify the one-way circulation of the proposed driveway on site to the satisfaction of the City Engineer. Note: the applicant has satisfied this condition.
- 14-14. The applicant shall provide an accurate drainage report that shall reflect current and proposed drainage, to the satisfaction of the City Engineer. Note: the applicant has satisfied this condition.
- 14-15. The applicant shall provide a plan that demonstrates a lack of conflict between overhead utilities and landscaping, to the satisfaction of the City Engineer. Note: the applicant has satisfied this condition.
- 14-16. The requirements of Sections 5.1.E(13) and 6.2.B of the Site Plan Regulations are waived as was requested by the applicant in connection with the Site Plan Review approval for #PB2015-10-SPA.

SPECIFIC CONDITIONS FOR PHASE 1-A:

- 15-1. As proposed by the applicant, the construction of Phase 1-A improvements shall commence before the end of 2023 and shall be completed within 2 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 15-2. The applicant shall obtain all required State approvals including, but not limited to, the following:
- NHDES Alteration of Terrain Permit, if applicable
 - NHDES approval for Sewage Discharge
- 15-3. The requirements of Section 6.2.B(1) of the Site Plan Review Regulations are waived for improvements on Lot 2 for Phase 1-A.

SPECIFIC CONDITIONS FOR PHASE 1-B:

- 16-1. As proposed by the applicant, the construction of Phase 1-B improvements shall commence before the end of 2024 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 16-2. The applicant shall obtain all required State approvals including, but not limited to, the following:
- NHDES Alteration of Terrain Permit
 - NHDES approval for Sewage Discharge
- 16-4. The requirements of Section 6.2.B(6) of the Site Plan Review Regulations are waived for improvements on Lot 8 for Phase 1-B.

SPECIFIC CONDITIONS FOR PHASE 2:

- 17-1. As proposed by the applicant, the construction of Phase 2 infrastructure improvements shall commence before the end of 2026 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 17-2. Prior to the issuance of a Building Permit for Phase 2 of the development, the applicant shall provide two complete sets of revised plans to the Planning Department, depicting the following plan changes:
 - a. Landscaping on Sheet 2-15 shall be revised and foundation plantings added along the westerly side of the parking garage structure to be consistent with the relocated garage #2 layout as depicted on Sheet 5-4, dated last revised May 2, 2011.
- 17-3. The applicant shall obtain all required State approvals including, but not limited to, the following:
 - NHDES Alteration of Terrain Permit
 - NHDES approval for Sewage Discharge
 - NHDES Comprehensive Shoreland Protection permit
- 17-4. As proposed by the applicant, the northerly development entrance improvements shall be constructed as part of Phase 2 of the development. Prior to the issuance of a Building Permit and prior to the start of any construction activities for Phase 2, the applicant shall have received approval from the NH Department of Transportation for the northerly development entrance and any other improvements within the portion of NH Route 10 under NHDOT jurisdiction. Signalization of the northerly development entrance shall be subject to approval and requirement of the NH Department of Transportation.
- 17-5. As recommended in Phase "A" of the applicant's Traffic Impact and Site Access Study, prepared by Holden Transportation Engineering, dated August 17, 2010, the applicant shall be required to implement traffic signal timing optimization improvements at the intersections of Main Street/Tracy Street and Main Street/South Main Street/Maple Street within 6 months following the issuance of any Certificate of Occupancy for Phase 2 of the development. Prior to issuing any Certificate of Occupancy for Phase 2, the applicant shall provide the City with an acceptable performance security in an amount sufficient to guarantee the completion of the traffic signal timing optimization as required. Any performance security required under this condition for Phase 2 shall be separate from any performance security required by Condition 9 of this decision.

SPECIFIC CONDITIONS FOR PHASE 3:

- 18-1. As proposed by the applicant, the construction of Phase 3 improvements shall commence before the end of 2028 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 18-2. The applicant shall obtain all required State approvals including, but not limited to, the following:

- NHDES Alteration of Terrain Permit
- NHDES approval for Sewage Discharge

- 18-3. As recommended in Phase "B" of the applicant's Traffic Impact and Site Access Study, prepared by Holden Transportation Engineering, dated August 17, 2010, the applicant shall be required to make a payment to the City in the amount of \$274,554.00 toward design, construction and installation by the City of geometric improvements and/or traffic signal upgrades as outlined in the Study for the intersection of Main Street/Bridge Street/Dana Street intersection and/or traffic signal upgrades at Main Street/Tracy Street and Main Street/South Main Street/Maple Street intersections prior to the issuance of any Certificate of Occupancy for Phase 3 of the development.

If the City elects to pursue geometric improvements at the Main Street/Bridge Street/Dana Street intersection, the City shall determine whether any existing on-street parking spaces on Main Street will be lost due to construction of these intersection improvements. If existing on-street parking spaces are to be lost, the applicant shall, prior to the issuance of any Certificate of Occupancy for Phase 3, be required to pay to the City an amount equal to \$4,700.00 per space for each lost parking space, which is the amount estimated by the City needed to pay for land and construction costs necessary to replace such lost parking. Any funds received by the City from the applicant shall be used by the City to study the parking needs of the West Lebanon Village Central Business District and to identify locations for and/or to reconstruct such lost parking spaces. Any funds not expended by the City within a period of 6 years from receipt shall be returned to the applicant in accordance with RSA 674:21,V(j).

- 18-4. The applicant shall be required to monitor and update traffic signal timing optimization along Main Street as individual phases of the development are completed and occupied to ensure optimal traffic operations through the Main Street corridor for the duration of the project build-out. Such monitoring shall be conducted within 6 months, and updates shall be implemented within 1 year, following the issuance of any Certificate of Occupancy for Phase 3 and for each later phase, to the satisfaction of the Department of Public Works. Prior to issuing any Certificate of Occupancy for Phase 3 and for each later phase, the applicant shall provide the City with an acceptable performance security in an amount sufficient to guarantee the completion of the traffic signal timing monitoring and updates, as required. Any performance security required under this condition for Phase 3 and each later phase shall be separate from any performance security required by Condition 9 of this decision.
- 18-5. The requirements of Section 6.2.B(6) of the Site Plan Review Regulations are waived for improvements on Lot 8 for Phase 3.

SPECIFIC CONDITIONS FOR PHASE 4:

- 19-1. As proposed by the applicant, the construction of Phase 4 improvements shall commence before the end of 2030 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.

- 19-2. The applicant shall obtain all required State approvals including, but not limited to, the following:
- NHDES Alteration of Terrain Permit, if applicable
 - NHDES approval for Sewage Discharge
 - NHDES Comprehensive Shoreland Protection permit

SPECIFIC CONDITIONS FOR PHASE 5:

- 20-1. As proposed by the applicant, the construction of Phase 5 improvements shall commence before the end of 2032 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 20-2. Prior to the issuance of a Building Permit for Phase 5 of the development, the applicant shall provide two complete sets of revised plans to the Planning Department, depicting the following plan changes:
- a. Landscaping on Sheet 5-7 shall be revised and foundation plantings added along the westerly side of the parking garage structure to be consistent with the relocated garage #2 layout as depicted on Sheet 5-4, dated last revised May 2, 2011.
- 20-3. The applicant shall obtain all required State approvals including, but not limited to, the following:
- NHDES Alteration of Terrain Permit, if applicable
 - NHDES approval for Sewage Discharge
 - NHDES Comprehensive Shoreland Protection permit

SPECIFIC CONDITIONS FOR PHASE 6:

- 21-1. As proposed by the applicant, the construction of Phase 6 improvements shall commence before the end of 2035 shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 21-2. The applicant shall obtain all required State approvals including, but not limited to, the following:
- NHDES Alteration of Terrain Permit, if applicable
 - NHDES approval for Sewage Discharge
 - NHDES Comprehensive Shoreland Protection permit

GENERAL CONDITIONS OF APPROVAL:

22. The applicant shall implement and maintain NHDES Site Specific Best Management Practices before, during, and after construction.
23. All proposed streets, sidewalks, water and sewer mains, and service lines shall be constructed pursuant to the City's standards.

-
24. All required landscape plantings shall meet the minimum size requirements for such plantings set forth in Section 6.2.B of the Site Plan Review Regulations at the time of installation.
25. Any light fixtures used to illuminate signage, including building-mounted signage, shall be installed to light the signs from above and shall conform to the City Site Plan Review Regulations.
26. In accordance with the City's Impact Fee Ordinance fee schedule adopted on September 13, 2010, this application is exempt from impact fees for a period of 5 years from the date of the Planning Board's final approval. Building permits obtained after the 5-year period shall be subject to impact fees in existence at the time of the Building Permit application submission. [Note: The River Park subdivision plat (#PB2011-01-FMAJ) was recorded on January 2, 2018, representing the final approval for the subdivision and starting the 5-year exemption period, which shall expire on January 2, 2023.]
27. The applicant shall provide to the City copies of any agreements, memoranda of understanding, or licenses granting permission for Advance Transit and other local transit service providers to utilize the River Park development as a transfer point for existing and future transit routes serving West Lebanon. Any such documents shall be provided as soon as practicable and prior to the relocation of transit services from Main Street to the River Park development.
28. The applicant is encouraged to work with tenants and residents of the River Park development to implement Transportation Demand Management measures, including flexible work hours, incentives for carpooling, adequate parking and showers and changing rooms for bicyclists, and other measures, to reduce peak hour travel and reliance on single-occupancy vehicles.
29. Effect of Approval. This approval is a final, conditional site plan approval for a "phased development" under Section 4.9 of the Site Plan Review Regulations and is a final decision of the Planning Board for purposes of RSA 677:15, I. As set forth in Section 4.10(C) of those Regulations, the deadlines for the construction of improvements within each phase shall be as stated in the approved phasing plan, rather than the 1-year period under Section 4.10(A). It is the intent and effect of this approval, subject to the satisfactory completion of the financial security requirements set forth in Condition #5 of the Final Major Subdivision approval (#PB2011-01-FMAJ) for the development, that upon completion of the Phase 1 infrastructure improvements within 5 years of the final subdivision approval, as set forth in Condition #14-2 above, the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II, and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect this phased development, provided that the applicant and its successors-in-interest continue to comply with all conditions of this approval and of the Planning Board's approval of Final Major Subdivision application #PB2011-01-FMAJ, including the time limits set forth in the phasing plan, unless such a limit is extended for good cause by the Planning Board, acting upon an application submitted prior to the expiration of such limit.

PLANNING BOARD NOTICE OF ACTION

167-197 North Main Street

#PB2018-34-SPA

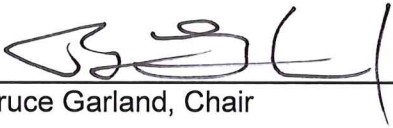
September 9, 2019

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30. If any dispute arises over the interpretation or application of any of the above conditions, such dispute shall be resolved by the Planning Board itself after notice and public hearing.

The motion was seconded by Matthew Cole. The vote on the motion was 5-2, with Ms. Monroe and Mr. Schwarz voting against the motion. Ms. Romano and Ms. Stavis recused themselves from hearing the application.

THE CITY OF LEBANON PLANNING BOARD

By:  DATE: 10/22/19
Bruce Garland, Chair

River Park

Master Plan – Proposed Phasing Parking

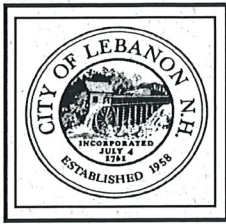
Color Code		<u>Lot #</u>	<u>Building#</u>	<u>Modified Parking Required</u>	<u>Onsite Parking Provided</u>	<u>Net Temporary Parking Needed</u>	<u>Temporary Parking Location ****</u>
	Phase 1	1	1	149	42	107	Lot 3 (120 spaces)
	Phase 1-A	2	8	132*	73	59	Lot 3 & 4 (225 spaces)
	Phase 1-B	10	3	285	30	255	Lot 3, 4, 5 (325 spaces + shared parking reduction credit of 123 spaces)
	Phase 2	3	5	209	33	0	
	Phase 3	8	Garage 1	(585)***	585	0	Garage #1 must be completed prior to Bldg 5 Certificate of Occupancy
			4	70	19	0	
	Phase 4	5	7	180	6	0	
	Phase 5	3	Garage 2	(808)***	808	0	
			2	96	0	0	
	Phase 6	4	6	156	6	0	
				<u>1276**</u>	<u>209 surface</u> <u>1393 Garages 1+2</u>	<u>421</u>	

*Assumes 125 units X 1.5 spaces per unit required X .070 (approved reduction factor)

** Proposed totals 1276 spaces required due to increase in apartment units from 80 to 125 (Existing totals 1233 spaces)

*** Garage 1 and 2 total 1393 spaces

**** Assumes Waiver Request is granted



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

NOTICE OF ACTION LEBANON PLANNING BOARD

Notice is hereby given that on **October 12, 2021**, the following action was taken by a majority of the Lebanon Planning Board in accordance with the City of Lebanon Site Plan Review Regulations:

Matthew Hall moved that the Lebanon Planning Board finds the application of XYZ Dairy, LLC for an extension of the timelines set forth in the Planning Board Notice of Action dated September 9, 2019 (PB2018-34-SPA) for the commencement of construction and completion of the River Park development, (PB2021-29-EXT) is complete enough to accept jurisdiction and commence review.

The motion was seconded by Jeremy Rutter. The vote on the motion was unanimous in favor, 6-0.

Notice is hereby given that on **October 12, 2021**, the following action was taken by a majority of the Lebanon Planning Board in accordance with the City of Lebanon Site Plan Review Regulations:

Matthew Hall moved that the Lebanon Planning Board **APPROVE** the application of XYZ Dairy, LLC, PB2021-29-EXT, for a two-year extension of the timelines set forth in the Planning Board Notice of Action dated September 9, 2019 (PB2018-34-SPA) ("2019 Notice of Action"). Consequently, the following conditions of approval from the 2019 Notice of Action are hereby revised as follows (the text of each condition to be removed is struck through; the new language is in bold and underlined):

- 14-2. The construction of Phase 1 infrastructure improvements, which commenced in 2018, shall be completed within 5 7 years from the date of the Planning Board's final subdivision approval, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 15-1. As proposed by the applicant, the construction of Phase 1-A improvements shall commence before the end of 2023 2025 and shall be completed within 2 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 16-1. As proposed by the applicant, the construction of Phase 1-B improvements shall commence before the end of 2024 2026 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 17-1. As proposed by the applicant, the construction of Phase 2 infrastructure improvements shall commence before the end of 2026 2028 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 18-1. As proposed by the applicant, the construction of Phase 3 improvements shall commence before the end of 2028 2030 and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.

PLANNING BOARD NOTICE OF ACTION

River Park Drive (Tax Map 44, Lots 3 & 7 & Tax Map 58, Lot 27)

PB2021-29-EXT

October 12, 2021

Page 2 of 2

- 19-1. As proposed by the applicant, the construction of Phase 4 improvements shall commence before the end of 2030 **2032** and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 20-1. As proposed by the applicant, the construction of Phase 5 improvements shall commence before the end of 2032 **2034** and shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
- 21-1. As proposed by the applicant, the construction of Phase 6 improvements shall commence before the end of 2035 **2037** shall be completed within 5 years of commencement, unless the applicant requests and receives an extension of time for such build-out from the Planning Board.
26. In accordance with the City's Impact Fee Ordinance fee schedule adopted on September 13, 2010, this application is exempt from impact fees for a period of 5 years from the date of the Planning Board's final approval. Building permits obtained after the 5-year period shall be subject to impact fees in existence at the time of the Building Permit application submission. [Note: The River Park subdivision plat (#PB2011-01-FMAJ) was recorded on January 2, 2018, representing the final approval for the subdivision and starting the 5-year exemption period, which. The 5-year exemption period shall now expire on January 2, 2023 **2025**.]
29. Effect of Approval. This approval is a final, conditional site plan approval for a "phased development" under Section 4.9 of the Site Plan Review Regulations and is a final decision of the Planning Board for purposes of RSA 677:15, I. As set forth in Section 4.10(C) of those Regulations, the deadlines for the construction of improvements within each phase shall be as stated in the approved phasing plan, rather than the 1-year period under Section 4.10(A). It is the intent and effect of this approval, subject to the satisfactory completion of the financial security requirements set forth in Condition #5 of the Final Major Subdivision approval (#PB2011-01-FMAJ) for the development, that upon completion of the Phase 1 infrastructure improvements within 5 **7** years of the final subdivision approval, as set forth in Condition #14-2 above, the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II, and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect this phased development, provided that the applicant and its successors-in-interest continue to comply with all conditions of this approval and of the Planning Board's approval of Final Major Subdivision application #PB2011-01-FMAJ, including the time limits set forth in the phasing plan, unless such a limit is extended for good cause by the Planning Board, acting upon an application submitted prior to the expiration of such limit.

The motion was seconded by Jeremy Rutter. The vote on the motion was unanimous in favor, 6-0.

THE CITY OF LEBANON

By: 
Planning Board Chair

DATE: 3/28/2022



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

NOTICE OF ACTION LEBANON PLANNING BOARD PB2024-34-EXT

Notice is hereby given that on **November 12, 2024**, the following action was taken by the Lebanon Planning Board:

Richard Ford Burley moved to **DENY** the extension request, because the applicant has not in the opinion of the Board demonstrated that the need for more time is attributable to unusual circumstances beyond the control of the applicant, or that there is otherwise good cause to grant a two-year extension. A written decision, consistent with the draft prepared by staff and discussed by the Board, including findings of fact and reasoning for this decision, and consistent with testimony and information submitted during the hearings, will be prepared for the Chair's signature.

The motion was seconded by Jerry Rutter. The vote on the motion was unanimous in favor, 5-0.

FINDINGS OF FACT

BACKGROUND

A. Subdivision Approval

On October 11, 2011, the Planning Board granted subdivision approval for a 22-lot phased development known as River Park (PB2011-01-FMAJ). The development includes 11 residential lots located within the R-3 district at the southerly end of the property and two additional residential lots in the R-3 district at the northerly end of the site. Five parcels are located in the CBD district and 3 parcels are within the IND-L district, all of which will be served by a new development roadway. One additional lot was created to provide open space for the overall development along the river.

The applicant was granted a two-year extension to the approved subdivision on September 9, 2013 (PB2013-21-EXT). Subsequently, the applicant requested and was granted an amendment to the subdivision approval on May 11, 2015 (PB2015-07-FMAJ). The amendment addressed minor alterations to the layout of the development roadways and select lots.

Following additional extensions approved by the Planning Board on November 9, 2015 (PB2015-33-EXT), November 14, 2016 (PB2016-28-EXT), and October 10, 2017 (PB2017-17-AAD), the River Park Subdivision plat was recorded on January 2, 2018 in the Grafton County Registry of Deeds, together with a Notice of Restriction.

B. Site Plan Approval

On October 24, 2011, the Planning Board granted site plan approval for the River Park development (PB2010-25-SPR). As originally approved, the development would consist of eight (8) non-residential or multi-family residential buildings totaling 839,145 square feet plus two parking garages for 1,393 vehicles on the 7 parcels within the CBD and IND-L zoning districts.

The applicant was granted an extension to the approved site plan on September 9, 2013 (PB2013-22-EXT). On June 8, 2015, the applicant was granted a site plan amendment for the layout of Lot 1, which included changes to the building footprint, parking layout, vehicular circulation, loading location of the building, landscaping, lighting, and the drainage and engineering of the site (PB2015-10-SPA). On November 9, 2015, the applicant was granted additional time within which to obtain Building Permits for each approved development phase (PB2015-34-EXT). An additional extension was granted on November 14, 2016 (in connection with PB2016-28-EXT).

On September 9, 2019, the Planning Board approved an amendment to the site plan to, among other things, change the sequencing of the project phasing and increase the number of residential dwelling units from 80 to 125 in Building #8 (PB2018-34-SPA). The 2019 Notice of Action was written to supersede and replace all prior Notices of Action relating to the River Park site plan approval. On October 12, 2021, the Planning Board approved a request to extend the phasing deadlines (PB2021-19-EXT).

APPLICATION OVERVIEW

The applicant's current request for an extension of the River Park approvals is set forth in a letter dated July 8, 2024, from Chet Clem of Lyme Properties, as follows:

Lyme Properties operating as the development agent for XYZ Dairy, LLC hereby requests a 2-year extension of the River Park West Lebanon Site Plan (#PB2010-25-SPR) and Subdivision Approvals (#PB2011-01-FMAJ, October 11, 2011) as most recently amended on September 9, 2019 (#PB2018-34-SPA) and extended by this Board on October 12, 2021 (#PB2021-29-EXT).

In accordance with Section 4.10 of the Lebanon Site Plan Review Regulations, this extension request is due to delays attributable to unusual circumstances beyond the control of the Applicant.

We request that this matter be added to the agenda for consideration at the regularly scheduled August 12, 2024 hearing of the Lebanon Planning Board.

The Applicant also provided the following in support of the subject application:

- Document titled, "Request for Extension of River Park Approvals Due to Circumstances Beyond the Control of the Applicant," dated August 12, 2024 ("Applicant's Handout"); and
- Proposed updated phasing schedule, dated September 5, 2024.

The basis for the applicant's extension request is set forth on page 5 of the Applicant's Handout as follows:

Issue #1: 1 River Park Building Permit (#2016-00293) was invalidated by Lebanon Planning Department on Feb. 1, 2024. This unexpected action up-ended six months of work (see Page 6), direct costs in excess of \$220,000, and contractual obligations in excess of \$650,000 that River Park had incurred toward restarting the project following 2023 delays.

The Staff's decision was overturned by the Lebanon Building Code Board of Appeals on May 6, 2024. On June 6, 2024 the Planning Department chose to appeal to the NH Building Code Review Board. On July 31, 2024 the NH BCRB overturned the BCBA and remanded the issue back to Lebanon. *This matter is ongoing and unresolved.*

Issue #2: After BCBA decision on 5/6/24 (94 days), River Park restarted project and filed Excavation Permit for Phase 1 Infrastructure with City of Lebanon on June 5, 2024. Staff comments on corresponding Performance Bond / Security Agreement were not received until July 25, 2024. *This matter is ongoing and unresolved.*

Issue #3: Following months of meetings, Excavation Permit for Route 10 was filed with NH DOT on June 5, 2024. On July 15, 2024, NH DOT responded with the surprise demand that new/additional Traffic Analysis be conducted. *This matter is ongoing and unresolved.*

These delays are beyond our control, costly to defend against, and time-consuming. These actions have jeopardized lease negotiations, delayed the intended commencement of work (originally April, delayed until July), and have made it impossible for XYZ Dairy, LLC to meet the current deadlines in the River Park approvals.

There is good cause for the Approvals to be extended by the Lebanon Planning Board.

APPLICABLE REGULATIONS

Pursuant to the September 9, 2019 Planning Board Notice of Action for PB2018-34-SPA, approval of the River Park development is in accordance with the Lebanon Zoning Ordinance dated December 5, 1990, last revised July 21, 2010, and the Lebanon Site Plan Review Regulations dated May 9, 1977, last revised November 9, 2009. The current Site Plan Review Regulations are dated May 13, 1991, and were last revised on January 23, 2023.

STANDARD OF REVIEW

Section 4.10.A of the Lebanon Site Plan Review Regulations dated May 9, 1977, last revised November 9, 2009, provides as follows:

Any approved site plan for which a Building Permit has not been obtained within one (1) year of the date of the original approval shall be considered void, **unless the Board grants an extension for good cause.** [...] An extension shall be for up to one (1) additional year beyond the original expiration date. The Board shall grant no more than one extension for any site plan. (emphasis added)

Pursuant to Section 4.10.B of the current Lebanon Site Plan Review Regulations dated May 13, 1991, last revised January 23, 2023, "the Board may grant an extension of up to two (2) additional years beyond the original expiration date." Pursuant to current Section 4.10.C:

In determining whether to grant such an extension, the Board shall consider the totality of the circumstances, including the extent and complexity of the conditions precedent, the extent of the progress made by the Applicant toward satisfying the conditions-precedent and/or starting construction, and whether the need for more time is attributable to unusual circumstances beyond the control of the Applicant, rather than to the Applicant's neglect or failure to proceed with reasonable promptness. The Board shall indicate in its minutes the reason(s) for its decision on an extension request under this Section. The Board shall grant no more than

one extension for any site plan, unless it determines, based on legal advice, that such extension is required in order to prevent a violation of constitutional rights.

The extension standard set forth in the current Site Plan Review Regulations is reflected in Conditions #3 and #29 of the September 9, 2019 Planning Board Notice of Action for PB2018-34-SPA which provide as follows:

- Condition 3: "In determining whether to grant any requested extensions, the Board shall consider the totality of the circumstances, including the extent and complexity of the conditions-precedent, and whether the need for more time is attributable to circumstances beyond the control of the applicant, rather than to the applicant's neglect or failure to proceed with reasonable promptness."
- Condition 29: "It is the intent and effect of this approval [...] that upon completion of the Phase 1 infrastructure improvements within 5 years of the final subdivision approval [...] the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II [...] provided that the applicant and its successors-in-interest continue to comply with all conditions of this approval and of the Planning Board's approval of Final Major Subdivision application #PB2011-01-FMAJ, including the time limits set forth in the phasing plan, **unless such a limit is extended for good cause by the Planning Board**, acting upon an application submitted prior to the expiration of such limit." (emphasis added)

DISCUSSION

A. Subdivision Approval Extension

In addition to an extension of the Site Plan approval, the applicant has also requested an extension to the subdivision approval. Condition of approval #14 of the 10/11/11 Notice of Action for the Subdivision approval provides as follows: "The applicant acknowledges that the overall build-out of the River Park development will occur in seven (7) phases over an extended period of time in accordance with the application materials submitted to the Planning Board for Site Plan application (#PB2010-25-SPR)." Consequently, because the timeframes associated with the River Park development are per the Site Plan approval, it is not clear why the applicant is requesting an extension of the Subdivision approval. The last extension granted for the Subdivision was in 2017, and that extension was specifically to allow additional time for the plat to be recorded (which was accomplished on January 2, 2018). The Board finds that once the subdivision plat was recorded, the timelines in the subdivision approval were satisfied. Since there are no timelines in the Subdivision approval for the Board to extend, the applicant's request for an extension of the Subdivision approval is moot.

A. Site Plan Approval Extension

As set forth in the above-referenced letter dated July 8, 2024, from Chet Clem of Lyme Properties, the applicant states that, "[i]n accordance with Section 4.10 of the Lebanon Site Plan Review Regulations, this extension request is due to delays attributable to unusual circumstances beyond the control of the Applicant." On page 4 of the Applicant's Handout, the Applicant identifies three "issues" that constitute "delays beyond our control," and the applicant asserts, therefore, that these issues establish "good cause for the Approvals to be extended":

Issue #1: 1 River Park Building Permit (#2016-00293) was invalidated by Lebanon Planning Department on Feb. 1, 2024. This unexpected action up-ended six

months of work (see Page 6), direct costs in excess of \$220,000, and contractual obligations in excess of \$650,000 that River Park had incurred toward restarting the project following 2023 delays.

The Staff's decision was overturned by the Lebanon Building Code Board of Appeals on May 6, 2024. On June 6, 2024 the Planning Department chose to appeal to the NH Building Code Review Board. On July 31, 2024 the NH BCRB overturned the BCBA and remanded the issue back to Lebanon.

A Building Permit is not required to undertake site work. However, assuming that the status of the Building Permit is relevant to a Site Plan extension request, the Board finds that the applicant's decision to not proceed with the construction authorized by the Building Permit at an earlier time and its decisions relative to appealing the permit revocation instead of applying for a new Building Permit in time for the 2024 construction season were fully within the control of the Applicant.

Issue #2: After BCBA decision on 5/6/24 (94 days), River Park restarted project and filed Excavation Permit for Phase 1 Infrastructure with City of Lebanon on June 5, 2024. Staff comments on corresponding Performance Bond / Security Agreement were not received until July 25, 2024. This matter is ongoing and unresolved.

No written or oral testimony was provided to the Planning Board to explain why receiving comments on July 25th constitutes good cause to extend the River Park approval by an additional two (2) years.

Issue #3: Following months of meetings, Excavation Permit for Route 10 was filed with NH DOT on June 5, 2024. On July 15, 2024, NH DOT responded with the surprise demand that new/additional Traffic Analysis be conducted.

Based on the testimony given by the Applicant, it appears that preparation for work on the southerly entrance portion of the Phase 1 improvements was poorly managed. In August, 2020, the New Hampshire Department of Transportation (NHDOT) requested that the Applicant provide certain updated/additional information in order to issue a permit for work within the Route 10 right-of-way. Per an e-mail sent August 14, 2020 to the Applicant, NHDOT requested the following:

- Detailed summary of the currently proposed development program and how it compares to the previous development proposal.
- Trip generation summary for the currently proposed development program with a comparison to the previous study.
- The expected site generated traffic volume networks at the proposed site driveways.

In September 2020, the Applicant conveyed to NHDOT an argument against the need for updated traffic data. The Applicant did not receive a response from NHDOT and, instead of following up with NHDOT, chose to let the matter remain unresolved.

Upon the Applicant's contact with NHDOT in the Spring of 2024 to pursue an excavation permit, NHDOT reiterated the need for a revised traffic volumes (trip generation) summary memo.. The Applicant asserted in verbal testimony at the public hearing that they dispute NHDOT's request and gave no indication that they are working on preparing or providing such information. Consequently, it appears that the Applicant has chosen not to obtain an excavation permit from the NHDOT at this time and has given no indication on when or how they will do so in the future.

It was the applicant's choice in 2020 and again in 2024 not to provide the requested information to NHDOT. It was also the Applicant's choice to wait until June 2024 to apply for the excavation permit that they had known was required for many years, and it was not reasonable to assume that NHDOT's lack of response in September 2020 to the Applicant's refusal to provide the data meant the data wasn't required. Obtaining clarity on NHDOT's request and then more quickly taking action in response thereto was entirely within the Applicant's control. Inexplicably, the Applicant mishandled this task, resulting in the setback to their plans in the eleventh hour of discovery.

The Board finds that the Applicant's decision to not to provide the requested trip generation information for NHDOT was fully within the applicant's control and, moreover, that their choice not to provide such information or to follow up with NHDOT in 2020 or at any other time prior to Spring 2024 does not constitute "good cause" to extend the Site Plan approval by another two (2) years.

Although not identified in the written materials, the Applicant suggested in verbal testimony that the relocation of a stormwater pipe owned by the City of Lebanon is another reason for delay that is outside the control of the applicant. To the extent the Applicant is in fact suggesting that the existence of the City's stormwater pipe and the need to relocate it is a circumstance beyond their control and justifies the granting of another extension, the Board notes that the pipe has been shown on the River Park plans since the initial conceptual review with the Planning Board in 2009 and is shown on the existing conditions sheets for both the site plan and subdivision plan sets approved in 2011. In testimony before the Board, the applicant acknowledged that they have known the pipe was there. Per the 2011 approved subdivision plan, the applicant was required to reroute the stormwater pipe within the Route 10 right-of-way to the north side of lot 1. The applicant has been aware of the stormwater pipe since 2009 and has never appealed nor sought to have amended the requirement that they relocate the pipe as part of this project. Per the approved 2011 plans, it is their responsibility to relocate the pipe. The applicant acknowledged this in its letter to NHDOT dated August 11, 2020, wherein the applicant states, "XYZ's scope of work for the Southern Entrance includes relocating a City of Lebanon stormwater overflow line that currently runs, without any easement, diagonally through the footprint of 100 River Park drive. As currently approved, this will require excavation work within Route 10."

Finally, the Applicant suggested in verbal testimony that, since the last extension was granted on October 12, 2021, the Applicant's decision-making was primarily driven by business considerations rather than the timelines imposed by their Planning Board approvals. Whatever business reasons the Applicant may have had for proceeding without constructing the required Phase 1 site improvements within the timeline approved by the Board in October, 2021, the Applicant hasn't established that circumstances beyond its control prevented the Applicant from constructing the Phase 1 improvements. Rather, the Applicant has established that they had different priorities than meeting the timelines established by the Planning Board. To wit, following the extension granted by the Board in October, 2021, the Applicant demonstrated no early attention to or sense of urgency for completing the required Phase 1 improvements within the required timeframe. Rather, the Applicant spent considerable time attempting to find alternative ways to cover and finance these costs. The Applicant testified that it was only early in 2024 when the decision was finally made to "grit and bear it" to cover the infrastructure costs and to initiate that work. The Applicant testified that the loss of the Building Permit in January 2024 -- a consequence of the Applicant engaging in no work on site for the prior 6-month period -- interrupted those plans but failed to acknowledge how this inactivity was the reason the Building Permit was revoked.

Twice during the course of the public hearing, the Applicant referenced their intention to align the infrastructure work and expense thereof with progress on a tenancy agreement and/or on the actual building construction on Lot 1 in order to shorten the gap between incurring costs and producing revenue to defray their expenses. Seemingly, such testimony was given to explain why no new work was advanced until very late within the timeframe required by the Board's approvals. A natural consequence of not performing work on site is the loss of the Building Permit. The Board finds that it was the Applicant's business decisions that delayed work activity necessary for completion, and that these delays also contributed to the loss of the Building Permit - not the other way around.

CONCLUSIONS

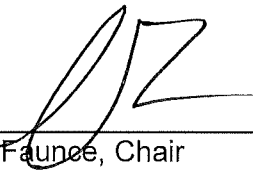
The Board finds that the testimony and evidence offered by the Applicant does not support a finding that circumstances beyond the applicant's control prevented completion of the Phase 1 infrastructure within the timeframes required by the Board:

1. The Applicant did not promptly advance the outstanding infrastructure work. Rather, the Applicant chose (a) to devote considerable time on a failed attempt to develop partnerships, a tax increment financing (TIF) district, and other methods for defraying the infrastructure expense, and (b) to delay the performance and expense of the remaining infrastructure work until it had secured a building tenant to minimize the gap between paying for infrastructure work and commencing work on the actual building (a source of revenue), regardless of the deadlines which had been established (and not appealed) in the most recent extension of their approvals. The Applicant's decision to advance the remaining work was finally made in 2024, with several years of opportunity already squandered.
2. The Applicant mismanaged communication and coordination with NHDOT for the southerly entrance by failing to follow up on the Applicant's misunderstanding of the viability of their existing trip generation data, which was originally prepared in connection with their 2011 Planning Board approvals. That communication gap spanned several years without evidence of any effort by the Applicant to obtain confirmation or clarification from NHDOT. The "surprise" need for updated trip generation data was demonstrably in the Applicant's control to know and to plan for had the Applicant simply pursued the matter to its conclusion several years ago when the matter was raised by NHDOT but not resolved. That overlooked attention would have supported timely action.
3. The Applicant does not have a Building Permit because they hadn't performed any work on site in the most recent 6-month period for construction ahead of the permit's revocation - and because the Applicant chose to litigate the decision to revoke the permit rather than to reapply for a new permit to quickly resume the work they claimed to have queued up. Performing work on site to both advance the project and retain the Building Permit was within the Applicant's control - as was seeking a quick remedy to reinstating the permit as soon as possible upon its revocation.

Taken together, the Applicant's actions and purposeful inactions demonstrate a lack of urgency and a disregard for the deadlines imposed by the Board for this project. The Applicant's choices to delay work on the infrastructure while pursuing other business goals were within its control and effectively meant that they would have to accomplish everything in a short time during 2024. When those choices resulted in the expiration of the building permit, the Applicant did not take the available quick action to restore it in order to make a good faith effort to satisfy the conditions of approval.

For the reasons set forth above, the Board finds that the Applicant has not demonstrated that the extension request is due to delays attributable to unusual circumstances beyond the control of the Applicant or that there is otherwise good cause to grant another two (2) year extension. The Board notes that the Applicant is free to apply for a new Site Plan approval at any time. Provided the Applicant submits an application that complies with all applicable Site Plan submission and design requirements, there is no identifiable reason that a new approval couldn't be obtained well in advance of the Spring 2025 construction season.

LEBANON PLANNING BOARD

By: 

Andrew Faunce, Chair

DATE: 11-19-24

APPLICATION FOR

SPECIAL EXCEPTION	☐	☐	SITE PLAN REVIEW
VARIANCE	☐	☐	SUBDIVISION
MOTION FOR REHEARING	☐	☐	LOT LINE ADJUSTMENT
APPEAL OF AN ADMIN. DECISION	☐	☐	CONDITIONAL USE PERMIT

☒ OTHER Extension _____

PROPERTY OWNER (APPLICANT):

NAME: XYZ Dairy, LLC

TEL.#: (603) 676-7800

MAILING ADDRESS: 57 Main Street, West Lebanon, NH 03784

E-MAIL ADDRESS: [REDACTED]

CO-APPLICANT, AGENT, OR LESSEE:

NAME: Lyme Properties 2, LLC

TEL.#: (603) 676-7106

MAILING ADDRESS: 57 Main Street, West Lebanon, NH 03784

E-MAIL ADDRESS: [REDACTED]

PROJECT LOCATION:

TAX MAP #: 44

LOT#: 21-30 & 7

PLOT #:

ZONE: CBD, IND-L, R3

STREET ADDRESS OF PROJECT:

IS THIS PROPERTY LOCATED IN THE:

WETLANDS

☐ YES ☒ NO

HISTORIC DISTRICT

☐ YES ☒ NO

FLOOD PLAIN

☐ YES ☒ NO

SCOPE OF PROJECT:

Request for extension of River Park West Lebanon Site Plan Approvals

TYPE OF OCCUPANCY:

EXISTING

☒ VACANT

☐ ONE FAMILY

☐ TWO FAMILY

☐ MULTI-FAMILY

☐ COMMERCIAL

☐ INDUSTRIAL

PROPOSED

☐ VACANT

☐ ONE FAMILY

☐ TWO FAMILY

☒ MULTI-FAMILY

☒ COMMERCIAL

☒ INDUSTRIAL

IF USE IS **COMMERCIAL** OR **INDUSTRIAL**, PLEASE NOTE **SPECIFIC**

USE: Lab, Office, Retail, Apartments

SIGNATURE BLOCK:

FOR PLANNING BOARD APPLICATIONS ONLY: I, the undersigned, hereby submit this application on the date noted below with the knowledge and understanding that the Planning Board shall determine if the submitted application is complete according to its regulations at its next regularly scheduled meeting on January 13 or soonest available, 2025, unless I personally request, in writing, that the Board delay its determination of completeness to a later date.

PROPERTY

OWNER: David Clem

DATE: 12/19/2024

NOTE: IF, AS OWNER, YOU WISH TO DESIGNATE AN AGENT TO ACT ON YOUR BEHALF, PLEASE READ THE FOLLOWING AND SIGN BELOW: I hereby designate the person listed above as my agent for the purpose of procuring the necessary local permits for the proposed work as described herein. Representations made by my agent may be accepted as though made by me personally, and I understand that I am bound by any official decision made on the basis of such representation.

PROPERTY

OWNER: David Clem

DATE: 12/19/2024

DATE RECEIVED	FILE # (MAP/LOT)	APPLICATION #	FEE - \$ AMOUNT	DATE PAID	VOUCHER #



December 19, 2024

Lebanon Planning Board
City of Lebanon
51 N Park Street
Lebanon, NH 03766

Request for Extension: #PB2018-34-SPA

Members of the Lebanon Planning Board,

Based on newly available information provided to the Board herein, Lyme Properties operating as the development agent for XYZ Dairy, LLC hereby requests a 2-year extension of the River Park West Lebanon Site Plan (#PB2010-25-SPR) as most recently amended on September 9, 2019 (#PB2018-34-SPA) and extended by this Board on October 12, 2021 (#PB2021-29-EXT). This request for Site Plan extension follows the November 12, 2024 vote by the Lebanon Planning Board to reject XYZ's previous request for extension as submitted on July 8, 2024.

The Planning Board's decision was made prior to the Grafton County Superior Court's issuance of its November 25, 2024 Omnibus Order granting a Preliminary Injunction to XYZ Dairy, LLC. In its November 25th decision, the Court granted XYZ's request for an extension of the River Park Site Plan approvals in addition to re-instating the Building Permit, on the basis that XYZ had demonstrated a "likelihood of success on the merits" of its municipal estoppel claim against the City of Lebanon.

Following three days of evidentiary hearings, the Court's determination differs from that of the Planning Board and the City's argument in both venues that XYZ should have continued investing in Site Plan work while the building permit matter was unresolved.

As the Court stated in its *Omnibus Order on Pending Motions XYZ Dairy, LLC v. City of Lebanon, New Hampshire* as recommended by Peter H. Bornstein, Judicial Referee, and as approved and so ordered by Laurence A. MacLeod Jr., Associate Judge, New Hampshire Superior Court on November 25, 2024 (**Appendix A**, note pages 24-28):

"The Court is unpersuaded by the City's argument that XYZ should have completed the Phase 1 infrastructure work without a building permit. As Chet and David Clem testified, the City cannot reasonably expect a developer to pursue infrastructure work without a building permit for the associated building project."

With this judicial injunction now available to the Planning Board—which directly rejects the reasoning of the Staff Memorandum to the Board and the Board's November 19, 2024 decision—XYZ returns to the Lebanon Planning Board seeking an extension of the River Park West Lebanon Site Plan. The



Court's decision overrules the Staff's February 1, 2024 action and "re-set" the approvals to the status quo as of January 31, 2024.

This decision substantiates XYZ's position that the delays were beyond our control. As such, XYZ hereby requests that a 2-year extension of all relevant dates in the Site Plan approval be granted in accordance with "the extension standard set forth in the current Site Plan Review Regulations [as] reflected in Condition #3 and #29 of the September 9, 2019 Planning Board Notice of Actions for PB2018-34-SPA."

NOTICE OF ACTION

PB2024-34-EXT

Page 4 of 8

one extension for any site plan, unless it determines, based on legal advice, that such extension is required in order to prevent a violation of constitutional rights.

The extension standard set forth in the current Site Plan Review Regulations is reflected in Conditions #3 and #29 of the September 9, 2019 Planning Board Notice of Action for PB2018-34-SPA which provide as follows:

- Condition 3: "In determining whether to grant any requested extensions, the Board shall consider the totality of the circumstances, including the extent and complexity of the conditions-precedent, and whether the need for more time is attributable to circumstances beyond the control of the applicant, rather than to the applicant's neglect or failure to proceed with reasonable promptness."
- Condition 29: "It is the intent and effect of this approval [...] that upon completion of the Phase 1 infrastructure improvements within 5 years of the final subdivision approval [...] the subdivision as a whole, including all phases, shall vest as provided in RSA 674:39, II [...] provided that the applicant and its successors-in-interest continue to comply with all conditions of this approval and of the Planning Board's approval of Final Major Subdivision application #PB2011-01-FMAJ, including the time limits set forth in the phasing plan, **unless such a limit is extended for good cause by the Planning Board**, acting upon an application submitted prior to the expiration of such limit." (emphasis added)

(Excerpted from Page 4 of 8, *Notice of Action Lebanon Planning Board PB2024-34-EXT 11/19/2024*, Attachment 1 within Appendix A herein).

This application does not include a request for Subdivision extension, as that has been determined to not be required. This is per the written opinion in the Planning Department's August 12, 2024 Staff Memorandum (Page 3), and the written determination in the Planning Board decision signed by the Planning Board chair on November 19, 2024 (Page 4) that, "the Board finds that once the subdivision plat was recorded, the timelines in the subdivision approval were satisfied. Since there are not timelines in the Subdivision approval for the Board to extend, the applicant's request for an extension of the Subdivision approval is moot."



Respectfully,

Chet Clem
Lyme Properties

Attached:

Appendix A: Omnibus Order

Appendix B: Compendium of legal filings by XYZ Dairy, LLC v. City of Lebanon

Appendix C: September 23, 2024 supplemental memo from XYZ regarding "Appeal of Administrative Decision: #PB2024-40-AAD"

Cc:

David Clem, XYZ Dairy, LLC

Angela McCanna, Lyme Properties

Attorney Philip Hastings, Cleveland, Waters and Bass, P.A.

Attorney Robert Miller, Sheehan Phinney, P.A.

February 10, 2025

Lebanon Planning Board
City of Lebanon
51 N Park Street
Lebanon, NH 03766

Re: River Park West Lebanon – December 19th Request for Extension

Dear Board Members:

On December 19, 2024, Lyme Properties, operating as the development agent for XYZ Dairy, LLC, submitted a request for a 2-year extension of the River Park West Lebanon Site Plan (#PB2010-25-SPR) as most recently amended on September 9, 2019 (#PB2018-34-SPA) and extended by this Board on October 12, 2021 (#PB2021-29-EXT). The December 19th extension request identified that, since the Lebanon Planning Board's rejection of XYZ's previous request for extension (as submitted on July 8, 2024), the Grafton County Superior Court issued an Omnibus Order granting a Preliminary Injunction to XYZ (1) reinstating the building permit at issue in both the state court action and within the prior request for extension; and (2) extending the Planning Board's Phase 1 site plan approval deadlines by 11 months and two days from notice of the Order.

I now submit this correspondence in advance of today's "limited public hearing," scheduled "to determine whether there has been a material change of circumstances affecting the merits of [XYZ's] application since the time of [its] prior [July 8th] application."¹

Under New Hampshire law, the requirement of material change pursuant to the "subsequent application doctrine" is "**not to be technically and narrowly imposed**, but yet enforced to the extent that property interests may be settled and stable, and property owners protected from harassment."² Moreover, **a decision of a superior court can create a material change warranting a change in an administrative body's decision.**³

¹ XYZ received notice of the nature of this hearing by way of the City's counsel's February 7, 2025 Memorandum. To the extent that the Planning Board desires or requires supplementation of this letter, XYZ is amenable to providing a further submission. To the extent that this evening's hearing expands beyond the outlined "limited" scope, XYZ requests an opportunity to further supplement this letter as it relates to the merits of its request.

² *Bois v. Manchester*, 113 N.H. 339, 342 (1973)(emphasis supplied).

³ See *Radcliff v. Zoning Bd. Of Appeals*, D.N. CV 121852 S, 1993 Conn. Super. LEXIS 1536, at *18 (June 9, 1993) (relating to the revocation and reinstatement of a building permit)(emphasis supplied); *Middlesex Theatre, Inc. v. Commissioner of State Police*, 128 Conn. 20, 22-23, 20 (1941) ("Where a change of conditions has occurred since the decision of the administrator or where other considerations have arisen materially affecting the merits of the matter and no vested rights have intervened, it is reasonable and appropriate to the functioning of efficient administrative machinery that the subject matter be re-examined in the light of the altered circumstances.").

That is precisely the case here. Critically, in submitting its second request for a 2-year extension, XYZ identified several material changes of circumstance since its prior application, including but not limited to:

- after *three days* of evidentiary hearings, the Court explicitly disagreed with the City’s argument that XYZ should have continued investing in Site Plan work while the building permit matter was unresolved (an argument the Planning Board seemingly adopted on or about its November 12, 2024 decision);
- the building permit has been reinstated; and
- the Phase 1 deadlines have been extended.

In support of its December 19th second extension request, XYZ attached the Court’s Omnibus Order, its Superior Court Complaint (including its twenty-two exhibits), and its Memorandum in Support of its Petition for Temporary Restraining Order and Motion for Preliminary Injunction—none of which were previously before the Lebanon Planning Board when considering XYZ’s July 8th first request for extension. These documents encompass—by the City’s counsel’s own admission contained in his February 7, 2025 Memorandum—“a different but overlapping set of facts.”

In its Omnibus Order, the Court determined that, after three days of evidentiary hearings, XYZ established a “likelihood of success on the merits” that the City of Lebanon made an actionable misrepresentation of a material fact that XYZ relied upon to its detriment. In other words, after hearing the evidence, the Court concluded that XYZ reasonably relied upon the City’s representations related to the building permit, that XYZ was harmed as a result, and that the facts established by XYZ warranted the reinstatement of the building permit and the extension of the Phase 1 deadlines. Importantly, the Court also stated as follows:

The Court is unpersuaded by the City’s argument that XYZ should have completed the Phase 1 infrastructure work without a building permit. As Chet and David Clem testified, the City cannot reasonably expect a developer to pursue infrastructure work without a building permit for the associated building project.

The same argument underscored by the Court holds true for the attendant delays in all of the other phases of development. The City could not have reasonably expected XYZ to meet the deadlines for those other development phases without a valid building permit on Phase 1, since the Phase 1 building was critical to the overall economics of the project and to the construction of the primary entrance of the development. The clear “changes in circumstances” provided by the direction in the Court’s Order warrant the Board’s full consideration of the merits of XYZ’s second request for extension.

To the extent that the Planning Board is not otherwise persuaded that a material change necessitates consideration of XYZ’s December 19th extension request, XYZ further asserts that consideration is warranted as this Board’s consideration of XYZ’s July 8th request was neither fair

or impartial.⁴ In brief, the Planning Board was notified of XYZ's pending action related to the building permit and site plan deadlines pending in Grafton County Superior Court prior to issuing its formal decision on XYZ's first extension request. Nevertheless, the Planning Board, relying upon the recommendations of municipal staff, rejected XYZ's first extension request prior to the issuance of any decision by the Court. More specifically, five members of the Planning Board *met in advance of the public hearing without a motion to convene in executive session* in a public meeting. These same five members then voted to deny the extension request without reading the motion in the public hearing or making the motion available to the applicant in advance. While I appreciate the fact that the Planning Board relies on municipal staff to support the Board, I believe the Planning Board is an independent, quasi-public body and should affirm its authority by acting independently of staff opinion, fairly, and impartially—in line with the Court's Order—in this instance.

Turning to the merits of this request, the Planning Board is tasked with determining whether the delays on the other phases of the River Park project were the result of circumstances beyond XYZ's control. It is clear, based on the specific language of the Court's Order, that the Court's findings not only necessitate consideration of XYZ's December 19th second extension request, but granting XYZ's request for two-year extensions in full. The City's misrepresentations as to the building permit irrefutably predated the other events the Planning Board considered in relation to XYZ's prior extension request. Accordingly, (1) because of the City's misrepresentations as to the building permit and the delays resulting therefrom; and (2) because XYZ reasonably did not invest in other aspects of the project while the permit was in a City-imposed limbo, there plainly exist circumstances beyond XYZ's control necessitating a 2-year extension of XYZ's site plan deadlines on the remaining phases of the River Park project.

It is my hope that the Lebanon Planning Board will exercise reason and fairness, as the Court has done, in considering the merits of and granting XYZ's request for extension. Doing so would also constitute a significant gesture of good faith in rebuilding the trust required to bring this beneficial project to fruition for the City of Lebanon.

Sincerely,



David Clem
XYZ Dairy, LLC, Manager
Lyme Properties 2, LLC, Agent

Cc:

Angela McCanna, Lyme Properties
Attorney Philip Hastings, Cleveland, Waters and Bass, P.A.
Attorney Robert Miller, Sheehan Phinney, P.A.

⁴ See *Album v. Anderson*, 25 A.D.2d 481 (N.Y. 4th Dept. 1966).



The Dry Bridge remains unsafe, delayed yet again, and 60% over budget. The reconstruction will only add to the pressure on remaining businesses in West Lebanon and add to the economic uncertainty in the CBD.

1



A walk down Main Street in West Lebanon hardly paints a picture of revitalization. The number of boarded buildings continues to grow.

2



What is the Lebanon Planning Board's vision for West Lebanon? Which ordinances does the Planning Staff choose to enforce / ignore as part of their revitalization policies?

3



Promise a new fire station, evict residential and business tenants, reduce property tax revenue, abandon the fire station, incur the costs of acquisition debt with nothing to show for it. West Lebanon has become the playbook for failed municipal action.

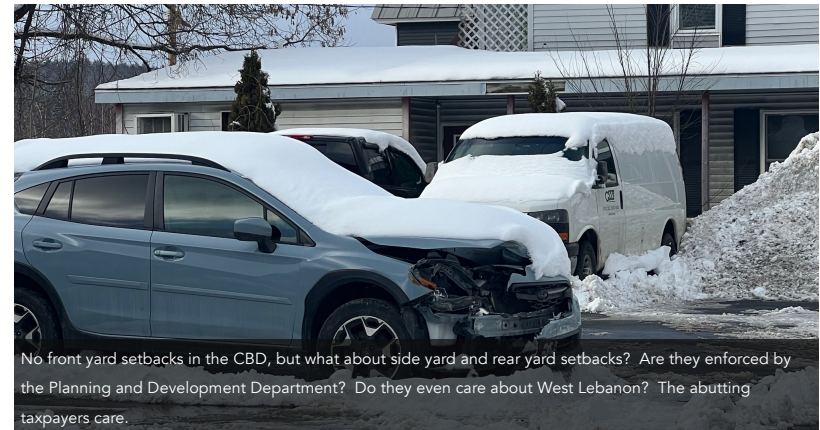
4



Another abandoned service station. Is junk car storage an allowed use in the CBD Table of Use?

5

5



No front yard setbacks in the CBD, but what about side yard and rear yard setbacks? Are they enforced by the Planning and Development Department? Do they even care about West Lebanon? The abutting taxpayers care.

6

6



City Hall evidently doesn't even care about improper uses on property it owns. Maybe monthly rent is involved, or perhaps the City allows the use for free to stimulate economic revitalization.

7

7



Lebanon has not learned the painful lessons of "urban renewal" from the 1960's. Evicting tenants, vacant storefronts, and not so benign neglect is a recipe for decline. No wonder the RFP issued by the City did not produce an interested development partner.

8

8



Absent intelligent intervention, market forces respond to the no risk bottom of users. Property owners are trapped by the City's lack of help, their proven unwillingness to enforce existing ordinances equally, and this leads to expanding disinvestment in downtown West Lebanon.

9

9



Main Street Revitalization depends on who you know in City Hall. Existing residential tenants and business tenants cannot compete with a municipal entity that taxes others to pay for their power, control, and justification of their 4 day / week jobs.

10

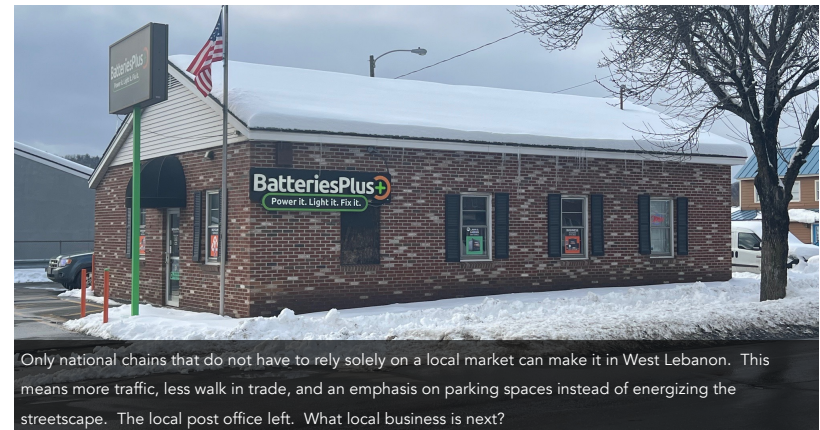
10



So how long can long time owners resist the temptation to close, move on, and cut their losses? There is no level playing field in West Lebanon.

11

11



Only national chains that do not have to rely solely on a local market can make it in West Lebanon. This means more traffic, less walk in trade, and an emphasis on parking spaces instead of energizing the streetscape. The local post office left. What local business is next?

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The larger chains move in to protect their favored nation status, resulting in less competition for local users to consider. Who do you think owns the local paint store now?

13

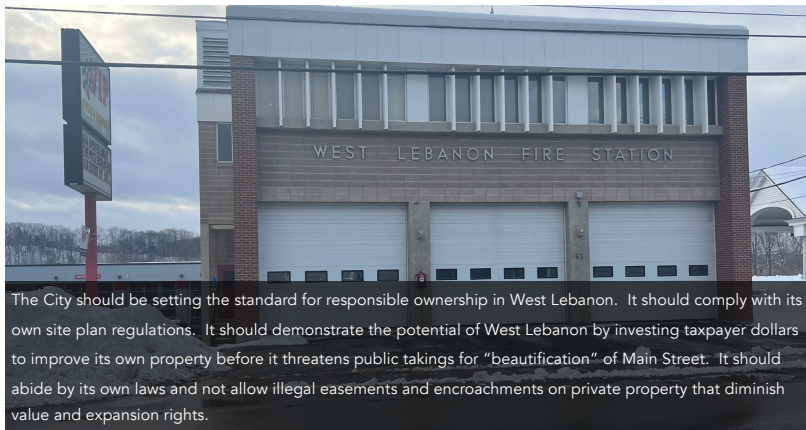
13



Locally owned small businesses in West Lebanon are trying to fulfill the diverse needs of the area's neighborhoods. Owner occupancy continues to be a positive barometer of the support for mixed uses in the West Lebanon CBD.

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The City should be setting the standard for responsible ownership in West Lebanon. It should comply with its own site plan regulations. It should demonstrate the potential of West Lebanon by investing taxpayer dollars to improve its own property before it threatens public takings for "beautification" of Main Street. It should abide by its own laws and not allow illegal easements and encroachments on private property that diminish value and expansion rights.

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What is the Lebanon Planning Board's vision for West Lebanon? Auto parts stores, vape shops, and seasonal tax preparation users as long as they are away from downtown Lebanon? Will West Lebanon's old downtown become just an extension of Route 12A -chain stores, absentee owners, and a disproportionate demand for police services?

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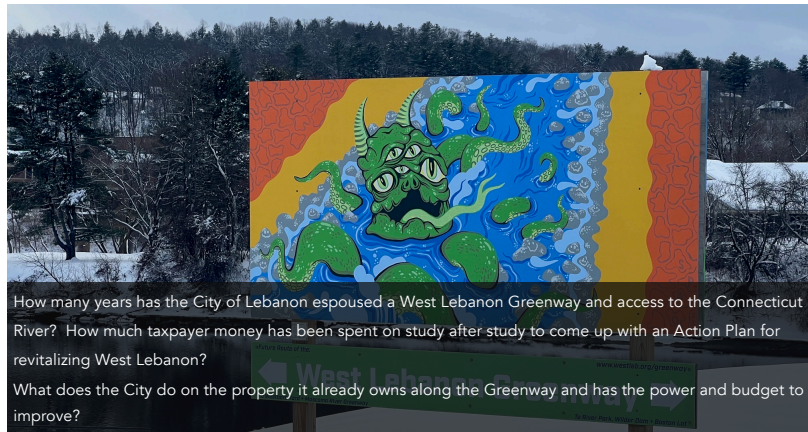
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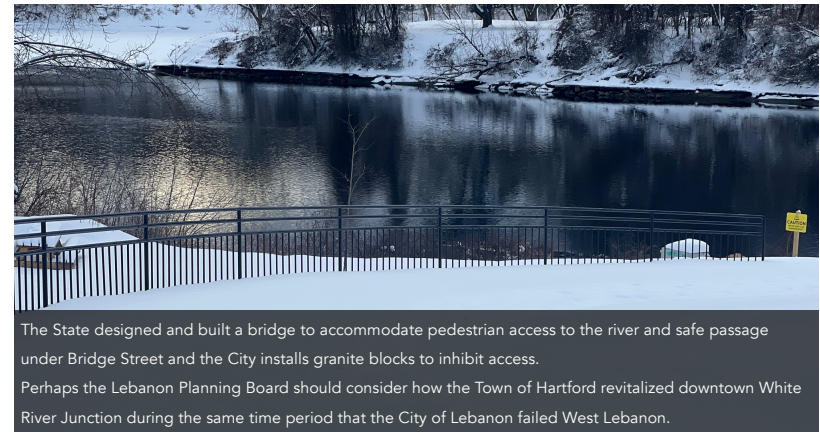
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**RULES OF PROCEDURE
FOR THE PLANNING BOARD
CITY OF LEBANON, NEW HAMPSHIRE**

ARTICLE I **GOVERNING RULES**

- 1.1 GOVERNANCE.** The Planning Board of the City of Lebanon shall be governed by the provisions of all applicable State statutes, City regulations, and these Rules of Procedure adopted under the authority of RSA 676:1.
- 1.2 DEFINITION OF BOARD.** As used in these rules, the term "Board" shall mean the Planning Board duly appointed by the legislative body of the City of Lebanon under the authority of RSA Chapter 673.
- 1.3 DEFINITION OF MEETING.** As used in these rules, the term "meeting" shall have the meaning as set forth in RSA 91-A:2.
- 1.4 RULES OF DECORUM.** Meetings of the Planning Board shall be conducted in the spirit of the "Lebanon Boards, Committees, and Commissions Rules of Decorum and Commitment to Civil Behavior," which is addended hereto and made a part of these Rules of Procedure, and all Board members shall endeavor to adhere to the principles set forth therein.

ARTICLE II **MEMBERS AND ALTERNATES**

- 2.1 REGULAR MEMBERS.** The Planning Board shall consist of nine (9) regular members, namely eight persons who shall be appointed by the City Council, by majority vote, upon nomination by the City Manager, and one member of the City Council who shall be selected by it as a member ex-officio with voting privileges.
- 2.2 ALTERNATE MEMBERS.** Alternate members of the Board shall be appointed by the City Council, by majority vote, upon nomination by the City Manager. Alternate members shall join the regular members in all presentations, public hearings, and discussions except that such alternates may not vote on any proposal or motion before the Board unless so directed by the Chair. In the absence of any regular member, except the ex-officio member of the City Council, the Chair shall appoint an alternate member to fill such vacancy. Said alternate shall then act as a regular member.
- 2.3** All members of the Planning Board shall be residents of the City of Lebanon and shall be sworn in and take an oath of office as required by RSA 42:1.
- 2.4 ATTENDANCE.** A Board member may be excused for non-attendance of a meeting or hearing for valid reasons if he or she notifies the Chair or Clerk prior to the meeting or hearing. Any Board member may leave the Board chambers for pressing business while in regular session after notice to the Chair.
- 2.5 TRAINING.** All newly-appointed Board members shall attend one (1) orientation meeting with the Planning and Zoning Director, prior to sitting as a member of the Board, unless waived or extended by the Chair at the request of the Planning and Zoning Director.

ARTICLE III **OFFICERS AND DUTIES**

- 3.1 ELECTION OF OFFICERS.** At the annual meeting, the Board shall elect a Chair and a Vice-Chair from the regular members and such other officers as it may deem necessary;

but in case of failure to elect at the time specified, the election shall take place at the next meeting. The Chair and the Vice-Chair, shall hold their respective offices until the next annual meeting after election or until their successors are elected and qualified. They shall perform such duties as the Board may prescribe. The office of Chair and Vice-Chair shall be held by an individual for no more than three consecutive terms per office unless waived by the Board.

- 3.2 DUTIES OF THE CHAIR.** The Chair shall call the meeting together, preside over all meetings and hearings of the Board, put all questions to a vote, maintain order, decide all questions of order and procedure, subject to these rules, and shall appoint any committees found necessary to carry out the business of the Board.

The Chair may present to the Board such matters as in the Chair's judgment require attention.

At the request of any Board member, the Chair shall direct that the yeas and nays be taken and entered on the record on any question before the Board.

When the Board has no established rule of parliamentary practice, the Chair shall be guided as nearly as may be by Robert's Rules of Order, which may be simplified by the Chair as deemed necessary and appropriate. In the event of a challenge by a Board member of any modification of Robert's Rules by the Chair, Robert's Rules shall prevail.

The Chair shall exercise a general supervision over the business, papers, and property of the Board and shall execute all formal documents on behalf of the Board.

- 3.3 DUTIES OF THE VICE-CHAIR.** The Vice-Chair shall assume the duties and powers of the Chair in the Chair's absence.

- 3.4 CLERK.** With the approval of the City Manager, the Director of Planning & Zoning, through the Department of Planning & Zoning, shall function as the Clerk for the Board. The Clerk shall administer official correspondence, subject to these rules and at the direction of the Board; shall issue the proper forms, compile all information, maps, and records for the Board's review; shall send all notices required by law; shall keep the minutes of all Board actions and proceedings; shall prepare reports and perform other duties as directed by the Chair; and, shall keep records of its examinations and other official actions.

The Clerk shall direct the recording secretary to take complete and accurate minutes, to tape record all meetings, to prepare in writing the official minutes of all meetings; to show the vote of each regular member upon every question, or if absent, disqualified, or failing to vote so indicate; to include in the minutes the names and addresses of all witnesses, a summary of the facts on which the decision is based and the decision rendered; and to deliver to the Clerk within 144 hours the completed document for submission to the Board for acceptance.

The Clerk, in consultation with the Chair, shall prepare the agenda for each meeting, provide all supportive documentation, and deliver said materials to each Board member no later than the Thursday preceding any scheduled Monday meeting. The Clerk shall also make public notice of the agenda of each meeting in accordance with the appropriate regulations. Any Board member may request and have placed on the agenda any item for discussion.

The Clerk shall perform other duties as directed by the Chair.

- 3.5 VACANCIES.** At the direction of the Chair, the Clerk shall give immediate notice of any vacancy to the City Council. Any vacancy among the officers of the Board shall be filled by a regular member by election, for the unexpired term, at the next regular meeting of the Board.
- 3.6 STAFF SUPPORT.** The Chair may request, through the City Manager, the attendance of any officer or employee of the City to confer with the Board. The Board may vote to request the City Manager to provide an officer or employee.
- 3.7 ASSISTANCE BY THE DIRECTOR OF PLANNING & ZONING & DEPARTMENT OF PLANNING & ZONING.** Requests for assistance to the Director of Planning & Zoning and/or Department of Planning & Zoning in matters before the Board or Chair of the Board shall be made by the Board either by consensus or motion duly passed. Requests for information may be made to the Director of Planning & Zoning and/or Department of Planning & Zoning by any Board member through the Chair.

ARTICLE IV MEETINGS

- 4.1 ANNUAL MEETINGS.** The annual meeting of the Board shall be the second Monday in the month of January each year, or if there is no meeting due to a lack of business, then the first public meeting held thereafter.
- 4.2 REGULAR MEETINGS.** Regular meetings shall be conducted by the Board at which applications for development shall be reviewed and acted upon. Regular meetings of the Board shall be held on the second Monday of the month unless there is no business to transact, in which case no meeting shall be held. The Clerk shall give each Board member timely notice of the cancellation of such meeting and shall post a notice in at least one public place by the time of the regularly scheduled commencement. Regular meetings shall normally start at 6:30 p.m. and terminate at 9:30 p.m.
- 4.3 PLANNING SESSIONS.** Planning sessions shall be conducted by the Board at which study items and planning issues are analyzed. Said sessions shall be held on the fourth Monday of the month unless there is no business to transact, in which case no meeting shall be held. The Clerk shall give each Board member timely notice of the cancellation of such meeting and shall post a notice in at least one public place by the time of the scheduled commencement. Planning sessions shall normally start at 6:30 p.m. and terminate at 9:30 p.m.
- 4.4 SPECIAL MEETINGS.** Special meetings of the Board may be called by the Chair provided that at least 48 hours notice shall be given to each Board member of the time, place, and business of such meeting. The Clerk shall ensure the provision of adequate public notice of such special meetings as required by law.

Upon the written or oral request of at least four (4) Board members, a special meeting shall be called. Said meeting shall take place not later than one week after the fourth Board member shall have made the request for a special meeting, or otherwise may be scheduled for a date agreeable by all requestors.

- 4.5 PLACE OF MEETING.** Meetings of the Board shall normally be held at City Hall, in the City of Lebanon, or at some other public place in the City of Lebanon, or at the site of a proposed project for the express purpose of inspecting said site as part of the review for a proposed project.
- 4.6 OPEN MEETINGS.** All meetings of the Board and its committees shall be open to the public except as stipulated by State Law.

- 4.7 HOLIDAYS.** When any meeting date happens to be a holiday, the Board shall determine either to conduct the meeting on the next business day, cancel said meeting, or call a special meeting.

ARTICLE V **CONDUCT OF BUSINESS**

- 5.1 CALL TO ORDER.** Meetings shall be called to order by the Chair, or in the Chair's absence, by the Vice-Chair. In the absence of both, the Clerk or staff member shall call the meeting to order after which those Board members present may elect a Chair pro tem.

- 5.2 QUORUM.** The Board shall only conduct a meeting and transact business when a quorum is present. A quorum shall be at least a majority of the total membership of the Board including alternate members sitting in place of regular members.

- 5.3 ORDER OF BUSINESS.** For each regular meeting the order of business, unless otherwise ordered by the Chair, shall be as follows, and shall be shown on the agenda:

1. Call to Order
2. Notice of Regional Impact
3. Continued Applications – Public Hearings
4. New Applications – Completeness Reviews and Public Hearings
5. Approval of Minutes
6. Other Business
7. Adjournment

For each planning session, the order of business shall be as follows:

1. Call to Order
2. Study Items
3. Committee Reports
4. Approval of Minutes
5. Other Business
6. Adjournment

- 5.4 PRESENTATIONS DURING PUBLIC HEARINGS.** The Chair shall request that before the start of each Public Hearing a representative of the proposal give a brief presentation of the request before the Board. The brief presentation shall be adequate so as to inform all abutters and members of the public as to the nature of the project in order that they may comment on the proposed project.

- 5.5 PERMISSION REQUIRED TO ADDRESS THE BOARD.** Persons other than members of the Board shall not be permitted to address the Board except by consent of the Chair. Anyone wishing to address the Board during Open Discussion should indicate their intent and subject matter to the Chair prior to the meeting. A time limit of 3 minutes shall normally be in effect. The speaker shall not enter into any debate with anyone present and shall speak only to the subject matter indicated. A group may have one person act as its spokesperson and shall follow the same rules.

- 5.6 MINUTES.** The minutes of previous meetings shall be submitted for approval at the next regular meeting or planning session. The Chair shall call for any corrections to the minutes. Following the discussion of corrections, if any, the minutes shall be approved by motion duly passed by majority vote of the members present.

- 5.7 RECESS OF THE MEETING.** The Chair may order a temporary halt to the proceedings of the meeting. Said recess should normally not exceed 30 minutes. Upon ordering the recess, the Chair shall state the time and place for reconvening.

- 5.8 CONTINUANCE OF THE HEARING.** The Board may continue a hearing if the application cannot be disposed of on the day set. No further public notice shall be necessary provided that the date, time, and place of the continued hearing shall be announced before adjournment.
- 5.9 ADJOURNMENT OF MEETING.** The Board shall adjourn each meeting to its next scheduled meeting or to a special meeting specifying time, date, and place. If the order of business has not been concluded by 9:30 PM, the Chair shall poll the attending Board members to determine if the Board should continue beyond 9:30 PM or continue the matters on the agenda to the next appropriate meeting, or continue to a special meeting specifying time, date, and place.

ARTICLE VI VOTING

- 6.1 MOTION TO BE STATED BY THE CHAIR.** When a motion is made and seconded, it shall be stated by the Chair before debate. At the request of the Chair or any member of the Board, the motion shall be in writing. A motion may not be withdrawn or amended by the mover without the consent of the second.
- 6.2 MAJORITY VOTE REQUIRED.** Determinations on any matter before the Board shall require the concurrence of a majority of the regular members present.
- 6.3 TIE VOTE OR DECISION BY LESS THAN A MAJORITY.** A tie vote or an approval or denial by less than a majority of the regular members present constitutes no action. If the Board is unable to obtain concurrence of a majority of regular members present on a request because of the absence of one or more Board members from the vote, it shall continue the discussion or may continue the matter to a subsequent meeting pursuant to Section 5.8 above.
- 6.4 CONFLICT OF INTEREST or PREJUDGEMENT.** In accordance with RSA 673:14, no Board member shall participate in deciding or shall sit upon the hearing of any question if that member has a direct personal or pecuniary interest in the outcome which differs from the interests of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.

Reasons for disqualification include, but are not limited to, when a Board member:

- A. Is an abutter
- B. Is related to the applicant or any abutter;
- C. Has assisted or advised the applicant or any abutter; or,
- D. Is biased or prejudiced in any manner or to any degree which would, in the eyes of a reasonable and prudent person, prevent the member from acting impartially with respect to the application before the Board.

Reasons for disqualification also include prejudgment which occurs when a Board member has directly or indirectly taken a position, formed a conclusion, or has prejudged the application to be decided by the Board. Prejudgment includes, but is not limited to, a position taken either for or against an application expressed at a public meeting, by letter, by ex parte communication, or by comment made in some public forum. Prejudgment does not include questions or statements made by Board members in response to the details of the application expressed during the public hearing held on that application or during the Board's deliberations.

When an uncertainty arises as to whether a Board member is disqualified in particular circumstances, the Board shall, at the request of that member or another Board member, vote on the question of his/her disqualification, but such vote shall be advisory and non-

binding. Any person with a direct interest in the outcome may voice an objection to a Board member's participation, setting forth specific reasons, and may also request such a vote, but such a request shall be non-binding. Any such request or objection shall be made either prior to or at the commencement of the public hearing, or at such later time as the facts claimed to warrant disqualification first become known. No such vote shall be taken if the Board member involved steps down voluntarily.

A Board member who is disqualified shall remove himself/herself from the Board and shall sit with the public until such time as the Board has completed its consideration of the application at that meeting. The member may then return to the Board. If, as a result of disqualification, the Board loses its quorum, then there shall be an adjournment or recess of consideration of the matter until there is a quorum either at the same meeting or the next available meeting.

6.5 VOTE OF ABSENT MEMBERS. Unless a Board member has attended the meetings on a matter or has stated publicly that he or she has examined the record and become familiar with the evidence presented from a transcript of the proceedings, he or she shall not cast a vote essential to the decision.

6.6 EXTENSION OF TIME. Any three Board members may request an extension of time before voting on any proposal before the Board. If such an extension is requested, the Board shall schedule a special meeting not more than two weeks from the date of the request to take action on the proposal or otherwise such special meeting may be scheduled for a date agreeable by all requestors. There shall be no new business placed on the agenda of any special meeting scheduled under this section.

ARTICLE VII **COMMITTEES**

7.1 AUTHORIZATION. The Chair is authorized to appoint Committees to study and to report upon such matters as directed by the Chair which are germane to the purpose of the Board.

7.2 DEFINITION OF COMMITTEE. A group of Board members delegated by the Chair to perform a function.

7.3 MEMBERSHIP. All Committees shall consist of not more than four (4) Board members.

7.4 DUTIES. The duties of any Committee shall be defined by the Board at a regular meeting.

7.5 COMMITTEE CHAIR. The first Board member named on the Committee shall be the Chair thereof.

7.6 MEETINGS. The Chair of a Committee shall call the same at such time and place as he or she may deem proper whenever there is any business requiring the attention of the Committee.

7.7 INVESTIGATIONS. If necessary for the proper consideration of any matter referred to the Committee, the Committee is authorized to make investigations and call upon the City staff for such surveys, plans, estimates, and recommendations as may be deemed necessary.

ARTICLE VIII **E-MAIL AND OTHER COMMUNICATIONS BETWEEN MEETINGS**

8.1 PURPOSE. The aims of this Article are:

- A. To ensure compliance with the letter and spirit of the Right-to-Know Law, RSA 91-A, and with the Due Process rights of parties before the Board;
- B. To clarify Board members' ability, between meetings, to research issues and prepare motions or other potential Board actions, thus promoting efficient use of meeting time, but only to the extent allowed by law; and,
- C. To clarify the role of electronic media, such as E-mail, in achieving these goals.

8.2 DEFINITIONS. In this Article:

- A. **Communication** means a transfer of information, objective or subjective, from one person to another. It includes face-to-face or phone conversations, letters, memos, E-mails, web sites, or any other medium, regardless of the location or ownership of any device or equipment used.
- B. **Distribution** is a one-way communication between meetings involving more than one Board member where no between-meeting response (except acknowledgment of receipt) occurs or is expected.
- C. **Exchange** is a communication between meetings, or series of communications, involving more than one Board member which includes a between-meeting response, or expectation of a response.
- D. **Ex Parte Communication** is communication, other than at a legally-noticed meeting, between a Board member and a person with an interest in, or affected by, a pending or future case.

8.3 ACTIVITIES BETWEEN MEETINGS OF INDIVIDUAL MEMBERS. Individual Board members may, between meetings, prepare drafts of motions or other potential Board actions. They may also research or investigate general or specific factual issues. However, if the research pertains to a case, the Board member shall, at the public hearing, report all findings to the Board, and parties to the case shall be given a meaningful opportunity to respond.

8.4 DISTRIBUTIONS. A Distribution may be made to any number of Board members, so long as it does not become an Exchange. Whenever a Board member makes a Distribution concerning a pending or future case and it involves a quorum of the Board (counting all senders and recipients):

- A. A copy shall be forwarded to the Director of Planning & Zoning, who shall determine, under RSA 91-A or other applicable law, whether the Distribution is subject to public disclosure and shall place the copy in the appropriate file;
- B. The Board member making the Distribution shall report on it, and its contents, at the public hearing on the case unless the information is exempt from disclosure under RSA 91-A; and,
- C. Parties to the case shall be given a meaningful opportunity to respond to the information in the Distribution.

8.5 EXCHANGES. Exchanges involving a quorum or more of the Board or of any Planning Board Committee are prohibited. Such Exchanges shall be considered deliberations and shall occur only at meetings noticed in accordance with RSA 91-A. An Exchange pertaining to any activity allowed under Subsection 8.3 is permitted if the number of Board or Committee members involved is less than a quorum; however:

- A. Each Board member involved shall be responsible for preventing the number of members involved from reaching a quorum;
- B. Information discussed in, or generated by, an Exchange between Board members shall not be subject to further Distribution; and
- C. No Exchange shall include any vote or straw vote, or any Ex Parte Communication.

- 8.6 EX PARTE COMMUNICATIONS.** Board members shall not initiate Ex Parte Communications. If an Ex Parte Communication is initiated by another person, the Board member contacted shall:
- A. Refrain from discussing the substance or merits of a case;
 - B. Inform the person, if necessary, that such a discussion could lead to disqualification;
 - C. Refer the person to the Department of Planning & Zoning or to a Board meeting, as appropriate; and
 - D. Report on the conversation to the Board at a public meeting.
- 8.7 SCHEDULING AND AGENDA.** Notwithstanding Subsections 8.4, 8.5, and 8.6, nothing in this policy prevents any Distributions, Exchanges, or Ex Parte Communications which pertain solely to:
- A. Scheduling of meetings or hearings;
 - B. The determination or ordering of agenda items or topics to be taken up at meetings or hearings; or
 - C. General procedural requirements pertaining to such scheduling and agenda matters.
- 8.8. PLANNING BOARD COMMITTEES.** A Planning Board Committee shall be considered a public body, and all provisions of RSA 91-A and this Article, applicable to a quorum of the Board, shall also apply to a quorum of a Committee.

ARTICLE IX **ADMINISTRATION**

- 9.1 ADOPTION.** Upon adoption, the Clerk shall file a copy of these Rules and all amendments with the City Clerk as a public record and post a copy in one or more public places for 15 days.
- 9.2 AMENDMENTS.** These rules may be amended at any regular meeting by an affirmative vote of a quorum of the Board provided that such amendment has been presented in writing to each member of the Board at least 15 days preceding the meeting at which the vote is taken.

These Rules of Procedure were adopted by the Planning Board on November 21, 1989 and amended on:

December 9, 1996	Section 5.6 - MINUTES
January 11, 1999	Section 5.3 - ORDER OF BUSINESS
September 11, 2000	Section 4.1 - ANNUAL MEETINGS
September 11, 2000	Section 4.2 - REGULAR MEETINGS
January 28, 2002	Section 5.3 - ORDER OF BUSINESS
May 7, 2003	Section 2.7 (new) - ASSISTANCE BY THE CITY PLANNER & PLANNING OFFICE
May 7, 2003	Section 6.5 - CONFLICT OF INTEREST OR PREJUDGMENT
May 7, 2003	Article VII (new) - E-MAIL AND OTHER COMMUNICATIONS BETWEEN MEETINGS.
December 13, 2010	Section 4.2 - REGULAR MEETINGS
December 13, 2010	Section 4.3 - PLANNING SESSIONS
July 11, 2016	Article II (new) - MEMBERS AND ALTERNATES;
July 11, 2016	Section 5.9 - ADJOURNMENT OF MEETING;
July 11, 2016	General updates and reformatting;
January 28, 2019	Section 5.6 - MINUTES, General updates
August 26, 2019	Section 5.3 – ORDER OF BUSINESS
June 28, 2021	Section 1.4 – RULES OF DECORUM and Addendum

These Rules of Procedure supersede all other Rules and By-Laws.

ADDENDUM

LEBANON BOARDS, COMMITTEES, AND COMMISSIONS

RULES OF DECORUM AND COMMITMENT TO CIVIL BEHAVIOR

It is acknowledged that:

1. Civil, respectful, and courteous discourse and behavior are conducive to the democratic and harmonious airing of concerns and decision making.
2. Uncivil discourse and/or discourteous and inappropriate behavior have a negative impact on the character and productivity of the decision-making process.
3. Anger, rudeness, ridicule, obscene or profane language, impatience, and lack of respect for others and personal attacks are not acceptable behavior.
4. Demonstrations in support or opposition to a speaker or idea are not permitted by members of the Board. The Chairman is responsible for maintaining order. Failure to abide by this requirement may result in the forfeiture of the speaker's right to speak.

To maintain a cohesive, productive working environment, the members of the Lebanon Boards, Committees, and Commissions commit to:

1. Supporting the Board's mission.
2. Showing respect to each other as appointed members and staff representatives to the Board.
3. Promoting civility during Board meetings and tolerating nothing less.
4. Demonstrating reflective listening and not displaying negative body language (for example eye rolling, pencil tapping, shrugging of one's shoulders, hand gestures, etc.)
5. Allowing uninterrupted speech by those recognized as "having the floor" and refraining from speaking until recognized by the Chair.
6. Bringing appropriate committee-related concerns, issues, and conflicts to the Board for discussion.
7. Offering alternative solution(s) when addressing a problem or issue.
8. Maintaining the confidentiality of material discussed during closed Board meetings.

PLEDGE OF CIVILITY

The manner in which we govern ourselves is often as important as the positions we take. The City's collective decisions will be better and truer to our mission when differing views have had the opportunity to be fully vetted and considered. All those who appear before the City's boards, committees, and commissions have the right to be treated with respect, courtesy, and openness. We value all input.

Accordingly, we commit to conduct ourselves at all times with civility and courtesy, to both those with whom the Board interacts and to each other. We also pledge to endeavor to correct ourselves, should our conduct fall below this standard.

CERTIFIED NOTIFICATION LIST

Notice shall be sent by certified mail to the Owner; Applicant, if different from Owner; Abutters; Holders of conservation, preservation, or agricultural preservation restrictions (as defined under RSA 477:45) on the subject property; the holders of easements, rights-of-way, and other restrictions; and every engineer, architect, land surveyor, or soil or wetlands scientist whose seal appears on any plan submitted to the Board; and any other persons required by RSA 676:4, I(d). The names and mailing addresses shall be furnished by the Applicant.

672:3 Abutter. – "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356-B:3, XXIII. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

Source. 1983, 447:1. 1986, 33:2. 2002, 216:1, eff. July 15, 2002.

PLEASE PROVIDE NAMES & MAILING ADDRESSES FOR ALL PERSONS LISTED ABOVE.

Map & Lot Number: 44-21 - 44-30 & 44-7	Map & Lot Number: 44-21 - 44-30 & 44-7
Property Owner: XYZ DAIRY, LLC 57 MAIN STREET WEST LEBANON, NH 03784	Applicant, Co-Applicant, Agent, or Lessee: LYME PROPERTIES 2, LLC 57 MAIN STREET WEST LEBANON, NH 03784
Map & Lot Number: 44-13 & 50-28-E	Map & Lot Number: 44-5
DARTMOUTH COLLEGE TRUSTEES PO BOX 5188 HANOVER, NH 03755	DOWNES, ROBIN C TTEE 187 NORTH MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 44-6	Map & Lot Number: 44-9 & 58-97
193 NMWL LLC 57 MAIN ST WEST LEBANON, NH 03784	CAESD LLC 57 MAIN ST WEST LEBANON, NH 03784

Map & Lot Number: 44-10	Map & Lot Number: 44-15
DVG VENTURES LLC 10 BENNING ST #160-255 WEST LEBANON, NH 03784	CHURCHILL, WAYNE & TINA M 194 NORTH MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 44-12	Map & Lot Number: 58-12
GRAHAM, DOUGLAS 10 BENNING ST #160-255 WEST LEBANON, NH 03784	TOWNSEND III, WINTHROP I 1823 US ROUTE 5 NORTH WINDSOR, VT 05089
Map & Lot Number: 44-14	Map & Lot Number: 59-18
BURNS, TRACY A & SALLY J 198 NORTH MAIN ST WEST LEBANON, NH 03784	STENGER-CRAFT PROPERTIES LLC 112 N MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 44-19-5700	Map & Lot Number: 58-91
HOMEOWNERS AT THE FALLS ATTN: DAN CHASE, COMM MGR PO BOX 1051 NORWICH, VT 05055	JONES, BECKY P TTEE 67 CRAFTS AVE WEST LEBANON, NH 03784
Map & Lot Number: 44-4	Map & Lot Number: 58-93
SALAZAR-KISH, JOLIN M TTEE 32 LEBANON ST, STE A HANOVER, NH 03755	CUMMINGS, LAUREN H & SANDRA L 66 CRAFTS AVE WEST LEBANON, NH 03784
Map & Lot Number:	Map & Lot Number:
Map & Lot Number:	Map & Lot Number:

(Revised 2/8/2024)

FEE SCHEDULE LEBANON PLANNING BOARD

Adopted January 24, 2022

LOT LINE ADJUSTMENT (Boundary Line Adjustment)		
		TOTALS
FILING FEE	\$25.00	\$25.00
ADVERTISING FEE	\$100	\$100
NOTIFICATION FEE (see note on page 2)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)
TOTAL DUE		\$ _____

MINOR SUBDIVISION		
		TOTALS
FILING FEE	\$150.00	\$150.00
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note on page 2)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)
TOTAL DUE AT TIME OF FILING		\$ _____

**Engineering Review fees may also be required. See note on page 2.

PRELIMINARY REVIEW OF A MAJOR SUBDIVISION		
		TOTALS
FILING FEE	\$200.00	\$200.00
NUMBER OF LOTS* _____	\$30.00 per lot*	
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note on page 2)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)
TOTAL DUE AT TIME OF FILING		\$ _____

*Or units when the subdivision does not create individual lots.
**Engineering Review fees will also be required. See note on page 2.

FINAL REVIEW OF A MAJOR SUBDIVISION		
		TOTALS
FILING FEE	\$500.00	\$500.00
FIRST FIVE (5) LOTS*	\$75.00 per lot*	
NUMBER OF LOTS 6+*	\$150.00 per lot*	
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note on page 2)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)
TOTAL DUE TIME OF FILING		\$ _____

*Or units when the subdivision does not create individual lots.
**Engineering Review fees will also be required. See note on page 2.

SITE PLAN REVIEW		
		TOTALS
FILING FEE	\$250.00	\$250.00
SQUARE FOOTAGE	\$75.00 per 1,000 sq. ft. (gross floor area)	
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note on page 2)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)

SITE PLAN REVIEW		
TOTAL DUE AT TIME OF FILING		\$
**Engineering Review fees will also be required. See note on page 2.		

SITE PLAN REVIEW AMENDMENT (WITH STRUCTURAL CHANGES)		
		TOTALS
FILING FEE	\$250.00	\$250.00
SQUARE FOOTAGE	\$75.00 per 1,000 sq. ft. (gross floor area)	
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note below)	\$5.00 + Current USPS rate per certified notice (see below) X _____ notices	\$5.00 \$ _____ (abutter certified)
TOTAL DUE AT TIME OF FILING		\$
**Engineering Review fees may also be required. See note below.		

OTHER		
-SITE PLAN REVIEW AMENDMENT (WITH NO STRUCTURAL CHANGES) -EXTENSION REQUESTS -CONDITIONAL USE PERMITS		
		TOTALS
FILING FEE	\$250.00	\$250.00
ADVERTISING FEE	\$100.00	\$100.00
NOTIFICATION FEE (see note below)	\$5.00 + Current USPS rate per certified notice (see below) X 16 _____ notices	\$5.00 \$ 88.64 (abutter certified)
TOTAL DUE AT TIME OF FILING		\$ 443.64
**Engineering Review fees may also be required. See note below.		

MINOR SITE PLAN REVIEW		
		TOTALS
FILING FEE	\$150.00	\$150.00
NOTIFICATION FEE (see note below)	Current USPS rate per certified notice (see below) X _____ notices	\$ _____ (abutter certified)
TOTAL DUE		\$

ENGINEERING REVIEW FEES:

After an application to the Planning Board is submitted and the filing fees identified above have been paid, the Planning & Development Department will determine the scope of required engineering review and will obtain an estimated cost from the reviewing engineer. A cost estimate of the review fees will usually be generated within two (2) – three (3) business days. Once conveyed to the applicant, the estimated review fees shall be paid by the applicant within five (5) business days, and an escrow account shall be established by the Planning & Development Department. No plans will be reviewed unless and until the review fee estimate is paid, if required.

Please note that escrow fees are only an estimate of what services will cost and actual costs of review may be less or more than the amount initially estimated. Any unused portion of the escrow will be returned to the applicant at the end of the approval process if such a surplus remains. Additionally, in the event the escrow amount does not cover the full cost of services the Applicant shall pay any remaining costs as a condition of approval. See also Section 4.7 of the Site Plan Review Regulations and Section 7.7 of the Subdivision Regulations.

NOTIFICATION FEE: CURRENT FEE as of January 2024 is \$5.54 per certified notice

THE CERTIFIED NOTIFICATION FEE IN ALL SECTIONS ABOVE INCLUDES THE FOLLOWING: ALL ABUTTERS, THE APPLICANT, PROPERTY OWNER, HOLDER OF CONSERVATION, PRESERVATION, OR AGRICULTURAL PRESERVATION RESTRICTION(S); AND EVERY ENGINEER, ARCHITECT, LAND SURVEYOR OR SOIL SCIENTIST WHOSE PROFESSIONAL SEAL APPEARS ON ANY PLAT SUBMITTED TO THE BOARD AND ANY OTHER PERSONS REQUIRED BY RSA 676:4, I(d).

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 215-2024-CV-00311

XYZ Dairy, LLC

v.

City of Lebanon, New Hampshire

OMNIBUS ORDER ON PENDING MOTIONS

The plaintiff, XYZ Dairy, LLC ("XYZ"), brings this action against the defendant, the City of Lebanon ("the City") seeking injunctive relief in connection with the defendant's declaration that the plaintiff's building permit was expired. (See Index #1.) This matter is before the Court on the plaintiff's Motion for Preliminary Injunction.¹ (Indices ##3–4.) The defendant objects (Index #12), to which Objection the plaintiff filed a Motion to Strike. The Court denied the plaintiff's Motion to Strike. (See Index #17.) The Court held a three-day evidentiary hearing on the matter on October 17 and 25, and November 6. The parties also made offers of proof. The Court requested memoranda on the material representation and adequate remedy elements. Only the plaintiff filed a Memorandum. (Index #19.)

Also before the Court is the defendant's motion to dismiss (Index #18), to which the plaintiff objects (Index #21), and the defendant responds. (Index #25.) Finally, the plaintiff filed an assented-to motion for a status conference. (Index #24.) Having considered the parties' arguments, evidence, offers of proof, and the applicable law, the Court finds and rules as follows.

¹ The plaintiff also filed a Motion for Temporary Restraining Order With Notice (Indices ##2, 4) which the Court denied following the October 17 and 25 hearings. (Indices ##13, 16.)

Factual Background

The Court takes the following facts from the parties' memoranda and the hearing. (See Indices ##4, 12.) Three witnesses testified at the hearing: Chet Clem, the President of Lyme Properties who acted as XYZ's agent at all times relevant; David Clem, the manager of XYZ and a real estate developer; and Calvin Hunnewell, who served as the City's Building Inspector during all times relevant to this dispute. The City also made offers of proof as to two witnesses, David Brooks, Director of Planning and Development and later Deputy City Manager, and Nathan Reichert, Director of Planning and Development after Mr. Brooks. The parties agree on the facts except where otherwise noted.

XYZ owns a parcel off Route 10 in West Lebanon, where it has pursued a mixed-use development ("River Park") since 2007. In 2011, the City Planning Board granted XYZ site plan approval for a multi-phase development. In December 2019, the City granted Building Permit #2016-00293 to XYZ for a 63,000-square-foot commercial building on Lot 1. (Ex. 1.) XYZ intends this building to be primarily a life science research facility with restaurant and retail spaces on the lower level and asserts that the building reflects features unique to life science tenants (e.g., a double air-handling system). The building permit is only for the core and shell of the building; tenants must apply for permits to build out to their needs.

The State of New Hampshire has adopted the International Building Code (IBC) as the state building code. See RSA 155-A:1, IV. Section 105.5 of the IBC required XYZ to commence work within 180 days after the City issued the building permit. (See Ex. 2.) The COVID pandemic, however, thwarted XYZ's plans to begin construction in the spring of 2020.

In 2021, Mr. Hunnewell brought to XYZ's attention the 180-day expiration period. Under Section 105.5 of the IBC, a "building official is authorized to grant, in writing, one or more extensions for time, for periods not more than 180 days each." (See Ex 2.) If a party needs an extension, it must be requested in writing and "justifiable cause demonstrated." See id. XYZ thus applied for and received two 180-day extensions to the building permit. (Exs. 3–6.) The first extension ran through July 17, 2022, and the second extension ran through January 13, 2023. In both cases, Mr. Hunnewell found that the COVID pandemic and resulting economic challenges were "adequate justification" for an extension. The second extension noted that if XYZ requested another extension, "this office may not be able to justify granting additional extensions and will require the applicant to submit revised and updated plans and specifications for the development to demonstrate compliance with the 2018 edition of the IBC." (Ex. 6.) At that point, XYZ had already updated its plan set to comply with the 2018 IBC.

On November 29, 2022, XYZ began excavating the building's foundation. Work stopped that same day when the excavator uncovered a City stormwater pipe. XYZ expected to encounter the pipe as it knew that a stormwater pipe existed in the general area (see Ex. 7); however, the City was unable to produce documentation showing the pipe's exact location or specifications. On December 9, 2022, XYZ alerted Mr. Brooks that the pipe's depth posed a conflict with the building's foundation. (Ex. 8.) XYZ told the City that excavation would stop until the parties could reach a mutually agreeable solution. On February 2, 2023, Mr. Brooks wrote back to XYZ that the City would approve a temporary stormwater line with certain conditions. (Ex. 9.) Alternatively, XYZ could delay construction until the City completed Route 10 improvements that would render the stormwater pipe redundant.

On February 15, 2023, a month after the second extension would have expired on January 13, Mr. Hunnewell requested information from XYZ to determine whether work had commenced under Section 105.5. (Ex. 10.) Mr. Hunnewell's letter included nine "examples" of documentation that XYZ could provide to prove commencement of work (hereinafter referred to as the "nine items"). Mr. Hunnewell further stated that if he could not verify that XYZ had "actively prosecuted the permit," he would retroactively revoke the permit as of January 13, 2023. Mr. Hunnewell testified that these nine items were not burdensome, particularly to a developer about to begin construction.

On March 7, 2023, XYZ responded to Mr. Hunnewell, explaining that work started with the foundation excavation on November 29, 2022, and attached a summary of work to date. (Ex. 11.) XYZ also requested that Mr. Hunnewell direct it to a policy or definition about what constitutes "commencement of construction." Mr. Hunnewell does not recall responding to this letter, although he testified that his practice would have been to respond timely. XYZ asserts that it did not receive a response. On March 16, 2023, XYZ met with City staff (Mr. Hunnewell, Mr. Reichert, and Tim Corwin, Deputy Director of Planning & Development) largely to review the information XYZ provided in the March 7 letter about its work to date. After the meeting, XYZ provided Mr. Hunnewell or another City employee with receipts for approximately \$300,000 of material it ordered for the Phase 1 infrastructure associated with the building. (Ex. 12.)

On March 24, 2023, Mr. Hunnewell notified XYZ that he determined XYZ had "commenced work" within the meaning of Section 105.5. (Ex. 13.) Mr. Hunnewell wrote, "As a result of the meeting and your follow up e-mail sent later the same day, 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.” (Id.) The letter further stated, “The following additional steps need to be completed in order to maintain activation of the building permit without jeopardizing the 180-day allowance from November 29, [2022] . . .” The “additional steps” required XYZ to provide documentation about the same nine items that Mr. Hunnewell listed in his February 15 letter. (Id.)

Mr. Hunnewell testified that the IBC does not define “work” within the meaning of Section 105.5. Mr. Hunnewell estimated that he had processed around 10,000 building permit applications during his career, and this is the only permit he remembers lapsing due to inactivity. He further testified that most projects start physical work on site within a few months, and no other permit holder had gone six years without starting construction.

On April 10, 2023, XYZ wrote back to Mr. Hunnewell, in part to ask for the “ordinance/requirement/documentation” supporting information requests in the nine items. (Ex. 14.) Mr. Hunnewell initially testified that Section 105.5’s “justifiable cause” standard was the source of authority for the nine items. After XYZ suggested that “justifiable cause” only pertained to extensions, Mr. Hunnewell said that perhaps Section 105.5 was not the right source of authority, but all nine items dealt with requirements elsewhere in the code. When pressed, Mr. Hunnewell acknowledged that some of the nine items related to infrastructure were under another department’s jurisdiction and outside his authority. Mr. Hunnewell further testified that his source of authority for the items was his role as building inspector.

XYZ did not receive a response from Mr. Hunnewell about his authority to impose the information requests in the nine items. Consequently, it appealed the nine items to the City’s Building Code Board of Appeals (BCBA). (Ex. 15.) On July 11, 2023, the City

BCBA confirmed that the building permit was active but did not opine on the items. (Ex. 16.)

On August 3, 2023, XYZ wrote to Mr. Hunnewell seeking permission to connect the temporary stormwater line so that it could continue excavation for the Lot 1 building. (Ex. 17.) XYZ also wrote that it had "restarted conversations with project partners" after receiving confirmation from the City BCBA that the permit was active. Mr. Brooks responded that he had directed Department of Public Works staff to work with XYZ to resolve the matter. (Ex. 18.) The City asserts that the documentation XYZ provided for the temporary line did not adequately portray the design. The City further asserts it could not "just approve" the relocation because it had no security that XYZ would ultimately build a permanent stormwater solution.

While XYZ and the City attempted to resolve the stormwater line issue, XYZ continued preparatory work with its construction partners. On January 5, 2024, XYZ wrote to Mr. Hunnewell that it had named a new construction manager and was "diligently pursuing construction" in anticipation of the 2024 season. (Ex. 20.) Chet Clem testified that between the July 2023 BCBA hearing and the January 5, 2024 letter, XYZ did not send further information about its progress because XYZ was "confident" it was in compliance with Section 105.5 and Mr. Hunnewell had not pressed the issue of the nine items.

On February 1, 2024, XYZ received a letter from Mr. Hunnewell declaring that the building permit "has expired and is invalid" because XYZ had not conducted work on site for more than 180 days. (Ex. 21.) XYZ was "very surprised" because it understood "work" within the meaning of Section 105.5 to include preparatory work, based on Mr. Hunnewell's March 24, 2023 letter. Between March 2023 and February 2024, XYZ

undertook preparatory work with project partners, including obligating itself to \$870,000 of contracts. Mr. Hunnewell testified that he did not know about this preparatory work and contracts. Mr. Hunnewell further testified that he never contacted XYZ to find out whether it was conducting any work, preparatory or otherwise, before declaring the permit expired and invalid; however, he felt that he had no duty to solicit information from builders as generally they contacted him for inspections. Mr. Hunnewell testified that the focus of his job was to promote life safety via code enforcement; when pressed, he did not identify what harm he sought to prevent by invalidating XYZ's permit.

Accordingly, XYZ appealed Mr. Hunnewell's invalidation of the building permit to the City BCBA. (Ex. 22.) On May 6, 2024, the BCBA held that "work" included preparation work, reversed Mr. Hunnewell's February 1, 2024 determination, and reinstated the building permit. (Ex. 24.) The City then appealed the City BCBA's decision to the State Building Code Review Board (BCRB). On July 31, 2024, the State BCRB reversed the City BCBA, holding that "work" refers only to "physical work authorized by the permit and conducted at the site." (Ex. 25.) However, the State BCRB noted that "we do [not] review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials concerning the types of conduct that would qualify as work under Subsection 105.5." (Id.) In other words, the state BCRB recognized that XYZ may have a municipal estoppel claim.

While XYZ and the City engaged in this back and forth over permitting, XYZ worked behind the scenes to attract and retain a "unicorn" anchor tenant. This tenant is a local life sciences company owned by a publicly traded corporation. The tenant is unique because it is the only company of its type that stayed local after licensing

intellectual property to a for-profit entity. Further, the tenant has its own capital to outfit its facility beyond the building's core and shell. The tenant refuses to enter a lease without an active building permit in place. XYZ asserts that without that lease, it will not be able to secure the financing it needs to move forward with the Lot 1 building and the rest of the River Park development.

Analysis

I. Preliminary Injunctive Relief

XYZ seeks a preliminary injunction (1) reinstating Building Permit #2016-00293 and (2) extending the Planning Board site plan approvals by two years. (Index #4 at 24–25; Index #5 ¶¶1–2.) The City argues that XYZ is not entitled to a preliminary injunction reinstating the building permit because it has no likelihood of success on the merits of its municipal estoppel claim. (Index #12 at 3.) The City further argues that even if the Court does order the City to reinstate the building permit, the Court should not extend the Planning Board approval because estoppel with respect to the building permit has no bearing on planning approvals. (Index #12 at 3 n.2.)

“A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” DuPont v. Nashua Police Dep’t, 167 N.H. 429, 434 (2015) (quotation omitted). The party requesting the injunction must show that (1) it is likely to succeed on the merits; (2) it has no adequate remedy at law; and (3) there is an immediate danger of irreparable harm to the party if the court does not grant injunctive relief. Pike v. Deutsche Bank Nat’l Trust Co., 168 N.H. 40, 45 (2015).

A. Preliminary Injunction to Reinstate Building Permit

As a threshold matter, the City argues that injunctive relief is inappropriate because XYZ seeks to alter, not maintain, the status quo. (Index #12 at 11.) The “status quo” in the context of a preliminary injunction is the “last uncontested status which preceded the pending controversy.” Crowley v. Loc. No. 82, 679 F.2d 978, 995 (1st Cir. 1982), rev’d on other grounds, 467 U.S. 526 (1984) (quotation omitted).

Here, the “pending controversy” is whether Mr. Hunnewell properly invalidated XYZ’s building permit on February 1, 2024. (Ex. 21.) Consequently, the last uncontested status is that of January 31, 2024. At that time, XYZ held a valid building permit subject to Mr. Hunnewell’s March 24, 2023 “approval of work,” with the nine contested items attached. (Ex. 13). The permit was also subject to the July 11, 2023 City BCBA decision, which confirmed the permit was active but did not decide the validity of the nine items. (Ex. 16.) Thus, the “status quo” as of January 31, 2024, where XYZ held a valid permit subject to the nine contested items, would be the appropriate status for the Court to restore if it were to grant a preliminary injunction.

i. Likelihood of Success on the Merits

The first element a plaintiff must prove in its case for a preliminary injunction is that it is likely to succeed on the merits. Pike, 168 N.H. at 45. XYZ claims municipal estoppel, arguing that the City is estopped from terminating XYZ’s building permit because XYZ reasonably relied on Mr. Hunnewell’s representation that XYZ’s preparatory work constituted “work” within the meaning of Section 105.5 of the IBC. (Index #4 at 25–29.) The City responds that XYZ acted unreasonably when it never provided any of the information described in the nine items Mr. Hunnewell laid out in the same representation. (Index #12 at 11–12.)

The doctrine of municipal estoppel prevents “unjust enrichment” and ensures “fairness to those who bargain with the agents of municipalities for the promises of the municipalities.” Town of Atkinson v. Malborn Realty Tr., 164 N.H. 62, 67 (2012). In order for a plaintiff to prevail on a municipal estoppel claim, the plaintiff must show that (1) the municipality, by the words or conduct of an authorized official, misrepresented a material fact with knowledge of the fact; (2) the plaintiff was ignorant of the truth of the matter; (3) the representation was made with the intention of inducing the plaintiff to rely upon it; and (4) the plaintiff was induced to and reasonably relied upon the representation to the plaintiff’s detriment. Sutton v. Town of Gilford, 160 N.H. 43, 58 (2010). Courts apply the doctrine of municipal estoppel “with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.” Town of Seabrook v. Vachon Mgmt., Inc., 144 N.H. 660, 666 (2000) (quotations omitted).

1. *Actionable Misrepresentation*

The first element of municipal estoppel is that a municipality, by the words or conduct of an authorized official, misrepresented a material fact with knowledge of the fact. Sutton, 160 N.H. at 58. XYZ makes two arguments that Mr. Hunnewell’s March 24, 2023 statement that XYZ’s preparatory work constituted “work” under Section 105.5 is an actionable misrepresentation. First, XYZ argues that the representation regards “then-existing facts” and is more than a mere, nonactionable, statement of law. (Index #19 at 11–13.) Second, XYZ argues that even if Mr. Hunnewell’s representation is a statement of law, basic fairness weighs in favor of estopping the City. (Index #19 at 13–16.) In response, the City contends that Mr. Hunnewell’s communications were “statements [of] his legal position vis-à-vis avoiding expiration of the building permit,”

i.e., mere statements of law. (Index #12 at 12.) The parties agree that as long as Mr. Hunnewell acted with authority, his actions can be imputed to the City. XYZ asserts, and the City does not dispute, that Mr. Hunnewell acted within his authority to make the representation about “work.”

The general rule is that municipal estoppel “applies only to misstatements of fact, not misstatements of law.” See Bosonetto v. Town of Richmond, 163 N.H. 736, 743 (2012) (noting that New Hampshire case law has not yet addressed misstatements of fact versus law). Mere representations of law are not actionable because “every person is presumed to know the law and, therefore, to organize his or her conduct and affairs accordingly.” See Lennartz v. Oak Point Assocs., P.A., 167 N.H. 459, 464 (2015). Bosonetto offers an example of a clear misstatement of the law. The law at issue concerned the 30-day period to move for a Zoning Board of Appeals (ZBA) rehearing. RSA 677:2 starts the period the day after the ZBA votes on the application, but the town incorrectly told the plaintiff that the period began when the ZBA filed its decision. Bosonetto, 163 N.H. at 743. There, the town made a general statement of law that the plaintiff could have researched on his own. Id. Further, the town’s statement was not specific to the facts of the plaintiff’s case. See id.

However, a municipal official’s representations are not always a clear statement of fact or a statement of law. Where officials apply the law to the facts of a party’s case, representations are often statements of mixed law and fact. Mixed statements may or may not be actionable. City of Concord v. Tompkins offers an example of a non-actionable mixed statement. 124 N.H. 463 (1984). There, the city misstated the law when it told the plaintiff that “there was no time limit for construction of the sign” under his building permit. Id. at 467. In fact, a building code provision—which the plaintiff could

have read—required that construction begin within six months or else the permit would expire. Id. The city involved the facts of the case when it applied the law to the plaintiff's permit to build a sign; however, like the Bosonetto representation, the city's opinion did not turn on the facts of the plaintiff's situation. Rather, the city made a general misstatement of the law that referenced "the sign" but was not otherwise specific to the plaintiff's project. See id. at 473–74.

In contrast, Aranosian Oil Co. v. City of Portsmouth presents an actionable statement of mixed law and fact. 136 N.H. 57 (1992). There, the city issued a building permit to the plaintiff to expand a prior non-conforming use, then revoked the permit when it realized that the expanded use was also non-conforming. Id. at 58–59. The building permit was the city's statement of law (it implies compliance with zoning regulations) as applied to specific facts (the plaintiff's project). See id. at 60. Unlike the City of Concord statement, which did not turn on the facts of the plaintiff's sign project, the Aranosian Oil permit approval relied heavily on the details of the project, i.e., its facts. Taken together, these New Hampshire cases suggest that a mixed statement of law and fact is most actionable where the official's application of the law turns closely on facts specific to the case.

Here, the alleged misrepresentation is Mr. Hunnewell's March 24, 2023 statement "we agree that" XYZ "justified the preparation work you have been preparing with your construction partners constitutes commencement of work at 1 River Park Drive." (Ex. 13.) Like the City of Concord and Aranosian Oil statements, Mr. Hunnewell's statement mixes law and fact. The legal part of the statement is Mr. Hunnewell's determination that "preparation work" constitutes "commencement of work" within the

meaning of Section 105.5.² The factual part of the statement occurs where Mr. Hunnewell references XYZ's work specifically, i.e., where he determines that "the preparation work **you have been preparing** with your construction partners" is "preparation work" (emphasis added).

The evidence reflects that City staff called the March 16, 2023 meeting to learn more about the facts of XYZ's situation and that the information XYZ provided at the meeting heavily informed Mr. Hunnewell's March 24, 2023 determination. Mr. Hunnewell's March 24 letter begins with a list of topics discussed at the March 16 meeting. It continues, "As a result of the meeting and your follow up e-mail . . . we agree that you have justified the preparation work . . ." Just as the Aranosjan Oil permit approval turned closely on that project's details, the language of the March 24 letter shows that so too did Mr. Hunnewell's determination about XYZ's work. Thus, Mr. Hunnewell's representation is actionable as a mixed statement of law and fact that turns closely on facts specific to the case.

The Court is further persuaded by XYZ's arguments about basic fairness. Generally, "representations or opinions as to matters of law do not ordinarily base or create an estoppel unless made under circumstances that render a repudiation inequitable." 31 C.J.S. Estoppel and Waiver § 115. In the municipal context, one such extenuating circumstance occurs where an official makes a misstatement "so closely connected to the basic fairness of the administrative decision making process that the government may be estopped from disavowing the misstatement." Sunapee Difference, LLC v. State, 164 N.H. 778, 795 (2013) (quoting City of Concord, 124 N.H. at 472).

² The March 24, 2023 letter does not specifically reference Section 105.5, but the parties do not dispute that Mr. Hunnewell was referring to "work" in the context of Section 105.5.

Other jurisdictions have identified another extenuating circumstance where the party making a statement of law has "special knowledge," including legal skill. See, e.g., Waugh v. Lennard, 69 Ariz. 214, 227–228 (1949) (plaintiff relied on lawyer's statement of law); Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380, 1386 (9th Cir. 1981) (special knowledge may be a basis for estoppel).

Here, even if Mr. Hunnewell's representation was a mere statement of law, basic fairness weighs in favor of finding his statement actionable. When XYZ first raised questions about Section 105.5's meaning, XYZ, its architect, and its lawyers conducted their own research. Finding nothing, XYZ turned to and relied on Mr. Hunnewell because, as he testified, Mr. Hunnewell is the person at the City with authority to apply and enforce the building code under RSA 155-A:7. Where XYZ had no other resource to establish Section 105.5's meaning, Mr. Hunnewell was the person with "special knowledge." See Shamrock Dev. Co., 656 F.2d at 1386.

To the extent that Mr. Hunnewell's job involves statutory interpretation of the building code, Mr. Hunnewell also has unique legal skills. Accordingly, the need for basic fairness in the administrative permitting process renders inequitable Mr. Hunnewell's February 1, 2024 repudiation of XYZ's continued preparatory work, where Mr. Hunnewell approved the same type of work less than a year earlier. Thus, the Court rules that whether Mr. Hunnewell's March 24, 2023 representation is a qualifying statement of mixed law and fact or a mere statement of law but from an official with special knowledge, the representation is actionable. See id.

2. Plaintiff's Ignorance

The second element of municipal estoppel is that the plaintiff was ignorant of the truth of the matter. Sutton, 160 N.H. at 58. Here, the "truth of the matter" is that contrary

to Mr. Hunnewell's March 24, 2023 statement, XYZ's preparatory work did not actually constitute "work." Simply, XYZ had no way to know the "true" meaning of "work." Mr. Hunnewell testified that the building code does not define "work" and XYZ further notes that the code does not define "commencement," "suspension," or "abandonment" of work. Further, the City BCBA reached one conclusion as to the meaning of "work" while the State BCRB reached the opposite conclusion; this back and forth shows that the meaning of "work" under Section 105.5 is hardly obvious, even to those tasked with interpreting the building code. Thus, the Court finds that XYZ was ignorant of the truth of the matter.

3. Representation Made to Induce Reliance

The third element of municipal estoppel is that the official must have made the representation with the intention of inducing the plaintiff to rely upon it. Sutton, 160 N.H. at 58. XYZ argues that its long history of communication with Mr. Hunnewell, including the March 16 meeting, leads to no other conclusion than that Mr. Hunnewell intended that XYZ rely on his March 24, 2023 "work" representation. (Index #4 at 28.) The context of the March 24 letter also includes the fact that XYZ was at risk of losing its building permit, per Mr. Hunnewell's February 15, 2023 letter. Given how high the stakes were at the time, Mr. Hunnewell must have intended any further communication to induce XYZ to act according to Mr. Hunnewell's directions. Thus, the Court finds that Mr. Hunnewell made the "work" representation intending for XYZ to rely on it.

4. Plaintiff's Reasonable Reliance

The fourth element of municipal estoppel is that the plaintiff was induced to and reasonably relied upon the representation to the plaintiff's detriment. Sutton, 160 N.H. at 58. XYZ argues that it reasonably relied on Mr. Hunnewell's March 24, 2023 "work"

representation because it had no reason to doubt whether continued preparatory work, of the same type and scope as the work approved by Mr. Hunnewell, would suffice to keep the permit active. (Index #4 at 28–29.) Based on its assumption that it could continue business as usual, XYZ obligated itself to \$870,000 of contracts from March 2023 through January 2024. The City does not dispute that that XYZ reasonably relied on Mr. Hunnewell’s representation about “work,” and the Court finds that it did so.

The City contends that Mr. Hunnewell’s representation also included the nine items, and because XYZ never provided information to satisfy the nine items, it did not rely reasonably on the March 24, 2023 letter. (Index #12 at 11–12; Index #18 at 11–12.) The City further argues that to the extent XYZ claims to have relied on Mr. Hunnewell’s March 24 letter, XYZ acted unreasonably when “it did not follow his instructions” and “believed that its January 5, 2024 letter, without more, could keep its permit active.” (Index #12 at 12.)

Any reliance by the party asserting municipal estoppel must have been reasonable. Thomas v. Town of Hooksett, 153 N.H. 717, 722 (2006). “Reliance is unreasonable when the party asserting estoppel, at the time of his or her reliance or at the time of the representation or concealment, knew or should have known that the conduct or representation was improper, materially incorrect or misleading.” Id. “Incorporated into the concept of reasonable reliance is the requirement that the moving party exercise due diligence to learn the truth of a matter relied upon.” Cadle Co. v. Bourgeois, 149 N.H. 410, 418 (2003).

Here, XYZ’s reliance on Mr. Hunnewell’s representation that its preparatory work constituted “work” under Section 105.5 was reasonable. XYZ exercised due diligence to research the meaning of Section 105.5 and through that research learned that there

was little to no law interpreting the term “work.” Accordingly, XYZ reasonably—and wisely—turned to Mr. Hunnewell as the official with jurisdiction to interpret and enforce the code. After the March 24, 2023 letter, XYZ continued to act reasonably when it assumed that it could continue the same type of preparatory work without jeopardizing its permit status. The City BCBA decision affirming Mr. Hunnewell’s representation further shows XYZ’s reasonableness in relying on Mr. Hunnewell’s opinion.

Turning to the nine items, the parties dispute whether they were part of Mr. Hunnewell’s “representation” and, if so, whether XYZ responded reasonably. XYZ characterizes the items as “conditions” and argues that because Mr. Hunnewell acted outside his authority to impose the nine items, they are void. (Index #4 at 8–9.) XYZ contends that at least several of the items are retroactive, and therefore illegal, because they ask for information XYZ already provided in the permit application process. XYZ further contends that to the extent the items implied that XYZ had violated some aspect of the building code, those items were void for not citing the applicable code provision as required by RSA 155-A:7, V. Finally, XYZ asserts that “several other steps” imposed in the letter beyond the nine items relate to the Phase 1 infrastructure, which was not under Mr. Hunnewell’s jurisdiction.

The City characterizes the items as “examples” and alleges that XYZ “did not provide any information at all.” (Index #12 at 11.) Mr. Hunnewell testified that his intent was to help XYZ by providing nine examples of preparatory work documentation so it could prove that physical work was starting soon. Mr. Hunnewell further testified that Section 105.5 was likely not the source of authority for the nine items and that he was not sure what code provision was the source of his authority. He testified that several of

the items do have a basis in other code provisions, such as the provisions regarding special inspections or cost estimates.

Assuming without deciding that the nine items were part of Mr. Hunnewell's March 24, 2023 representation, the Court leaves the issue of whether Mr. Hunnewell's had authority to impose the items for a hearing on the merits. At this stage, the issue is whether XYZ responded reasonably to the nine items. The Court determines that XYZ did respond reasonably because XYZ had a good-faith basis to question the items, it provided some if not all of the requested information, and it diligently pursued a resolution to the question of Mr. Hunnewell's authority to impose the items.

XYZ had a good-faith basis to question the nine items because Mr. Hunnewell had no obvious source of authority to request the additional information. Mr. Hunnewell's testimony reflects as much; while he asserts that he did have authority as the building inspection to impose conditions, he could not testify to the precise source of that authority. After first reviewing the nine items in Mr. Hunnewell's February 15, 2023 letter (Ex. 10), XYZ questioned the items in its March 7 response. (Ex. 11.) In that letter, XYZ asked Mr. Hunnewell to define "commencement of construction" and share a "policy on what is required to meet that burden of proof." After Mr. Hunnewell reiterated the nine items in the March 24, 2023 letter, XYZ asked again in its April 10 email for the authority behind the requests. (Ex. 14.) In both its March 7 and April 10 communications, XYZ explained that it was asking for more information "so that I can ensure sufficient information is relayed" and because "that would be helpful in ensuring we provide sufficient information to be in compliance," respectively. (Exs. 11, 14.)

Further, XYZ provided some information and acted diligently to resolve its concerns. Contrary to the City's assertion that XYZ provided no information whatsoever

in response to the nine items, XYZ attached to its March 7 letter a two-page narrative of work to date; in its April 10 email, XYZ answered two of the nine items, stated that two more items were “pending,” and asked Mr. Hunnewell to define the information it sought with respect to the other five items. (Exs. 11, 14.) The language XYZ used—that it sought to provide “sufficient information”—and the fact that it provided some, if not all, information shows that while XYZ did not rush to comply strictly with all nine items, neither did it seek to avoid or subvert the items.

Finally, when XYZ did not receive an answer from Mr. Hunnewell about his authority or further definition of the items, XYZ followed up on the issue by appealing the items to the City BCBA. (Ex. 15.) Thus, in light of the confusion over whether the nine items were examples or conditions, Mr. Hunnewell’s authority to impose the nine items, and the requirements for each item, and given Mr. Hunnewell’s nonresponse to XYZ’s second request for clarification on April 10, XYZ acted reasonably with respect to the “nine items” portion of Mr. Hunnewell’s representation. Further, XYZ continued to rely reasonably on Mr. Hunnewell’s March 24, 2023 representation as to what constituted “work” under Section 105.5.

ii. *No Adequate Remedy at Law*

Having determined that XYZ has established its likelihood of success on the merits, the Court turns to the second element of XYZ’s claim for a preliminary injunction. A plaintiff must prove that it has no other adequate remedy at law. Pike, 168 N.H. at 45. XYZ argues that it has no adequate remedy because equitable relief is the only appropriate remedy where real estate is concerned. (Index #4 at 30.) XYZ further argues that if the building permit remains expired, it faces irreparable harm because it will lose its “unicorn tenant,” have no ability to secure financing, ultimately need to

"scrap" the entire seven-phase River Park project, and suffer ensuing reputational damage. (Indices ##4 at 29–30, 19 at 16–17.) The City argues that XYZ has an adequate remedy because it could seek damages for an alleged breach of duty by the City. The City contends that XYZ should have a business plan sufficient to establish damages and that reputational harm is irrelevant because it would accrue to David and Chet Clem as individuals and not to XYZ Dairy, LLC.

Whether an adequate remedy at law exists "necessarily depends upon the factual circumstances in each case." Sands v. Stevens, 121 N.H. 1008, 1011 (1981) (quotation omitted). Courts may exercise "considerable discretion in determining whether equity should intervene to aid litigants in the protection of their legal rights." Id. (quotation omitted). Further, "superior courts should not limit their inquiry solely to the question of the adequacy of the remedy at law; they should also consider whether the remedy at law is plain and complete." Id. Where rights in real estate are concerned, courts generally presume a lack of an adequate alternative remedy at law due to the "unique character of real estate." See Moore v. Sterling Warner Indus. Inv. Corp., 114 N.H. 520, 522 (1974); Soukup v. Brooks, No. 215-2006-EQ-141, 2006 N.H. Super. LEXIS 35 at *5–6 (Jul. 31, 2006).

Here, XYZ has established that it has no adequate remedy at law because real estate is at issue and any damage recovery would arrive too late to prevent irreparable harm. Although the building permit at issue is not "real estate," permits may confer a vested right on the property owner. Winn v. Lamoy Realty Corp., 100 N.H. 280, 281 (1956). In turn, that right to build is part of the "group of rights" that comprise "property." See Burrows v. City of Keene, 121 N.H. 590, 597 (1981). The River Park parcel is unique in its size, central location within the Upper Valley, and how much XYZ has

already invested in the property to date. XYZ cannot simply find another piece of shovel-ready land in the Upper Valley for a mixed-use development of this type and scale. See Bacon v. Town of Enfield, 150 N.H. 468, 482 (2004) (Nadeau, J., dissenting) (“Each piece of real property possesses characteristics which contribute to its uniqueness.”).

The City argues that XYZ is an entity that exists solely to make money off of River Park. In contrast, both David Clem and Chet Clem testified to their personal desire to give back to the community via the River Park project. If XYZ sought merely to turn a profit, it likely would have turned to other real estate opportunities to do so. To the extent that the unique connections between parties and their real property undergird the tradition of affording equitable relief in such cases, the Court is persuaded that such a connection exists here.

Even if XYZ sought damages for lost revenue and property value, as the City contends it could, those damages would come too late to prevent irreparable harm. In this way, irreparable harm is a central consideration to the “adequate remedy” element, in addition to an element in its own right. A remedy where XYZ secures damages but still suffers irreparable harm would hardly be “plain and complete.” See Sands, 121 N.H. at 1011. Given that real estate is at issue and that XYZ faces irreparable harm not compensable by damages, the Court determines that XYZ has shown that it has no adequate remedy at law.

iii. Irreparable Harm

Accordingly, the Court turns to the third element of a preliminary injunction. A plaintiff must prove that it faces an immediate danger of irreparable harm without

injunctive relief. Pike, 168 N.H. at 45. The parties' arguments about irreparable harm are largely the same as their arguments about adequate remedies.

When evaluating irreparable harm, a court must balance the significance of the threat of irreparable harm to the party requesting injunctive relief against the potential harm that granting an injunction would inflict on the other party. Kukene v. Genuardo, 145 N.H. 1, 4 (2000). Even in cases where damages may be quantifiable, irreparable harm exists "where the potential economic loss is so great as to threaten the existence of the movant's business." NACM-New England, Inc. v. Nat'l Ass'n of Credit Mgmt., Inc., 927 F.3d 1, 5 (1st Cir. 2019) (quotations omitted).

Here, the Court finds credible XYZ's assertion that it may have to "scrap" the River Park project if the Court denies immediate injunctive relief. XYZ explained the domino effect that the City's refusal to reinstate its building permit will likely precipitate. Without a building permit, XYZ will lose its anchor life science tenant. Without the anchor tenant, XYZ cannot secure financing. Without financing, XYZ cannot continue building out River Park. XYZ's loss of its anchor tenant, and potentially the entire development opportunity, constitutes irreparable harm under the circumstances. To the extent that River Park is XYZ's business, losing the anchor tenant threatens the existence of the business. See NACM-New England, 927 F.3d at 5.

XYZ articulated this chain of harm routinely throughout its pleadings and testimony. In contrast, the City articulated only one harm it may suffer if the Court awards XYZ its requested relief: the possibility that future permittees may sue to reinstate invalidated permits. The Court is unpersuaded by this argument, as any decision would not expand or otherwise change the rights that other City permittees already have. Having decided the adequate remedy and irreparable harm issues on

other grounds, the Court declines to address XYZ's argument about reputational harm. Thus, the Court finds that XYZ establishes an immediate threat of irreparable harm.

Because XYZ establishes that it is likely to succeed on the merits of its municipal estoppel claim, it has no adequate remedy at law, and it faces an immediate threat of irreparable harm, the Court rules that XYZ is entitled to a preliminary injunction reinstating Building Permit #2016-00293.

B. Preliminary Injunction to Extend Planning Board Approval

Although the building permit is the focus of XYZ's case against the City, the site plan approval is also at issue. The City Planning Board first approved XYZ's site plan in 2011 and most recently extended that approval in October 2021, requiring XYZ to complete Phase 1 infrastructure by January 2, 2025. (Ex. 29.) Among other improvements, the Phase 1 infrastructure includes extending municipal water and sewer service to the Lot 1 building. XYZ concedes that it would have been physically possible to undertake the Phase 1 infrastructure work while waiting on the City to reinstate the building permit; however, XYZ contends it would have been unreasonable and a breach of duty to its investors to do so. XYZ asserts that without a building permit, any infrastructure work would have accrued only to the City's benefit with no benefit to XYZ. XYZ further asserts that, even if the Court reinstated the building permit via this order, it could not meet the January 2 deadline because "work has now been suspended for approximately nine months and . . . the City's seasonal moratorium on excavation [is] impending." (Index #19 at 16.)

Accordingly, XYZ requested from the Planning Board a two-year extension to the January 2, 2025 Phase 1 deadline. The matter went before the Planning Board on November 12, 2024, and the Planning Board denied the extension. (Index #24.)

Consequently, XYZ seeks a preliminary injunction not only to reinstate its building permit but also to extend the Planning Board's site plan approval deadlines by two years. (Index #19 at 16.) XYZ argues that it would be within the Court's expansive equitable powers to afford such relief, and further contends that extending site plan approval deadlines is necessary to restore the building permit status quo as of January 31, 2024. The City argues that it would be inappropriate for the Court to interfere with Planning Board jurisdiction; XYZ responds that the Planning Board has no jurisdiction over a municipal estoppel claim and this Court is the proper venue to determine such relief. The City further contends that XYZ should have been working on Phase 1 infrastructure while pursuing reinstating the building permit; XYZ argues that it made no economic or common sense to do so without a valid building permit.

The Court finds persuasive XYZ's argument that reinstating the building permit alone would afford incomplete relief. See Sands, 121 N.H. at 1011. The Lot 1 building at issue in this case is reasonably related to the Phase 1 infrastructure deadline because that infrastructure, e.g., sewer and water, is necessary for the building to operate. The Court did not receive testimony suggesting that the building permit delay has affected site plan approval phases other than the Phase 1 infrastructure deadline. The Phase 1 infrastructure approval expires on January 2, 2025. (Ex. 29.) Even if XYZ was unaffected by the winter excavation moratorium, David Clem testified that the Phase 1 infrastructure work will take about three months; consequently, XYZ cannot complete the work by January 2.

The Court is unpersuaded by the City's argument that XYZ should have completed the Phase 1 infrastructure work without a building permit. As Chet and David Clem testified, the City cannot reasonably expect a developer to pursue infrastructure work

without a building permit for the associated building project. Further, as David Clem testified, starting Phase 1 infrastructure without a building permit in hand may have breached XYZ's fiduciary obligations to its investors, which are four trusts with a variety of beneficiaries. Because XYZ cannot reasonably work on the Lot 1 building without a feasible timeline to complete Phase 1 infrastructure, complete relief requires extending the Phase 1 infrastructure approval.

Likewise, the Court finds persuasive XYZ's argument that extending the January 2, 2025 infrastructure deadline is necessary to restore the status quo as of January 31, 2024. At that time, XYZ held a valid permit, subject to the dispute over the nine items. XYZ also then anticipated the first site plan deadline for Phase 1 infrastructure work on January 2, 2025. The January 2, 2025 deadline would have been 11 months and two days after the January 31, 2024 "status quo" date. Although XYZ requests a two-year extension because two years is the customary Planning Board extension period, the Court will extend the site plan deadline only to the extent necessary to restore the parties to their "status quo" positions, which is 11 months and two days from the date of the Clerk's notice of this order and specified in the conclusion. XYZ anticipates completing Phase 1 infrastructure within three months of reinstated site plan approval, or four months to account for unexpected delays. Accordingly, 11 months and two days—even considering the winter excavation moratorium—should provide more than enough time for XYZ to complete the Phase 1 infrastructure during the 2025 construction season. XYZ has not, however, shown that it is in immediate danger of irreparable harm as to the other Planning Board approval deadlines.

Turning to the parties' dispute over jurisdiction, the Court agrees with XYZ, for the reasons XYZ lays out in its Bench Memorandum, that the Court has jurisdiction over XYZ's

request to extend the January 2, 2025 Planning Board site plan approval deadline. (Index #19 at 17–20.) See also Hatch v. Hillsgrove, 83 NH 91, 93 (1927) (“No jurisdiction can be more ample and unqualified than that of this court in cases of injunction.”). However, the Court limits its jurisdiction to only the extent necessary to afford complete relief in this case; that is, to Phase 1 only and limited to XYZ’s position as of January 31, 2024. Therefore, because extending the Phase 1 site plan approval entitlement is necessary to afford XYZ complete relief and restore the parties to the January 31, 2024 status quo, and it is within the Court’s equitable powers to do so, the Court GRANTS XYZ’s motion for a preliminary injunction extending the Phase 1 site plan approval by 11 months and two days from the date of the Clerk’s notice this order.

C. Attorneys’ Fees and Costs

XYZ is not requesting an award of attorneys’ fees and costs at this time but only “in connection with the trial on the merits.” (Index #5 at 2.) Accordingly, the Court does not act on XYZ’s request for attorneys’ fees and costs.

II. Defendant’s Motion to Dismiss

The City filed a motion to dismiss (Index #18), to which XYZ objects (Index #21), to which the City responds. (Index #25.) When ruling on a motion to dismiss, the court must determine whether the plaintiff’s allegations stated in the complaint “are reasonably susceptible of a construction that would permit recovery.” Plourde Sand & Gravel, Co. v. JGI Eastern, Inc., 154 N.H. 791, 793 (2007). In doing so, the Court must “assume all facts [pled] in the plaintiff’s writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff’s favor.” Id. The court need not, however, “assume the truth of statements . . . that are merely conclusions of law[]” not supported by “predicate facts[.]” Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601,

611–12 (2010). The court should test these facts against the applicable law and deny the motion to dismiss “[i]f the facts as alleged would constitute a basis for legal relief[.]” Starr v. Governor, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts alleged in the complaint do not constitute a basis for relief. See Jay Edwards, Inc. v. Baker, 130 N.H. 41, 46–47 (1987) (finding dismissal appropriate where plaintiff’s complaint failed to plead sufficient facts supporting the elements of the claims).

Construing the facts in XYZ’s complaint as true, the Court finds that the XYZ’s allegations are “reasonably susceptible of a construction that would permit recovery.” See Plourde Sand & Gravel, Co., 154 N.H. at 793. As set forth above, XYZ has not only stated a municipal estoppel claim but also proved a likelihood of success. Therefore, the Court **DENIES** the City’s motion to dismiss.

III. Plaintiff’s Motion for Status Conference

XYZ filed an assented-to motion for a status conference. (Index #24.) XYZ seeks to discuss how the Planning Board’s November 12 denial affects XYZ’s request for a preliminary injunction. The Court determines that the relief issued in this order extending the Phase 1 deadline renders XYZ’s motion for a status conference **MOOT**.

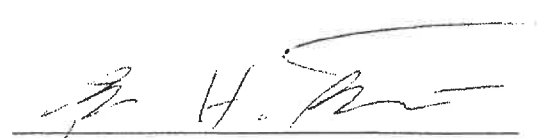
Conclusion

The Court **GRANTS** XYZ’s motion for a preliminary injunction to reinstate Building Permit #2016-00293 as of the date of this order. The Court further **GRANTS** XYZ’s motion to extend the Planning Board’s site plan approval deadlines with respect to the Phase 1 deadline by 11 months and two days from the date of the Clerk’s notice of this order. The new Phase 1 deadline will be October 27, 2025, if this Order is issued on November 25, 2024. The Court **DENIES** the City’s motion to dismiss. XYZ’s motion for a status conference is **MOOT**. This order conveys the Court’s view on the merits of

the parties' respective claims and legal arguments only to the extent necessary to decide the limited questions presented.

Recommended by:

Dated: 11/25/2024

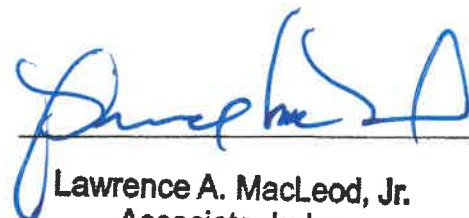

Peter H. Bornstein
Judicial Referee

Approved and so ordered.

I certify that I have read the recommendations of the Judicial Referee and agree that the Judicial Referee has applied the correct legal standard to the facts determined by the Judicial Referee.

So ordered.

Date: 11/25/2024


Lawrence A. MacLeod, Jr.
Associate Judge
New Hampshire Superior Court

Clerk's Notice of Decision
Document Sent to Parties
on 11/26/2024

STATE OF NEW HAMPSHIRE
GRAFTON COUNTY, SS. SUPERIOR COURT

XYZ Dairy, LLC

v.

The City of Lebanon, New Hampshire

and

Calvin Hunnewell, in his official capacity as
Building Inspector for the City of Lebanon, New Hampshire

Docket No. 215-2024-CV-00311

**COMPLAINT FOR TRO AND PRELIMINARY AND PERMANENT INJUNCTION ON
THE BASIS OF MUNICIPAL ESTOPPEL**

(Jury Trial Demanded)

(Evidentiary Hearing Requested)

The Parties

1. Plaintiff XYZ Dairy, LLC (“XYZ”), is a Delaware Limited Liability Company, with a physical address of 57 Main Street, West Lebanon, New Hampshire, 03784.
2. XYZ Dairy, LLC is engaged in the business of real estate development.
3. Defendant City of Lebanon, New Hampshire (“City of Lebanon”) is a municipal corporation with a physical address of 51 North Park Street, Lebanon, New Hampshire, 03766.
4. Defendant Calvin Hunnewell (the “Building Inspector”) is the former Building Inspector of the City of Lebanon, New Hampshire, and, sued here in his official capacity, has a

physical address of 51 North Park Street, Lebanon, New Hampshire, 03766.

Jurisdiction and Venue

5. This Court has jurisdiction pursuant to N.H. RSA 491:7
6. Venue is proper in Grafton County Superior Court pursuant to N.H. RSA 507:9.

Facts

7. The City of Lebanon's Building Inspector Calvin Hunnewell issued Building Permit #2016-00293 (the "Building Permit") to XYZ on December 31, 2019. *See Exh. 1.*

8. The Building Permit authorized XYZ to develop a "[n]ew mixed use commercial building within Lot #1 of the River Park subdivision" located at 1 River Park Drive (Tax Map 44, Lot 21) in West Lebanon, New Hampshire (hereinafter "River Park"). *See id.*

9. XYZ paid the City of Lebanon \$90,492.00 for the Building Permit. *See id.*

10. The "Description of Work" on the Building Permit states: "New mixed-use commercial building within Lot #1 of the River Park subdivision." *See id.* The planned use was a complicated life sciences building with research laboratory space, requiring a multi-faceted planning and development process.

11. The Building Permit contained only the following five standard conditions of approval to be satisfied at various points during the construction process, with no stated deadlines for completion or other requirements except that "work shall not proceed until the City inspectors have approved the following stages of construction:

- (1) Foundation footings, forms and reinforcements. Lot pins must be in place at this inspection to assure the setback requirements are met. If the pins are not set and the setbacks cannot be verified, the construction will not be approved or allowed to continue. Mistakes in the location of boundary lines are the sole responsibility of the owner. **DO NOT POUR CONCRETE UNTIL THE ABOVE HAS BEEN APPROVED!**
- (2) Foundation insulation, waterproofing, and drainage, prior to backfilling.
- (3) Structural rough frame, rough electrical and rough plumbing, prior to covering.

- (4) Prior to concealing any work authorized under this permit.
- (5) Final inspection for Certificate of Occupancy, to include plumbing, heating, electrical, and any other code issue or miscellaneous item as applicable to the project, including site improvements. **PLEASE SCHEDULE THIS AT LEAST 5 DAYS IN ADVANCE. A building or structure shall not be used or occupied in whole or in part until a CERTIFICATE OF OCCUPANCY has been issued.**

See id.

12. Section 105.5 of the New Hampshire Building Code, which adopts the language of the International Building Code, states, in its entirety:

“Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions for time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”

13. In response to a written extension request from XYZ dated December 9, 2021 necessitated by the Covid-19 pandemic, the Building Inspector approved a 180-day extension of the Building Permit by memo dated January 18, 2022.

14. The Building Inspector’s January 18, 2022 approval memo acknowledged that the COVID-19 pandemic represented adequate justification for granting an extension of the Building Permit through July 17, 2022.

15. The Building Inspector’s January 18, 2022 approval memo also clarified that the Building Inspector was granting the multiple retroactive extensions required to date back to the original issuance of the Building Permit on December 31, 2019. *See Exh. 2.*

16. On May 3, 2022, XYZ submitted a written request for a second 180-day extension of the Building Permit, again citing various Covid-19-related justifications.

17. The Building Inspector granted this second 180-day extension of the Building Permit by letter dated May 27, 2022.

18. The Building Inspector’s May 27, 2022 letter again noted that the COVID-19

pandemic represented adequate justification for granting XYZ's request and extended the Building Permit through January 13, 2023. *See id.*

19. The 2022 construction season was adversely impacted by an exceptionally tight labor market, and supply chain issues were rampant due to the lingering effects of the Covid-19 pandemic. XYZ experienced months-long delays in sourcing the materials needed to proceed. XYZ was finally able to begin construction activities at River Park on November 29, 2022. *See Exh. 3 at 4.*

20. These construction activities included the staking out of the foundation area and excavation of a portion of the basement area of the planned mixed-use commercial building on Lot #1 at River Park. *See id.*

21. This excavation work was also done to locate the City's stormwater line running from catch basins on Route 10 to a ravine on the River Park site for which the city neither had an easement nor sufficient documentation as to its location or construction.

22. During the course of this excavation work, XYZ's excavation contractor encountered the City's stormwater line. *See id.*

23. The depth of the stormwater drainage pipe put the pipe in direct conflict with XYZ's foundation excavation of the planned mixed-use commercial building on Lot #1 at River Park and as such, the pipe could not simply be abandoned in place. Best construction practices called for the removal of the City's stormwater drainage pipe and accommodating the stormwater runoff through some other temporary means of stormwater management. *See Exh. 4 at ¶7.*

24. XYZ's excavation contractor also expressed significant concern that the pipe was made of clay, posing significant additional risk of crushing the pipe, and increasing both the

process required, and the cost to move it.

25. XYZ's civil engineer sought and received permission from the State of New Hampshire to install a temporary bypass line in compliance with all code and regulatory requirements, and amended XYZ's alteration of terrain permit to reflect those changes.

26. With the State's permission in place, all that remained was for the City of Lebanon to grant permission to XYZ to disconnect the stormwater drainage line and permit XYZ to make the connection to the temporary bypass line that XYZ had already installed for this purpose. The temporary line was entirely contained on XYZ's property and did not require any disturbance of state or municipal property.

27. In furtherance of this outcome, on December 9, 2022, XYZ sent a letter to Deputy City Manager David Brooks, DPW Engineer Brian Vincent, and Building Inspector Calvin Hunnewell, stating that XYZ had "commenced construction on 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293." The letter specified that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022," but that XYZ's contractor had located and unearthed the City of Lebanon's stormwater drainage pipe and solicited feedback from the City of Lebanon as to how to handle the stormwater runoff issue on a temporary basis, as the pipe itself was considered to be municipal infrastructure. *See Exh. 5.*

28. The City of Lebanon did not respond to XYZ's December 9, 2022 letter for nearly *two months* – importantly until *after* the Building Permit's January 13, 2023 expiration date

29. Finally, on February 2, 2023, Deputy City Manager David Brooks sent an email back to XYZ addressing the stormwater management issue and providing additional information regarding options for addressing the conflict. He then added that "[w]ith respect to the

commencement of the construction on Lot 1, I understand that the Planning Department will be reaching out separately to request additional information” on that issue. *See Exh. 6.*

30. Two weeks later, on February 15, 2023, 68 days after XYZ’s December 9, 2022 initial communication on the issue, the Building Inspector sent a letter to XYZ addressing XYZ’s November 29, 2022 “commencement of construction” and attempted to unlawfully impose retroactive conditions on the Building Permit in order for the permit to “remain active.” *See Exh.*

7. Among those conditions were requirements that XYZ produce:

- “contract agreements with description of the project, the scope of work, and construction schedule”
- A “Construction schedule, including the project’s intended completion date, and start and finish times for each phase of the project;” and
- “cost estimates” and other financial information

31. The Building Inspector’s memo also added “several other steps that need to be completed prior to the resumption of construction activities (and which should have been completed prior to the commencement of any construction).” Those “steps,” however, were NOT related to the Building Permit in question, but rather to the Phase 1 Infrastructure work that was subject to a *different* permitting process and, per the written conditions of approval from the City of Lebanon, only needed to be completed prior to requesting the Certificate of Occupancy for 1 River Park. *See id.*

32. The Building Inspector, however, stated in his February 15, 2023 letter that without this additional information, I “will revoke the permit as of January 13, 2023.” This letter from the Building Inspector, however, was dated nearly a month *after* the date that he threatened to revoke the permit. *See id.*

33. By letter dated March 7, 2023, XYZ provided additional information to the Building Inspector, but also asked the Building Inspector to provide the source of the authority, either in the Building Code or in the City of Lebanon’s regulations, that supported the additional

conditions the Building Inspector was attempting to place on XYZ in order to for its Building Permit to “remain active.” *See Exh. 8.*

34. The Building Inspector never provided XYZ with any source authorizing him to impose retroactive conditions on an already issued and active building permit.

35. On March 16, 2023, the Building Inspector met with representatives of XYZ to discuss the situation.

36. The Building Inspector did not accept XYZ’s physical work on the River Park site as evidence of work having commenced under the Building Permit. Instead, the Building Inspector requested that additional evidence in the form of receipts for project materials be provided to substantiate the preparatory work that XYZ claimed to be doing. XYZ provided those receipts later that same day.

37. The Building Inspector memorialized the subject matter covered at this meeting in a March 24, 2023 letter from the Building Inspector to XYZ. *See Exh. 9.*

38. The Building Inspector’s March 24, 2023 letter to XYZ acknowledges that the following topics were discussed at the meeting:

- Determination of commencement of work
- Timing and continuance of work
- Existing stormwater situation
- Inability to complete the excavation of the building
- TF Moran designing potential solutions
- Meetings with project partners
- Project expenses and requested documentation

39. None of these eight topics discussed, involved, or established that the City was relying on any actual physical on-site construction work at River Park to establish that “work” had occurred under the Building Permit. To the contrary – all of these topics involved work preparatory to any further actual, on-site construction. *See id.*

40. The Building Inspector’s March 24, 2023 letter to XYZ concluded as follows:

“we agree that you have justified [that] 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 id. (emphasis supplied).

41. Accordingly, in his March 24, 2023 letter to XYZ, the Building Inspector took the position that it was “the preparation work” that XYZ had “been preparing with [its] construction partners” that constituted “commencement of work” under the Building Permit.

42. The Building Inspector acted within the scope of his authority in making such a finding as it was his duty to administrate building permits in the City of Lebanon – including XYZ’s Building Permit.

43. In the very next paragraph of his March 24, 2023 letter to XYZ, however, the Building Inspector re-introduced the unlawful conditions that he again claimed “need to be completed in order to maintain activation of the building permit.” These unlawful conditions included:

- “Design of the storm water solution”
- “Confirmation that the registered design professionals are in your hire and ready to proceed
- “contract agreements with description of the project, the scope of work, and construction schedule
- Construction schedule, including the project’s intended completion date and start and finish times for each phase of the project
- “Scope of work, including which contractors and subcontractors are responsible for each component of work,” and
- “Cost estimates”

See id.

44. The Building Inspector’s March 24, 2023 letter contained no reference to the authority permitting him to impose these additional retroactive requirements on XYZ after he had already concluded that the preparatory work that XYZ had been engaging in with its construction partners was sufficient to constitute the “commencement of work” under the

Building Permit.

45. By email dated April 10, 2023, XYZ again sought a response from the Building Inspector seeking clarity about (1) the date that the Building Inspector was using to determine the “commencement of work” under the Building Permit; (2) the need for the City’s permission to make the bypass line connection; (3) the re-started work on the Civil Engineering; and (4) the legal basis for the Building Inspector’s demand for this additional information as a condition of maintaining the Building Permit’s “activation.” *See Exh. 10.*

46. The Building Inspector did not respond to XYZ’s April 10, 2023 email.

47. XYZ was concerned, given the lack of a response from the Building Inspector, the four months of uncertainty that had already transpired, and the Building Inspector’s ongoing attempt to improperly impose retroactive conditions on the issued and active Building Permit, that the Building Inspector would again attempt to revoke the Building Permit.

48. As such, on April 25, 2023, XYZ took an administrative appeal of the Building Inspector’s retroactive imposition of these additional requirements on its Building Permit to the City of Lebanon’s Building Code Board of Appeals (the “BCBA”) (Docket #BCBA2023-01). XYZ took this action in order to (1) protect its investment-backed interests; (2) get clarification as to XYZ’s obligation to comply with these requirements; and (3) determine the source of authority, if any, for the Building Inspector’s imposition of these requirements. *See Exh. 11.*

49. The BCBA held a hearing on July 11, 2023 and *dismissed* XYZ’s appeal, holding that the Building Inspector’s March 24, 2023 letter to XYZ imposing the additional conditions on XYZ did not constitute an official “administrative decision.” In so doing, the BCBA concluded that the Building Permit remained in full force and effect without the additional conditions. *See Exh. 12.*

50. Immediately following the BCBA's July 11, 2023 decision, XYZ re-started its development activities in furtherance of the work authorized by the Building Permit.

51. XYZ memorialized the re-initiation of these efforts in an August 3, 2023 letter to the Building Inspector. *See Exh. 13.*

52. XYZ's actions included (1) reengaging with XYZ's contractors, architects, engineers, and consultants; (2) meeting with officials from the City of Lebanon to arrive at a plan with respect to the drainage pipe; and (3) taking steps to adequately secure the River Park construction site by expanding the construction fencing on the site. *See id.; Exh. 14.*

53. In parallel with these efforts, XYZ re-started negotiations with prospective tenants to obtain leasing commitments for the completed building. *See Exh. 15 (names redacted).*

54. The Building Inspector did not respond to XYZ's August 3, 2023 letter.

55. On August 17, 2023, XYZ held an on-site meeting with engineers from the City of Lebanon's Department of Public Works with respect to the connection of the temporary stormwater line to allow work on the site to continue – reflecting that XYZ was actively engaged in work on the site. The City of Lebanon's Department of Public Works engineers had no issues with XYZ's proposed temporary solution, but XYZ could never get permission to proceed with the temporary solution from officials in the City of Lebanon's Planning and Development Department. These delays, and the City of Lebanon's moratorium on winter excavation, are what pushed XYZ's commencement of construction out of the 2023 construction season.

56. On January 5, 2024, XYZ provided another written update to the Building Inspector, documenting that its contracted architects, Elkus Manfredi, and its General Contractor, Engleberth Construction, were actively and diligently working on the plans and specifications for the commencement of construction activities in the Spring of 2024 as soon as the City's seasonal

excavation moratorium was lifted. *See Exh. 16.*

57. Then, despite having heard nothing from the Building Inspector since his March 24, 2023 letter, and despite the Building Inspector's failure to respond to multiple communications from representatives of XYZ, on February 1, 2024, the Building Inspector sent a letter to XYZ stating that:

"It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid."

See Exh. 2 at 1.

58. In the 180-day period preceding the Building Inspector's February 1, 2024 determination that the Building Permit had expired, XYZ had been actively engaged in additional preparatory activities for the River Park site. In connection with those preparations, XYZ spent \$221,838 in direct costs for the site and entered into contractual obligations to pay another \$652,303 in professional and contracting fees. *See Exh. 17 (Affidavit of David Clem); Exh. 18 (Findings of Fact of City of Lebanon Building Code Board of Appeals at Finding of Fact #8)*

59. During that same 180-day period, XYZ also formally re-engaged three subject-specific engineering firms and one architectural firm in an effort to move the River Park project forward in the Spring of 2024. *See id.*

60. The amount of money XYZ invested in the River Park project in the 180 days immediately preceding the Building Inspector's revocation of the Building Permit equates to more than *nine times* the original cost of the Building Permit and more than *seven percent* of the original \$12,296,100 budget for the entire 1 River Park project. *See id.*

61. This decision by the Building Inspector was totally inconsistent with the position taken in his March 24, 2023 letter that preparatory work undertaken within a 180-day window

was sufficient to maintain an active Building Permit.

62. The Building Inspector's unexpected decision required XYZ to once again suspend the work of its contractors, architects, engineers, and consultants in order to protect the investment-backed interests of its investors. The timing of this appeal also jeopardized XYZ's ability to move forward with the River Park project during the 2024 construction season. *See Exh. 19 at ¶11.*

63. The Building Inspector's decision also interfered with XYZ's leasing activity, since the disruption of XYZ's construction activities affected XYZ's ability to project the completion of the space for lease, jeopardizing time-sensitive tenant needs and expectations, and the overall financial viability of the River Park project. *See id.*

64. XYZ timely filed its administrative appeal of the Building Inspector's decision with the City of Lebanon's BCBA pursuant to NH RSA 674:34 on February 29, 2024. *See Exh. 20.*

65. In an effort to mitigate its rapidly accruing financial damages caused by the Building Inspector's actions, however, XYZ, through XYZ's prior counsel contacted the Building Inspector and Planning Director via the City's attorney and asked the Building Inspector to either rescind his February 1, 2024 decision, or to permit work to continue under the Building Permit on a temporary basis. The Building Inspector refused. *See Exh. 19 at ¶13.*

66. The City of Lebanon BCBA held hearings on April 1, 2024 and April 18, 2024. The Board heard testimony from XYZ representatives David Clem and Chet Clem, and legal argument from XYZ's prior counsel. The Board also heard legal argument from the City's attorney, and from the Building Inspector himself. All parties were invited to submit additional briefing and any information that they wanted to provide to refute, rebut, or clarify any

arguments.

67. On May 17, 2024, the City of Lebanon BCBA issued its written decision, **REVERSING** the decision of the Building Inspector that XYZ’s Building Permit had expired on February 1, 2024 due to inactivity on the site, and granted XYZ’s request to reinstate the Building Permit. *See Exh. 18.*

68. In its written decision, the City of Lebanon BCBA made several factual findings relevant to the claim at Bar. First, the BCBA found that:

“[t]he development of a new building on a previously undeveloped site is a complex, multi-part endeavor. This endeavor requires engineering, architectural planning, multi-agency coordination, materials procurement, and contractor scheduling. Although not unusual for any major construction project, these complex activities are distinguishable from common, single-action activities that also require permits, such as a minor residential electrical upgrade or heating furnace installation.”

See id. at ¶5 (emphasis added).

69. Second, the BCBA found that:

“the Building Official issued a letter to XYZ on March 24, 2023. That letter identified 8 bullet-pointed topics discussed on March 16, 2023. None of the eight topics discussed involved actual completed physical work at the building site.”

See id. at ¶6. Finally, the BCBA observed, the written determination of the Building Inspector in his March 24, 2023 letter, after reviewing those 8 bullet-pointed topics, was 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.

making it clear that the Building Inspector had previously considered the engineering, architectural planning, multi-agency coordination, materials procurement, and contractor scheduling that XYZ had been engaged to constitute “work” sufficient to keep its Building Permit active. *See id.*

70. Third, the BCBA found that the City *conceded* ALL of the following points in the hearings:

- a. “Section 105.5 does not set a high bar for ‘work’
- b. That it is “obvious that there are aspects of construction projects that are supported by offsite operations and preparation to perform”
- c. That “‘one day of work every 179’ would be sufficient to keep the permit active”
- d. That the “City believes that it ‘must do what the law says even when it makes no sense’”
- e. That “there are items of work that could occur offsite that the City would accept as work”
- f. That Section 105.5 of the IBC “does not purport to regulate the intensity or pace of work progress”

See id. at ¶9.

71. Amazingly, at 4:30pm on June 5, 2024, the very last day of the appeal period, the City of Lebanon appealed *its own BCBA’s decision* to the State Building Code Review Board (the “New Hampshire BCRB”). *See Exh. 21.*

72. The City of Lebanon did not provide its BCBA with independent counsel to defend its decision at the New Hampshire BCRB.

73. As such, XYZ was required to intervene in the proceeding to defend its rights under the Building Permit that the City of Lebanon’s BCBA had reinstated.

74. The City of Lebanon’s appeal from its own Building Code Board of Appeals was based on the interpretation of the word “work” in the New Hampshire Building Code – specifically, what actions qualify as “work” sufficient to keep an issued building permit active under Section 105.5 of the International Building Code as adopted by the New Hampshire Building Code.

75. As the New Hampshire BCRB observed in its Final Order, *see Exh. 22*, an ordinary reading of the relevant code sections provides a member of the public with no clarity on the subject:

“[s]ubsection 105.5 uses the term ‘work’ three times. And Section 105, Permits, as a whole uses the term ‘work’ nineteen times. Yet the term is undefined in this section and throughout the Code.”

76. The New Hampshire BCRB’s decision thus, would turn on a question of statutory construction – specifically, whether the Lebanon BCBA **incorrectly interpreted** the language of Section 105.5 of the IBC – which states, in its entirety:

“Every permit issued shall become invalid **unless the work on the site authorized by such permit is commenced** within 180 days after its issuance, or if **the work authorized on the site by such permit is suspended or abandoned** for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions for time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”

(emphasis added). *See id.*

77. No part of the IBC, the New Hampshire Building Code, or any other provision of the City of Lebanon’s ordinances, rules, or regulations sets forth definitions or standards for what constitutes “work,” or the “commencement,” “abandonment” or “suspension” of such work under a building permit.

78. In the absence of specific provisions in the IBC, the New Hampshire Building Code, or the City of Lebanon’s Code of Ordinances, New Hampshire’s well-established common law rules of statutory construction applied. *See Trottier v. Lebanon*, 117 N.H. 148, 150 (1977); *see also* Loughlin, O., 15 New Hampshire Practice, Land Use Planning and Zoning (4th Ed.) § 6.01.

79. Pursuant to New Hampshire’s rules of statutory construction, “words and phrases must be given their ordinary meaning unless it appears from the context that a different meaning was intended. *Greenland v. Bunker*, 118 N.H. 783, 785 (1978). “Doubt about the meaning of an ordinance is determined **in accordance with the intent of the ... body that enacted it**, and any ambiguity is to be resolved by reference to the apparent object of the provision.” *Id. citing Storms v. Eaton*, 131 N.H. 50 (1988)(emphasis added).

80. Thus, in undertaking a proper legal analysis of this question, the New Hampshire

BCRB first determined the *object* of Section 105.5 of the IBC. As the City of Lebanon Building Code Board of Appeals had correctly found, the intent of Section 105.5 of the IBC is “primarily administrative” in nature. *See Exh. 18 (Ruling of Law #1)*

81. The City of Lebanon’s Director of Planning and Development admitted in testimony before the City of Lebanon’s BCBA that the Planning and Development Office has to contend with how to dispose of the “voluminous numbers of permits that are applied for and never acted upon” – in other words, to administratively dispose of those permits where *no work at all* is undertaken in pursuit of the permit within the 180-day timeframe. *That*, as the City of Lebanon’s BCBA concluded, is the object of Section 105.5.

82. There is nothing in Section 105.5, however, to suggest that its object is to regulate the *pace* of construction pursuant to a building permit where activities in pursuit of that permit, whatever their pace, have actually been undertaken by the permit holder within the 180-day timeframe.

83. Instead, as the City of Lebanon BCBA concluded:

“It is possible that one developer may believe it to be economically advantageous to hyper-accelerate a project and complete a project quickly, paying substantial overtime and expedite fees in doing so. Conversely, it is also possible that a different developer could elect to proceed at a more leisurely pace.

See Exh. 18 (Ruling of Law #1)

84. Pursuant to New Hampshire’s rules of statutory construction, then, “words and phrases must be given their ordinary meaning unless it appears from the context that a different meaning was intended. *Bunker*, 118 N.H. at 785. The plain and ordinary meaning of the word “work” is broad. According to Black’s Law Dictionary, “work” is “physical and mental exertion to attain an end.” *Black’s Law Dictionary* (11th Ed. 2019), or as the City of Lebanon BCBA defined it, “effort, exertion, or activity.” *See Exh. 18 (“Ruling of Law #4).*

85. In seeking to develop a reasonable interpretation of “work” under Section 105.5, the City of Lebanon BCBA, as New Hampshire law directed them to do, looked at the *purpose* for which the Building Permit was issued. *See Bunker*, 118 N.H. at 785 (in defining words, a Board should refer to the apparent “object” of the provision). The approved “Description of Work” in the Building Permit states that the Building Permit is for a “New mixed-use commercial building within Lot #1 of the River Park Subdivision.” Therefore, the BCBA concluded, when the project is completed, the resulting “New mixed-use commercial building” would be the product of the “effort, exertion, or activity” required to bring it about. Based on this working definition, the BCBA stated, a reasonable interpretation of the “work” contemplated by Section 105.5 would be “any effort, exertion, or activity directed to accomplish the “New mixed-use commercial building.” *See Exh. 18 (“Ruling of Law #4).*

86. Importantly, the Building Inspector’s March 24, 2023 letter to XYZ completely *supports* the City of Lebanon BCBA’s interpretation of Section 105.5.

87. In that March 24, 2023 letter, the Building Inspector interpreted the word “work” in Section 105.5, and acknowledged to XYZ that “the **preparation work** you have been preparing with your construction partners **constitutes commencement of work** at 1 River Park Drive in accordance with the City of Lebanon Building Permit #2016-00293.” (emphasis added).

88. As the City of Lebanon’s BCBA properly observed, in order not to be arbitrary and capricious, the decisions of the building inspector must either adhere to precedent or state a compelling and valid reason why a different result must be reached on essentially the same set of facts. Here, since the Building Inspector in this case had already concluded that XYZ’s “preparation work” constituted “work” under Section 105.5, XYZ’s later, nearly identical preparatory work, which occurred in the 180-day window prior to the Building Inspector

declaring the Building Permit expired, must *also* count as “work” under Section 105.5. As the City of Lebanon BCBA determined in its May 6, 2024 decision:

“we hold that since “work” as previously found by the City in the March 2023 letter includes “preparation work”, similar “preparation work” must also count as work in the absence of a valid justification of a different approach.”

See Exh. 18 (“Ruling of Law #2).

89. There is nothing obvious in the language of Section 105.5 that required XYZ to engage in specific, physical, on-site construction activities in order to keep its Building Permit from expiring. The approved “Description of Work” in the Building Permit simply states that the Building Permit is for a “New mixed-use commercial building within Lot #1 of the River Park Subdivision.” The City of Lebanon BCBA found that the “work” contemplated by that Building Permit was any action taken that advances the project toward the end result of the creation of that “New mixed-use commercial building.” XYZ had assumed the same to be true because the Building Inspector had so concluded in his March 24, 2023 letter. There was no way for XYZ to know or learn otherwise.

90. As noted above, in the 180-day period preceding the Building Inspector’s February 1, 2024 determination that the Building Permit had expired, XYZ incurred direct costs relative to the development of the site totaling \$221,838, and incurred contractual obligations totaling an additional \$652,303, for a total financial outlay during that six-month period of \$874,141.

91. In that same six-month period, XYZ also contractually engaged three subject-specific engineering firms and one architectural firm in an effort to move the River Park project forward.

92. The amount of money XYZ invested in the River Park project during this six-

month period immediately prior to the Building Inspector revoking the Building Permit for “inactivity” equates to more than nine times the original cost of the permit and constitutes more than seven percent of the original \$12,296,100 total estimated cost of construction of the entire 1 River Park project.

93. XYZ also engaged in inter-departmental and inter-agency communication and activity to advance the River Park project during these 180 days.

94. It defies credulity to suggest that all of these activities undertaken by XYZ in furtherance of the River Park project did not constitute “work” under Section 105.5 sufficient to maintain its Building Permit as active.

95. The City of Lebanon BCBA found, in its review of the record of this case, that the City had conceded this point several times, and had recognized that there are multiple off-site activities that could constitute “work” under Section 105.5. *See Exh. 18 (Finding of Fact #9)*

96. The New Hampshire BCRB disagreed with the City of Lebanon BCBA’s analysis of Section 105.5, and **REVERSED** the BCBA’s decision, holding that “the BCBA incorrectly interpreted the word “work” given the context and use of the word throughout Section 105 of the Code.

97. As the New Hampshire BCRB stated:

the term “work” refers to activities that are regulated by the Code. The activities range from constructive acts to destructive acts and vary from large to small. But it does not include all efforts, exertions, or activities directed toward an ultimate end result. Nor does the term “work” encompass efforts and activities that occur beyond the identified and definitively located site listed in the permit and where the permit must be posted... the BCBA interpreted the term “work” as used within Subsection 105.5 to encompass more than physical activities and favorably cited a North Carolina decision holding the word “work” includes the mental effort to overcome obstacles... We conclude this interpretation of “work” goes too far. We find the meaning of the term “work” within Section 105 to be more limited.... Qualifying activities are those that are authorized by the permit

and occur at the identified location, i.e., physical acts that take place at the physical site where the permit must be posted.

See Exh. 22 at 4.

98. The New Hampshire BCRB, however, recognized the fact that the City of Lebanon BCBA had based its interpretation and ultimate holding, at least in part, on the fact that the Building Inspector and other City Officials had made representations to XYZ about what qualified as “work” in the earlier stages of the River Park Project. The New Hampshire BCRB recognized that:

Because the City previously communicated in a March 2023 letter to XYZ that “preparation work” was sufficient to meet the requirements of “work” under Subsection 105.t, the BCBA held similar “preparation work” must also suffice as “work” in 2024. It is beyond our jurisdiction to opine on whether there are equitable claims against the City of Lebanon for representations to XYZ. Here, our authority is limited to reviewing the interpretation of the text of the Code by the BCBA. And it is beyond our authority to waive or grant variances to requirements of the code. Accordingly, we do [not] review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials concerning the types of conduct that would qualify as work under Subsection 105.5.

See Exh. 22 at 5.

99. As the New Hampshire BCRB decision demonstrates, this is *not* a case where XYZ could have simply looked up Section 105 of the New Hampshire Building Code and determined that the Building Inspector had given XYZ an improper reading of that Code section in his March 24, 2023 letter. Here, as already established, neither the New Hampshire Building Code, nor the International Building Code defines what “work” or the “commencement” or “suspension,” or “abandonment” of “work” is. No local ordinance provision provides any greater clarity. And the only recorded judicial decision interpreting Section 105.5’s definition of

“work” found that a local permit had *not* expired simply because there had not been on-site work. See *Morris Communications Corp. v. City of Bessemer Zoning Board of Adjustment*, 365 N.C. 152, 157 (2011).

100. In the *Morris Communications* case, the North Carolina Supreme Court held that the fact that the zoning administrator did not observe construction-like activities on the site was not dispositive, because the term “work” had a broader meaning than mere visible evidence of on-site construction. The City of Lebanon’s BCBA seized on this, observing:

“[a]lthough out-of-state rulings have no precedential value over us, the Board references the highly informative ruling from the North Carolina Supreme Court in *Morris Communs. Corp v City of Bessemer*... ruling in favor of the landowner who argued that “work” encompasses the border range of activities necessary [to complete a project]... and Webster’s Dictionary defines ‘work’ to include ‘sustained physical or mental effort to overcome obstacles and achieve an objective or result...’ Applying this definition to the Bessemer City ordinance, the term “work” has a broader meaning than mere visible evidence of construction.”

101. Here, XYZ has never demonstrated, either by any overt act, or by any failure to act, any intention *whatsoever* to stop or abandon or suspend “work” on the River Park project for 180 days. To the contrary, XYZ has, at all times, continuously, diligently, and in good faith pursued completion of the “work” authorized by the Building Permit.

102. XYZ completed two Code Compliance reports and has made all necessary updates and adjustments to its building plans to bring those plans into full compliance with the updated IBC and submitted those changes to the City of Lebanon. XYZ’s building plans are fully up to date with the latest code requirements, and its development of River Park should be allowed to continue under the existing Building Permit.

COUNT I MUNICIPAL ESTOPPEL

103. Plaintiff restates and incorporate herein by reference all of the preceding

paragraphs as if fully set forth herein.

104. Municipal corporations, like natural persons, are subject to estoppel. *Concord v. Tompkins*, 124 N.H. 463, 469 (1984).

105. Here, the City of Lebanon Building Inspector, Calvin Hunnewell, made an affirmative written representation in his March 24, 2023 letter to XYZ that “... we agree that you have justified that 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.”

106. The Building Inspector was acting within the scope of his authority in making this determination, as it was his duty to both interpret and enforce the NH Building Code in the City of Lebanon.

107. The Building Inspector’s representation was made, in writing, in a March 24, 2023 letter to XYZ.

108. Not only was XYZ ignorant of the truth of the matter – XYZ had *absolutely no way of knowing or of possibly discovering* that “preparatory work” did not actually constitute work under Section 105.5 of the Building Code. “Work” is not defined anywhere in the Building Code, or anywhere else in the City of Lebanon’s ordinances – and the only recorded legal case in the county interpreting Section 105.5 interpreted “work” the way that both XYZ and the City of Lebanon BCBA did – to include offsite preparatory work.

109. The Building Inspector made this representation to XYZ with the intent that XYZ would rely on his ruling that the Building Permit was still valid. The Building Inspector’s March 24, 2023 letter to XYZ makes that abundantly clear.

110. Given the interpretation of “work” that the Building Inspector made in his March

24, 2023 letter to XYZ, XYZ acted reasonably in subsequently relying on that interpretation later in 2023 and in the beginning of 2024, in assuming that the continuing preparatory work XYZ was engaged in - investing in professional contracts, purchasing materials, engaging with City officials to design a workaround for the drainage pipe, and engaging in all manner of preparatory work in anticipation of the Spring 2024 construction season – was sufficient “work” to keep the Building Permit active.

111. XYZ was induced by the Building Inspector’s March 24, 2023 interpretation to rely on that interpretation, and did so, and XYZ has been financially damaged as a result of that reliance.

112. The City of Lebanon has conceded that “there are aspects of construction projects that are supported by offsite operations and preparation to perform.” *See Exh. 18 (Finding of Fact #9)*.

113. The City of Lebanon has also conceded that “there are items of work that could occur offsite that the City would accept as work.” *See id.*

114. Finally, the City of Lebanon has conceded that Section 105.5 of the IBC “does not purport to regulate the intensity or pace of work progress. *See id.*

WHEREFORE, XYZ Dairy, LLC respectfully requests that this Honorable Court:

- A. Schedule an Evidentiary Hearing on the Plaintiff’s Request for a Preliminary Injunction if the Court deems it necessary prior to providing the relief requested; and
- B. Enter a temporary restraining order, and a preliminary and permanent

injunction reinstating the Building Permit to allow XYZ to continue to timely develop the River Park project and enter into leasing arrangements with prospective tenants; and

- C. Enter judgment against the Defendants, City of Lebanon Building Inspector Calvin Hunnewell, and the City of Lebanon; and
- D. Award XYZ their reasonable attorneys' fees incurred in taking this action – which should never have been required as XYZ was forced to defend a clearly defined right; and
- E. Enter such other and further relief as this Court deems just and proper under the circumstances of this case.

Respectfully submitted,
XYZ DAIRY, LLC

By and through its attorneys,
SHEEHAN PHINNEY, P.A.

Date: September 13, 2024

/s/ Robert H. Miller
Robert H. Miller, Esquire
1000 Elm Street, 17th Floor
Manchester, New Hampshire 03105-3701
Telephone: 603.627.8145
Email: rmiller@sheehan.com

EXHIBIT 1

CITY OF LEBANON
Building Permit

Lebanon, NH 03766
603-448-1524
www.lebanonNH.gov

Permit Number
2016-00293

Date of Issue
12/31/2019

Owner: XYZ DAIRY LLC
Applicant: XYZ DAIRY LLC

Location of Work: 173 N MAIN ST/WEST LEBANON
(No. and Street) (Unit or Building)

Description of Work: New mixed use commercial building within LOT #1 of the River Park subdivision

ZONING DATA: District: R3 - R3 Map/Lot: 44-3
CONTRACTOR: CONSIGLI CONSTRUCTION

REMARKS:

**THIS PERMIT IS BEING ISSUED WITH THE FOLLOWING CONDITIONS:
SEE ATTACHED CONDITIONS LIST**

**WORK SHALL NOT PROCEED UNTIL THE CITY INSPECTORS HAVE APPROVED THE FOLLOWING STAGES OF
CONSTRUCTION:**

1. Foundation footings, forms and reinforcements. Lot pins must be in place at this inspection to assure the setback requirements are met. If the pins are not there, the setback cannot be verified, the construction will not be approved or allowed to continue. Mistake in the location of boundary lines are the sole responsibility of the owner. **DO NOT POUR CONCRETE UNTIL THE ABOVE HAS BEEN APPROVED!**
2. Foundation insulation, water proofing and drainage, prior to backfilling.
3. Structural rough frame, rough electrical and rough plumbing, prior to covering.
4. Prior to concealing any work authorized under this permit.
5. Final Inspection for Certificate of Occupancy, to include plumbing, heating, electrical, and any other code issue or miscellaneous item as applicable to the project including site improvements. **PLEASE SCHEDULE THIS AT LEAST 5 DAYS IN ADVANCE.**

A building or structure shall not be used or occupied in whole or in part until a **CERTIFICATE OF OCCUPANCY** has been issued.

APPROVED PLANS MUST BE KEPT AT THE JOB SITE – THIS CARD MUST BE KEPT UNTIL POSTED UNTIL FINAL INSPECTIONS HAVE BEEN COMPLETED

Permit Holder: XYZ DAIRY, LLC

(Taking Responsibility for the work)

Company/Affiliation: XYZ DAIRY, LLC

Job Site Phone Number:

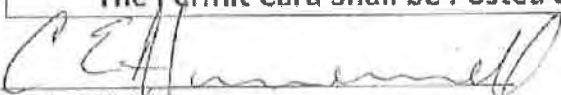
Constr Cost: \$12,296,100.00

Permit Fee: \$90,492.00

Check No.:

Cash: \$0.00

The Permit Card Shall be Posted and Visible From the Street During Construction


Code Official

12/31/2019
Date

CONDITIONS LIST FOR PERMIT 2016-293 (44-3)

Calvin Hunnewell, Building Inspector, 603 448 1457 x1446

B1. The plans show the foundation drain discharging into leaching catch basin LCB-13. The foundation engineering report recommends the basement space be protected against groundwater intrusion with the installation of a perimeter and under slab drainage systems. The drainage systems are recommended to drain to a storm drain which is not subject to surcharge. The code requires the subsoil drainage system to discharge into an approved location. The code requires buildings subject to backwater of the subsoil drain be protected by an accessible located backwater valve. Additionally, subsoil sump and pumping systems may be required. Request additional engineering documentation be provided demonstrating LCB-13 will not subject the foundation drainage systems to a surcharge/backwater. 2009 IBC 1805.4, IPC Sections 1111, 1112 & 1113

B2. The code requires accessible routes within the site be provided from public transportation stops; accessible parking; accessible passenger loading zones; and public streets or sidewalks to the accessible building entrance served. Request accessible routes be identified on the site plans with sufficient detail to demonstrate compliance with the accessibility standards. 2009 IBC Sec 1104.1

B3. Accessible parking spaces are required to be located on the shortest accessible route of travel from the adjacent access aisle to the accessible building entrance. Buildings with multiple accessible entrances with adjacent parking, requires accessible parking to be dispersed and located near the accessible entrances. The submitted plans do indicate some disbursement of accessible parking; however, they are not located on the shortest accessible route to the building entrance. The submitted plans show an excessive amount of accessible parking for lot 1 and an insufficient amount of parking for Lot 2. Request clarification be provided explaining how compliance with the accessibility standards is being achieved. 2009 IBC Section 1106 & 1106.6

B4. The submitted plans and documentation provided show a proposed new building at 173 North Main Street, West Lebanon, NH. According to the submitted documents the building is 3 story with a full basement approximately 45 feet in height with a total building area of approximately 62,185 square feet. The aggregate basement area is approximately 14,180 square feet, first floor area is approximately 14,084 square feet, second floor area is approximately 15,769 square feet, third floor area is approximately 15,499 square feet and the penthouse approximately 2,653 square feet.

B5. The building review will be considered as a non-separated mixed-use building of Storage Group S-1 Moderate-hazard Occupancy, Mercantile Group M, Assembly Group A-2 and Business Group B.

B6. The submitted plans and documents indicate that a sprinkler system is installed throughout the building in accordance with NFPA 13. The building is indicated to have a fire protective signaling system in accordance with NFPA 72. The type of construction indicated for the building is Type IIB.

B7. Project manual section 014320 Part 3.1-C-4-b., notes in part that the testing agency shall include submission of reports to the following: Owner, Architect, Structural Engineer, General Contractor and Inspectional Services. Submission of reports required to be distributed as part of the Statement of Special Inspections include submission to the Building Official. 2009 IBC Sections 1704.1.2 & 1705

B8. The submitted Statement of Structural Special Inspections dated 12/18/15 does not indicate the independent testing agency. Request the approved agency and or agencies performing the inspections be identified, in place of the independent testing agency (TBD), as part of the Statement of Structural Special Inspections.

B9. Drawing A021 indicates the basement requires one exit. The code requires a minimum 2 exits for the basement space. Request plans indicate appropriate required number of exits. 2009 IBC Section 1021

B10. Drawing A025 does not indicate the roof required number of exits. The code requires a minimum 2 exits for the roof space. Request plans indicate appropriate required number of exits. 2009 IBC Section 1021

- B11. Clarify support of shafts and bottom enclosure. Shafts are required to be supported by fire rating consistent with shaft rating.
- B12. Drawing A021 indicates the basement requires one exit. The code requires a minimum 2 exits for the basement space. Request plans indicate appropriate required number of exits. 2009 IBC Sections 1015.1 & 1021
- B13. Drawing A025 does not indicate the number of required exits on the roof. The code requires a minimum 2 exits for the roof space. Request plans indicate appropriate required number of exits. 2009 IBC Section 1021
- B14. Request additional details be provided for shaft continuity and top and bottom enclosure. 2009 IBC Section 708
- B15. Drawings A101 indicate the two hour exit stairways exiting through corridor 111 and lobby 101 on the main level. The drawings do not clearly indicate the fire rating of corridor 111 the exit passageway. The code required the exit passageway be protected with the same rating as the exit stairway. The code requires the entire area of the level of exit discharge be separated from the area below by construction conforming to the fire-resistance rating for the exit enclosure. Request clarification be provided detailing the design intent for exit continuity, termination and discharge. 2009 IBC Section 1020 through 1023
- B16. The life safety drawings indicate fire rated assemblies for some walls, detail drawings do not specify fire rated assemblies consistent with the life safety drawings. Request plans be revised for consistency.
- B17. Prior to installation of fire safety and smoke seal at the void created at the intersection of exterior wall assembly and floor assembly approval of the systems is required. 2009 IBC Section 714.4

Duane Egner, Fire Inspector, 603 488 8811

- F1. Fire alarm plans need to be submitted that include system detection in all common areas and in the means of egress as required by Local Ordinance.
- F2. Per City of Lebanon Fire Prevention Ordinance 72-10(E), carbon monoxide detection shall be installed in the vicinity of all propane fueled heating appliances.
- F3. Per the 2015 Edition of the International Fire Code, Appendix J, a building information sign shall be installed on a wall surface at the interior of the main entrance to the building.
- F4. Per Lebanon Fire Department requirements, three (3) sets of automatic fire sprinkler plans shall be submitted for review. The design of the automatic fire sprinkler system shall be based upon the 2016 Edition of NFPA 13 and shall include provisions for the removal of trapped air from the system and be designed with a minimum safety margin of 10 psi. Floor control valves shall also be provided.
- F5. Per the Lebanon Fire Department Rules & Regulations, the fire department connection for the automatic fire sprinkler system shall be a four (4) inch Stortz type connection with a 30-degree downturned elbow and shall be located near the main entrance to the building.
- F6. Per City of Lebanon Fire Prevention Ordinance 72-10(G), the fire alarm system for the building shall be connected to the municipal fire alarm system using a Gamewell Master Box. The master box shall be located adjacent to the main entrance to the building and have a red jelly jar light above the box.
- F7. Per the 2015 International Fire Code Section 506.1, a Knox box is required for the building. The Knox box shall be located adjacent to the master box at the main entrance of the building. A copy of all master keys to the building and at least one elevator key shall be placed in the Knox Box.
- F8. Per the 2015 International Fire Code, Section 906.1, fire extinguishers are required for the building. The fire extinguishers shall have a minimum of a 2A rating and shall be located so that they are reached within 75 feet of travel. An architect or engineer shall determine the proper locations of the fire extinguishers.
- F9. Per the 2015 International Fire Code, Section 3313.1, at least one standpipe shall be installed in a stair tower during the construction phase. This standpipe is allowed to be dry with a temporary fire department connection.

F10. All above ground propane gas lines shall be either painted yellow or have identification stickers/labels permanently affixed to the piping for identification by emergency responders.

F11. Prior to the start of construction, the general contractor shall meet with the Lebanon Fire Department to discuss the requirements of the 2015 International Fire Code, Chapter 33, Fire Safety During Construction and Demolition.

F12. The building shall be a no smoking site throughout the construction process. Approved smoking locations shall be determined with the general contractor and approved smoking receptacles shall be provided.

F13. Per the 2015 International Fire Code, Section 3304.2.3, where rubbish containers with a capacity of greater than 40 gallons are used inside of the building during construction, they shall be of non-combustible material with a tightfitting lid.

F14. An alarm user permit for the building shall be completed and all fees paid to the City of Lebanon Dispatch Center prior to acceptance testing of any fire protection system.

F15. A minimum of two (2) weeks' notice shall be provided for connection of the master box to the municipal fire alarm system.

F16. Prior to issuing any type of certificate of occupancy, all means of egress shall be installed and unobstructed and all fire protection systems shall be in a normal operating condition.

F17. Sheet A101, Corridor 111 and Elevator Lobby 101 shows a one-hour fire resistance rated assembly. Per the 2016 Edition of NFPA 101:7.2.6.3 Stair Discharge. An exit passageway that serves as a discharge from a stair enclosure shall have not less than the same fire resistance rating and opening protective fire protection rating as those required for the stair enclosure. In Elevator Lobby 101, there is section of wall between Toilet Rooms 102 & 104 that is shared with the lobby that does not have any rating shown.

F18. Per the 2016 Edition of NFPA 101:7.2.5.5.8 Emergency Exit Symbol. An emergency exit symbol with a luminescent background shall be applied on a door serving the exit enclosure that swing out from the enclosure in the direction of egress travel. The emergency exit symbol shall also meet both of the following requirements: (1) The emergency exit symbol shall meet the requirements of NFPA 170, Standard for Fire Safety and Emergency Symbols. (2) The emergency exit symbol applied on the door shall be a minimum of 4 in. (100 mm) in height and shall be applied on the door, centered horizontally, with the top of the symbol not higher than 18 in. (455 mm) above the finished floor.

F19. Sheet A101 shows the symbol for a 2-hour rated enclosure around the shafts for supply and return risers however the wall type listed is for a 1-hour assembly (1A3) or a non-rated assembly (A5) as shown on Sheet A005. This condition exists on all floors, if wall partition type A5 is a rated partition, please revise and resubmit.

Win Spencer, Electrical Inspector 603 448 1457 x 1448

E1. Meet with the electrical contractor when one is picked to go over the scheduling of inspections.

E2. Need to provide details on the electrical service (location of the pad transformer if there is one) and the location of the service lateral to the building.

David Brooks, Planning Director, 603 448 1457 x 1472

PLN1. Condition #6 of the original October 24, 2011 Planning Board Site Plan approval required that "The applicant shall be required to have at least one fire hydrant operational within the development prior to the issuance of any Building Permit for structural improvements (excluding the building foundation) to the satisfaction of the Lebanon Fire Department." This requirement was repeated as Condition #6 of the Planning Board's September 9, 2019 Site Plan Amendment for the River Park project. On November 8, 2016, the Fire Department issued a letter to the applicant (attached) indicating that the "installation of the fire hydrant proposed for the new Crafts Avenue cul-de-sac would meet the needs of the Lebanon Fire Department." The applicant shall be required to comply with all requirements of the Fire Department letter and with Condition #6 of the Planning Board's 9/9/19 approval prior to the commencement of structural improvements on Lot 1, excluding the building foundation.

EXHIBIT 2



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

February 1, 2024

Sent Via Certified Mail, copy via E-Mail (chet@lymeproperties.com)

Chet Clem

XYZ Dairy, LLC / Lyme Properties

57 Main Street

West Lebanon, NH 03784

MAR 1 2024

Re: Expiration of 1 River Park Drive Building Permit #2016-00293

Dear Mr. Clem,

Please be advised that Building Permit #2016-00293, originally issued on December 31, 2019, has expired and is no longer valid. Section 105.5 ("Expiration") of the applicable 2009 International Building Code ("IBC"), provides as follows:

105.5 Expiration. Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or *if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced.* The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated. (emphasis added)

It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of greater than 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid.

Permit History & Commencement of Work

By way of background, a building permit application for 1 River Park Drive (formerly 100 River Park Drive) was originally filed on July 28, 2016. The building permit was issued on December 31, 2019, as Building Permit #2016-00293. In response to a written request from Lyme Properties dated December 9, 2021, a 180-day extension of Building Permit #2016-00293 was approved by memo from the Building Inspector dated January 18, 2022. The approval memo acknowledged that the COVID-19 pandemic represented adequate justification for granting an extension until July 17, 2022. The memo also acknowledged that, in effect, the Building Inspector was granting multiple retroactive extensions since no work at the site had commenced within the nearly two (2) years between the issuance of the permit and the December 9, 2021 request for an extension.

In response to a written request dated May 3, 2022, from Lyme Properties, a second 180-day extension of Building Permit #2016-00293 was approved by letter from the Building Inspector dated May 27, 2022. At that time, the Building Inspector again found that the COVID-19 pandemic represented adequate justification to grant your request and, therefore, an extension of the Building Permit was granted until January 13, 2023. In the May 27, 2022 letter, you were advised that, due to changes in the State Building Code since the original building permit application, "in the event the applicant is required or elects to request an additional extension or extensions of

time beyond the State's formal adoption of the 2018 edition of the IBC as the State Building Code, this office may not be able to justify granting additional extensions and will require the applicant to submit revised and updated plans and specifications for the development to demonstrate compliance with the 2018 edition of the IBC and other applicable local regulations in place at the time of such request before the City will grant additional extensions of time."

On December 9, 2022, I received a copy of your letter to Deputy City Manager David Brooks stating that "XYZ Dairy, LLC commenced construction on 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293." The only information provided in your letter relative to the commencement of work was that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022." In response, by letter dated February 15, 2023, the Building Inspector requested additional information needed to determine that work had commenced for purposes of demonstrating compliance with Section 105.5 of the 2009 IBC (which, as cited above, provides that a permit "shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance[.]")

In a letter from Lyme Properties dated March 7, 2023, some of the requested additional information was provided. Following receipt of your March 7, 2023 letter, the Building Inspector determined, as set forth in a letter dated March 24, 2023, that work pursuant to building permit #2016-00293 had commenced as of November 29, 2022. In the March 24th letter, XYZ/Lyme was also advised that it would need to complete certain additional steps in order to maintain activation of the building permit and avoid a determination that work was suspended or abandoned for a period of 180 days following the November 29, 2022 commencement of work.

On April 10, 2023, you e-mailed a response to the March 24, 2023 letter, and on April 25, 2023, you filed an application to the Building Code Board of Appeals appealing "the Building Inspector's *ultra vires* request for information related to building permit #2016-00293." On July 11, 2023, the Building Code Board of Appeals dismissed the appeal for lack of subject matter jurisdiction, finding that no decision had been made in the March 24, 2023 letter.

Following the dismissal of your appeal, you wrote in a letter dated August 3, 2023, that "[t]he only thing that remains to allow work to continue on the excavation for 1 River Park is the connection of the existing line to the temporary line on Lot 1." By e-mail sent on the same date, Deputy City Manager David Brooks explained that your questions regarding the Route 10 stormwater connection issue should be addressed to the Department of Public Works and not to the Building Inspector. By e-mail sent to Mr. Brooks on August 4, 2023, you reiterated your position that your proposed Route 10 stormwater connection "temporary solution is within the City's jurisdiction to approve the temporary re-routing under the building permit".

Finally, by letter dated January 5, 2024, you told me that "XYZ Dairy, LLC is actively and diligently pursuing the construction of 1 River Park," and in support thereof you stated that "Engleberth Construction as our Construction Manager, and along with Elkus Manfredi Architects and the rest of the project team are working toward the Spring, 2024 construction season."

Suspension or Abandonment of Work

In your letter dated December 9, 2022, you wrote that, "we have encountered a conflict with existing City of Lebanon infrastructure that has suspended construction until a solution can be reached." Since that time, you have repeatedly stated that work at 1 River Park Drive has been suspended. Such statements include the following:

MAR 1 2024

February 1, 2024
Page 3 of 4

- Per your March 7, 2023 letter to the Building Inspector: "Once the pipe was located work ceased to avoid potentially damaging the existing, active line that was initially reported to be clay."
- Per the draft July 11, 2023 Building Code Board of Appeals meeting minutes: "Work has been suspended because of this hearing."
- Per your August 3, 2023 letter to the Building Inspector: "Following the determination of the Appeal Board, we have restarted conversations with project partners that were suspended because of your February 15, 2023 communication."
- Per your August 4, 2023 e-mail to David Brooks: "the City's pipe is preventing work on 1 River Park from continuing".

In your December 9, 2022 letter, you did not specify the date when work was suspended. Assuming the work ceased on the date of your letter (*i.e.* on December 9, 2022), then the 180-day deadline to re-commence work would have been June 7, 2023. If you wish to argue that your appeal to the Building Code Board of Appeals tolled the 180-day period, then the 180-day period would have resumed running as of the date that the ZBA dismissed your appeal on July 11, 2023 and expired on or about August 24, 2023. Furthermore, a full 180-day period has also now run between July 11, 2023 and January 7, 2024. However, as noted above, you have stated on multiple occasions that work has been suspended since at least December 9, 2022. Also, I have observed no work occurring at, or changes to, the site on multiple drive-by inspections conducted throughout 2023. It appears there can be no dispute that work has indeed been suspended for a period of significantly greater than 180 days, and remains suspended as of the date of this letter.

I also note that there has been no effort to address the items identified in my letter of March 24, 2023, as needing to be completed prior to the resumption of construction activities (and which should have been completed prior to the commencement of any construction). These include:

- Providing a cost estimate of remaining Phase 1 infrastructure improvements for review by the City Engineer, and providing security for such and entering into a new Performance Bond/Security Agreement.
- Providing a construction schedule to the City Engineer for purposes of retaining a third-party inspector, providing payment of estimated third party review costs, and entering into a third party inspection and water & sewer extension agreement.
- Installing edge-of-disturbance fencing on site to be reviewed by the City Engineer.
- Confirming that all state permits have been obtained or have been updated, as needed.

To my knowledge, none of the above have been accomplished as of the date of this letter.

For all of the foregoing reasons, your Building Permit #2016-00293 is declared expired and invalid. If you desire, you may submit an application for a new building permit. As a courtesy, the fee paid for the expired permit may be credited towards the new application fee provided the application is filed within six (6) months of the date of this letter. Please note that as part of such application, you will be required to submit revised and updated plans and specifications for your project to demonstrate compliance with the 2018 edition of the IBC and other local regulations currently in effect.

CR039

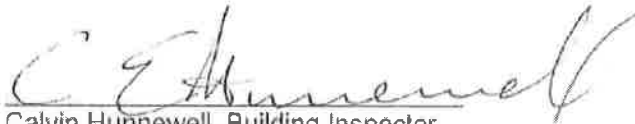
February 1, 2024

Page 4 of 4

This is a decision of the Building Inspector, which you have the right to appeal to the Building Code Board of Appeals. Should you wish to appeal this decision relative to the application and interpretation of the State Building Code, you have thirty (30) days from the date of this letter to file an appeal. See Chapter 36 of the Code of the City of Lebanon, Section 36-13.

Should you have any questions, please contact the City's legal counsel, Christine Johnston, at (603) 792-7417 or by e-mail at cjohnston@dwmlaw.com.

Sincerely,



Calvin Hunnewell, Building Inspector

Attachments

- Building Permit #2016-00293 (marked "expired" as of the date of this notice)
- Letter from Lyme Properties dated December 9, 2021
- Memo from the Building Inspector dated January 18, 2022
- Letter from Lyme Properties dated May 3, 2022
- E-mail from the Planning & Development Director sent May 27, 2022
- Letter from the Building Inspector dated May 27, 2022
- Letter from Lyme Properties dated December 9, 2022 (without attachments)
- Letter from the Building Inspector dated February 15, 2023
- Letter from Lyme Properties dated March 7, 2023
- Letter from the Building Inspector dated March 24, 2023
- E-mail from Chet Clem sent April 10, 2023
- Appeal of Administrative Decision by Lyme Properties dated April 25, 2023
- Draft 7/11/23 Building Code Board of Appeals Meeting Minutes
- Letter from Lyme Properties dated August 3, 2023
- E-mail from Chet Clem sent August 4, 2023
- Letter from Lyme Properties dated January 5, 2024

cc: Shaun Mullholland, City Manager
David Brooks, Deputy City Manager
Nathan Reichert, Planning & Development Director
Tim Corwin, Deputy Planning & Development Director
Christine Johnston, Esq., Drummond Woodsum
File

CR040

EXHIBIT 3



March 5, 2024
revised March 27, 2024

Building Code Board of Appeals
City of Lebanon
51 N Park Street
Lebanon, NH 03766

**Appeal of Administrative Decision: Lebanon Building Inspector's February 1, 2024
determination that Building Permit #2016-00293 has expired and is invalid**

Members of the Lebanon Building Code Board of Appeals,

In follow-up to our February 29, 2024 appeal of the Lebanon Building Inspector's February 1, 2024 decision that Building Permit #2016-00293 for the building at 1 River Park Drive "has expired and is no longer valid," we submit the following in support of our position that the Building Permit should remain in full force and effect and that the Building Inspector's decision is erroneous.

It should be noted that XYZ Dairy, LLC and Lyme Properties 2, LLC have received no substantive communication from the Lebanon Building Inspector– or any member of the Lebanon Planning and Development Department– regarding this Permit since the conclusion of the BCBA2023-01 Appeal on this same permit on July 11, 2023 other than the cursory communications referenced herein.

1. On January 5, 2024 Lyme Properties sent a memo to City of Lebanon Building Inspector Calvin Hunnewell regarding Lebanon Building Permit #2016-00293 (the "Permit"), stating: "XYZ Dairy, LLC is actively and diligently pursuing the construction of 1 River Park per City of Lebanon Building Permit #2016-00293 that was affirmed as "active" by the Lebanon Building Code Board of Appeals on July 11, 2023."

The memo states that Engelberth Construction has been named the Construction Manager and Elkus-Manfredi Architects continue to provide construction management services, in addition to the other consultants on the project team.

2. As it relates to the 180 Days in IBC 105.5, 180 days from the July 11, 2023 determination by the BCBA was Sunday, January 7, 2024. Lyme submitted the communication to Mr. Hunnewell ahead of the 180 day deadline, in so much as there was a requirement to do so.
3. Other than a cursory acknowledgement of receipt of the January 5 memo: "Thanks for your letter. We will get back with you next week." by Mr. Hunnewell on January 12, 2024, no additional communication was received by XYZ or Lyme until February 1, 2024.
4. In the February 1, 2024 memo received via email and certified mail Mr. Hunnewell declared the Permit expired and invalid:

It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of greater than 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid.

Figure 1: Excerpt of determination in February 1, 2024 memo from City of Lebanon Building Inspector

A. 180 Days and Expiration under Section 105.5 of International Building Code

5. The Building Inspector's determination that the Permit is expired is in conflict with the actions and intent of XYZ Dairy, LLC (XYZ) and Lyme Properties 2, LLC (Lyme), and is based upon incomplete information and an erroneous determination by the Building Inspector that work had been suspended or abandoned for a period of greater than 180 days.
6. The City's 2/1/2024 memo states "Section 105.5 ("Expiration") of the applicable 2009 International Building Code ("IBC"), provides as follows:"

105.5 Expiration. Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or *if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced.* The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated. (emphasis added)

Figure 2: Section 105.5 of the 2009 International Building Code as included [and emphasis added] in the City's February 1, 2024 memo

At no point since the commencement of work on Building Permit #2016-00293 on November 29, 2022 has work on the project been suspended or abandoned for a period of 180 days.

During XYZ's February – July, 2023 effort to defend the Permit against *ultra vires* conditions and the threat of revocation by the same Building Inspector under the same Section 105.5 of the IBC, Attorney Hastings for Lyme and XYZ provided a Statement of Facts and Law to the Planning Department and Building Code Board of Appeals on June 1, 2023¹ that laid out the interpretation of the 180 day period, and references relevant case law that substantiates what constitutes abandonment. That analysis of relevant case law has been

¹ Note: Attorney Hastings *Statement of Facts and Law* was submitted to the Lebanon Planning Department on June 1, 2023 in advance of the first BCBA hearing. The Planning Staff omitted XYZ's legal document from inclusion in the BCBA2023-01 Staff Memorandum and package of information that was posted the following day on June 2, 2023. That Staff Memo was delivered to the Building Code Board of Appeals and to the Appellant, and was posted publicly to the City's website, in advance of the June 5, 2023 hearing.



updated in Attorney Hastings' March 27, 2024 Statement of Facts and Law for BCBA2024-01:

19. This is consistent with New Hampshire case law involving the relinquishment or abandonment of permit for the use of real property. In those cases, there must be both an intention to abandon or relinquish the permit and an overt failure to act which carries the implication the holder of the permit neither claims nor retains any interest in the permit. *See Lawlor v. Town of Salem*, 116 N.H. 61, 62 (1976); *Pike Industries v. Woodward*, 160 N.H. 257, 261 (2010).

20. Similarly, in cases involving a developer's vested right to complete a project, New Hampshire courts "tend to construe the vesting of rights liberally." *AWL Power, Inc. v. City of Rochester*, 148 N.H. 603, 606 (2002).

Figure 3: Statement of Facts and Law, BCBA2024-01, March 27, 2024. Attorney Philip Hastings for XYZ Dairy

The record reflects that at no point from July 11, 2023 to January 5, 2024 did XYZ Dairy show any "**intention to abandon or relinquish the permit,**" nor was there any "**overt act or failure to act**" that would justify the determination that the permit has been abandoned.

Quite the contrary, XYZ was working continuously, diligently, and in good faith to re-start and to advance the work approved under the Permit following the Staff-caused delays in 2022-2023.

An overview of XYZ's actions to this effect from July, 2023 to February, 2024 are provided herein in Section D.

7. Any **temporary** suspensions of work have been due to actions beyond the control of XYZ Dairy or Lyme Properties, and the delays from 2022-present are specifically due to the decisions and actions of the Lebanon Planning Department.

This matches the long pattern of delays that XYZ has suffered in the course of Lyme's effort to construct 1 River Park under building permit #2016-00293.

- a. The 2016 mobilization was stopped by Municipal issues.
- b. The 2018 mobilization was stopped by Municipal issues.
- c. The 2020 mobilization was stopped by the NH Governor's declaration of emergency during the Covid-19 pandemic.
- d. The 2022 mobilization was stopped by Municipal issues, resulting in the Appeal BCBA2023-1 before the Lebanon Building Code Board of Appeals.
- e. The 2024 mobilization has now been put at risk by Municipal issues again, given the Building Inspector's determination that our permit has expired.

B. Addressing Building Inspector's arguments of suspension and/or abandonment

8. The Building Inspector's February 1 memo provides four (4) excerpts from Lyme Properties' past communications regarding the status of work on Permit #2016-00293, to purportedly



establish that a suspension or abandonment of work has occurred. Those four excerpts are addressed as follows:

9. **Example #1** provided in Building Inspector's February 1, 2024 memo:

- Per your March 7, 2023 letter to the Building Inspector: "Once the pipe was located work ceased to avoid potentially damaging the existing, active line that was initially reported to be clay."

Figure 4: Item #1 on Page 3 of 4 of City of Lebanon Feb. 1, 2024 Memo

The March 7, 2023 letter from Lyme referenced here is in response to the Building Inspector's February 15, 2023 communication— after 68 days— in response to the December 9, 2022 communication that XYZ had commenced construction on the work under Permit #2016-00293.

Broader context of the sentence excerpted by the Building Inspector helps inform the reason behind the cessation of work at that time:

After repeat delays encountered during 2022, we commenced excavation of the 1 River Park foundation in good faith and in earnest on November 29, 2022. The foundation had been staked prior to commencement of work by Nott's Excavating using their GPS system loaded with the approved River Park plans. Nott's began carefully excavating along the east side of the foundation to daylight the pipe. Once the pipe was located work ceased to avoid potentially damaging the existing, active line that was initially reported to be clay.

As my December 9, 2022 memo outlined I cannot proceed any further on the 1 River Park excavation until the conflict is addressed, and given that it is municipal infrastructure that solution must be coordinated with the City of Lebanon. The first meeting with City officials from the Department of Public Works was on December 15, 2022, and David Brooks' February 2, 2023 memo outlines potential solutions. I have subsequently been working with TF Moran, our engineer of record, to develop potential solutions in response.

Figure 5: Excerpt from March 7, 2023 memo from Lyme Properties in response to City of Lebanon Building Inspector's February 15, 2023 communication .

There is no question that the work that commenced on November 29, 2022 ceased upon the locating of the pipe, as it was XYZ's legal obligation to seek and obtain direction and approval from the City of Lebanon for the handling and proposed temporary relocation of the municipal stormwater line in question.

The March 7, 2023 memo provides two pages of "Additional information regarding efforts to commence construction of 1 River Park" to substantiate Lyme's work in defense of the



Building Inspector's threat, in his February 15, 2023 memo, to retroactively revoke the Permit effective January 13, 2023.

At no point from the commencement of work on November 29, 2022 and the communication to that effect on December 9, 2022 to the City of Lebanon would the "work ceased" be reasonably assumed intentional or permanent.

In fact, it was XYZ/Lyme waiting two months for a response from the City of Lebanon while continuing to advance work on the Permit, conversations with tenants for the building in question, and potential partners at the State and Federal level in the pursuit of the River Park plan.

10. As Attorney Hastings' June 1, 2023 Statement of Facts outlines in item A.13, no substantive response related to the Building Permit was received for **68 days** following XYZ's letter notifying the City:

13. Other than cursory acknowledgements of the Appellant's December 9 letter, the City did not respond substantively with regard to the Building Permit until February 15, 2023 (i.e., 68 days later), at which time the Building Inspector requested additional information "in order to make a determination as to whether work has commenced for purposes of demonstrating compliance with Section 105.5 of the IBC [International Building Code] (which provides that, '[e]very permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance[.]'"

Figure 5: Factual Background Item A.13, "Statement of Facts and Law," Attorney Philip Hastings for XYZ, June 1, 2023

11. 13 days prior to the Building Inspector's memo of February 15, 2023 and 55 days after receiving the Commencement memo from XYZ on December 9, 2022, on February 2, 2023, an email from Deputy City Manager David Brooks was received— with apologies for delay— that provided clear direction for dealing with the pipe in question. Until that point, no further action could be taken on the pipe by XYZ.

Additionally, the City's moratorium on excavation during winter months factored into the timing of any potential solution, supporting XYZ's position that there was no additional construction effort that could have been undertaken in the City's R.O.W. to end the temporary suspension.

12. It should be noted that Lyme Properties had raised the issue of the municipal stormwater line proactively and repeatedly, including its inclusion in the March 25, 2022 memo to City Manager and in resultant conversations with then Director of Planning David Brooks and members of the Lebanon Department of Public Works in the Summer of 2022, with no resolution.
13. Upon receipt of Mr. Brooks' email on February 2, 2023, the City's instructions were then forwarded to TF Moran (the Engineer of record) and a Zoom meeting to discuss the

engineering solutions was scheduled for February 17, 2023. A follow-up email that day to TF Moran memorializes the discussion, which resulted in a Professional Service Order from TF Moran for additional services to design and engineer an alternative permanent solution for the off-site stormwater.

That proposed work by TF Moran was temporarily suspended by XYZ during the 2023 delays resulting in BCBA Case 2023-01

14. The aforementioned information provided is indicative of the work that was underway to address the underlying and unresolved issue, and disproves the Building Inspector's insinuation that Lyme's March 7, 2023 memo reflected any true suspension.

15. **Example #2** provided in Building Inspector's February 1, 2024 memo:

- Per the draft July 11, 2023 Building Code Board of Appeals meeting minutes: "Work has been suspended because of this hearing."

Figure 7: Item #2 on Page 3 of 4 of City of Lebanon Feb. 1, 2024 Memo

16. Lyme's testimony at the July 11, 2023 Building Code Board of Appeals– which the Building Inspector was not present for– related to the *temporary* suspension of efforts due to the ongoing discussions between the City and XYZ that resulted in the Appeal before the BCBA.

17. By the time of the July 11th hearing, the Building Permit had been in limbo for **226 days** due to the threat of revocation and work had been temporarily suspended accordingly while Lyme awaited a determination regarding the *ultra vires* conditions. Per Attorney Hastings' June 1, 2023 Statement of Facts and Law submitted in the course of BCBA2023-1:

20. Without such information from the Building Inspector, continuation of the construction work under the Building Permit is practically and economically unfeasible, as it would entail substantial investment of resources and efforts without assurances that the Building Permit will not be revoked.

Figure 8: Factual Background Item A.20, "Statement of Facts and Law," Attorney Philip Hastings, June 1, 2023

At no point between December 9, 2022 and July 11, 2023 did XYZ permanently suspend or abandon Building Permit #2016-00923. Rather, work could not continue until the disagreement with the Building Inspector's new conditions and the subsequent Appeal had run its course.

18. Upon the BCBA's determination on July 11, 2023 that the Building Permit was in-fact in effect, XYZ worked to re-start the project after 226 days of delay, of which 77 days were spent on the BCBA appeal.

19. Of particular importance to the status of the Permit and the outcome of the July 11, 2023 hearing, in the June 2, 2023 Staff Memo from the Planning Department on BCBA2023-01 Planning Director Nathan Reichert the Permit "was allowed to expire by the Applicant"

- An Appeal of the Building Officials Determination was filed on April 25th 2023.
- May 29th 2023 without the benefit of an extension request the permit was allowed to expire by the Applicant.

PROPOSAL

The applicant is appealing the Notice of Violation Dated April 19th 2023 and May 16th 2023.

Figure 9: Staff Memorandum for June 5, 2023 BCBA2023-01 hearing of the BCBA.

This erroneous statement, along with the subsequent errors that XYZ was appealing two Notices of Violations, further jeopardized the Permit, confused the Appeal process, and put additional false statements about XYZ/Lyme into the public record.

20. **Example #3** provided in Building Inspector's February 1, 2024 memo:

- Per your August 3, 2023 letter to the Building Inspector: "Following the determination of the Appeal Board, we have restarted conversations with project partners that were suspended because of your February 15, 2023 communication."

Figure 10: Item #3 on Page 3 of 4 of City of Lebanon Feb. 1, 2024 Memo

21. Mr. Hunnewell makes reference to an August 3, 2023 memo in which XYZ, again, requested that the Building Inspector approve the connection to the temporary stormwater bypass line that had been previously installed by XYZ under means and methods of the 1 River Park building permit to enable the temporary re-routing of the conflicting stormwater line.

The purpose of that memo is excerpted here:

Now that the Building Code Appeals Board confirmed on July 11, 2023 that we have commenced construction on 1 River Park Drive, we seek your approval of the temporary relocation of the municipal/NH DOT stormwater line that impacts our property without benefit of an easement.

Please note that this request is distinctly related to connecting to the temporary connection that has already been designed and installed under means and methods of the 1 River Park building permit (#2016-00293). It is independent from the final stormwater design as presently approved, and can proceed independent from the ongoing conversations about an alternative solution as memorialized in the February 2, 2023 communication from Deputy City Manager David Brooks. The temporary solution is under the jurisdiction of building permit #2016-00293.

Figure 11: Excerpt from August 3, 2023 memo from Lyme requesting permission to connect temporary bypass line

22. The August 3, 2023 memo was relevant to concurrent conversations that XYZ was having with Engelberth Construction (see Section D) as to whether any of the 2023 construction season could be salvaged by proceeding with excavation of the 1 River Park foundation after the 7 months of delay caused by the City of Lebanon.

XYZ's attempt to seek this approval was stymied by the City's decision to reject the request to make the temporary connection, against the advice of XYZ's Engineer and Construction Manager.

23. **Example #4** provided in Building Inspector's February 1, 2024 memo:

- Per your August 4, 2023 e-mail to David Brooks: "the City's pipe is preventing work on 1 River Park from continuing".

Figure 12: Item #4 on Page 3 of 4 of City of Lebanon Feb. 1, 2024 Memo

It is not clear the Inspector's intent in including this excerpt as it references the ongoing conversations between XYZ and the City of Lebanon to address the municipal stormwater line interfering with 1 River Park construction.

The communication itself documents that XYZ was actively pursuing work on the Permit in August, 2023 following the July, 2023 BCBA determination. The very same work that XYZ had set out to accomplish on November 29, 2022, and was then seeking to restart.

Again, a review of the communication from which this single sentence is pulled provides context that disproves the Inspector's position that no work was underway as of August 4, 2023:

David,

The City was Cc'd on all the communications regarding the AOT permit when it was extended back in 2020, and TF Moran addressed this issue with NHDEP.

Additionally, the applicant is proposing a minor plan change to the approved drawings. The change consists of relocating the city-owned discharge of an existing 18" stormwater culvert on the property in order to construct the foundation of 100 River Park Drive on Lot 1. The proposed change meets all the requirements under Env Wq 1503.21 (d) under changes that can be made without applying for an amended permit or new permit. As such, we believe these changes meet the intent of the regulations to permit modifications to the Approved Project.

I understand the additional requirements as it relates to a permanent solution, but it remains our position that the temporary solution is within the City's jurisdiction to approve the temporary re-routing under the building permit. The connection can happen on River Park property, outside the right of way.

The present condition is in fact also a temporary solution as the pipe was redirected to its current route after the former City Engineer approved site work that blocked the pipe, requiring the current re-routing after it backed up.

How the City wishes to handle this is your prerogative, but the City's pipe is preventing work on 1 River Park from continuing. As we've both now noted, this pipe does not serve River Park whatsoever and is exhausting on our property without easement.

I look forward to receiving the City's proposed solution for moving its pipe out of the way so our work can continue.

Thank you,
Chet

Figure 13: Response from Chet Clem of Lyme Properties to Deputy City Manager David Brooks on August 4, 2023 regarding the City's rejection of XYZ's request to connect the temporary bypass line

This communication from Lyme goes to substantiate that the ongoing delays in August, 2023 are due to XYZ/Lyme waiting on the City of Lebanon to make a determination on how to handle the City's pipe, and that the City's position is in conflict with the project team's recommendations, and that the proposed solution by XYZ was in fact approved by the NHDES in the 2020 extension of the Alteration of Terrain permit and was communicated to the City in 2020.

Mr. Hunnewell's February 1, 2024 letter provides summary of the same back-and-forth communication on August 3rd and 4th, 2023 between Lyme and the City, which confirms that efforts were underway in August, 2023 to re-start and continue the work authorized by the Permit.

24. The Deputy City Manager communicated that the temporary stormwater line was not under the jurisdiction of the Permit and must instead be taken up with the City's Department of Public Works. XYZ continued to object to that determination, but proceeded as directed to take up the issue with the DPW.

Following the dismissal of your appeal, you wrote in a letter dated August 3, 2023, that "[t]he only thing that remains to allow work to continue on the excavation for 1 River Park is the connection of the existing line to the temporary line on Lot 1." By e-mail sent on the same date, Deputy City Manager David Brooks explained that your questions regarding the Route 10 stormwater connection issue should be addressed to the Department of Public Works and not to the Building Inspector. By e-mail sent to Mr. Brooks on August 4, 2023, you reiterated your position that your proposed Route 10 stormwater connection "temporary solution is within the City's jurisdiction to approve the temporary re-routing under the building permit".

Figure 14: Excerpt from Page 2 of 4 of City of Lebanon's February 1, 2024 communication.

25. A subsequent meeting between Lyme and member of the Lebanon Department of Public Works occurred at the River Park site on August 17, 2023 to review the temporary stormwater connection and efforts to connect it, as well as discuss the long-term solutions proposed by XYZ and under analysis by TF Moran.

In keeping with the City Manager Shaun Mulholland's April 24, 2023 communication of his new policy that all meetings between the City and Lyme be recorded, that on-site meeting was audio recorded by the Lebanon DPW and subsequently shared with Lyme upon request.²

² Audio recording of August 17, 2023 site visit by Lebanon DPW is accessible online via link in Appendix F



C. Lack of evidence and changes to the project site

26. The Inspector's February 1, 2024 memo, in his arguments that work has been abandoned, goes on to state: "Also, I have observed no work occurring at, or changes to, the site on multiple drive-by inspections conducted throughout 2023."

The statement "no work occurring at, or changes to, the site...throughout 2023" is factually incorrect.

XYZ would request that any notes and/or photographic evidence to that effect made by the Building Inspector during these "multiple" inspections be provided to substantiate that claim.

27. By example to the contrary of the Building Inspector's claim that no changes had occurred, on both September 12, 2023 and September 26, 2023, significant changes occurred to the River Park site, specifically including Lot 1 and the surrounding area.

The construction fence was relocated and expanded to secure the site, and was specifically erected in a manner to provide security for the construction efforts on 1 River Park and the remaining Phase 1 Infrastructure.

Previously, the fence had not included the Route 10 Southern Entrance area so as to allow ongoing public access to the trails and riverfront at River Park.

28. The elimination of the previous public access provided was in response to the Staff's actions and determinations during the Appeal of Administrative Decision PB2023-23-AAD before the Planning Board that XYZ had made "unpermitted site improvements."

XYZ believes that the Staff's statements in writing in Staff Memo PB2023-23-AAD and as reiterated in testimony were incorrect, and sought clarification in testimony at multiple hearings as to the legal justification(s) of those statements.

Absent those statements being rescinded by the Staff, documents submitted to the Planning Board and Building Code Board of Appeals and recorded statements in the public record claimed that XYZ was in violation of City laws. That created a liability issue for XYZ, and negated the insurance policy that XYZ and Lyme had paid for every year in order to provide public access through the construction site to the publicly accessible trails and the waterfront parcel owned by the Friends of River Park.

Given the loss of liability insurance, and on advice of Counsel, the "attractive nuisance" was eliminated and the active construction site secured while XYZ/Lyme determined next steps, and worked to re-start the work for Permit #2016-00293.



D. XYZ's Actions to Actively and Diligently Pursue Permit #2016-00293 since July 11, 2023

29. Following the BCBA decision on July 11, 2023 XYZ Dairy initiated the process to re-start the development of 1 River Park under Permit #2016-00293 that had been put in limbo for seven (7) months by the actions of the Lebanon Planning & Development Department.

30. On June 1, 2023, XYZ and Engelberth Construction met via Zoom to discuss 1 River Park, Phase 1 Infrastructure, and how to salvage the 2023 construction season. This was in follow-up to a phonecall on May 17, 2023 between David Clem of XYZ and Chris Yandow of Engelberth Construction.

Engelberth was engaged to perform pre-construction services with the initial task– given the ongoing BCBA2023-01 Appeal case and the perceived hesitance of the market given past false-starts– to provide internal estimating of the remaining work, to inform XYZ's decision making on 1 River Park and Phase 1 Infrastructure, and to inform the request by XYZ for Amendments to the River Park approvals that were before the Planning Board simultaneously.

31. On June 21, 2023, Engelberth provides XYZ with initial pricing based upon internal analysis and budgeting.^A

32. June 27, 2023 Elkus Manfredi delivers the 2023 Code Review prepared by sub-contractor Commercial Construction Consulting, Inc. (C3), updating the the 2019 Code Review C3 had previously conducted under the direction of Elkus Manfredi for the 2020 mobilization.^B

This was in response to the changes in the relevant codes related to 1 River Park that had been adopted by the City of Lebanon since the Permit was applied for in 2016 and issued in 2019.

These code changes, and the City's concerns that they be incorporated into Permit 2016-00293, were outlined in the Building Inspector's May 27, 2022 letter granting an extension of the 1 River Park permit.^C

33. At the July 11, 2023 hearing of the BCBA, the Board confirms that the Permit is active and in effect, eliminating the confusion caused by the June 2, 2023 Staff Memo (Item 21, Figure 9) and previous communications.

34. July 17, 2023 XYZ met with Engelberth Construction at 57 Main Street to review the June 19, 2023 estimates, and discuss re-commencement of work in 2023 to complete foundation before winter, the cost of incurring Winter Conditions, and the challenge of completing changes in the Route 10 R.O.W. prior to the excavation moratorium in local ordinances that had been invoked in 2018 to halt construction efforts at River Park.

35. On July 31, 2023, David Clem of XYZ Dairy, LLC emails the 1 River Park project team (Elkus Manfredi Architects, AHA Engineers, TF Moran, McNamara Salvia) to inform them that XYZ has engaged Engelberth Construction as CM and requests any updated fee proposals as necessary.^D
36. On August 3, 2023 Lyme sent a memo to Building Inspector Calvin Hunnewell, and Cc-ing members of the Lebanon Planning & Development Department and Department of Public Works, seeking "approval of the temporary relocation of the municipal/NH DOT stormwater line that impacts our property without benefit of an easement" under Permit #2016-00293.^E

Now that the Building Code Appeals Board confirmed on July 11, 2023 that we have commenced construction on 1 River Park Drive, we seek your approval of the temporary relocation of the municipal/NH DOT stormwater line that impacts our property without benefit of an easement.

Please note that this request is distinctly related to connecting to the temporary connection that has already been designed and installed under means and methods of the 1 River Park building permit (#2016-00293). It is independent from the final stormwater design as presently approved, and can proceed independent from the ongoing conversations about an alternative solution as memorialized in the February 2, 2023 communication from Deputy City Manager David Brooks. The temporary solution is under the jurisdiction of building permit #2016-00293.

Figure 15: Excerpt from email from Chet Clem to Calvin Hunnewell, August 3, 2023.

37. On August 3 and 4, 2023 there is the exchange between Lyme and the City of Lebanon pertaining to XYZ's August 3rd request. Deputy City Manager David Brooks' response that the connection cannot be made on a temporary basis to enable work to re-commence on the 1 River Park permit creates an additional hurdle for work on 1 River Park to continue in the Summer/Fall of 2023.

Lyme's August 3, 2023 memo outlines the distinction between the temporary connection and the final stormwater design.

The August 3, 2023 communication from Deputy City Manager David Brooks makes reference to Mr. Brooks' February 2, 2023 email outlining steps for XYZ's previous proposal to turn the temporary connection into an alternative final stormwater design.

It was then, and remains now, XYZ's position that the temporary connection was permitted to be completed under Permit 2016-00293, allowing the 1 River Park construction to proceed and the final stormwater solution to be determined.

Mr. Brooks February 2, 2023 email was helpful in providing guidance as it relates to the alternative final design, and was forwarded to XYZ's Civil Engineer at the time and discussed via conference call on February 17, 2023. However, the February 15, 2023 memo received two days prior, and the subsequent actions of the Planning & Development



Department related to BCBA2023-01, delayed further action on completing the engineering work in response to Mr. Brooks' February 2, 2023 communication.

38. XYZ's Civil Engineer TF Moran had previously communicated the temporary bypass line to the NH DES on August 4, 2020 in a request for extension of the Alteration of Terrain permit (AoT-0994).

Additionally, the applicant is proposing a minor plan change to the approved drawings. The change consists of relocating the city-owned discharge of an existing 18" stormwater culvert on the property in order to construct the foundation of 100 River Park Drive on Lot 1. The proposed change meets all the requirements under Env Wq 1503.21 (d) under changes that can be made without applying for an amended permit or new permit. As such, we believe these changes meet the intent of the regulations to permit modifications to the Approved Project.

Figure 16: "River Park, AoT-0994, Tax Map 44 Lot 3 & 7, Tax Map 57 Lot 27, West Lebanon, NH" Letter from Jason Hill, P.E, TF Moran on behalf of XYZ Dairy, LLC. to Ridgely Mauck, P.E. NHDES – Water Division, August 4, 2020.

The extension of the AoT was approved by the NHDES in the October 30, 2020 Alteration of Terrain permit extension (AoT-0994A). The City of Lebanon was copied on both the August 4, 2020 communication from TF Moran and the October 30, 2020 response from NHDES.

The temporary bypass line was installed in December, 2021 by Nott's Excavating from plans provided by TF Moran. Nott's was mobilized on-site for punch list work on Crafts Avenue Extension, and given the challenge of securing contractors in the Upper Valley in the Covid-19 era, XYZ had the bypass line installed in advance of work on 1 River Park that was anticipated for 2022.

39. At the suggestion of Mr. Brooks, on August 17, 2023, Chet Clem of Lyme Properties meets with Rod Finley and Brian Vincent from the City of Lebanon Department of Public Works on-site at River Park to discuss the temporary stormwater connection, as well as the proposed permanent connections that TF Moran is developing.

In keeping with City Manager Shaun Mulholland's April 24, 2023 policy determination that all meetings between City Staff and Lyme Properties be recorded, the meeting was audio recorded.^F

40. On August 21, 2023, in a Zoom meeting with Engelberth Construction following confirmation that the City would not permit the connection of the temporary stormwater line under Building Permit #2016-00293, XYZ and Engelberth determine that attempting to re-start the work on the foundation of 1 River Park in 2023 is not feasible.

The decision is made that the 2023 Construction season has been lost due to the delay caused by the Planning Department, and that any further progress was stymied by the inability to temporarily bypass the Municipal Stormwater line.



XYZ engages Engelberth to re-price the entire building and infrastructure for the Spring, 2024 construction season and to develop a GMP Contract to that effect.

41. On September 8, 2023, Engelberth Construction and Elkus Manfredi memorialize their communications to make the necessary changes to project documents to re-bid the project, pending XYZ's ongoing amendments before the Lebanon Planning Board.^G
42. On September 12, 2023, following the re-affirmation by the Planning Staff that "unpermitted site improvements" were in violation of the River Park Site Plan, access to River Park is closed due to the resultant liability issue the supposed violations pose to XYZ, Lyme, and the Clems. Over the course of that week, the improvements are removed and a temporary fence is erected
43. On September 26, 2023, Round Hill Fence adjusts the Construction Fencing at River Park to secure the site in a configuration that allows for construction of 1 River Park and Phase 1 Infrastructure work, and secures the construction site from public access.^H
44. On October 1, 2023 XYZ authorizes Elkus Manfredi to release C3 to make necessary Code updates.^I
45. On October 6, 2023 XYZ executes the updated Elkus Manfredi Architects Contract.^J
46. On October 11, 2023 XYZ directs Engelberth to go to the street on Phase 1 Infrastructure, and requests that Engelberth prepare a Tenant Improvement budget for the 3rd floor space in support of the leasing conversations.^K
47. On October 16, 2023 XYZ submits a formal Lease Proposal and Letter of Intent to advance ongoing discussions with a prospective Life Science tenant interested in the Third Floor laboratory space at 1 River Park.^L
48. On December 13, 2023 Elkus Manfredi supplies updated Code Report to XYZ and Engelberth Construction.^M
49. On December 18, 2023, at a regularly scheduled meeting of the West Lebanon Revitalization Committee^N, WLRAC member Kim Chewning and Lebanon Planning Board member and NH State Representative Laurel Stavis asked question of the Lebanon Planning Department regarding the status of River Park.

Deputy City Manager David Brooks states (at 18:33) "Note for the record there is still a building permit in their hands."



Lebanon Planning and Development Director Nathan Reichert goes on to state (at 21:09):
"The building permit still is in place, the planning approvals are all still in place, they would have to meet the standards laid out in those planning approvals in order to move forward."

Of note, no communication of these questions or that there was a public conversation about the River Park property status, was ever made to XYZ/Lyme by the City.

50. On December 29, 2023 Elkus Manfredi sends proposal for updated drawings for 1 River Park.^Q
51. On January 5, 2024 Lyme submits a Memo to the Lebanon Building Inspector updating him on XYZ's ongoing work on the 1 River Park project.^P
52. On January 12, 2024 Calvin Hunnewell responds that the Staff will be back in touch the following week.^Q
53. On January 17, 2024, Lyme submits a letter to the Lebanon City Council regarding the discussion of a West Lebanon Tax Increment Finance (TIF) District and the role that River Park can play in it, as expressed in numerous previous communications to the City of Lebanon.^R
54. On January 26, 2024, Lyme communicates to the Lebanon DPW that AHA Engineers in seeking updated water flow data for the purpose of updating 1 River Park drawings.^S
55. On January 29, 2024, David and Chet Clem have a teleconference with Elkus Manfredi to review updated interior finishes for 1 River Park.^T
56. On February 1, 2024, David and Chet Clem travel to Massachusetts to meet with a potential tenant for 1 River Park that specifically addresses a critical need in West Lebanon and the Upper Valley.

Following that productive meeting and site tour, the mutual decision is made to advance architectural work to determine the feasibility of this user in 1 River Park.

57. Later on February 1, 2024, the Lebanon Planning Department sends the expiration and invalidation memo, 27 days after receiving Lyme's update as to the status of the project.
58. An updated set of Construction Documents incorporating the aforementioned work was provided by Elkus Manfredi on February 23, 2024.^U
59. A project update was provided by Engelberth Construction on March 26, 2024 outlining the work underway to re-bid the project and coordinate with necessary parties.^V

E. Filing of BCBA Appeal BCBA2024-01

60. On February 29, 2024 XYZ and Lyme submitted Appeal BCBA2024-01 to the Lebanon Planning and Development Department via email, and Cc-ing all Lebanon representatives that were included on the Building Inspector's February 1, 2024 memo: City Manager Shaun Mulholland, Deputy City Manager David Brooks, Planning Director Nathan Reichert, Deputy Planning Director Tim Corwin.
61. On February 29, 2024, Planning Director Reichert responded, suggesting that the Appeal would need to be filed in person at City Hall the following Monday:

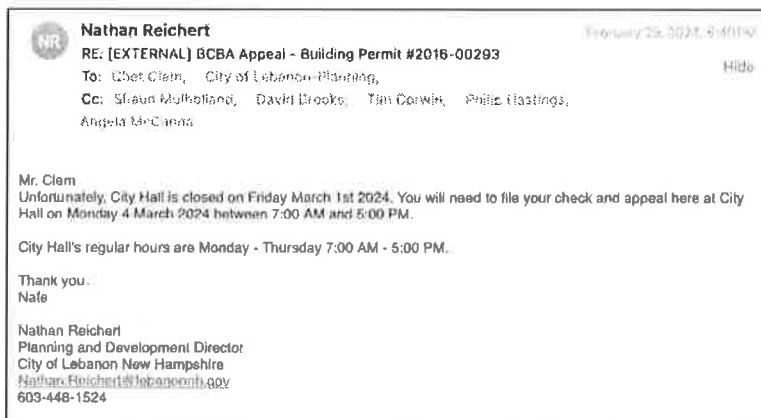


Figure 17: Email from Nathan Reichert to Chet Clem, February 29, 2024.

62. This determination was a departure from XYZ/Lyme's previous experience in which electronic submission of Applications was accepted practice. The calculation of the Application Fee has been determined by the Planning Department's Administrative staff subsequent to submittal due to past issues with the City's records and determination of appropriate abutters.
63. Mr. Reichert's instruction that "You will need to file your check and appeal here at City Hall on Monday 4 March 2024 between 7:00 AM and 5:00 PM" meant that the Appeal would not be filed ahead of the 30-day deadline to Appeal.

Given that Mr. Reichert sought to have #BCBA2023-01 dismissed on grounds of "timeliness," XYZ/Lyme exhausted all efforts to ensure the Application was received in a timely fashion, as outlined in Attorney Hastings' follow-up email on March 6, 2024 when XYZ/Lyme had received no response for 1 week:

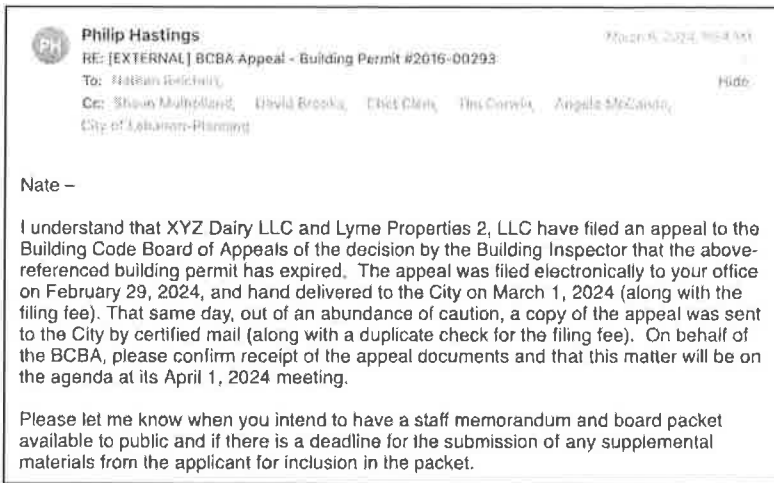


Figure 18: Email from Attorney Hastings to Planning Director Reichert on March 6, 2024.

64. No substantive response to XYZ/Lyme's Appeal Application or Attorney Hastings' subsequent March 6 email was ever received from the Lebanon Planning Department.

Per Attorney Hastings' March 19, 2024 to the City's Attorney Matthew Decker: "The City has had nearly three weeks to review the appeal. During that time, no effort has been made by the City to reach out to XYZ to explore the possibility of finding a productive resolution. The City has not even bothered to respond to my March 6 email asking to confirm its receipt of the appeal documents."

65. It was not until March 20, 2024— three (3) weeks after submission of the Appeal— that XYZ/Lyme finally received confirmation via the BCBA's Attorney Cordell Johnston that the Appeal had been accepted and was to be considered for inclusion on the April 1, 2024 BCBA Agenda.

A request was made that XYZ agree to have the hearing postponed until May 6, 2024, another 4-weeks of indecision and uncertainty, which would push the BCBA hearing until after the intended start of construction.

66. Attorney Hastings made repeat requests that the Building Inspector temporarily rescind the February 1, 2024 decision, a practical compromise that respected the Inspector's authority and the Appeal process without jeopardizing the progress that XYZ/Lyme was making. Those requests were summarily rejected by the City.
67. At the time of the advertised April 1, 2024 hearing of the BCBA, it will be **60 days** since the Building Inspector's February 1, 2024 determination that the Permit was invalid. In those two months, XYZ/Lyme has been unable to advance work on 1 River Park, leasing discussions with prospective tenants have been jeopardized, and XYZ/Lyme has been put at risk of being in violation of numerous executed contracts.



APPENDIXES:

- O. Overview of Key Dates since July 11, 2023 BCBA hearing.
- ^A 20230621 Engelberth – River Park Lot 1 construction documents cost estimate.pdf
- ^B 20230623 Elkus Manfredi Architects (EMA) - River Park 2023 Code Review
- ^C 20220527 Letter from the City of Lebanon - Building Permit #2016-00293 Extension
- ^D 20230731 Email from David Clem to the River Park Design Team - 1 River Park Drive.pdf
- ^E 20230803 Request for temporary stormwater connection
- ^F 20230817 River Park Site Meeting Audio Recording
- ^G 20230908 River Park Code Review coordination between Engelberth and EMA
- ^H 20230829 Fence estimates and communications with Round Hill Fence
- ^I 20231031 Email to EMA Authorizing them to Hire C3 for updated code report
- ^J 20231003 Proposal from EMA for Construction Admin
- ^K 20231016 River Park - Phase 1 and Tenant Improvements
- ^L 20231016 Lease Proposal and LOI
- ^M 20231211 River Park Lot 1 Code Report
- ^N 20231218 Link to December 18, 2023 WLRAC meeting
- ^O 20240117 EMA Conformed Drawings Package Contract
- ^P 20240105 Memo to Lebanon Building Inspector
- ^Q 20240201 Expiration of 1 River Park Drive Building Permit #2016-00293 Letter from Lebanon Building Inspector
- ^R 20240117 Request to be included in a West Lebanon Tax Increment Finance TIF District to the Lebanon City Council
- ^S 20240126 Email from AHA Consulting Engineers to Lebanon DPW regarding hydrant flow test data
- ^T 20240126 1 River Park Interior Finishes Meeting with EMA
- ^U 20240223 1 River Park – Lot 1 Construction Documents and Specs
- ^V 20240326 River Park site and infrastructure bidding update from Engelberth

Work on 1 River Park • Permit #2016-00293

Since July 11, 2023 Building Code Board of Appeals

June 1, 2023 – River Park meets with Engelberth Construction prior to first BCBA2023-01 hearing.

June 27, 2023 – Elkus Manfredi delivers Code Review

July 11, 2023 – Building Code Board of Appeals determines Permit #2016-00293 is Active, 224 days after commencement

July 17, 2023 – Meeting with Engelberth Construction to discuss how/if we could salvage the construction season after 7 months of delay dealing with Permit issue.

July 31, 2023 – Re-engaged Elkus Manfredi Architects, AHA Engineers, TF Moran Engineers, McNamara Salvia Engineers and requested updated contracts.

August 3, 2023 – Emailed City requesting permission to connect temporary bypass line under Means and Methods of Building Permit as had been approved by the State of New Hampshire.

August 4, 2023 – City rejects solution, requires meeting with DPW and additional engineering work to be completed, work that is only relevant to the permanent solution that isn't required to be done until the Building is completed.

August 17, 2023 – On-site meeting with DPW. Audio recording in keeping with City Manager's new policy that all communications with Lyme Properties are to be recorded.

August 21, 2023 – Meeting with Engelberth Construction, decide it is procedurally unlikely project can re-commence on-time given pipe issue, and would incur additional cost of Winter Conditions.

September 12, 2023 – In parallel matter, Planning Staff reaffirms that "unpermitted site improvements" are in violation of the River Park Site Plan. River Park/Lyme put at liability risk, closing site to public access.

September 28, 2023 – Round Hill Fence Co. adjusts River Park construction fence to secure the project site, and to enable Phase 1 Infrastructure (Route 10 entrance road, Municipal Stormwater solution, etc.) to be completed.

- Planning Staff argued against River Park's proposed 2023 Amendments that would have allowed project to proceed in a more efficient manner.

October 1, 2023 – XYZ authorizes Elkus Manfredi to do another Code Report for any updates to 1 River Park plans, as City had been promised.

October 6, 2023 – XYZ executes updated E-M Architectural Services contract, for the fourth time.

October 16, 2023 – Lease Proposal and Letter of Intent to prospective Life Science tenant interested in entire Third Floor.

December 13, 2023 – Code Report delivered.

December 29, 2023 – Elkus Manfredi sends proposal for updating drawings.

January 5, 2024 – Prior to 180 days from 7/11/2023, Lyme submits update memo to Lebanon Building Inspector.

"We have named Engelberth Construction as our Construction Manager, and along with Elkus Manfredi Architects and the rest of the project team are working toward the Spring, 2024 construction season."

January 26, 2024 – Lyme and AHA Engineers communicate with City of Lebanon DPW about updated water flow data.

January 29, 2024 – Teleconference with Elkus Manfredi to update and finalize Building Interiors.

February 1, 2024 – Travel to Massachusetts to meet with prospective tenant.

February 1, 2024 – Lebanon Planning Department sends Expiration and Invalidation Memo, outlines options to appeal, and directs Lyme to direct any questions to the City Attorney.

February 29, 2024 – XYZ/Lyme files Appeal.

April 1, 2024 – Building Code Board of Appeals Hearing on BCBA2024-01.

EXHIBIT 4

LYME PROPERTIES, AGENT FOR XYZ DAIRY, LLC

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

MAY - 1 2024

STATEMENT OF FACTS AND LAW

This Statement of Facts and Law is submitted on behalf of Lyme Properties, 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").

All testimony, statements, representations, evidence, plans, reports, studies, exhibits and other information submitted or to be submitted by or on behalf of the Applicant in connection with the Application at or prior to the public hearing on the Application are incorporated by reference hereto.

The Applicant requests that the Building Code Board of Appeals (the "Board") approve this Statement of Facts and Law as the specific findings required pursuant to RSA 676:3, I.

A. Factual Background.

1. By Building Permit dated December 31, 2019 (Permit #2016-00293; the "Building Permit"), the Appellant was authorized to commence construction on a mixed used commercial building on the Property, which is Lot 1 in the River Park Subdivision.

2. The Building Permit contained five (5) relatively standard conditions of approval, to be satisfied at various points during the construction process, with no expressly stated expiration date.

3. Due to the Covid-related public health emergency, the deadline to commence construction under the Building Permit was extended to January 13, 2023.

4. On or before November 29, 2022, the Appellant's contractor staked the foundation of the proposed building on the Property in accordance with the approved site plan and began initial excavation within the building footprint.

5. In the course of the initial excavation work, the contractor encountered the City's stormwater line from Route 10 to the ravine on the River Park site.

MAR - 1 2024

6. The City's stormwater line apparently was originally constructed to manage stormwater from Main Street/Route 10. According to plans provided by the City to the Appellant, it has additionally accommodated stormwater runoff from at least one private development (the Falls) on the easterly side of Main Street/Route 10.

7. The depth of the pipe is in direct conflict with the foundation excavation and cannot be abandoned in place; best construction practices is to remove the pipe and accommodate the stormwater runoff from the public street and other properties through some other means of stormwater management.

8. The conflict with the pipe, associated costs, and questions regarding responsibility of maintenance, were brought to the City's attention in Item #30 of the Appellant's March 25, 2022 comprehensive memorandum "A Framework For Public Private Partnership At River Park," which was submitted to the City in an effort to address past challenges and propose a collaborative, cost-saving path forwards.

9. A subsequent meeting between the Appellant and the City's Department of Public Works confirmed the assumption that the project had been over-engineered but nevertheless the Appellant would bear full responsibility for any re-engineering and cost-saving efforts to address the municipal stormwater line.

10. Since the initial excavation work, the Appellant has been working diligently with the City's engineering and planning staff to develop a plan to properly remove and dispose of the pipe, manage the City's stormwater, and fairly allocate the cost of those efforts. To date, all associated costs have been borne by the Appellant.

11. At the same time, the Appellant and the City have been engaged in communications regarding the status of the Building Permit.

12. By letter dated December 9, 2022, the Appellant formally notified the City of the commencement of construction under the Building Permit.

13. Other than cursory acknowledgements of the Appellant's December 9 letter, the City did not respond substantively with regard to the Building Permit until February 15, 2023 (i.e., 68 days later), at which time the Building Inspector requested additional information "in order to make a determination as to whether work has commenced for purposes of demonstrating compliance with Section 105.5 of the IBC [International Building Code] (which provides that, '[e]very permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance[.]'"

14. The Building Inspector's February 15 notice went on to: (a) list nine (9) specific "examples" of the information he required, none of which are set forth in Building Permit or otherwise in any applicable law, rule or regulation; (b) threaten to "revoke the permit as of January 13, 2023" if such additional information was not provided; and (c) set forth four specific actions

that, if the Building Permit was not revoked, the Appellant would need to take “prior to the resumption of construction activities,” none of which are conditions of the Building Permit or otherwise required by any applicable law, rule or regulation and two of which that fall entirely outside of the building inspection and permit process.

15. By letter dated March 7, 2023, the Appellant provided additional information to the Building Inspector and asked him to provide the Appellant with the City’s standards and policies with respect to the commencement of construction under a building permit and what specific information is required by the IBC and other applicable law with respect to the same.

16. Following subsequent discussions between the Appellant and City staff on March 16, 2023 and additional information supplied by the Appellant at the City’s request (in the form of invoices for project materials and cover letter dated March 24, 2023), the Building Inspector agreed that the Appellant’s work constituted commencement of work pursuant to the Building Permit as of November 29, 2022. At the same time, however, the Building Inspector set forth several “additional steps” that need to be completed “to maintain activation of the building permit without jeopardizing the 180-day allowance from November 29, 2023 [sic].”

17. The list of additional steps in the Building Inspector’s March 24 letter was substantially the same as the list provided in his February 15 notice, with an additional requirement with respect to the solution for the City’s drainage issue.

18. The Building Inspector’s March 24 letter contained no reference to the basis for the requirement for “additional steps” in either the Building Permit, the IBC or any other applicable law, rule or regulation or provide any specific deadline for the completion of such additional steps.

19. By email dated April 10, 2023, the Appellant sought a response from the Building Inspector for clarity as to the date of the commencement of work for purposes of the Building Permit and again for specification as to the legal basis for the Building Inspector’s request for additional steps as condition of maintain the permit’s “activation.”

20. Without such information from the Building Inspector, continuation of the construction work under the Building Permit is practically and economically unfeasible, as it would entail substantial investment of resources and efforts without assurances that the Building Permit will not be revoked.

21. Having received no response from Building Inspector, the Appellant filed this appeal of an administrative decision by the Building Inspector on April 25, 2023.

B. Applicable Law and Legal Findings.

22. Building permits in Lebanon are required under the Lebanon Code of Ordinances (the “LCO”), Chapter 36. Building Construction, §36-2.A.

MAY - 1 2024

23. No part of the Chapter 36 of the LCO, or any other provision of the City's ordinances, rules or regulations, set forth specific requirements governing the commencement or continuation of work under a building permit.

24. Section 36-2.A of the LCO incorporates by reference the requirements of the State Building Code as defined in RSA 155-A.

25. The State Building Code adopts by reference the International Building Code of 2018 (the "IBC"). RSA 155-A:1, IV; RSA 155-A:2, I.

26. Section 105.5 of the IBC provides in full:

"Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated."

27. No part of the State Building Code or the IBC set forth specific requirements governing the commencement or continuation of work under a building permit.

28. In the absence of specific provisions in the LCO, the State Building Code, the IBC, and any other applicable law, ordinance, code, rule or regulations, the Building Inspector's requests for the Appellant to provide additional information or take additional steps not set forth in the Building Permit itself in order to maintain the Building Permit in effect is arbitrary, capricious, unreasonable and unlawful.¹

29. Having commenced construction under the Building Permit in a timely fashion prior to its expiration under Section 105.5 of the IBC, and having continued construction-related activity continuously, diligently and in good faith since that time (including working with the City to resolve conditions in the field, *i.e.*, the effect of the municipal stormwater infrastructure on the site, and bringing this Appeal), under Section 105.5 of the IBC, the Building Permit shall remain in effect from the date hereof unless and until the work authorized by the Building Permit is suspended or abandoned for a period of 180 days. *Cf. City of Kalispell v. Schaffer*, 700 P.2d 1000 (Mont. 1985).²

¹ The Building Inspector's requests effectively constitute the retroactive imposition of conditions on the issuance of the Building Permit not authorized by applicable law.

² In the absence of specific language in the IBC regarding what constitutes abandonment of a building permit, abandonment requires both an intention to abandon or relinquish the permit and an overt act or failure to act which carries the implication that the holder of the permit neither claims nor retains any interest in the permit. See *Lawlor v. Town of Salem*, 116 N.H. 61, 62 (1976); *Pike Industries v. Woodward*, 160 N.H. 257, 261 (2010).

MAR - 1 2024

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

Respectfully submitted,
on behalf of XYZ Dairy, LLC
By Cleveland, Waters and Bass, P.A.

Date: June 1, 2023

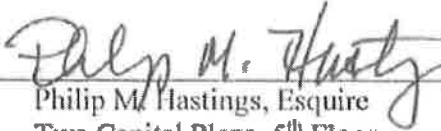
By: 
Philip M. Hastings, Esquire
Two Capital Plaza, 5th Floor
P.O. Box 1137
Concord, NH 03302-1137
Telephone: (603)224-7761
Email: hastingsp@cwbp.com

EXHIBIT 5



December 9, 2022

David Brooks
Deputy City Manager
City of Lebanon
51 N Park Street
Lebanon, NH 03766

Re: Commencement of 1(00) River Park Drive (Building Permit #2016-00293), conflict with City's existing municipal stormwater line

Mr. Brooks,

This memo is to provide official notice to the City of Lebanon that XYZ Dairy, LLC commenced construction on 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293, and that we have encountered a conflict with existing City of Lebanon infrastructure that has suspended construction until a solution can be reached.

Initial excavation within the building footprint began on Tuesday, November 29, 2022 by Nott's Excavating who returned to the site following the delayed conclusion of the Cross Country Connector work that was performed in August, 2022 but not deemed substantially complete until October 25, 2022.

Lebanon Build Inspector Calvin Hunnewell's May 27, 2022 memo outlines the status of Building Permit #2016-00293.

Excavation work on 1 River Park was stopped upon encountering the City's stormwater line running from Route 10 to the ravine on the River Park property. Work has now ceased accordingly, until there is a solution for this municipal utility obstructing the foundation of 1 River Park Drive. As XYZ Dairy, LLC does not own or control the pipe on our property, we cannot address it without City approval.

I reported the uncovering of the pipe to Brian Vincent, City Engineer on November 29, 2022 following the report from Nott's. Brian and I spoke on November 30, 2022 and agreed that he complete a file review to determine what, if any, information the City had available.

On December 2, 2022 I received a follow-up communication from Brian along with a PDF of a 1999 Bruno Associates Inc. P.C. plan showing the existing stormwater line as part of a permit set for "Project 98221 Maple Street." I subsequently requested additional information about that project, and Sheet S-3 which was referenced in the construction notes as containing "off-site drain & sewer profile" information which was provided on December 5, 2022. Brian and I are working to schedule a field visit next week, and a conversation to follow between the City and XYZ will be required to determine potential solutions and a path forwards.



The line in question is shown on the existing condition plan only as an "18" cast iron pipe." Nott's reports that the pipe they uncovered may in fact be clay. Either way, the depth of the pipe is in direct conflict with the foundation excavation and thus cannot be abandoned in place. Also, given the condition of the pipe and the additional future infrastructure that will be installed atop its current route, we believe that the best practice is to remove the deteriorating pipe so as to avoid future sink-holes, etc. That excavation work and disposal represents another additional development cost to XYZ Dairy, LLC to address a municipal issue.

The issues and costs associated with this pipe were outlined in Item #30 of the March 25, 2022 "A Framework For Public-Private Partnership" prepared by Lyme Properties for City Manager Shaun Mulholland.

Sincerely,

A handwritten signature in black ink that reads "Chet Clem". The signature is written in a cursive, slightly slanted style.

Chet Clem
Lyme Properties
57 Main Street
West Lebanon, NH 03784

Cc:

Brian Vincent, City of Lebanon
Calvin Hunnewell, City of Lebanon
David Clem, XYZ Dairy, LLC

EXHIBIT 6

From: David Brooks David.Brooks@lebanonnh.gov
Subject: RE: [EXTERNAL] Commencement of 100 River Park Drive (Building Permit #2016-00293), conflict with City's existing municipal stormwater line
Date: February 2, 2023 at 12:22 PM
To: Chet Clem chet@lymeproperties.com, David Clem dclem@lymeproperties.com, Angela McCanna amccanna@lymeproperties.com
Cc: Brian Vincent brian.vincent@lebanonnh.gov, Calvin Hunnewell Calvin.Hunnewell@lebanonnh.gov, Nathan Reichert Nathan.Reichert@lebanonnh.gov, Tim Corwin Tim.Corwin@lebanonnh.gov, Nik Coates Nik.Coates@lebanonnh.gov, Jay Cairelli Jay.Cairelli@lebanonnh.gov, Rod Finley rod.finley@lebanonnh.gov



Chet

My apologies for the delay in responding to your letter of December 9, 2022.

I am aware that City Engineers Brian Vincent and Rod Finley met you at the site on December 15th to review the current situation with the existing storm drain pipe. It is understood that the existing drain pipe is in conflict with the proposed building and that options discussed on December 15th included: 1) relocating the existing line, at least temporarily, or 2) delaying building construction until after the Route 10 intersection work is completed, which, as approved, will include installation of new drainage improvements thereby making the existing drainage pipe obsolete.

As an alternative, I understand that you discussed with the City Engineers on December 15th relocating the drainage pipe along the southerly side of Lots 1 and 2 to reach the ravine. You previously provided the City with a copy of an August 4, 2020 cover letter request from TF Moran to NHDES for a "proposed amendment extension to AoT-0994", which referenced the change of relocating the city-owned discharge of an existing 18" stormwater culvert on the property in order to construct the foundation of 100 River Park Drive on Lot 1. I believe TF Moran prepared a layout of the changed location, but I don't know if any revised drainage calculations were prepared or provided to NHDES. The subsequent AoT permit amendment (AoT-0994A) issued by NHDES on October 30, 2020 does not appear to explicitly reference or approve the proposed relocation, but does reference the recent request of August 4th, and is presumed to include and incorporate the changed drain pipe alignment, which in any event has been installed, but is not yet connected to the catch basin in Route 10.

The City has no issues with the use of the alternative drainage pipe alignment on a temporary basis, or perhaps even on a permanent basis, as long as the alternative alignment and design is approved by NHDES. The City would like a complete copy of the AOT amendment request, including any information that hasn't previously been provided. In addition, the City would need documentation that the alternative drainage pipe was properly sized and installed to handle only the existing stormwater flows currently handled by the existing pipe. The City would also require additional details and an as-built plan of the installed drain pipe, including confirmation that there are no conflicts with the recently-installed cross-country water and sewer mains extending from Crafts Avenue Extension into the commercial portion of the site. (The sketch plan prepared by TF Moran, which was presumably included with the 8/4/20 request to NHDES, appears to depict potential conflicts with water and/or sewer mains in the southeast corner of Lot 2, but any such conflicts could have been resolved in the field during installation of the cross-

conflicts could have been resolved in the field during installation of the cross-country water and sewer mains). Finally, the City would require a conveyance of the alternative drainage pipe and an easement for access, maintenance, repair, replacement, etc. Such easements normally extend 15 feet on each side of the centerline of the pipe, and depending on the final installed location, could include parts of Lot 24, which has since been conveyed to Lauren Cummings. An as-built plan of the installed pipe would confirm whether Mr. Cummings needs to grant an easement for the alternative drainage pipe.

With the above information, the City would then be prepared to issue an excavation permit (if necessary and upon application) for work within the City's right-of-way to disconnect the existing drainage pipe from the Route 10 catch basin and to connect the new drainage pipe. Following disconnection of the existing pipe from the catch basin, the remainder of the existing drainage pipe may be abandoned and removed to allow for construction of the building on Lot 1.

With respect to the commencement of the construction on Lot 1, I understand that the Planning Department will be reaching out separately to request additional information that could support a determination on that issue.

David

David R. Brooks

Deputy City Manager – Administrative Services

City of Lebanon

(603)-448-4220 (Office)

(603) 442-6134 (Direct)

David.Brooks@LebanonNH.gov

From: David Brooks

Sent: Monday, December 12, 2022 2:57 PM

To: Chet Clem <chet@lymeproperties.com>

Cc: Brian Vincent <brian.vincent@lebanonnh.gov>; Calvin Hunnewell <Calvin.Hunnewell@lebanonnh.gov>; David Clem <dclem@lymeproperties.com>; Angela McCanna <amccanna@lymeproperties.com>

Subject: RE: [EXTERNAL] Commencement of 1(00) River Park Drive (Building Permit #2016-00293), conflict with City's existing municipal stormwater line

Chet

I'm acknowledging receipt of your letter from last week. I will follow up with Brian on the latest inspections and discussions.

David

David R. Brooks

DAVID N. BROOKS

Deputy City Manager – Administrative Services
City of Lebanon

(603)-448-4220 (Office)

(603) 442-6134 (Direct)

David.Brooks@LebanonNH.gov

From: Chet Clem <chet@lymeproperties.com>

Sent: Friday, December 9, 2022 11:47 AM

To: David Brooks <David.Brooks@lebanonnh.gov>

Cc: Brian Vincent <brian.vincent@lebanonnh.gov>; Calvin Hunnewell

<Calvin.Hunnewell@lebanonnh.gov>; David Clem <dclem@lymeproperties.com>;

Angela McCanna <amccanna@lymeproperties.com>

Subject: [EXTERNAL] Commencement of 1(00) River Park Drive (Building Permit #2016-00293), conflict with City's existing municipal stormwater line

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Mr. Brooks et al,

Please find the attached memo regarding the status of 1 River Park Drive construction and a conflict with municipal infrastructure.

Sincerely,

Chet Clem
President
Lyme Properties

chet@lymeproperties.com

(603) 676-7106 (direct)

(207) 576-1410 (mobile)

[Calendly: book a Zoom with me](#)

[Lyme Properties](#)

[River Park West Lebanon](#)

[Action Plan for West Leb](#)

[A Green Vision for West Leb](#)

[Humor & Downtowns?](#)

[Decriminalize Development](#)

EXHIBIT 7



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

February 15, 2023

Sent Via E-Mail (chet@lymeproperties.com)

Chet Clem
Lyme Properties
57 Main Street
West Lebanon, NH 03784

Dear Mr. Clem,

I'm following up from my letter dated May 27, 2022, regarding your request for an extension of Building Permit #2016-00293 issued for 1 River Park Drive (formerly 100 River Park Drive), originally issued on December 31, 2019. As noted in my letter, this office found that the COVID-19 pandemic represented adequate justification to grant your request and, therefore, I approved an extension of the Building Permit until January 13, 2023.

On December 9, 2022, I received a copy of your letter to Deputy City Manager David Brooks providing "official notice to the City of Lebanon that XYZ Dairy, LLC commenced construction on 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293."

Please be advised that I will need additional information in order to make a determination as to whether work has commenced for purposes of demonstrating compliance with Section 105.5 of the IBC (which provides that, "[e]very permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance[.]") The only information provided in your letter relative to the commencement of work is that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022."

In order to make a determination with respect to Section 105.5, please provide us with more information as to what work was completed and what other steps were taken to effectuate the Building Permit and to commence construction in good faith and in earnest. For example:

1. Date that building footprint was staked and surveyor confirmation.
2. Confirmation that the statement of special inspections is approved by a registered design professional and the inspection agency has verification of notice to proceed.
3. Confirmation that the registered design professionals were and are in your hire as of November 29, 2022, and are ready to proceed.
4. Redacted copies of contract agreements with description of the project, the scope of work, and construction schedule.
5. Construction schedule including the project's intended completion date, and start and finish times for each phase of the project.
6. Scope of work including which contractors and subcontractors are responsible for each component of work.
7. Detailed cost estimates.
8. Additional information as to the nature and extent of the work performed.
9. Verification of notice to proceed.

Please provide all pertinent documents so that I can make a determination and, if adverse to your position, establish a date by which the determination can be appealed.

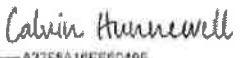
Without additional information and verification that you have actively prosecuted the permit, I cannot justify the continuance of the Building Permit and will revoke the permit as of January 13, 2023.

If I am able to confirm that the Building Permit has not expired, please be aware that there are several other steps that need to be completed prior to the resumption of construction activities (and which should have been completed prior to the commencement of any construction). These include:

- Providing a cost estimate of remaining Phase 1 Infrastructure improvements for review by the City Engineer, and providing security for such and entering into a new security agreement.
- Providing a construction schedule to the City Engineer for purposes of retaining a third-party inspector, providing payment of estimated third party review costs, and entering into a third party inspection and water & sewer extension agreement.
- Installing edge-of-disturbance fencing on site to be reviewed by the City Engineer.
- Confirming that all state permits have been obtained or have been updated, as needed.

If you have any questions, I can be reached at (603) 448-1524 or by e-mail at calvin.hunnewell@lebanonnh.gov.

Sincerely,

DocuSigned by:
 2/15/2023
A22F5A1BEE6D49E
Calvin Hunnewell, Building Inspector

cc: Nathan Reichert, Director of Planning & Development
Tim Corwin, Deputy Director of Planning & Development

EXHIBIT 8



March 7, 2023

Calvin Hunnewell
Building Inspector
City of Lebanon
51 N. Park Street
Lebanon, NH 03766

Re: Commencement of Building Permit #2016-00293

Mr. Hunnewell,

The first step in the construction of 1 River Park is addressing the City's stormwater line that is in conflict with the building's foundation. The pipe services Route 10 (NHDOT and Urban Compact) and *The Falls* development across the street and runs diagonally through Lot 1 at River Park and the footprint of the building before draining into the ravine on the River Park property.

After repeat delays encountered during 2022, we commenced excavation of the 1 River Park foundation in good faith and in earnest on November 29, 2022. The foundation had been staked prior to commencement of work by Nott's Excavating using their GPS system loaded with the approved River Park plans. Nott's began carefully excavating along the east side of the foundation to daylight the pipe. Once the pipe was located work ceased to avoid potentially damaging the existing, active line that was initially reported to be clay.

As my December 9, 2022 memo outlined I cannot proceed any further on the 1 River Park excavation until the conflict is addressed, and given that it is municipal infrastructure that solution must be coordinated with the City of Lebanon. The first meeting with City officials from the Department of Public Works was on December 15, 2022, and David Brooks' February 2, 2023 memo outlines potential solutions. I have subsequently been working with TF Moran, our engineer of record, to develop potential solutions in response.

I have provided additional information attached outlining the work that has been done in good faith and in earnest to initiate— for the fourth time, following suspensions in 2016, 2018, 2020— construction of 1 River Park.

If you feel that the information provided herein is insufficient to meet the standard of commencing construction in good faith and in earnest then I would ask that you provide me with the City's definition of Commencement of Construction and direct me to the City's policy on what is required to meet that burden of proof. You provided nine examples in your February 11, 2023 memo, but I'd like to know what is specifically required by the IBC or the Lebanon code so that I can ensure sufficient information is relayed.

Since initiating excavation on 1 River Park in November, 2022— and having heard no response for over 60 days to my December 9, 2022 memo to that effect other than my meeting with City officials



on December 15, 2022– I have been engaged in the requisite conversations with project partners that must be restarted every time we attempt to initiate work on any phase of River Park.

If you elect to revoke the building permit as of January 13, 2023 per your February 15, 2023 memo, I would ask that it be done promptly so that I do not continue to incur costs related to the development of River Park.

Sincerely,

A handwritten signature in black ink that reads 'Chet Clem'.

Chet Clem
Lyme Properties
57 Main Street
West Lebanon, NH 03784



the upfront cost and long-term maintenance of that solution falls entirely on the River Park project. As I have communicated to the City, I believe there is a better way to solve this problem for both parties, and one that does not unduly burden River Park. Those value-engineering efforts are being advanced by TF Moran in response to the criteria set forth by Mr. Brooks in his February 2, 2023 response.

A point of clarification in response to your February 15, 2023 memo: "1 River Park" and "Phase 1 Infrastructure" are two separate and distinct scopes of work. Phase 1 infrastructure serves the entire project, whereas 1 River Park is solely related to River Park Phase 1/Lot 1 and covered by Permit #2016-00293 in question. There is a distinction between the temporary redirecting of the existent conflicting line done under means and methods of the 1 River Park building permit as is already underway, and the permanent solution— which is now under review— under Phase 1 infrastructure. The installation of the temporary bypass line was done to facilitate construction on 1 River Park.

In the past, we had intended to do Phase 1 Infrastructure and 1 River Park simultaneously. However, in the course of past delays on 1 River Park, XYZ Dairy, LLC completed three of five segments of the Phase 1 infrastructure. Crafts Avenue Sewer and Roadway Improvements (CASRI, completed 2018) and Crafts Avenue Extension (CAE, completed 2020) brought municipal water and sewer to the River Park development site. The Cross Country Connector (CCC, completed 2022) brought municipal water and sewer to service 1 River Park. That was done in good faith and in earnest towards initiating construction on 1 River Park.

Per our approvals, Phase 1 infrastructure must be complete by the Certificate of Occupancy for 1 River Park, not ahead of construction. Similar to the Crafts Avenue Extension not needing to be complete prior to the issuance of building permits for houses on those subdivision lots, I believe it's logical for building construction to commence prior to the final roadway work. Accordingly, I do not believe a cost estimate, security agreement, and third-party inspection for the Southern Entrance and River Park Drive were required prior to advancing the 1 River Park construction.

The Route 10 Southern Entrance (SE) and River Park Drive Segment 1 (RPD-1) are the two outstanding segments of Phase 1 infrastructure. The scope and timing of those phases are also dependent on solving the stormwater line and ongoing conversations with the City. For example, if we can successfully re-route the existing stormwater line we can limit the necessary excavation and disruption in Route 10— which was just repaved by the City and State last year. Unfortunately, repeat efforts to coordinate Route 10 work with the NHDOT and Lebanon Planning Department were unsuccessful.

Additionally, as outlined in my May, 2022 memo, it's my hope that XYZ Dairy and the City can reach an agreement that would allow the entirety of the River Park Drive/Lyman Street loop to be completed at once for the sake of efficiency, and more importantly to facilitate the relocation of the Advance Transit transit hub from Kilton Library in keeping with City plans since 2010 and the 2021 Memorandum of Understanding to that effect between XYZ Dairy and Advance Transit.

EXHIBIT 9



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

March 24, 2023

Chet Clem
Lyme Properties
57 Main Street
West Lebanon, NH 03784

Thank you for attending the meeting last Thursday March 16, 2023, to further discuss your commencement of work at 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293.

Topics discussed included:

- Determination of commencement of work.
- Timing and continuance of work.
- Existing stormwater situation.
- Inability to complete the excavation for the building.
- TF Moran designing potential solutions.
- Meetings with project partners.
- Project expenses.
- Requested documentation.

As a result of the meeting and your follow up e-mail sent later the same day, 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.

The following additional steps need to be completed in order to maintain activation of the building permit without jeopardizing the 180-day allowance from November 29, 2023, which is the date you began construction:

- Stormwater design:
 - Design of the storm water solution by TF Moran submitted to the City.
 - Provide expected construction commencement and completion of the storm water system including demolition of the existing pipe in the footprint of the building.
- Provide the following additional documents relating to the commencement of construction:
 1. Date that building footprint was staked, after placement of concrete provide licensed surveyors certification of building placement.
 2. Completed statement of special inspections is approved by a registered design professional and the inspection agency has verification of notice to proceed.
 3. Confirmation that the registered design professionals are in your hire and are ready to proceed.

4. Redacted copies of contract agreements with description of the project, the scope of work, and construction schedule.
5. Construction schedule including the project's intended completion date and start and finish times for each phase of the project.
6. Scope of work including which contractors and subcontractors are responsible for each component of work.
7. Cost estimates.
8. Additional pertinent information as to the nature and extent of work performed.
9. Verification of notice to proceed.

EXHIBIT 10

From: [Chet Clem](#)
To: [Calvin Hunnewell](#)
Cc: [Nathan Belchert](#); [Tim Corwin](#); [David Brooks](#)
Subject: [EXTERNAL] Re: 1 River Park Drive/ Permit 2016-00293
Date: Monday, April 10, 2023 5:27:12 PM
Attachments: [2023-03-24 Commenced Work.pdf](#)

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Calvin et al,

1. I would suggest that the 180 day clock should start from the date (3/24/23) the City finally issued the decision that we had commenced, putting the 180 days at September 20, 2023. Otherwise, 107 days out of the 180 days I was held in limbo awaiting the City's response on commencement of construction and next-steps regarding the municipal stormwater line.

2. We will need City permission to connect the bypass line before work can proceed further, and that is dependent upon the engineering from TF Moran in response to David Brooks' February 2, 2023 memo.

3. As discussed in our March 16, 2023 meeting the delayed response from the City and the threat of building permit revocation caused me to pause consultant spend on the project. The TF Moran contract is in the works, and it will take some time for them to execute the design and coordinate with the NHDES and City of Lebanon. For the sake of efficiency I would like to have TFM do the temporary Diner connection work (per my 4/7/23 email) simultaneously.

4. Regarding the additional 9 items mentioned in your March 24, 2023 communication, as I wrote in my March 7, 2023 memo and as discussed in our 3/16 meeting, if you can direct me to the ordinance/requirement/documentation where the information defining these requirements are, that would be helpful in ensuring we provide sufficient information to be in compliance. Our attorney is on vacation so I have not had the opportunity to review this list with him.

1. Date that building footprint was staked, after placement of concrete provide licensed surveyors certification of building placement.

The Contractor (Nott's Excavating) utilized the existing plans approved by the City in their GPS system to stake the building footprint ahead of initial excavation for the purposes of addressing the municipal pipe. The stakes are visible in the photos I provided to the City in Nov/Dec. I was not aware a licensed surveyor was required at this stage; per the building permit conditions that requirement isn't until footings/forms/reinforcements.

2. Completed statement of special inspections is approved by a registered design professional and the inspection agency has verification of notice to proceed.

Pending

3. Confirmation that the registered design professionals are in your hire and are ready to proceed.

As explained in our 3/16 meeting, the full architectural services contract with Elkus Manfredi from 2015 included construction oversight. That underlying contract is still in force, despite the three previous false-starts. The construction management portion, which we have already renewed and paid for (at least in part) for the 2018 and 2020 mobilizations, has been updated and has a contract value of approximately \$400,000.

4. Redacted copies of contract agreements with description of the project, the scope of work, and construction schedule.

Please define requirement.

5. Construction schedule including the project's intended completion date and start and finish times for each phase of the project.

Please define requirement.

6. Scope of work including which contractors and subcontractors are responsible for each component of work.

Pending.

7. Cost estimates.

Please define requirement.

8. Additional pertinent information as to the nature and extent of work performed.

What specific additional pertinent information are you requesting?

9. Verification of notice to proceed.

Please define requirement.

All of this is dependent upon on the City's response to my April 7 "[A More Productive Path Forward](#)" email, based on my March 24, 2022 memo to the City Manager entitled [A Framework For Public Private Partnership](#).

I look forward to what I hope will be productive conversations about how the city staff can support the development of River Park akin to projects elsewhere in the City, with the goal of facilitating an approved mixed-use project that represents sufficient tax base to make considerable contributions to the ongoing revitalization of West Leb.

And as offered multiple times previously, I'd welcome the planning staff to come to the Lyme office to discuss River Park and broader West Leb efforts at any time.

Chat Clem
President

Lyme Properties

chet@lymeproperties.com
(603) 676-7106 (direct)
(207) 576-1410 (mobile)

[Calendly: book a Zoom with me](#)

[Lyme Properties](#)

[The UV Observer](#)

[River Park West Lebanon](#)

[Action Plan for West Leb](#)

[A Green Vision for West Leb](#)

[Humor & Downtowns?](#)

[Decriminalize Development](#)

On Mar 24, 2023, at 12:20 PM, Calvin Hunnewell
<Calvin.Hunnewell@lebanonnh.gov> wrote:

Chet, see attached approval of commenced work.

If you have any questions please let me know.

Calvin Hunnewell

Building Inspector

City of Lebanon

EXHIBIT 11

**CITY OF LEBANON, NEW HAMPSHIRE
SUPPORT STATEMENT FOR
AN APPEAL OF AN ADMINISTRATIVE DECISION**

A cover application, abutters list, filing fee and ten copies of the site plan (if applicable) must accompany this support statement.

City of Lebanon Zoning Ordinance:

APPEALS:

801.1 Administrative Appeals.

To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the enforcement of this ordinance, as set forth in RSA 676:5. In exercising this power, the Board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made, and to that end shall have all powers of the officer from whom the appeal is taken.

An appeal under this section shall be taken within 30 days of the date of the administrative decision being appealed, or within 30 days of the time that the person filing the appeal knew or had reason to know that the administrative decision had been made. The effect of an appeal shall be as set forth in RSA 676:6.

802.4 Decisions of the Board.

In exercising its powers the Board may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order, or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

- A. **Majority Vote:** The concurring vote of 3 members of the Board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant or any matter on which it is required to pass.

I am appealing the decision of: Calvin Hunnewell, Lebanon Building Inspector
(Name/Title of Official)

made on this date: 3/24/2023.

(Please describe the decision you are aggrieved by in the space provided or attach a separate statement.)

Concerning: Per the attached correspondence, XYZ Dairy LLC is appealing the Building Inspector's ultra vires request for information related to building permit #2016-00283.

In Relation to Article(s): _____, Section(s): _____ of the City of Lebanon Zoning Ordinance.



April 25, 2023

Lebanon Zoning Board of Adjustment
City of Lebanon
51 N. Park Street
Lebanon, NH 03766

Appeal of Administrative Decision by Lebanon Building Inspector

Members of the Lebanon Zoning Board of Adjustment,

Lyme Properties serves as the development agent on behalf of XYZ Dairy, LLC, the owner of record of the River Park West Lebanon development. We are hereby respectfully appealing the February 15, 2023 request, and subsequent, slightly edited request on March 24, 2023, by the Lebanon Building Inspector for additional documentation to substantiate the commencement of construction of 1 River Park under Lebanon Building Permit #2016-00293.

For those unfamiliar with the history of the project or curious about the 2016 date of the permit, this represents the 4th attempted mobilization of 1 River Park construction following municipal delays in 2016 and 2018 and Covid-related suspension in 2020. This permit, issued at the end of 2019 for the 2020 mobilization, has been extended previously by the Building Inspector.

The February 15, 2023 memo, specifically the threat to declare the building permit retroactively expired on January 13, 2023, came as a surprise to Lyme Properties. We have sought to address the stormwater line issue proactively for over a year now, and that work is still underway. However, with the 1 River Park building permit put at risk and the resultant limbo created, I have communicated to the City staff that Lyme Properties is hesitant to incur further engineering costs to address a pipe that may no longer be in issue if the 1 River Park building is abandoned.

As expressed in writing on March 7, 2023, in a meeting between Lyme Properties and the Lebanon Planning Department on March 16, 2023, and again in writing on April 10, 2023, Lyme believes that the 9-item list of additional information requested by the Building Inspector falls outside the requirements of the Lebanon ordinance(s) and the State Building Code. Our attorney Philip Hastings agrees with Lyme's assessment that this *ultra vires* request has not been substantiated and is without precedent.

Unfortunately, as we have outlined publicly at www.riverparkwestlebanon.com/path-forwards this is not the first time we have encountered such delays and confusion. Lyme's April 6, 2020 memo and the April 10, 2020 response from then-Planning and Zoning Director David Brooks (both included) summarizes a past example of the Lebanon Building Inspector's decision being outside the bounds of the Lebanon ordinances, and the lost revenue to XYZ Dairy, LLC that was a direct result of that erroneous decision. We would like to avoid a similar issue again, with even more financial impact to XYZ Dairy, LLC.

XYZ Dairy LLC. Developed by Lyme Properties. 57 Main Street, West Lebanon, NH 03784
Phone: 603-676-7800 • Fax: 603-676-7810 • Email: info@riverparkwestlebanon.com

000000 Appeal of Administrative Decision

CR138



Of specific importance to this timely matter, this stems from a December 9, 2022 memo from Lyme Properties regarding the commencement of construction on 1 River Park, and the conflict encountered with a municipal stormwater line serving Route 10 and, as I only recently learned, "The Falls" development across the street. It was 68 days before I received the Building Inspector's initial communication on February 15, 2023. As of the date of this memo, it has been a total of 137 days since this matter was brought to the City's attention.

Throughout that time, the development of 1 River Park and other River Park infrastructure has been put on hold and jeopardized awaiting the City's determination. I have now waited 15 days for a response to my last communication on April 10, 2023, again requesting clarification and substantiation of the information requested. The Deputy Planning and Development Director helpfully communicated in response on April 10th that the Building Inspector was on vacation that week. I will be on vacation the remainder of this week.

Lyme cannot proceed without this matter being addressed, so I now respectfully appeal this decision to the Lebanon Zoning Board of Adjustment.

Sincerely,

Chet Allen

Chet Clem
Lymo Properties
57 Main Street
West Lebanon, NH 03784

Cc:
David Clem, Lyme Properties
Angela McCanna, Lyme Properties
Philip Hastings, Cleveland, Waters & Bass.

EXHIBIT 12

DRAFT

LEBANON BUILDING CODE BOARD OF APPEALS
MONDAY, July 11, 2023 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: Chair William Koppenheffer, Vice Chair Jeremy Katz, Dan Nash, Paul McDonough, Dave Newlove, Catherine Hembree (Alt)

MEMBERS ABSENT: Jennifer Barkley (Alt)

STAFF PRESENT: Nathan Reichert – Zoning Administrator
Tim Corwin – Deputy Planning and Development Director

1. CALL TO ORDER

The meeting was called to order at 7:55 PM by Chair Koppenheffer.

2. APPROVAL OF MINUTES

A. June 5, 2023

Mr. Nash MOVED to approve the June 5, 2023, Minutes as presented in the July 11, 2023 packet, with amendments with amendment.

Seconded by Mr. Katz.

Amendments. Page 2, Line 35; Remove 'code' and Add 'office'.

**The Vote on the Motion was approved (4-0-1).*

Mr. Newlove abstained.

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: An appeal of the Building Official's determination pursuant to Lebanon Zoning Ordinance section §801.1 Administrative Appeals, and sections §674:34 Powers of Building Code Board of Appeals that additional documentation is required to substantiate the commencement of construction of 1 River Park under Lebanon Building Permit #2016-00293. BCBA2023-01 - Consideration of Jurisdiction Continued from June 5, 2023 Meeting**

Chet Clem, President of Lyme Properties and David Clem, manager of XYZ Dairy appeared on behalf of the application. A subsequent filing was made by June 19th. The applicant was asked if there was anything he wanted to add. He had a couple of questions and offered a presentation.

Lyme Properties has provided documentation and the question of the timeliness is a matter of interpretation. There is some missing information about the dates and there are numerous errors that are outlined in the subsequent facts. The matter of timeliness was not on their radar until it was brought forth by the City.

1 Mr. Katz said the sum total of what they need is in the February, 2023 Document where the
2 applicants were asked to provide documentation to allow the City to make a determination and to
3 establish a date when it can be appealed. In the March 24, documents there was no decision made
4 and no date of appeal was established. He believes this indicates this is an ongoing dialogue, and he
5 does not believe a decision was made and he believes the Board therefore does not have jurisdiction
6 because no decision has been made. Other members were in agreement.

7
8 David Clem spoke with all due respect; he cannot help but hark back to the previous hearing. Work
9 has been suspended because of this hearing. The excavation of the stormwater sewer has been a part
10 of the problem. He asked if the last extension is still in effect at this time.

11
12 Mr. Katz clarified what he sees. At the start of June, Mr. Clem essentially said there had been a lot of
13 conversations. Because he worried there was going to be a decision against him, he filed an appeal.
14 Attorney Hastings presented the opinion that this is not a decision and should not be held against the
15 applicants. There are two alternatives, there was no decision rather a discussion with no finality. Or
16 has this gone over the number of days. He believes the Board can agree that no decision has been
17 made and therefore there cannot be an appeal.

18
19 Mr. Clem asked if the building permit is still active and is it subject only to the conditions of the
20 original building permit or is it subject to the additional information asking for proof that any
21 construction is occurring.

22
23 *Mr. Katz MOVED, relative to the XYZ Dairy, LLC appeal of the Building Official's determination*
24 *pursuant to Lebanon Zoning Ordinance section §801.1, the Lebanon Building Code Boards of*
25 *Appeals determines that this appeal be dismissed on the grounds that no decision has been made.*

26
27 *Seconded by Mr. Newlove.*

28
29 **The Vote on the Motion was unanimously approved (4-1).*
30 *Mr. Nash voted nay.*

31
32 Mr. Katz asked about having a nonpublic meeting prior to the August 7 meeting. It would have to be
33 noticed, but it can be done in private session. It would be helpful if there was a document with a
34 decision.

35
36 **4. ADJOURNMENT**

37
38 *Vice Chair Katz MOVED to adjourn the meeting at 8:35 PM.*
39 *Seconded by Mr. Nash.*

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

41
42 Respectfully submitted,
43 Linda Billings
44 Recording Secretary

EXHIBIT 13



August 3, 2023

Calvin Hunnewell, Inspector
City of Lebanon
Planning & Development
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park Drive (Building Permit #2016-00293)

Calvin,

Now that the Building Code Appeals Board confirmed on July 11, 2023 that we have commenced construction on 1 River Park Drive, we seek your approval of the temporary relocation of the municipal/NH DOT stormwater line that impacts our property without benefit of an easement.

Please note that this request is distinctly related to connecting to the temporary connection that has already been designed and installed under means and methods of the 1 River Park building permit (#2016-00293). It is independent from the final stormwater design as presently approved, and can proceed independent from the ongoing conversations about an alternative solution as memorialized in the February 2, 2023 communication from Deputy City Manager David Brooks. The temporary solution is under the jurisdiction of building permit #2016-00293.

As you are aware, the current stormwater line does not serve any building footage at River Park. Moreover, the permanent relocation of this stormwater line falls under the jurisdiction of the Lebanon Department of Public Works, the Lebanon City Engineer, and has been approved by the Lebanon Planning Board as part of their Site Plan Approval for the Phased Development of River Park. The permanent solution is to be completed prior to the Certificate of Occupancy of 1 River Park, and the construction plans have previously been approved by the City of Lebanon.

The building permit for 1 River Park (#2016-00293) does not include the off-lot infrastructure work for the entire site. The stormwater requirements for 1 River Park/ Lot 1 have been properly designed by TF Moran, Civil Engineer for this project, and were approved by your office when the permit was issued for the mixed-use building on Lot 1.

This temporary stormwater line was included in the August 4, 2020 request for amendment to NH Alteration of Terrain permit #AoT-0994 sent on behalf of XYZ Dairy, LLC by TF Moran to the NHDES – Water Division, Alteration of Terrain Program. The resultant permit extension (AoT-0994A) was issued on October 30, 2020. The City of Lebanon was copied on both communications.

The temporary line is consistent with best practices and means and methods ordinarily involved in the execution of a building permit and the discovery of unknown conditions. In this case the unknown conditions were the size and precise location of the stormwater line, the extent of the



catch basins in Lebanon and the NH DOT that feed into this stormwater line, and the disclosure that The Falls stormwater design also feeds into this municipal stormwater line.

The temporary solution was engineered by TF Moran and installed by Nott's Excavation, the subcontractor hired by XYZ Dairy to complete Crafts Avenue improvements, Crafts Avenue Extension improvements, and the Cross Country Connector. Nott's is an approved contractor within the City of Lebanon. The installed pipe is a 24" HDPE, more than sufficient to handle the existing municipal/state/private stormwater flows presently running through the existing 18" line. There is no issue or conflict with the Cross Country Connector, per the as-builts provided to the City of Lebanon following the completion of the Cross Country Connector work in 2022.

The only thing that remains to allow work to continue on the excavation for 1 River Park is the connection of the existing line to the temporary line on Lot 1. This can be accomplished without any excavation in the City's Right of Way of North Main or Route 10 outside the compact area.

We respectfully ask that you allow us to proceed with his work so that excavation can continue as soon as practicable. Your favorable decision will allow XYZ Dairy and Lyme Properties to market the completion of 1 River Park according to a realistic time frame and schedule. It will also dictate the completion schedule for the off-site infrastructure work necessary for the issuance of a certificate of occupancy upon 100% completion of the building.

Following the determination of the Appeal Board, we have restarted conversations with project partners that were suspended because of your February 15, 2023 communication. When the Construction Management contract is finalized, XYZ Dairy will again notify your office in writing as we did when Consigli was terminated due to the Covid emergency.

Time is of the essence for this decision. I look forward to your favorable response.

Sincerely,

A handwritten signature in black ink that reads "Chet Clem".

Chet Clem
Lyme Properties
on behalf of XYZ Dairy, LLC

Cc: David Brooks, Deputy City Manager, City of Lebanon
Nik Coates, Deputy City Manager, City of Lebanon
Brian Vincent, City Engineer, City of Lebanon
Jay Cairelli, Acting Public Works Director, City of Lebanon
Rod Finley, City Engineer, City of Lebanon
Nathan Reichert, Director of Planning & Development, City of Lebanon
Tim Corwin, Deputy Director of Planning and Development, City of Lebanon

EXHIBIT 14

From: [Chet Clem](#)
To: [David Brooks](#)
Cc: [Calvin Hunnewell](#); [Nik Coates](#); [Brian Vincent](#); [Jay Calrelli](#); [Rod Finley](#); [Nathan Reichert](#); [Tim Corwin](#); [David Clem](#); [Angela McCanna](#)
Subject: Re: [EXTERNAL] Temp Stormwater connection - Permt #2016-00293
Date: Friday, August 4, 2023 1:28:57 PM

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

David,

The City was Cc'd on all the communications regarding the AOT permit when it was extended back in 2020, and TF Moran addressed this issue with NHDHP.

Additionally, the applicant is proposing a minor plan change to the approved drawings. The change consists of relocating the city-owned discharge of an existing 18" stormwater culvert on the property in order to construct the foundation of 100 River Park Drive on Lot 1. The proposed change meets all the requirements under Env Wq 1503.21 (d) under changes that can be made without applying for an amended permit or new permit. As such, we believe these changes meet the intent of the regulations to permit modifications to the Approved Project.

I understand the additional requirements as it relates to a permanent solution, but it remains our position that the temporary solution is within the City's jurisdiction to approve the temporary re-routing under the building permit. The connection can happen on River Park property, outside the right of way.

The present condition is in fact also a temporary solution as the pipe was redirected to its current route after the former City Engineer approved site work that blocked the pipe, requiring the current re-routing after it backed up.

How the City wishes to handle this is your prerogative, but the City's pipe is preventing work on 1 River Park from continuing. As we've both now noted, this pipe does not serve River Park whatsoever and is exhausting on our property without easement.

I look forward to receiving the City's proposed solution for moving its pipe out of the way so our work can continue.

Thank you,
Chet

On Aug 3, 2023, at 12:24 PM, David Brooks <David.Brooks@lebanonnh.gov> wrote:

Chet

I saw that Nate Reichert has already alerted you that Calvin Hunnewell is out of the office until next week. However, it is my feeling that the Building Inspector is not the correct venue for addressing the Route 10 stormwater connection issue, which, as you noted, does not handle stormwater generated on Lot 1 or elsewhere within River Park.

I have asked DPW representatives, who were also copied on your email below, to engage with you about the Route 10 stormwater connection request so that the existing stormwater pipe can be moved out of the way. As a reminder, the February 2, 2023 email, which is referenced in your letter, outlines several pieces of information that the City needs to ensure the temporary, alternate storm drainage system is adequate.

Again, I have asked the City Engineers or other DPW staff to contact you to open a dialogue in order to get the matter resolved.

David

DAVID R. BROOKS
DEPUTY CITY MANAGER
CITY OF LEBANON, NH
(603) 448-2220 (OFFICE)
(603) 442-6134 (DIRECT)
DAVID.BROOKS@LEBANONNH.GOV

From: Chet Clem <chet@lymeproperties.com>

Sent: Thursday, August 3, 2023 10:11 AM

To: Calvin Hunnewell <Calvin.Hunnewell@lebanonnh.gov>

Cc: David Brooks <David.Brooks@lebanonnh.gov>; Nik Coates

<Nik.Coates@lebanonnh.gov>; Brian Vincent <brian.vincent@lebanonnh.gov>; Jay

Calrelli <jay.calrelli@lebanonnh.gov>; Rod Finley <rod.finley@lebanonnh.gov>; Nathan

Reichert <Nathan.Reichert@lebanonnh.gov>; Tim Corwin

<Tim.Corwin@lebanonnh.gov>; David Clem <dclem@lymeproperties.com>; Angela

McCanna <amccanna@lymeproperties.com>

Subject: [EXTERNAL] Temp Stormwater connection - Permit #2016-00293

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Calvin,

Please find the attached memo regarding the temporary solution for the Municipal

stormwater line in conflict with the 1 River Park foundation, and requesting approval under Building Permit #2016-00293 to make the connection so that the foundation excavation and construction may proceed.

Following delays incurred earlier this year, your prompt response and approval would be appreciated.

Thank you,
Chet

chet@lymeproperties.com
603-676-7106

This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

<20230803 Request for temporary stormwater connection.pdf>

EXHIBIT 15



Lease Proposal: 1 River Park Drive, West Lebanon, NH 03784

Proposal Date: October 16, 2023

Prepared For:



Prepared By: David Clem, Manager
XYZ Dairy, LLC
57 Main Street
West Lebanon, NH 03784

Tenant:



Landlord: XYZ Dairy, LLC, or Nominee ("Landlord")

Building: 1 River Park Drive, a three-story building with a full height basement (the "Building") consisting of approximately 59,804 rentable square feet ("RSF"), in West Lebanon, NH, located on the parcel of land known as River Park Lot 1 (the Building and such parcel of land hereinafter being collectively referred to as the "Property"). See Attachment A.



1 River Park Drive
West Lebanon, NH 03784
603-676-7800

info@riverparkwestlebanon.com
www.riverparkwestlebanon.com
www.lymeproperties.com



River Park

RIVER PARK West Lebanon

Welcome to River Park

Along the banks of the Connecticut River in West Lebanon, New Hampshire, River Park is a 38-acre master-planned, mixed-use development just minutes from Dartmouth College and its growing research, technology, and life science cluster.

River Park will be the Upper Valley's finest research park, an extension of historic West Lebanon, and it will provide public access to the Connecticut River. The mixed-use development will include over 850,000 S.F. of life science research and office space, service retail, restaurants, single family homes and multi-family housing in a pedestrian friendly environment.

We invite you to join us at the next center of the Upper Valley's innovation ecosystem

River Park is envisioned as the future home for companies building upon the innovation and technology coming out of **Dartmouth College**, the **Tuck School of Business**, the **Thayer School of Engineering**, and the **Geisel School of Medicine**, as well as **Dartmouth-Hitchcock Medical Center**, New Hampshire's only Level 1 Trauma Center and academic medical center.

River Park is fully permitted, and ideally positioned to serve the existing and future companies that call the Upper Valley home.

Lyme Properties has built over 4 million square feet of life science research space in Cambridge, Boston, and beyond. River Park is our latest project, creating a campus of innovation just *Downstream from Dartmouth*.

Table of Contents

About River Park

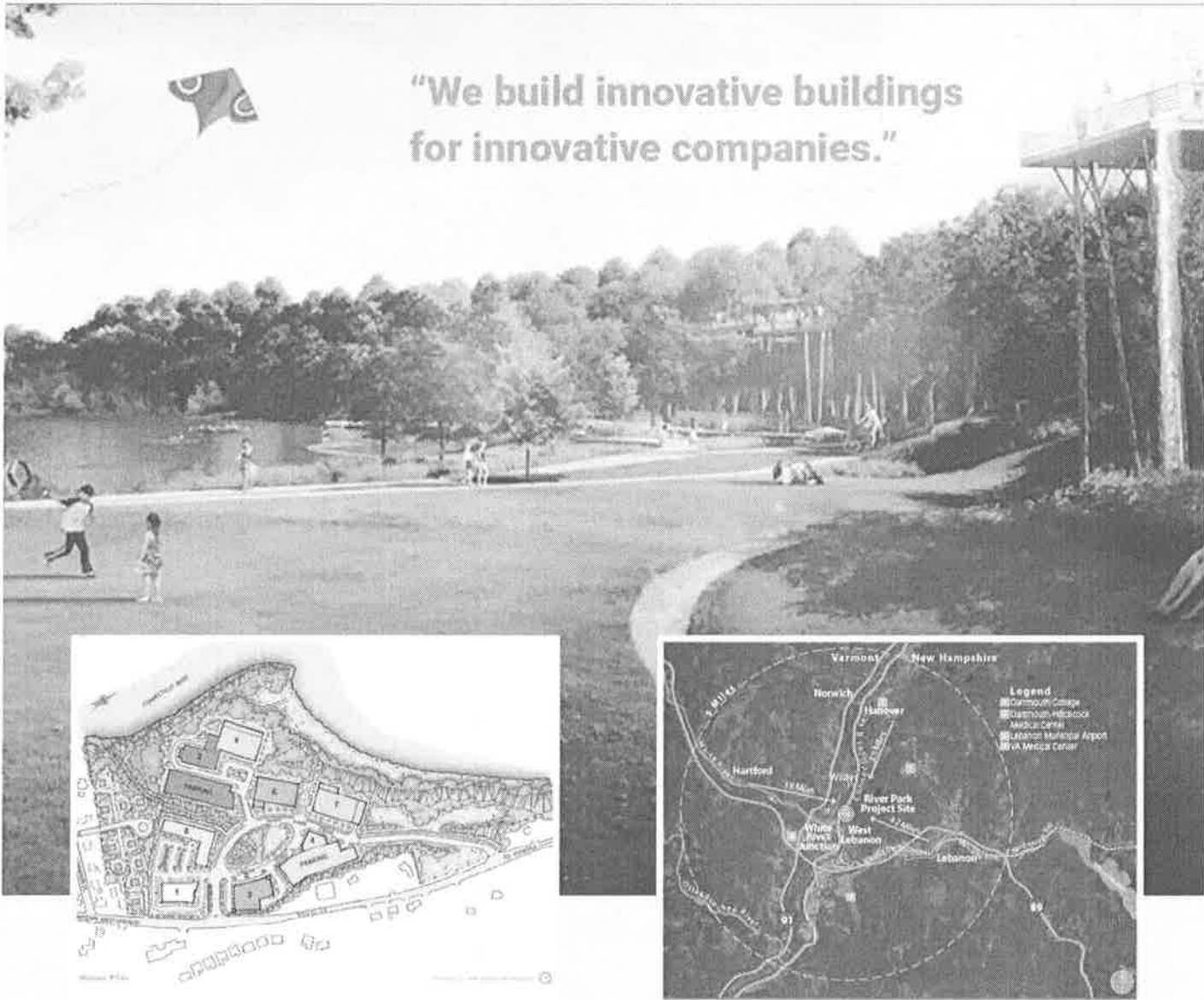
Leasing Plans

Project Team



Unmatched Architecture

1 River Park Drive was designed by Howard Elkus of Elkus-Manfredi Architects. Inspired by the steel bridges spanning the Connecticut River, the building facade is designed for a blend of restaurant, retail, office and laboratory users, and will be an anchor of activity at River Park.



A Riverfront Campus

The project is designed as a walkable, green campus with a mix of life science research, office, retail, restaurants, and housing to create an active live/work/play development with unprecedented access to the Connecticut River, Dartmouth College, and the Upper Valley. For more, visit www.friendsofriverpark.org

Central to the Upper Valley

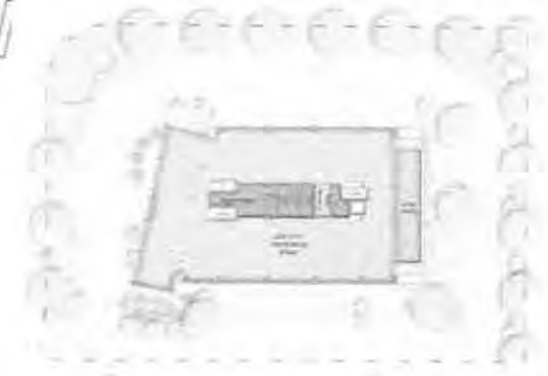
Located on Route 10, just minutes from Hanover and Lebanon, and the Interstate highway system, the River Park location avoids the congestion of other local commerce centers. An Advance Transit hub will be located at the site, with four free-ride regional bus lines connecting at River Park.

1 RIVER PARK

Building:
1 River Park Drive

Test Fit: Option 1
Life-Science Lab/Office

Space:
3rd Floor



LAB AREA
7,564 SF (62%)
SUPPORT AREA
1,639 SF (14%)
OFFICE AREA
2,854 SF (24%)
1.014 If Bench

22CR088



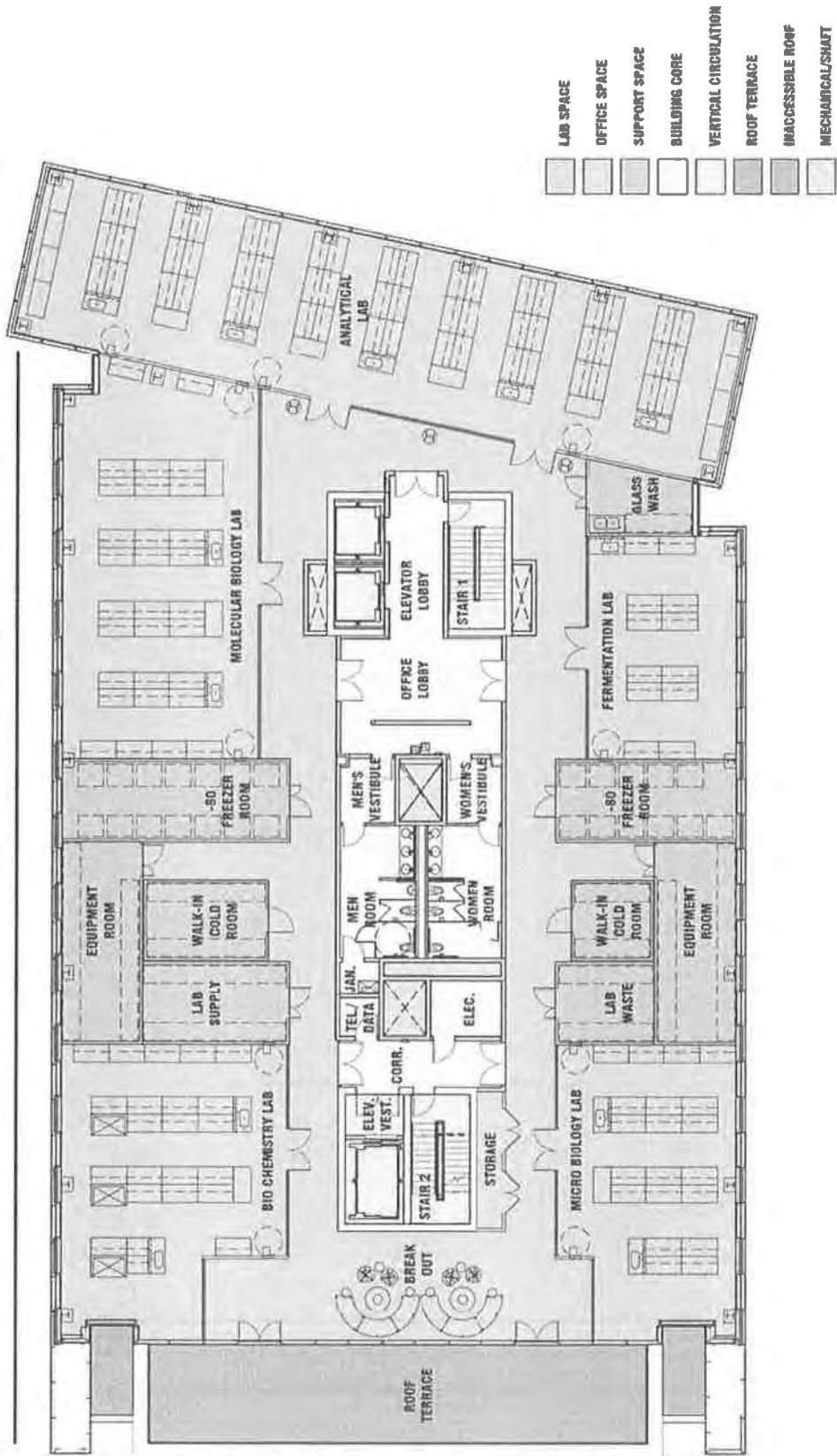


1 RIVER PARK

Building:
1 River Park Drive

Test Fit: Option 2
Life-Science Lab/Office

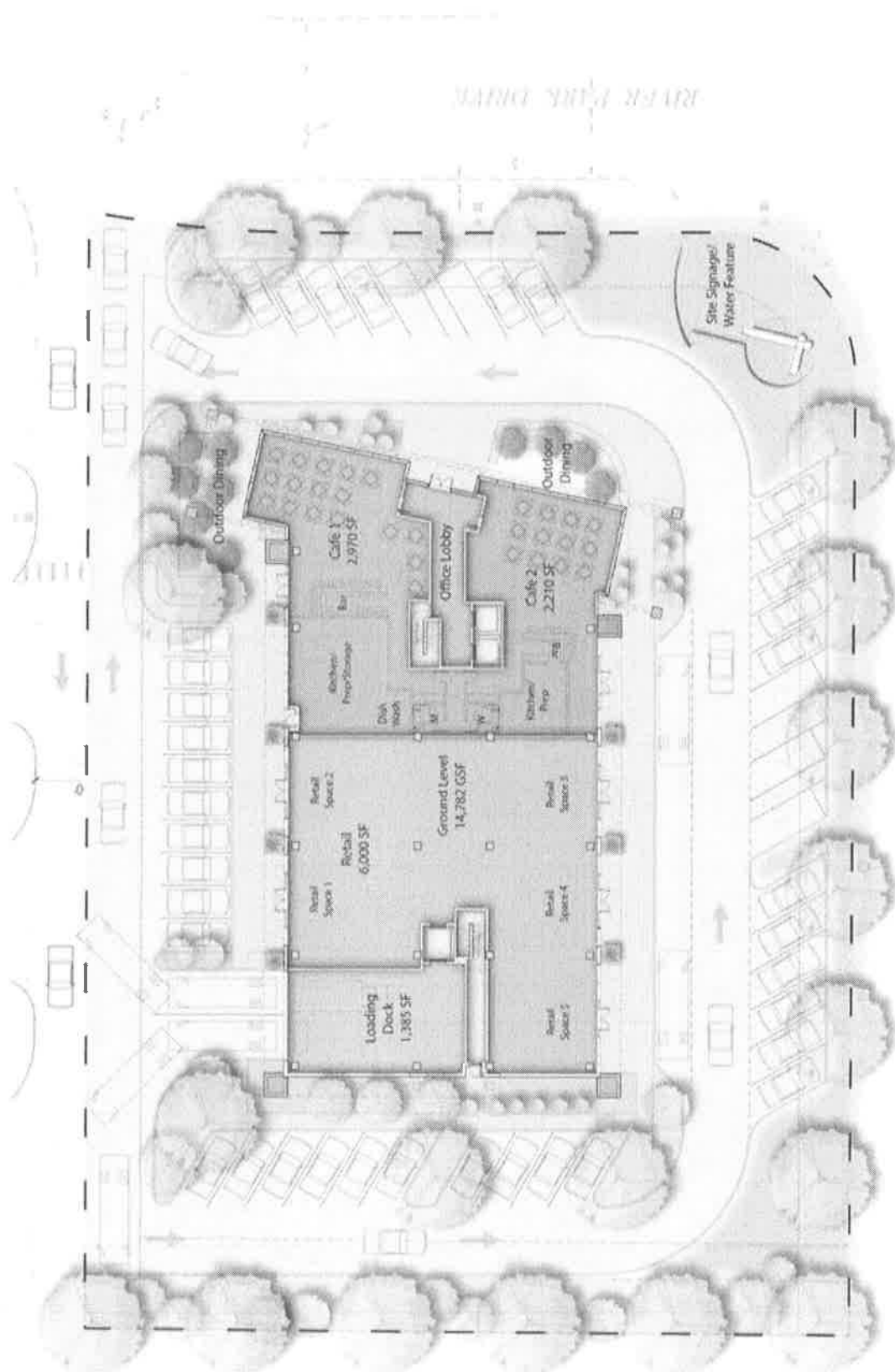
Space:
3rd Floor



1 RIVER PARK

Building:
1 River Park Drive

Space:
Ground Floor



24CR090



Project Team

01

**Owner**

XYZ Dairy, LLC

57 Main Street
West Lebanon, NH 03784**Contact:**

David Clem

dclem@lymeproperties.com
603-676-7800 ext. 1

02

**Architect**

Elkus-Manfredi

25 Drydock Avenue
Boston, MA 02210**Contact:**

John Martin

jmartin@elkus-manfredi.com
617-426-1300

03

**Structural Engineer**

McNamara Salvia

101 Federal St, Suite 1100
Boston, MA 02110**Contact:**

Mark Aho

aho@mcsal.com
617-737-0040

04

**M/E/P/FP Engineer**

AHA Consulting Engineers

24 Hartwell Avenue, 3rd Floor
Lexington, MA 02421**Contact:**

Robert Andrews

Robert_Andrews@aha-engineers.com
781-402-6000

05

**Construction Management**

Engelberth Construction

150 Water Tower Circle, #101
Colchester, VT 05446**Contact:**

Chris Yandow

chris.yandow@engelberth.com
802-846-2386

06

**Civil Engineer**

TF Moran

48 Constitution Drive
Bedford, NH 03110**Contact:**

James Robinson

jrobinson@tfmoran.com
603-472-4488

07

**Development & Leasing**

Lyme Properties

57 Main Street
West Lebanon, NH 03784**Contact:**

Chet Clem

chet@lymeproperties.com
603-676-7800 ext. 2

08

**Municipality**

City of Lebanon

51 N Park Street
Lebanon, NH 03766**Contact:**

Shaun Mulholland

City Manager
mulholland@lebanonnh.gov
603-448-4220



The Developer: Lyme Properties

57 Main Street
West Lebanon, NH 03784
603-676-7800

Info@riverparkwestlebanon.com
www.riverparkwestlebanon.com
www.lymeproperties.com

— Our Past Portfolio

Lyme brings a proven track record of award-winning development for leading life science companies and institutions.



- Forbes Magazine named Genzyme Center one of "The Five Most Important Green Buildings."
- 2008 Harleston Parker Medal for "Most Beautiful Building in Boston" Awarded to Genzyme Center.
- Lyme's Kendall Square development received the 2006 EPA Phoenix Award for Excellence in Brownfield Redevelopment
- American Institute of Architects named Genzyme Center one of its Top Ten Projects of 2004
- Genzyme Center was the first privately financed *LEED Platinum* office building in the United States.
- Center For Life Science Boston was the first *LEED Gold* high-rise laboratory

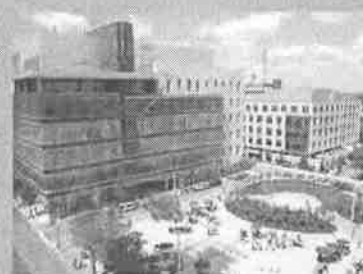
— It's Easy Being Green

Lyme Properties is nationally known for excellence in urban design, green buildings, and adaptive re-use with a portfolio of mixed-use projects that have established pioneering standards for architecture, land-use, and conservation. We focus on the master planning, permitting, and execution of transformative real estate projects, grounded in a philosophy of community-conscious development.

www.lymeproperties.com



Genzyme Center



Kendall Square



200 Sidney Street



Center for Life Science

EXHIBIT 16



January 5, 2024

Calvin Hunnewell
Building Inspector
City of Lebanon
51 N. Park Street
Lebanon, NH 03766

Re: Building Permit #2016-00293

Calvin,

An update that XYZ Dairy, LLC is actively and diligently pursuing the construction of 1 River Park per City of Lebanon Building Permit #2016-00293 that was affirmed as "active" by the Lebanon Building Code Board of Appeals on July 11, 2023.

We have named Engleberth Construction as our Construction Manager, and along with Elkus Manfredi Architects and the rest of the project team are working toward the Spring, 2024 construction season.

Additional information will be provided by the project team in due course.

Sincerely,

A handwritten signature in black ink that reads "Chet Clem".

Chet Clem
President, Lyme Properties

EXHIBIT 17

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

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

EXHIBIT 18



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

NOTICE OF DECISION LEBANON BUILDING CODE BOARD OF APPEALS BCBA2024-01

The Lebanon Building Code Board of Appeals, at a regular meeting held on **May 6, 2024**, approved the following motion made by Jeremy Katz, seconded by Dave Newlove, by a vote of **4-1**:

On March 6, 2024, XYZ Dairy, LLC ("XYZ"), 1 River Park Dr (Tax Map 44, Lots 21-30 & Map 44, Lot 7) Zoned R-3, CBD and 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

On **May 6th, 2024**, duly-noticed hearings were held on April 1st and 18th, 2024. Testimony and legal argument were taken from Appellant, represented by Attorney Philip Hastings and XYZ representatives David Clem and Chet Clem. Testimony and legal argument were taken from the City, represented by Attorney Matthew Decker and Building Official Calvin Hunnewell. XYZ and the City were provided the opportunity to submit additional briefing or information; as well as to refute, rebut and clarify until both rested their cases. Dan Nash, a member of the public, spoke in favor of granting the appeal.

This Board has jurisdiction over this matter pursuant to NH RSA 674:34. Lebanon's Building Official, interpreting Section 105.5 of the 2009 International Building Code ("IBC"), ruled that permit 2016-00293 has expired and is no longer valid. XYZ is the landowner and is aggrieved by that decision. In this matter, our jurisdiction is derived from XYZ's claim that the true intent of the code has been incorrectly interpreted.

The positions of the parties are summarized as follows:

The Building Official, through the City Attorney, argues that IBC section 105.1 defines what activities require a permit and section 105.2 defines what activities are exempt. The Building Official further argues that if XYZ's activities require a permit (105.1), then the activity required to ensure the permit's continued validity must be activities identical to those that required the permit in the first place. The City advocated for denying XYZ's appeal based on its belief that Section 105.5 requires that work be physical, on the approved site, and any such work be the type that would [if considered individually] require a permit.

XYZ, through its attorney, argues that the position taken by the City is overly constrained and not reflective of the true intent of the code. XYZ argues that its continued investment in the project, and development efforts over the relevant six-month period constitute "work." XYZ also argues that it is entitled to rely upon prior interpretations of Section 105.5 of the Code made by the City.

Interpretations of the IBC are a question of law, and our review is de novo.

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Lebanon Building Code Board of Appeals makes the following findings of fact:

NOTICE OF DECISION

1 River Park Dr (44-21-30 & 44-7)

BCBA2024-01

May 6, 2024

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We find the following facts in this matter:

1. The Building Official issued XYZ Permit #2016-00293 on December 31, 2019*.
2. XYZ paid a fee of \$90,492 for the permit.
3. The Building Permit is for the development of a new mixed-use commercial building.
4. The building permit states:

Description of Work: New mixed-use commercial building within Lot #1 of the River Park Subdivision

5. The development of a new building on a previously undeveloped site is a complex, multi-part endeavor. This endeavor requires engineering, architectural planning, multi-agency coordination, materials procurement and contractor scheduling. Although not unusual for any major construction project, these complex activities are distinguishable from common single action activities that also require permits, such as a minor residential electrical upgrade or heating furnace installation.
6. The Building Official issued a letter to XYZ on March 24, 2023. That letter identified 8 bullet-pointed topics discussed on March 16, 2023. None of the eight topics discussed involved actual completed physical work at the building site. The written determination of the Building Official states as follows (emphasis added)[†]:

As a result of the meeting and your follow up e-mail sent later the same day, 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.

7. The Building Official issued a letter to XYZ on February 1, 2024. The written determination of the Building Official states as follows:

It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of greater than 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid.

8. In the six-month period preceding the Building Official's February 1, 2024, determination of expiration, XYZ incurred direct costs relative to the development of the site totaling \$221,838 and incurred contractual obligations to pay another \$652,303.[‡] In that same time period XYZ engaged three engineering firms and one architect to move the project forward. The amount of money invested in the project within the relevant six-month period equates to more than nine times the original cost of the permit and exceeds seven percent of the \$12,296,100 total estimated cost of construction.
9. The City conceded the following points in the hearings: that Section 105.5 does not set a high bar for "work"[§], that it is "obvious that there are aspects of construction projects that are supported

NOTICE OF DECISION

1 River Park Dr (44-21-30 & 44-7)

BCBA2024-01

May 6, 2024

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by offsite operations and preparation to perform”^{**}, that “one day of work every 179” would be sufficient to keep the permit active⁺⁺, that the City believes that it “must do what the law says even when it makes no sense,”⁺⁺ that there are items of work that could occur offsite that the City would accept as work⁵⁵. The City furthermore conceded that Section 105.5 does not purport to regulate the intensity or pace of work progress^{***}.

10. The Building Official testified that the instant case is unusual and the only time that he can remember expiring a building permit in this manner. The City’s Director of Planning and Development also added that the Planning and Development Office must contend with how to dispense with voluminous numbers of permits that are applied for and never acted upon.

II. RULINGS OF LAW

We make the following rulings of law in this matter:

1. The true intent of Section 105.5 of the Code is primarily administrative in nature. The Board finds that this section exists primarily to dispose of numerous permits that are applied for and never acted upon, rather than to be an enforcement lever in adjudicating active permit disputes or regulating the pace of construction. Section 105.5 does not purport to regulate “not inactive, but not really active enough” activities in construction.

It is possible that one developer may believe it to be economically advantageous to hyper-accelerate a project and complete a project quickly, paying substantial overtime and expedite fees in doing so. Conversely, it is possible that a different developer could elect to proceed at a more leisurely pace. To the extent that the City is concerned about “slow rolling” projects or “system gaming” and wishes to enact a policy to regulate construction intensity, this is best pursued through legislative process.

2. Section 202 of the IBC (“Definitions”) does not define “work.” Nonetheless, section 105.5 uses the term “work” thrice. See below with emphasis added:

Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the work is commenced.

Whatever “work” happens to be, the Board believes that the three instances of “work” within this section should be read harmoniously with each other.

The March 24, 2023, letter from the City to XYZ interpreted the first and third appearances of “work” when it opined “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.”

NOTICE OF DECISION

1 River Park Dr (44-21-30 & 44-7)

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As a general rule, decisions must either adhere to precedent or indicate a valid reason why a different result is reached on essentially the same set of facts. The City's explanations that it previously provided "charitable treatment" and a "longer leash" to the landowner are not valid explanations for a different result on the same facts. Accordingly, we hold that since "work" as previously found by the City in the March 2023 letter includes "preparation work", similar "preparation work" must also count as work in the absence of a valid justification for a different approach.

3. Furthermore, the Board disagrees with the City's position that, in order to keep a permit active, Section 105.5 mandates very specific physical site activities identical to those that required the original permit. It is correct that the developer has items in the project that, individually, would require permits. However, the approved "Description of work" in the permit is for the end result and not the individual, unbundled components. The end result of the permitted work is to be a "New mixed use commercial building." The proper question is not "did you perform a physical activity on the site that would, if applied for individually, need a permit" but rather "did you engage in effort, exertion or activity to produce a new mixed use commercial building on the site."

The City, several times in the hearings, conceded as much. Despite advocating for its constrained reading of the code, the City repeatedly conceded that there were multiple off-site activities that could constitute "work" under section 105.5.

4. If the project was completed the "new mixed use commercial building" on the site would be seen by a reasonable person as "a product of effort, exertion or activity^{†††}." Based upon this, the reasonable definition of "work" prior to a project's completion would be "effort, exertion or activity directed to produce or accomplish something^{†††}." In this case, the "something" to be accomplished by the "work on the site authorized by the permit" is the "new mixed use commercial building."

XYZ has spent hundreds of thousands of dollars, committed to spending hundreds of thousands more, and retained at least four licensed and qualified professional service providers to promote the completion of the described work - all within the six-month period preceding the appealed decision. XYZ has also engaged in inter-departmental and inter-agency communication and activity to advance its project.

We recognize that the City believes that these activities fall far short of an optimal level of diligence and intensity, but Section 105.5 does not purport to regulate either diligence or intensity. We also recognize that the City finds the interaction with XYZ to be extremely difficult. XYZ may, in fact, be pursuing its project through antagonistic and confrontational means. If true, that would be unfortunate, but it is also unfortunately outside of the parameters of Section 105.5 to impose or develop a policy on preferred manners of developer-municipal interaction.

The Board finds that the true intent of Section 105.5 of the code is to require effort, exertion or activity to accomplish the goal of developing the site. The City previously ruled that a minor breaking of ground at the site, possibly performative, was sufficient to satisfy the requirements of 105.5. "Work" does not necessarily mean that a physical alteration must occur at the site^{§§§}. The

NOTICE OF DECISION

1 River Park Dr (44-21-30 & 44-7)

BCBA2024-01

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efforts, exertions and activities testified to by XYZ to pursue the development of the site are substantially in excess of the "low bar" set by the City. Those efforts, including the substantial expenditure of investment capital, advanced the "work authorized on the site", and need not have actually occurred on the land itself in order to qualify under Section 105.5.

5. Finally, the Board issues two clarifications. First, not every activity identified by XYZ qualifies as "work" pursuant to 105.5. A lease proposal to a prospective tenant for a building that is not yet built is not "work" as contemplated in the IBC. Second, nothing in this ruling diminishes the very extensive power of the Building Official to enforce compliance with the Code, as well as other ordinances and regulations through IBC 2009 Section 105.6.

III. DECISION

For all of the reasons set forth above, including but not limited our findings of fact and rulings of law, the City of Lebanon Building Code Board of Appeals on this 6th Day of May 2024 hereby **GRANTS** the appeal of XYZ Dairy, LLC.

Notice of Decision prepared by: Tiffany Adams, Administrative Secretary, A May 15, 2024

NOTE: (NH RSA 677:2) Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This 30-day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35; provided however, that if the moving party shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the person applying for the rehearing shall have the right to amend the motion for rehearing, including the grounds therefor, within 30 days after the date on which the written decision was actually filed.



May 17, 2024

EXHIBIT 19

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

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

STATEMENT OF FACTS AND LAW

This 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”).

All 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 the Application are incorporated by reference hereto. All testimony, statements, representations, evidence, plans, reports, studies, exhibits and other information submitted by or on behalf of the Appellant in connection with any prior proceedings before the Building Code Board of Appeals (the “Board”) with respect to the Property (including Docket #BCBA2023-01) are incorporated by reference hereto.

The Appellant requests that the Board approve this Statement of Facts and Law as the specific findings required pursuant to RSA 676:3, 1.

A. Factual Background.

1. By Building Permit dated December 31, 2019 (Permit #2016-00293; the “Building Permit”), the Appellant was authorized to commence construction on a mixed used commercial building on the Property, which is Lot 1 in the River Park Subdivision.

2. Following several extensions of the deadline to commence construction under the Building Permit, work under the permit was timely commenced on November 29, 2022.

3. In the winter and spring of 2023, work was interrupted by the Building Inspector’s unlawful attempt to impose retroactive conditions on the Building Permit in order to keep the permit active.

4. The Building Inspector’s actions necessitated the Appellant’s first appeal to the Board (Docket #BCBA2023-01), seeking clarification as to the status of the Building Permit.¹

¹ Reference is specifically made to the facts of the first appeal, which support a pattern of mistreatment of the Appellant on the part of the Building Inspector and the City’s Planning Department. For example, the Staff Memorandum received by the Appellant on June 2, 2023 for the first BCBA hearing on June 5, 2023 contained

5. At its hearing on July 11, 2023, the Board dismissed the Appellant's first appeal, determining that the communication of the Building Inspector from which the appeal was taken did not constitute an appealable decision. The Board's dismissal effectively constituted a finding that the Building Permit remained in full force and effect, ending an unnecessary and unwarranted 224 delay for the Appellant.

6. Promptly following that hearing, the Appellant re-started its activities in furtherance of the construction work authorized by the Building Permit. As set forth in the material and other testimony submitted to the Board in connection with this Appeal, these activities included re-engaging with the Appellant's contractors, architects, engineers and other consultants; meeting with City officials to coordinate construction efforts; and taking steps to adequately secure the construction site.

7. Hand in hand with these activities, the Appellant has been in negotiations for several months with prospective tenants of the building to obtain leasing commitments which further support the construction efforts.

8. By memorandum dated January 5, 2024, the Appellant provided an update to the Building Inspector on the status of construction, affirming that Engleberth Construction and Elkus Manfredi Architects were actively engaged in preparation for the Spring 2024 construction season.

9. At no time since March 24, 2023 has the Building Inspector, or any official of the Lebanon Planning Department, engaged in any meaningful dialogue with the Appellant or requested further information from the Appellant regarding activity on the site related to the Building Permit.

10. Notwithstanding the lack of any inquiry, by letter dated February 1, 2024, the Building Inspector notified the Appellant of his determination that "the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid."

11. The Building Inspector's decision has, once again, delayed the Appellant's efforts to mobilize the numerous contractors and consultants for the upcoming construction season, adversely impacted and put at risk the Appellant's leasing activity, and jeopardized the completion of River Park and the River Park project overall.

numerous errors and false accusations, including that the Building Permit "was allowed to expire by the Applicant" and that the Applicant was subject to a Notice of Violation. Neither of which were accurate but imposed additional financial risk and reputational damage to the Appellant.

In addition to the errors contained within the June 2, 2023 Staff Memorandum, the Planning Department failed to include the Appellant's June 1, 2023 Statement of Facts and Law from the Agenda Packet that was provided to the Board, Appellant, and posted to the City of Lebanon Agenda Center for public access. This omission of a legal filing deprived the Appellant of equal consideration before the Board on June 5, 2023, contributing to the continuation of the hearing for a month and further delaying the matter to the detriment of the Appellant's business.

12. The Appellant timely filed this appeal of an administrative decision by the Building Inspector on February 29, 2024.²

13. Since then, in an effort to mitigate the damage to the project caused by the Building Inspector's action, the Appellant, through counsel, asked the Building Inspector to temporarily rescind its February 1, 2024 determination. The Building Inspector has refused.

B. Applicable Law and Legal Findings.

14. Fundamentally, this Appeal turns on a question of statutory construction,³ specifically the terms of Section 105.5 of the International Building Code of 2018 (the "IBC"),⁴ which states in full:

"Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated

15. No part of the Chapter 36 of the Lebanon Code of Ordinances, the State Building Code or the IBC, or any other provision of the City's ordinances, rules or regulations, set forth specific standards for what constitutes the "abandonment" or "suspension" of "work" under a building permit.

16. In the absence of specific provisions in the Lebanon Code of Ordinances, the State Building Code, the IBC, and any other applicable law, ordinance, code, rule or regulations, the well-established rules of statutory construction apply. *Cf. Trottier v. Lebanon*, 117 N.H. 148, 150 (1977); *see also* Loughlin, P., 15 New Hampshire Practice, Land Use Planning and Zoning (4th Ed.), §6.01. "Words and phrases in [an ordinance] must be given their ordinary meaning unless it appears from the context that a different meaning was intended." *Greenland v. Bunker*, 118 N.H. 783, 785 (1978). "Doubt about the meaning of an ordinance is determined in accordance with the intent of the municipal body that enacted it, and any ambiguity is to be resolved by reference to the apparent object of the provision." *Id.* (citing *Storms v. Eaton*, 131 N.H. 50 (1988)).

² Despite multiple inquiries through counsel, the Appellant failed to receive confirmation of the Appeal's acceptance until March 21, 2024. This delay deprived the Appellant of any opportunity for a speedy resolution or productive dialogue with the City.

³ The Building Inspector's decision also implicates the Appellant's rights to due process, equal protection and fundamental fairness under the United States and New Hampshire Constitutions. The Appellant reserves the right to more fully develop these arguments as this matter proceeds, together with all other rights and remedies with respect thereto.

⁴ The IBC is incorporated by reference under the State Building Code, RSA ch. 155-A, which is in turn incorporated by reference pursuant to Chapter 36 of the Lebanon Code of Ordinances.

17. The plain and ordinary meaning of the term “work” is broad. According to multiple dictionaries, the term includes both physical and non-physical efforts. *See, e.g., merriam-webster.com/dictionary/work* (work is a “sustained physical or mental effort to overcome obstacles and achieve an objective or result”); *Black’s Law Dictionary* (11th ed. 2019) (work is “physical and mental exertion to attain an end”).

18. At least one court has relied on similar dictionary definitions to find that a local permit had not expired. *See Morris Communications Corp. v. City of Bessemer City Zoning Board of Adjustment*, 365 N.C. 152, (2011).⁵ In that case, the fact that the zoning administrator did not observe construction-like activities on the site was not dispositive, and the North Carolina Supreme Court found that the term “work” has “a broader meaning than mere visible evidence of construction.” *Id.* at 157. The Court further relied on the interpretative rule that government restrictions on the use of land are “construed strictly in favor of the free use of real property.” *Id.*

19. This is consistent with New Hampshire case law involving the relinquishment or abandonment of permit for the use of real property. In those cases, there must be both an intention to abandon or relinquish the permit and an overt failure to act which carries the implication the holder of the permit neither claims nor retains any interest in the permit. *See Lawlor v. Town of Salem*, 116 N.H. 61, 62 (1976); *Pike Industries v. Woodward*, 160 N.H. 257, 261 (2010).

20. Similarly, in cases involving a developer’s vested right to complete a project, New Hampshire courts “tend to construe the vesting of rights liberally.” *AWL Power, Inc. v. City of Rochester*, 148 N.H. 603, 606 (2002).

21. Here, at no point has the Appellant demonstrated, by any overt act or failure to act, any intention to stop or abandon the work (as that term is properly construed in accordance with accepted principles of statutory construction) for 180 days. Instead, it has at all times continuously, diligently and in good faith pursued completion of the work authorized by the Building Permit.

22. Based on the foregoing, the Building Inspector’s determination that the Building Permit has expired is arbitrary, capricious, erroneous, unreasonable, and unlawful and the Building Permit remains in full force and effect.

⁵ The parallel citation is 712 S.E. 2d 868.

The Appellant reserves the right to amend, modify and supplement this 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.

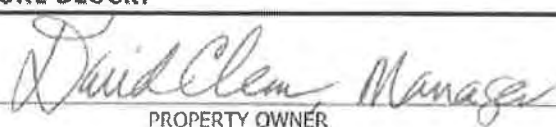
Date: March 27, 2024

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

EXHIBIT 20

**CITY OF LEBANON
APPLICATION FOR**

SPECIAL EXCEPTION	☐	☐	SITE PLAN REVIEW
VARIANCE	☐	☐	SUBDIVISION
MOTION FOR REHEARING	☐	☐	LOT LINE ADJUSTMENT
APPEAL OF AN ADMIN. DECISION	☒	☐	OTHER ()

PROPERTY OWNER (APPLICANT):			
NAME: XYZ Dairy, LLC		TEL.#: (603) 676-7800	
MAILING ADDRESS: 57 Main Street, West Lebanon, NH 03784			
E-MAIL ADDRESS: dclem@lymeproperties.com			
CO-APPLICANT, AGENT, OR LESSEE:			
NAME: Lyme Properties 2, LLC		TEL.#: (603) 676-7106	
MAILING ADDRESS: 57 Main Street, West Lebanon, NH 03784			
E-MAIL ADDRESS: chet@lymeproperties.com			
PROJECT LOCATION:			
TAX MAP #: 44	LOT#: 21	PLOT #:	ZONE: CBD
STREET ADDRESS OF PROJECT: 1 River Park Drive, West Lebanon			
IS THIS PROPERTY LOCATED IN THE: WETLANDS ☐ YES ☒ NO HISTORIC DISTRICT ☐ YES ☒ NO			
FLOOD PLAIN ☐ YES ☒ NO			
SCOPE OF PROJECT:			
Phase 1 of River Park, 64,000 SF Mixed-Use Building. Lebanon Building Permit #2016-00293			
TYPE OF OCCUPANCY:			
EXISTING ☒ VACANT ☐ ONE FAMILY ☐ TWO FAMILY ☐ MULTI-FAMILY ☐ COMMERCIAL ☐ INDUSTRIAL			
PROPOSED ☐ VACANT ☐ ONE FAMILY ☐ TWO FAMILY ☐ MULTI-FAMILY ☒ COMMERCIAL ☐ INDUSTRIAL			
IF USE IS COMMERCIAL OR INDUSTRIAL , PLEASE NOTE SPECIFIC USE : Life Science Research, Office, Childcare, Retail			
SIGNATURE BLOCK:			
 PROPERTY OWNER		DATE: 2/29/24	
NOTE: IF, AS OWNER, YOU WISH TO DESIGNATE AN AGENT TO ACT ON YOUR BEHALF, PLEASE READ THE FOLLOWING AND SIGN BELOW: I hereby designate the person listed above as my agent for the purpose of procuring the necessary local permits for the proposed work as described herein. Representations made by my agent may be accepted as though made by me personally, and I understand that I am bound by any official decision made on the basis of such representation.			
 PROPERTY OWNER		DATE: 2/29/24	

DATE RECEIVED	FILE # (MAP/LOT)	APPLICATION #	FEE - \$ AMOUNT	DATE PAID	VOUCHER #
3/4/24					

(12/07/07)

CR007

**CITY OF LEBANON, NEW HAMPSHIRE
SUPPORT STATEMENT FOR
AN APPEAL OF AN ADMINISTRATIVE DECISION**

A cover application, abutters list, filing fee and ten copies of the site plan (if applicable) must accompany this support statement.

City of Lebanon Zoning Ordinance:

APPEALS:

801.1 Administrative Appeals.

To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the enforcement of this ordinance, as set forth in RSA 676:5. In exercising this power, the Board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made, and to that end shall have all powers of the officer from whom the appeal is taken.

An appeal under this section shall be taken within 30 days of the date of the administrative decision being appealed, or within 30 days of the time that the person filing the appeal know or had reason to know that the administrative decision had been made. The effect of an appeal shall be as set forth in RSA 676:6.

802.4 Decisions of the Board.

In exercising its powers the Board may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order, or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.

- A. **Majority Vote:** The concurring vote of 3 members of the Board shall be necessary to reverse any action of the administrative official or to decide in favor of the applicant or any matter on which it is required to pass.

I am appealing the decision of: Calvin Hunnewell, Building Inspector,
(Name/Title of Official)
made on this date: February 1, 2024.

(Please describe the decision you are aggrieved by in the space provided or attach a separate statement.)

Concerning: Determination that 1 River Park Drive Building Permit #2016-00293 has
expired and been deemed invalid related to case BCBA 2023-1

In Relation to Article(s): _____, Section(s): _____ of the City of Lebanon Zoning Ordinance.



February 29, 2024

Building Code Board of Appeals
City of Lebanon
51 N Park Street
Lebanon, NH 03766

**Re: Appeal of Administrative Decision: Building Inspector's February 1, 2024 determination
"Building Permit #2016-00293 has expired and is invalid."**

Members of the Building Code Board of Appeals,

Lyme Properties (Lyme) serves as the development agent on behalf of XYZ Dairy, LLC (XYZ), the owner of record of the River Park West Lebanon development. We are hereby appealing the February 1, 2024 decision of Lebanon Building Inspector Calvin Hunnewell in the Lebanon Planning & Development Department:

It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of greater than 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid.

*Excerpt 1: "Expiration of 1 River Park Drive Building Permit #2016-00293," City of Lebanon - Planning & Development Office"
February 1, 2024, Page 1 of 4.*

Since the July 11, 2023 determination during the Building Code Board of Appeals case BCBA2023-01 (BCBA2023-01) that Building Permit #2016-00293 (the "Permit") was active and in effect—correcting the June, 2, 2023 Staff Memo that declared it expired—XYZ and Lyme have been working to re-start the various contracts that were affected by the Staff's actions from December 9, 2022 to July 11, 2023.

This includes the numerous consultants and contractors that constitute the 1 River Park project team under the direction of Elkus Manfredi Architects and Engelberth Construction, which were re-engaged on July 31, 2023 (attached) and as memorialized in our January 5, 2024 memo (attached) to Lebanon Building Inspector Calvin Hunnewell.

The development work on the Permit was done in conjunction with re-starting leasing conversations that were suspended by the Staff's actions in 2023, conversations that have now been jeopardized again by the Staff's February 1, 2024 memo.

The record reflects that not only has there never been a 180-day suspension of work as Section 105.5 of the International Building Code dictates, but that any delays are due to the previous actions of the Lebanon Planning & Development department.



It is disingenuous that this permit be revoked given what has transpired over the past 14 months. Mr. Hunnewell was not in attendance at the BCBA hearing on July 11, 2023. Neither the Building Inspector, the Planning Director, or the Deputy Planning Director have communicated directly with XYZ or Lyme about this Permit in any material way since.

XYZ/Lyme are prepared to address and refute the Building Inspector's February 1, 2024 decision as it relates to Building Permit #2016-00293 and the Conditions of Approval as included upon issuance on December 29, 2019.

Prior to the April 1, 2024 hearing, the Board of Appeals should be aware that the conditions on Page 4 of 4 in the February 1, 2024 memo from Mr. Hunnewell are incorrect, unrelated, and *ultra vires* and thus irrelevant to the Permit and this Appeal.

These conditions inappropriately included in this matter by the Building Inspector are related to the Phase 1 Infrastructure improvements spelled out in the River Park Subdivision and Site Plan Approvals (the "Approvals"), which are separate and distinct from Building Permit #2016-00293.

I also note that there has been no effort to address the items identified in my letter of March 24, 2023, as needing to be completed prior to the resumption of construction activities (and which should have been completed prior to the commencement of any construction). These include:

- Providing a cost estimate of remaining Phase 1 infrastructure improvements for review by the City Engineer, and providing security for such and entering into a new Performance Bond/Security Agreement.
- Providing a construction schedule to the City Engineer for purposes of retaining a third-party inspector, providing payment of estimated third party review costs, and entering into a third party inspection and water & sewer extension agreement.
- Installing edge-of-disturbance fencing on site to be reviewed by the City Engineer.
- Confirming that all state permits have been obtained or have been updated, as needed.

To my knowledge, none of the above have been accomplished as of the date of this letter.

Excerpt 2: "Expiration of 1 River Park Drive Building Permit #2016-00293," City of Lebanon - Planning & Development Office" February 1, 2024, Page 4 of 4.

The first two bullet items are specifically referenced in the Subdivision Approvals (originally Condition #15 in the October 11, 2011 Notice of Action), the December 15, 2017 Subdivision Agreement (Sections D.1, G.I.1), and the September 9, 2019 Notice of Action (Conditions 4, 5). There is no deadline given, no timeline tied to the Building Permit, and no practical reading that this must be completed before the commencement of the Building. Simply put, these are not conditions precedent to the Building Permit.

The deadline for the commencement and completion of the remaining Phase 1 Infrastructure is otherwise unrelated to the Building Permit in question. The deadline for completion is established

by Condition 14-2 of the September 9, 2019 Notice of Action, and as was extended by two years in the October 12, 2021 Notice of Action.

Bullet #3, inasmuch as it relates to the work entitled under the Building Permit and not the unrelated infrastructure work, will be installed by the Construction Manager in due course.

Bullet #4 is addressed in Condition 14-4 of the September 9, 2019 Notice of Action, wherein it is noted that these requirements have been satisfied, and the City has been kept aware of the status and any requisite extensions of #AoT-0994 and #D2015-0802 throughout the numerous delays and project suspensions.

There is an important distinction between the infrastructure work serving the entire phased development and the conditions relevant to the Permit, which has been communicated numerous times previously to the Lebanon Planning & Development Department:

1. in a memo from Lyme on March 7, 2023 in response to the Department's February 15, 2023 memo;
2. in person at the meeting between Lyme and the Department on March 16, 2023;
3. in the April 10, 2023 email from Lyme in response to the March 24, 2023 communication from the Department in which the erroneous conditions were repeated;
4. in the June 1, 2023 "Statement of Facts and Law" from Attorney Philip Hastings on behalf of XYZ and Lyme;
5. in the June 19, 2023 "Supplemental Statement of Facts and Law" from Attorney Philip Hastings on behalf of XYZ and Lyme;
6. and, in the August 3, 2023 memo from Lyme and XYZ to the Department.

Put simply, there is no requirement that these items be completed prior to commencement of work on the Permit. As such, the Building Inspector's suggestion in the February 1, 2024 communication that "there has been no effort to address these items" by XYZ and Lyme is disingenuous and serves only to confuse matters and cast doubt upon Lyme and XYZ's efforts.

Attorney Philip Hastings June 1, 2023 "Statement of Facts and Law" and June 19, 2023 "Supplemental Statement of Facts and Law" prepared for the BCBA2023-01 are attached for reference by the Board and constitute XYZ/Lyme's position on the previous attempts of the Building Inspector to apply these additional conditions- and more- to an already issued permit.

We request that this matter be included on the agenda for the April 1, 2024 regularly scheduled hearing of the Lebanon Zoning Board of Appeals/Building Code Board of Appeals so that resolution may be reached as soon as possible without further delay, cost, and financial risk to XYZ/Lyme and associated parties.

This appeal is being filed in accordance with Article III, Section 36-13 Building Code Board of Appeals, and XYZ Dairy, LLC and Lyme Properties 2, LLC reserve all rights to amend, modify, and supplement this appeal.



Chat Chen

David Allen

Page 254 of 371

CERTIFIED NOTIFICATION LIST

Notice shall be sent by certified mail to the Owner; Applicant, if different from Owner; Abutters; Holders of conservation, preservation, or agricultural preservation restrictions (as defined under RSA 477:45) on the subject property; the holders of easements, rights-of-way, and other restrictions; and every engineer, architect, land surveyor, or soil or wetlands scientist whose seal appears on any plan submitted to the Board; and any other persons required by RSA 676:4, I(d). The names and mailing addresses shall be furnished by the Applicant.

672:3 Abutter. – "Abutter" means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board. For purposes of receiving testimony only, and not for purposes of notification, the term "abutter" shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356-B:3, XXIII. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of an abutting property being under a manufactured housing park form of ownership as defined in RSA 205-A:1, II, the term "abutter" includes the manufactured housing park owner and the tenants who own manufactured housing which adjoins or is directly across the street or stream from the land under consideration by the local land use board.

Source. 1983, 447:1. 1986, 33:2. 2002, 216:1, eff. July 15, 2002.

PLEASE PROVIDE NAMES & MAILING ADDRESSES FOR ALL PERSONS LISTED ABOVE.

Map & Lot Number: 44-21	Map & Lot Number: 44-21
Property Owner: XYZ DAIRY LLC 57 MAIN ST WEST LEBANON, NH 03784	Applicant, Co-Applicant, Agent, or Lessee: LYME PROPERTIES 57 MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 58-27, 44-22 - 44-30 & 44-7	Map & Lot Number: 59-18
XYZ DAIRY LLC 57 MAIN ST WEST LEBANON, NH 03784	STENGER-CRAFT PROPERTIES LLC 112 N MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 58-93	Map & Lot Number: 58-97 & 44-9
CUMMINGS, LAUREN H & SANDRA L 66 CRAFTS AVE WEST LEBANON, NH 03784	CAESD LLC 57 MAIN ST WEST LEBANON, NH 03784

Map & Lot Number: 44-6	Map & Lot Number: 44-14
193 NMWL, LLC PO BOX 137 CONCORD, NH 03302	BURNS, TRACY A & SALLY J 198 NORTH MAIN ST WEST LEBANON, NH 03784
Map & Lot Number: 44-15 & 44-16	Map & Lot Number: 58-98
CHURCHILL, WAYNE & TINA M 194 NORTH MAIN ST WEST LEBANON, NH 03784	CITY OF LEBANON 51 NORTH PARK ST LEBANON, NH 03766
Map & Lot Number: 44-4	Map & Lot Number: 44-3
SALAZAR-KISH, JOLIN M TTEE 32 LEBANON ST, STE A HANOVER, NH 03755	FRIENDS OF RIVER PARK 57 MAIN STREET WEST LEBANON, NH 03784
Map & Lot Number: 44-5	Map & Lot Number: 44-10
DOWNES, ROBIN C TTEE 187 NORTH MAIN ST WEST LEBANON, NH 03784	DVG VENTURES LLC 10 BENNING ST #160-255 WEST LEBANON, NH 03784
Map & Lot Number: 44-13	Map & Lot Number: 58-91
DARTMOUTH COLLEGE TRUSTEES PO BOX 5188 HANOVER, NH 03755	JONES, BECKY P TTEE 67 CRAFTS AVE WEST LEBANON, NH 03784
Map & Lot Number: 44-19-5600	Map & Lot Number: 44-19-5700
FALLS AT RIVERS EDGE HOA PO BOX 1051 NORWICH, VT 05055	HOMEOWNERS AT THE FALLS ATTN: DAN CHASE, COMM MGR PO BOX 1051 NORWICH, VT 05055
Map & Lot Number:	Map & Lot Number:

(Revised 2/8/2024)

EXHIBIT 21

June 5, 2024

Via Hand Delivery and Electronic Mail

NH State Building Code Review Board
c/o Roxie Beall, Administrative Supervisor
NH State Fire Marshal's Office
Department of Safety
110 Smokey Bear Blvd
Concord, NH 03301
Bldgcodebrd@dos.nh.gov

RE: Appeal of Lebanon Building Code Board of Appeals Decision

Dear Ms. Beall,

My firm represents the building inspector in Lebanon, NH. Pursuant to RSA 674:34, II, RSA 155-A:10, IV(e), RSA 155-A:11-b and the NH State Building Code Review Board administrative rules, Bcr 200, I am enclosing an original and 16 copies of a Notice of Appeal and Petition seeking the State Building Code Review Board's review of a decision of the local Lebanon Building Code Board of Appeals (BCBA).

The written decision that is the subject of the building inspector's appeal, adopted by the Lebanon BCBA at a meeting on May 6, is attached to the Petition as Attachment A.

I am hand delivering these documents to 110 Smokey Bear Blvd. on your instruction that nobody is physically present at 33 Hazen Road to receive hand delivery.

Please do not hesitate to contact my office with any questions or concerns. I am grateful for your assistance in this matter.

Sincerely,



Matthew C. Decker

Enclosures

cc: Lebanon City Manager (e-mail only)
Lebanon Building Inspector (e-mail only)
Lebanon Building Code Board of Appeals,
c/o Lebanon Planning & Development Director N. Reichert
Philip Hastings, Esq. (e-mail only)

**State of New Hampshire
State Building Code Review Board**

**APPEAL OF CITY OF LEBANON'S
BUILDING CODE BOARD OF APPEALS DECISION
Pursuant to RSA 674:34, II, RSA 155-A:10, IV(e), and RSA 155-A:11-b**

Docket # _____

(In Re: Appeal of Administrative Decision of Building Inspector
by Lyme Properties, 2, LLC, Agent for XYZ Dairy, LLC
River Park Development
West Lebanon, New Hampshire)

NOTICE OF APPEAL / PETITION

Now comes the Building Inspector for the City of Lebanon, NH, by and through his attorneys, Drummond Woodsum & MacMahon, and hereby appeals a decision of the Lebanon Building Code Board of Appeals, reversing the Building Inspector's administrative determination under 2009 International Building Code §105.5 that a building permit had become invalid because the work authorized on the site by such permit was suspended for a period of more than 180 days after the time the work was commenced. In support of his appeal, the Building Inspector alleges as follows:

Introduction

1. This appeal concerns the correct interpretation of Section 105.5 of the 2009 International Building Code (IBC), as adopted by the New Hampshire legislature as the state building code under RSA 155-A for the time period relevant to this appeal.¹
2. On February 1, 2024, the Building Inspector issued to property owner XYZ Dairy, LLC ("XYZ") a written notice that building permit #2016-00293 pertaining to XYZ's property at 1 River Park Drive (Tax Map 44, Lot 21) had expired and is deemed to be invalid due to a period of inactivity at the site in excess of 180 days prior to February 1 pursuant to 2009 IBC §105.5.
3. 2009 IBC §105.5 (Expiration) provides, in relevant part, that **"[e]very permit issued shall become invalid... if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced"**.
4. XYZ appealed the Building Inspector's decision to the Lebanon Building Code Board of Appeals (BCBA). XYZ did not materially contest that physical work on the site had been suspended for a period of more than 180 days, but argued that it had been making off-site

¹ The text of 2009 IBC Section 105.5 is identical to Section 105.5 in the 2018 IBC, the currently-effective version of the state building code per RSA 155-A:1, IV.

preparations that it had vaguely described in a January 5, 2024 letter to the Building Inspector as “working toward the Spring, 2024 construction season”.

5. On May 6, 2024, the BCBA issued a decision reversing the Building Inspector’s determination that the building permit had expired. A copy of the BCBA’s written decision is attached hereto as **Attachment A**.

6. The Building Inspector is hereby appealing the BCBA’s decision because, *inter alia*, the BCBA incorrectly interpreted the term “work authorized on site by such [building] permit” in IBC §105.5, and improperly ruled that conclusory evidence of unspecified off-site “efforts” related to the development, not submitted to the Building Inspector before February 1, was sufficient to establish that work authorized on site by the building permit had not been suspended for 180+ days and, therefore, the building permit had not expired.

Parties

7. The Building Inspector a/k/a Building Official a/k/a Code/Health Inspector is the City official given authority under RSA 676:11 and Lebanon City Code Ch. 36, §36-1(C), “to issue building permits as provided in RSA 676:11-13, and any required certificates of use and occupancy, and to perform inspections as may be necessary to assure compliance with the State Building Code”. At the time of the BCBA decision that is the subject of this appeal, the Building Inspector was Calvin Hunnewell. The current Building Inspector, advancing this appeal in Mr. Hunnewell’s stead, is Leigh Hays. The Building Inspector’s mailing address is City Hall, 51 N. Park Street, Lebanon NH 03766.

8. The appellee is the Lebanon Building Code of Appeals. Lebanon City Code Ch. 36, §36-13(A) designates the Lebanon Zoning Board of Adjustment to act as the Building Code Board of Appeals per RSA 673:1. The BCBA’s mailing address is City Hall, c/o Planning & Development Dept., 51 N. Park Street, Lebanon NH 03766.

9. The property owner/building permittee before the BCBA was XYZ Dairy, LLC, c/o Lyme Properties, 57 Main Street, West Lebanon, NH 03784. XYZ is represented by Attorney Philip M. Hastings of Cleveland, Waters and Bass, P.A., Two Capital Plaza, 5th Floor, Concord, NH 03302-1137. It is anticipated that XYZ will seek to intervene in this appeal.

Jurisdiction and Venue

10. The NH State Building Code Review Board has jurisdiction over this appeal and is the proper venue for this appeal pursuant to RSA 674:34, II, RSA 155-A:10, IV(e), and RSA 155-A:11-b, because this appeal concerns a dispute over the correct interpretation of IBC §105.5.

11. RSA 674:34, II provides: “Appeals of decisions of any local building code board of appeals shall be made within 30 days of the board’s decision to the state building code review board as outlined under RSA 155-A:10, IV(c).”

12. RSA 155-A:10, IV(e) [*formerly IV(c)*] provides: “The [state building code review] board may hear appeals of final decisions of any local building code board of appeals

established under RSA 674, provided that the appeal shall be based on a claim that the intent of the code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or there is an alternative construction. The board shall not have authority to waive or grant variances to requirements of the code.”

13. RSA 155-A:11-b, I and II, provide: “I. The board shall hear appeals of final decisions of any local building code board of appeals established under RSA 674. II. An application for appeal shall be based on a claim that the intent of the code or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of the code do not fully apply, or an alternative construction is proposed. The board shall not have authority to waive or grant variances to requirements of the code.”

Procedural Background

14. The Building Inspector issued to XYZ a building permit #2016-00293 (the “Permit”) on December 31, 2019. The Permit was for the construction of a new mixed-use commercial building at XYZ’s property referenced above, a/k/a Lot #1 at the so-called River Park subdivision.

15. Due to the date of application for the Permit, the parties agreed that it is governed by the 2009 version of the International Building Code.

16. On February 1, 2024, the Building Inspector issued to XYZ a notice that the Permit had expired under 2009 IBC §105.5, upon his determination that the work on the site authorized by the Permit was suspended or abandoned for a period of greater than 180 days.

17. XYZ appealed the Building Inspector’s February 1 notice to the BCBA. After a public hearing held on April 1 and April 18, 2024, the BCBA issued a written decision on May 6, 2024 (**Attachment A**) reversing the Building Inspector’s decision.

18. This appeal of the BCBA final decision is being filed within 30 days of the final decision per RSA 674:34.

Facts Common to All Counts

19. Permit #2016-00293 was issued to XYZ on December 31, 2019.

20. The Building Inspector granted XYZ a number of extensions to its 180-day deadline to commence work on the site authorized by the permit, per IBC §105.5.

21. XYZ commenced work on the site authorized by the permit on November 29, 2022, when XYZ began excavation within the building footprint.

22. XYZ stopped work on the site on November 29, 2022, when it encountered a stormwater pipe, the relocation of which was included in XYZ’s approved plans for the River Park development.

23. Between November 29, 2022 and February 1, 2024, no further work authorized by the permit was performed on the site.

24. Between November 29, 2022 and February 1, 2024, XYZ did not request any extension of time from the Building Inspector, as allowed under IBC §105.5.

25. The Building Inspector issued XYZ a notice of expiration of the Permit pursuant to IBC §105.5 on February 1, 2024.

26. At the April 1 and April 18 public hearing on XYZ's appeal to the BCBA, the Building Inspector asserted through counsel that his intent in declaring the Permit expired was not to "kill" the project, but rather that he assumed XYZ would apply for a new permit when it was ready to proceed with construction, XYZ's prior permit fees would be applied to the new permit, and that the new permit would be issued under the current (2018) IBC rather than the two-versions-old 2009 IBC, simplifying the task of constructing and inspecting the project in accord with the current version of the code rather than in accordance with an outdated code version.

27. At the April 1 and April 18 public hearing on XYZ's appeal to the BCBA, XYZ did not assert that any physical work had been performed on the Lot #1 construction site in the 180 days prior to February 1, 2024, nor did XYZ assert that the Building Inspector had failed to observe such work.

28. At the April 1 and April 18 public hearing, XYZ submitted brief testimony and a short affidavit in support of its allegation that it had incurred off-site costs and entered into contractual obligations relating to future development of the site.

29. XYZ did not present evidence or argument supporting a conclusion that the acts to incur off-site costs, or enter into contractual obligations, could only occur pursuant to an active building permit. In other words, these acts were not "authorized by" the Permit under the meaning of IBC §105.5.

30. Prior to the public hearing, the Building Inspector was not aware of the costs and contractual obligations allegedly incurred by XYZ, and XYZ did not assert at the hearing that the Building Inspector was aware or had notice of such prior to February 1.

31. The Building Inspector's counsel was not permitted to cross-examine XYZ's representatives concerning their proffered evidence for off-site preparations.

COUNT I:

The BCBA Incorrectly Interpreted 2009 IBC Section 105.5

32. The Building Inspector repeats and realleges each foregoing paragraph as if fully set forth here.

33. The entire text of 2009 (and 2018) International Building Code Section 105.5 is as follows:

105.5 Expiration. Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.

34. The term “work” or “work authorized on the site by such permit” is not defined in the IBC.

35. Per IBC §201.4, “[w]here terms are not defined through the methods authorized by this section [201], such terms shall have ordinarily accepted meanings such as context implies.”

36. Where a term or phrase is clear and unambiguous, its plain meaning must be applied without inquiry as to whether a different meaning may have been intended.

37. The BCBA incorrectly interpreted the meaning of 2009 IBC §105.5 by substituting the clear, unambiguous and plain meaning of the phrase “work authorized on the site by such permit” with the BCBA’s own interpretation of the word “work”.

38. Alternatively, even if, *arguendo*, the phrase “work authorized on the site by such permit” is ambiguous and subject to legal interpretation, the BCBA also incorrectly interpreted the meaning of “work” when it did not weigh the modifying words “authorized on the site by such permit”, and did not consider the implied context of the rest of the IBC, as required by IBC §201.4.

39. The BCBA’s interpretation of 2009 IBC §105.5 was also not in accord with the canons of statutory construction applied by New Hampshire courts to interpret legislative intent. When examining the language of a statute or code, the BCBA was required to ascribe the plain and ordinary meaning to the words used. See New Hampshire Alpha of SAE Trust v. Town of Hanover, 174 N.H. 269, 274 (2021) (“SAE II”). The BCBA was also required to interpret legislative intent from the code as written and could not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* The BCBA was required to interpret a code section in the context of the overall statutory scheme and not in isolation. *Id.* In other words, the BCBA was required discern the intent of the legislature as expressed in the words of the code considered as a whole. Dembiec v. Town of Holderness, 167 N.H. 130, 134 (2014).

40. The BCBA erroneously cherry-picked the word “work” out of the phrase “work authorized on the site by such permit” and erroneously adopted an overly-broad dictionary definition of the word: “effort, exertion or activity directed to produce or accomplish something”.

41. The BCBA erroneously substituted its own equitable opinion for the plain meaning of black letter law when it held that “[t]he true intent of Section 105.5... is primarily administrative in nature” and that Section 105.5 “does not purport to regulate ‘not inactive, but

not really active enough' activities in construction." This interpretation is nowhere to be found in the plain text of the IBC.

42. The BCBA erroneously substituted its own equitable opinion for the plain meaning of black letter law when it held that the Building Inspector's "generous" determination that work on the site had commenced on November 29, 2022 could estop the Building Inspector from applying the plain meaning of §105.5 after no further work was performed on the site between November 29, 2022 and February 1, 2024. The BCBA had no authority to lessen the requirements of the IBC on equitable grounds.

43. The BCBA erroneously concluded that "the true intent of Section 105.5 of the [IBC] is to require effort, exertion or activity to accomplish the goal of developing the site" and "'Work' does not necessarily mean that a physical alteration must occur at the site."

44. The BCBA's interpretation of IBC §105.5 makes it effectively impossible for the Building Inspector to enforce the section, as he cannot know when some "effort" has commenced off-site, or whether some "effort" is occurring on an ongoing basis to avoid suspension or abandonment of a building permit, and he cannot evaluate the quality or quantity of such "effort".

45. To the extent the the BCBA's interpretation of IBC §105.5 implies that a building inspector must make inquiries to a permittee regarding off-site "effort", this interpretation improperly shifts an evidentiary burden to the building inspector, while "work authorized on the site by such permit" should generally evident from simply observing or inspecting a building site.

46. Accordingly, the State Building Code Review Board should reverse the BCBA and order that the plain meaning of the phrase "work authorized on the site by such permit" applies to the facts before the BCBA and, where no work on the site occurred for 180 days prior to February 1, 2024, the Permit was duly declared expired.

COUNT II:

After-the-Fact Affidavits and Testimony of Off-Site Work Cannot Be Evidence of "Work Authorized on the Site by a Building Permit"

47. The Building Inspector repeats and realleges each foregoing paragraph as if fully set forth here.

48. Separate from its erroneous interpretation of the term "work authorized on the site by a building permit", the BCBA also erred in accepting testimony and affidavits presented at the hearing as evidence of "work".

49. Work that is performed on a work site to construct a new building, pursuant to a building permit, may be observed by a building inspector in real time simply by visiting the site, but the evidence of "work" submitted by XYZ to the BCBA was not information observable by the Building Inspector or made available to him before his February 1 determination that the Permit had expired.

50. The BCBA's decision incorrectly interprets IBC §105.5 by impliedly holding that a permittee can resuscitate an expired permit by making an after-the-fact assertion of unspecified off-site efforts to advance a project.

51. The BCBA's decision also incorrectly interprets IBC §105.5 by impliedly holding that a building inspector cannot determine that a building permit has expired without first contacting the permittee and requesting information about off-site efforts over the past 180 days.

52. The BCBA's decision also incorrectly interprets IBC §105.5 by allowing a permittee to substantiate its off-site efforts with conclusory testimony and affidavits, without disclosing the specific details of where and why money is being spent, what retained professionals might be working on, or how and to what extent all this relates to or constitutes "work authorized on the site by a building permit".

53. Accordingly, the State Building Code Review Board should reverse the BCBA and order that IBC §105.5 may be enforced by the Building Inspector through his observations of the construction site.

WHEREFORE, the Lebanon Building Inspector, by and through his counsel, respectfully requests that the Honorable New Hampshire State Building Code Review Board:

- A. Issue an Order of Notice and schedule a hearing under Bcr 200;
- B. Reverse the decision of the local Lebanon Building Code Board of Appeals;
- C. Hold that Building Permit #2016-00293 is expired and invalid because, pursuant to 2009 IBC Section 105.5, the work authorized on the site by the Building Permit was suspended or abandoned for a period of 180 days after the time the work on site authorized by the permit was commenced; and
- D. Grant such other and further relief as is fair and just.

DATED this 5th day of June, 2024.

Respectfully Submitted,
On behalf of the Lebanon Building Inspector
By his Attorneys,

A handwritten signature in cursive script, reading "Matthew C. Decker", written in dark ink over a horizontal line.

Matthew C. Decker, NH Bar #267540
DRUMMOND WOODSUM &
MACMAHON
1 Court Street, Suite 320
Lebanon, New Hampshire 03766-1727
(603) 792-7421
mdecker@dwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal/Petition was served this day upon the Lebanon Building Code Board of Appeals, c/o Lebanon Planning & Development Director Nathan Reichert, by hand delivery and by e-mail, and upon Philip Hastings, Esq., attorney for XYZ Dairy, LLC, by U.S. Mail and by e-mail.

Date: June 5, 2024

By: Matthew C. Decker

ATTACHMENT A

XYZ Dairy, LLC ("XYZ"), 1 River Park Dr (Tax Map 44, Lots 21-30 & Map 44, Lot 7) Zoned R-3, CBD and 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

Duly noticed hearings were held on April 1st and 18th, 2024. Testimony and legal argument were taken from Appellant, represented by Attorney Philip Hastings and XYZ representatives David Clem and Chet Clem. Testimony and legal argument were taken from the City, represented by Attorney Matthew Decker and Building Official Calvin Hunnewell. XYZ and the City were provided the opportunity to submit additional briefing or information; as well as to refute, rebut and clarify until both rested their cases. Dan Nash, a member of the public, spoke in favor of granting the appeal.

This Board has jurisdiction over this matter pursuant to NH RSA 674:34. Lebanon's Building Official, interpreting Section 105.5 of the 2009 International Building Code ("IBC"), ruled that permit 2016-00293 has expired and is no longer valid. XYZ is the landowner and is aggrieved by that decision. In this matter, our jurisdiction is derived from XYZ's claim that the true intent of the code has been incorrectly interpreted¹.

The positions of the parties are summarized as follows:

The Building Official, through the City Attorney, argues that IBC section 105.1 defines what activities require a permit and section 105.2 defines what activities are exempt. The Building Official further argues that if XYZ's activities require a permit (105.1), then the activity required to ensure the permit's continued validity must be activities identical to those that required the permit in the first place. The City advocated for denying XYZ's appeal based on its belief that Section 105.5 requires that work be physical, on the approved site, and any such work be the type that would [if considered individually] require a permit.

XYZ, through its attorney, argues that the position taken by the City is overly constrained and not reflective of the true intent of the code. XYZ argues that its continued investment in the project, and development efforts over the relevant six month period constitute "work." XYZ also argues that it is entitled to rely upon prior interpretations of Section 105.5 of the Code made by the City.

Interpretations of the IBC are a question of law, and our review is de novo.

FINDING OF FACTS:

We find the following facts in this matter:

¹ Neither party introduced the 2009 IBC into the record, but it is undisputed and a public document adopted by New Hampshire State Law.

- 1) The Building Official issued XYZ Permit #2016-00293 on December 31, 2019².
- 2) XYZ paid a fee of \$90,492 for the permit.
- 3) The Building Permit is for the development of a new mixed-use commercial building.
- 4) The building permit states:

Description of Work: New mixed-use commercial building within Lot #1 of the River Park Subdivision

5) The development of a new building on a previously undeveloped site is a complex, multi-part endeavor. This endeavor requires engineering, architectural planning, multi-agency coordination, materials procurement and contractor scheduling. Although not unusual for any major construction project, these complex activities are distinguishable from common single action activities that also require permits, such as a minor residential electrical upgrade or heating furnace installation.

6) The Building Official issued a letter to XYZ on March 24, 2023. That letter identified 8 bullet-pointed topics discussed on March 16, 2023. None of the eight topics discussed involved actual completed physical work at the building site. The written determination of the Building Official states as follows (emphasis added)³:

As a result of the meeting and your follow up e-mail sent later the same day, 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.

7) The Building Official issued a letter to XYZ on February 1, 2024. The written determination of the Building Official states as follows:

It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of greater than 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid.

8) In the six month period preceding the Building Official's February 1, 2024 determination of expiration, XYZ incurred direct costs relative to the development of the site totaling \$221,838 and incurred contractual obligations to pay another \$652,303.⁴ In that same time period XYZ engaged three engineering firms and one architect to move the project forward. The amount of money invested in the project within the relevant six month period equates to more than nine

² The Building Permit file was not submitted in this case but is undisputed, in possession of both the City of Lebanon and XYZ, and a public record.

³ This communication is unsigned, but neither party disputes its authenticity and the Building Official confirmed that he authored and sent it.

⁴ Testimony in April 1 and 18 hearings and sworn affidavit of David Clem.

times the original cost of the permit and exceeds seven percent of the \$12,296,100 total estimated cost of construction.

9) The City conceded the following points in the hearings: that Section 105.5 does not set a high bar for “work”⁵, that it is “obvious that there are aspects of construction projects that are supported by offsite operations and preparation to perform”⁶, that “one day of work every 179” would be sufficient to keep the permit active⁷, that the City believes that it “must do what the law says even when it makes no sense,”⁸ that there are items of work that could occur offsite that the City would accept as work⁹. The City furthermore conceded that Section 105.5 does not purport to regulate the intensity or pace of work progress¹⁰.

10) The Building Official testified that the instant case is unusual and the only time that he can remember expiring a building permit in this manner. The City’s Director of Planning and Development also added that the Planning and Development Office must contend with how to dispense with voluminous numbers of permits that are applied for and never acted upon.

RULINGS OF LAW

We make the following rulings of law in this matter:

1) The true intent of Section 105.5 of the Code is primarily administrative in nature. The Board finds that this section exists primarily to dispose of numerous permits that are applied for and never acted upon, rather than to be an enforcement lever in adjudicating active permit disputes or regulating the pace of construction. Section 105.5 does not purport to regulate “not inactive, but not really active enough” activities in construction.

It is possible that one developer may believe it to be economically advantageous to hyper-accelerate a project and complete a project quickly, paying substantial overtime and expedite fees in doing so. Conversely, it is possible that a different developer could elect to proceed at a more leisurely pace. To the extent that the City is concerned about “slow rolling” projects or “system gaming” and wishes to enact a policy to regulate construction intensity, this is best pursued through legislative process.

2) Section 202 of the IBC (“Definitions”) does not define “work.” Nonetheless, section 105.5 uses the term “work” thrice. See below with emphasis added:

⁵ See meeting media, video tape of April 18, 2024 Hearing at minute 11

⁶ Ibid at minutes 34-35

⁷ Ibid at minutes 41-42, the amount of work is not an issue and a hole in the ground suffices

⁸ Ibid at minute 45

⁹ Ibid at minutes 48-51, for instance “a signed notice to proceed from a contractor”, see also minutes 35-36

¹⁰ Ibid at minutes 41-42

Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the work is commenced.

Whatever “work” happens to be, the Board believes that the three instances of “work” within this section should be read harmoniously with each other.

The March 24, 2023 letter from the City to XYZ interpreted the first and third appearances of “work” when it opined “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.”

As a general rule, decisions must either adhere to precedent or indicate a valid reason why a different result is reached on essentially the same set of facts. The City’s explanations that it previously provided “charitable treatment” and a “longer leash” to the landowner are not valid explanations for a different result on the same facts. Accordingly, we hold that since “work” as previously found by the City in the March 2023 letter includes “preparation work”, similar “preparation work” must also count as work in the absence of a valid justification for a different approach.

3) Furthermore, the Board disagrees with the City’s position that, in order to keep a permit active, Section 105.5 mandates very specific physical site activities identical to those that required the original permit. It is correct that the developer has items in the project that, individually, would require permits. However, the approved “Description of work” in the permit is for the end result and not the individual, unbundled components. The end result of the permitted work is to be a “New mixed use commercial building.” The proper question is not “did you perform a physical activity on the site that would, if applied for individually, need a permit” but rather “did you engage in effort, exertion or activity to produce a new mixed use commercial building on the site.”

The City, several times in the hearings, conceded as much. Despite advocating for its constrained reading of the code, the City repeatedly conceded that there were multiple off-site activities that could constitute “work” under section 105.5.

4) If the project was completed the “new mixed use commercial building” on the site would be seen by a reasonable person as “a product of effort, exertion or activity¹¹.” Based upon this, the reasonable definition of “work” prior to a project’s completion would be “effort, exertion or activity directed to produce or accomplish something¹².” In this case, the “something” to be accomplished by the “work on the site authorized by the permit” is the “new mixed use commercial building.”

¹¹ See, for instance, the definition of “work” at www.dictionary.com , definition #8

¹² See, for instance, the definition of “work” at www.dictionary.com, definition #1

XYZ has spent hundreds of thousands of dollars, committed to spending hundreds of thousands more, and retained at least four licensed and qualified professional service providers to promote the completion of the described work - all within the six month period preceding the appealed decision. XYZ has also engaged in inter-departmental and inter-agency communication and activity to advance its project.

We recognize that the City believes that these activities fall far short of an optimal level of diligence and intensity, but Section 105.5 does not purport to regulate either diligence or intensity. We also recognize that the City finds the interaction with XYZ to be extremely difficult. XYZ may, in fact, be pursuing its project through antagonistic and confrontational means. If true, that would be unfortunate, but it is also unfortunately outside of the parameters of Section 105.5 to impose or develop a policy on preferred manners of developer-municipal interaction.

The Board finds that the true intent of Section 105.5 of the code is to require effort, exertion or activity to accomplish the goal of developing the site. The City previously ruled that a minor breaking of ground at the site, possibly performative, was sufficient to satisfy the requirements of 105.5. "Work" does not necessarily mean that a physical alteration must occur at the site¹³. The efforts, exertions and activities testified to by XYZ to pursue the development of the site are substantially in excess of the "low bar" set by the City. Those efforts, including the substantial expenditure of investment capital, advanced the "work authorized on the site", and need not have actually occurred on the land itself in order to qualify under Section 105.5.

5) Finally, the Board issues two clarifications. First, not every activity identified by XYZ qualifies as "work" pursuant to 105.5. A lease proposal to a prospective tenant for a building that is not yet built is not "work" as contemplated in the IBC. Second, nothing in this ruling diminishes the very extensive power of the Building Official to enforce compliance with the Code, as well as other ordinances and regulations through IBC 2009 Section 105.6.

¹³ Although out-of-state rulings have no precedential value over us, the Board references the highly informative ruling from the North Carolina Supreme Court in *Morris Communs. Corp. v. City of Bessemer* 365 NC 152, ruling in favor of the landowner who argued that "'work" encompasses the border range of activities necessary [to complete a project]." and "Webster's Dictionary defines "work" to include "sustained physical or mental effort to overcome obstacles and achieve an objective or result"....Applying this definition to the Bessmer City ordinance, the term "work" has a broader meaning than mere visible evidence of construction."

DECISION

For all of the reasons set forth above, including but not limited our findings of fact and rulings of law, the City of Lebanon Building Code Board of Appeals on this 6th Day of May 2024 hereby GRANTS the appeal of XYZ Dairy, LLC.

Seconded by _____

Vote _____

EXHIBIT 22



State of New Hampshire
State Building Code Review Board

Physical Address:
NH State Fire Marshal's Office
Department of Safety
110 Smokey Bear Blvd
Concord, NH 03301

Mailing Address:
Office of the Commissioner,
Department of Safety,
33 Hazen Road
Concord, NH 03305

(603) 223-4315

Docket No. 24-3

Appeal of the City of Lebanon Building Code Board of Appeals
in Re: Appeal of Administrative Decision of Building Inspector

FINAL ORDER

This is an appeal from the City of Lebanon's Building Code Board of Appeals based on the interpretation of the word "work." Specifically, what actions qualify as "work" sufficient to keep an issued building permit active under the New Hampshire Building Code, specifically Subsection 105.5 of the International Building Code.¹ In applying this subsection of the Code, the City of Lebanon Building Inspector determined a building permit was rendered invalid due to a period of physical inactivity at the proposed building site. XYZ Dairy, LLC, the permittee (and Intervenor), appealed this decision to the City of Lebanon Building Code Board of Appeals (BCBA). The BCBA reversed, holding that "work" under Subsection 105.5 encompassed a broad realm of activities and therefore had been misapplied by the building inspector. This appeal followed.

On July 12, 2024, we held a hearing and heard arguments from the City of Lebanon Building Inspector and XYZ Dairy, LLC. After hearing the arguments and reviewing the record of the BCBA, we hold that the BCBA incorrectly interpreted the word "work" given the context and use of the word throughout Section 105 of the Code. We therefore reverse the BCBA's decision and remand.

MATERIAL FACTS

The material facts, as found by the Lebanon Building Code Board of Appeals,² include the following:

¹ The "New Hampshire Building Code" includes the adoption of the of the International Building Code 2018, as published by the International Code Council Inc. *See* RSA 155-A:1, IV. The parties agree, however, that the permit at issue here should be reviewed under the 2009 edition of the International Building Code. The provision subject to review, Subsection 105.5 of the International Building Code, is the same under the 2009 and 2018 editions of the International Building Code.

² These material facts were uncontested by the parties and we, as a body with limited appellate review authority focused on questions of law, give deference to the local building code board of appeals as the fact-finder. *See* RSA 155-A:10, IV(e) and RSA 155-A:11-b.

1. The City of Lebanon Building Inspector issued XYZ Dairy, LLC (XYZ) a building permit on December 31, 2019, based on the 2009 edition of the International Building Code. CR170, CR176.³
2. The permit is for the development of a new mix-use commercial building. CR171, CR176.
3. Under “Description of Work” the building permit states: “New mixed-use commercial building within Lot#1 of the River Park Subdivision.” *Id.*
4. The development of a new building on a previously undeveloped site is a complex, multipart endeavor, requiring engineering, architectural planning, multi-agency coordination, materials procurement, and contractor scheduling. *Id.*
5. On March 24, 2023, the Lebanon Building Inspector issued a written determination via letter to XYZ regarding the commencement of “work” at the building site. That letter identified eight topics discussed with XYZ, but none of these involved physical work at the building site. Nevertheless, the Building Inspector determined, “[a]s a result of the meeting and your follow-up e-mail sent later the same day, 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 [the issued building permit].” *Id.*
6. On February 1, 2024, the Building Inspector issued a letter to XYZ Dairy, LLC containing a written determination that its building permit was invalid. Specifically, the letter states, in part: “It is my determination that the work on the site authorized by [the building permit] has been suspended or abandoned for a period of greater than 180 days. Consequently, [the building permit] has expired and is invalid.” *Id.*
7. In the six-month period preceding the Building Inspector’s February 1, 2024, determination, XYZ incurred direct costs in excess of \$220,000 and entered into contractual obligations in excess of \$650,000 in furtherance of the development of the new, mixed-use commercial building for which the permit was issued. *Id.*
8. In the six-month period preceding the Building Inspector’s February 1, 2024, XYZ also engaged three engineering firms and one architect in support of developing the new, mixed-use commercial building. *Id.*

STANDARD OF REVIEW

This matter is before us pursuant to RSAs 155-A:10, IV(e); 155-A:11-b; and 674:34, II. The singular claim is that the New Hampshire Building Code, specifically Subsection 105.5 of the International Building Code, has been incorrectly interpreted by the Lebanon Building Code Board

³ “CR” refers to the Certified Record of the Lebanon Building Code Board of Appeals, which was bates numbered and provided to this Board. The decision of the BCBA is contained in the record twice, at CR 170-174 and CR175-179.

of Appeals. As the New Hampshire Building Code has been adopted by the General Court—RSA 155-A:1, IV—this appeal is focused on the interpretation of a statute.

The interpretation and application of a statute presents questions of law, which as an appellate body, this Board reviews *de novo*. *Bennett v. Town of Hampstead*, 157 N.H. 477, 483 (2008). Accordingly, we use the record of the local building code board of appeals but review the board’s interpretation and application of the Code without deference to the board’s decision.

ANALYSIS & CONCLUSIONS OF LAW

The issue before us is the interpretation of the State Building Code of New Hampshire Subsection 105.5 and its use of the term “work.” Subsection 105.5 uses the term “work” three times. And Section 105, Permits, as a whole uses the term “work” nineteen times. Yet the term is undefined in this section and throughout the Code.

Subsection 105.5 states, in full, the following:

105.5 Expiration

Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.

In interpreting this provision, the Lebanon Building Code Board of Appeals (BCBA) held that engagement in any effort, exertion, or activity directed to accomplish the goal completing the permitted building on the site qualified as “work” sufficient for a permit to remain active. See CR178-179. We conclude that such an expansive interpretation of the term “work” is unsupported by the context.

When reviewing the interpretation of the New Hampshire Building Code, we apply the rules of statutory construction. See *Harrington v. Town of Warner*, 152 N.H. 74, 79 (2005). Under these rules, words and phrases must be given their ordinary meaning unless it appears from the context that a different meaning was intended. *Greenland v. Bunker*, 118 N.H. 783, 785 (1978); see also, Subsection 201.4 of the International Building Code (mandating that undefined terms must have ordinarily accepted meanings such as the context implies). We interpret the intended meaning of the Code from the words used and enacted; we do not consider what the legislature might have said or add language that was not included. *N. H. Alpha of SAE Trust v. Town of Hanover*, 174 N.H. 269, 274 (2021). We do not interpret a word or phrase of the Code in isolation, but in the context of the overall scheme. See *id.*; see also Subsection 201.4. So, to understand the term “work” as used within Subsection 105.5, we look to Section 105 and the Code as a whole. See

Dembiec v. Town of Holderness, 167 N.H. 130, 134 (2014); *see also* Subsection 201.4; Antonin Scalia and Bryan Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 167-173 (explaining the “Whole Text” and the “Presumption of Consistent Usage” canons of statutory interpretation).

Subsection 105.1 details what “work” requires the issuance of a permit, while Subsection 105.2 exempts certain “work” from the permit requirements of the Code. Under Subsection 105.1, any “owner or owner’s authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by [the] code, or to cause any such work to be performed,” must first apply to the appropriate building official and obtain the required permit.

To apply for a permit, the applicant must, among other things, identify and describe the “work to be covered by the permit”, describe in a manner that readily identifies and definitively locates the “proposed building or work”, “indicate the use and occupancy for which the proposed work is intended”, and “state the valuation of the proposed work.” *See* Subsection 105.3.

After receiving an application, the appropriate building official must issue a building permit if satisfied that the “proposed work conforms to the requirements of [the] code” and the applicable laws and ordinances. Subsection 105.3.1. The issued permit, however, is rendered invalid if the “work authorized on the site by the permit” is not commenced within 180 days of issuance or if the “work authorized on the site by the permit” is suspended or abandoned for a period of 180 days. Subsection 105.5. Upon issuance of a permit, the permittee is required to keep the permit or a copy of the permit “on the site of the work until the completion of the project.” Subsection 105.7.

In reviewing the term “work” within Section 105 as a whole, it is apparent that the appropriate interpretation of “work” is neither overly expansive nor extremely narrow.

From its use throughout the section, the term “work” refers to activities that are regulated by the Code. The activities range from constructive acts to destructive acts and vary from large to small. But it does not include all efforts, exertions, or activities directed toward an ultimate end result. Nor does the term “work” encompass efforts and activities that occur beyond the identified and definitively located site listed in the permit and where the permit must be posted. For example, mental exertion associated with complex commercial building projects or particularly intricate residential projects (even if small) undoubtedly requires taxing effort by professionals. But this type of exertion is not readily encompassed by the term “work” as used within Section 105 of the Code.

To hold otherwise makes the Section confusing and incoherent, requiring multiple interpretations of “work” within a single section of the Code. As noted above, an applicant is required to describe the work covered by the permit and identify the location of the proposed work. But the BCBA interpreted the term “work” as used within Subsection 105.5 to encompass

more than physical activities and favorably cited a North Carolina decision holding the word “work” includes the mental effort to overcome obstacles. CR174, CR178.⁴

We conclude this interpretation of “work” goes too far. We find the meaning of the term “work” within Section 105 to be more limited, which becomes apparent from when reviewing the full context of the provision. Qualifying activities are those that are authorized by the permit and occur at the identified location, i.e., physical acts that take place at the physical site where the permit must be posted.

Last, it is evident that the BCBA based its interpretation and ultimate holding, at least in part, on the representations of City Officials to the permittee about what qualified as work in the early stages of the project. CR177-178. Because the City previously communicated in a March 2023 letter to XYZ that “preparation work” was sufficient to meet the requirements of “work” under Subsection 105.5, the BCBA held similar “preparation work” must also suffice as “work” in 2024. *Id.* It is beyond our jurisdiction to opine on whether there are equitable claims against the City of Lebanon for representations to XYZ. Here, our authority is limited to reviewing the interpretation of the text of the Code by the BCBA. *See* RSA 155-A:11-b. And it is beyond our authority to waive or grant variances to requirements of the code. *Id.* Accordingly, we do review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials concerning the types of conduct that would qualify as work under Subsection 105.5.

CONCLUSION

Because we hold that the local building code board of appeals incorrectly interpreted the term “work” as used within Section 105 of the Building Code, we reverse its decision. We hold that proper definition of “work” as used in Subsection 105.5 of the code refers to physical work authorized by the permit and conducted at the site.

We note the issuance of permits and collection of fees under the state building code is expressly reserved for local municipalities. *See* RSA 155-A:2, III. We therefore remand this matter to the City of Lebanon and its Building Code Board of Appeals for any additional and necessary proceedings to be held consistent with this Order.

⁴ The Notice of Decision and accompanying decision of the Lebanon Building Code Board of Appeals at CR175-179 lacks footnotes. The BCBA’s decision, however, is also printed, in full, in the May 6, 2024 minutes of the Lebanon Building Code Board of Appeals at CR169-174. The decision as reflected in the minutes contains the missing footnotes. As the minutes reflect the adoption of the Order via proper motion and vote of 4-1, we construe the omission of footnotes in the decision accompanying the Notice of Decision at CR175-179 to be a simple scrivener’s error and not an intentional deletion with legal significance.

Based upon the above, it is:

ORDERED that the decision of the Lebanon Building Code Board of Appeals is **REVERSED** and this matter is **REMANDED** for further proceedings consistent with this Order.

BY ORDER OF THE BOARD⁵

Dated: July 31, 2024

Philip R. Sherman, PE
Digitally signed by Philip R. Sherman, PE
DN: C=US,
E=psherman@prisherman.com,
O="Philip R. Sherman, PE",
CN="Philip R. Sherman, PE"
Date: 2024.07.31 11:30:56-04'00'

Philip Sherman, Chair
New Hampshire State Building Code Review Board

⁵ This Order is the formalization of a decision previously made during the Board's meeting held on July 12, 2024 by unanimous vote of the participating Board members. The Board members participating and specific motions are captured in the Board's meeting minutes.

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY, SS.

SUPERIOR COURT

XYZ Dairy, LLC

v.

The City of Lebanon, New Hampshire

and

Calvin Hunnewell, in his official capacity as
Building Inspector for the City of Lebanon, New Hampshire

Docket No. 215-2024-CV-00311

(Evidentiary Hearing Requested)

**PLAINTIFF XYZ DAIRY LLC'S MEMORANDUM OF LAW IN SUPPORT OF
ITS PETITION FOR A TEMPORARY RESTRAINING ORDER AND MOTION
FOR A PRELIMINARY INJUNCTION**

Plaintiff XYZ Dairy, LLC submits this Memorandum of Law in Support of Its Petition
for a Temporary Restraining Order and Motion for Preliminary Injunction.

INTRODUCTION/SUMMARY

On December 31, 2019, the City of Lebanon's Building Inspector granted a Building
Permit to XYZ Dairy for a complex life sciences building in the City of Lebanon. After a series
of Covid-19 related extensions, the Building Inspector attempted to revoke the Building Permit
on the basis of what he perceived to be inactivity at the site for a period of longer than 180 days.

Representatives of XYZ met with the Building Inspector and he reversed himself, issuing a letter to XYZ on March 24, 2023 acknowledging that the preparatory work XYZ was engaging in off-site in furtherance of the development of the complex project constituted “work” sufficient to keep XYZ’s Building Permit active. Relying on this representation, XYZ continued to pursue the required architectural, engineering, materials ordering, and other preparatory work required to commence construction on the project. On February 2, 2024, the Building Inspector declared XYZ’s Building Permit invalid, despite the fact that XYZ had incurred nearly \$900,000 in development costs in the 180-days immediately prior to the Building Inspector’s revocation decision. XYZ appealed, and the City of Lebanon’s Building Code Board of Appeals overruled the Building Inspector and reinstated XYZ’s Building Permit. For reasons that are not clear to anyone, the City of Lebanon then appealed its own Board’s decision, throwing XYZ’s Building Permit back into limbo, and making it impossible for XYZ to proceed with its development of the site.

The State of New Hampshire Building Code Review Board then reversed the decision of the Building Code Board of Appeals, taking the position, for the first time that counsel could find anywhere in U.S. jurisprudence, that the “work” required to keep a building permit active had to be physical, on-site work, and could not be preparatory in nature. The Building Code Review Board noted, however, that:

Because the City previously communicated in a March 2023 letter to XYZ that “preparation work” was sufficient to meet the requirements of “work” under Subsection 105.t, the BCBA held similar “preparation work” must also suffice as “work” in 2024. **It is beyond our jurisdiction to opine on whether there are equitable claims against the City of Lebanon for representations to XYZ. Here, our authority is limited to reviewing the interpretation of the text of the Code by the BCBA.... Accordingly, we do [not] review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials**

concerning the types of conduct that would qualify as work under Subsection 105.5.

This claim followed.

The Court should grant XYZ Dairy’s Petition for a TRO and its motion for a preliminary injunction, reinstating XYZ’s Building Permit before XYZ experiences irreparable harm.

RELEVANT FACTS

The Parties

XYZ Dairy, LLC

Plaintiff XYZ Dairy, LLC (“XYZ”), is a Delaware Limited Liability Company, with a physical address of 57 Main Street, West Lebanon, New Hampshire, 03784. XYZ Dairy, LLC is engaged in the business of real estate development. Compl. ¶1-2.

The City of Lebanon, New Hampshire

Defendant City of Lebanon, New Hampshire (“City of Lebanon”) is a municipal corporation with a physical address of 51 North Park Street, Lebanon, New Hampshire, 03766. Compl. ¶3.

Building Inspector Calvin Hunnewell

Defendant Calvin Hunnewell (the “Building Inspector”) is the former Building Inspector of the City of Lebanon, New Hampshire, and is sued here in his official capacity. Compl. ¶4.

Chronology of Facts and Procedural History

The Building Permit

The City of Lebanon’s Building Inspector Calvin Hunnewell issued Building Permit #2016-00293 (the “Building Permit”) to XYZ on December 31, 2019. Compl. ¶7 (Exh.1)

The Building Permit authorized XYZ to develop a “[n]ew mixed use commercial building within Lot #1 of the River Park subdivision” located at 1 River Park Drive (Tax Map 44, Lot 21) in West Lebanon, New Hampshire (hereinafter “River Park”). Compl. ¶8. XYZ paid the City of Lebanon \$90,492.00 for the Building Permit. Compl. ¶9.

The “Description of Work” on the Building Permit calls for a “new mixed-use commercial building within Lot #1 of the River Park subdivision.” Compl. ¶10. The contemplated “mixed use commercial building,” was a complex life sciences building with research laboratories and cleanrooms for scientific research, requiring a multi-faceted planning and development process and specialized equipment. *Id.*

The Building Permit, as approved, contained only the following five standard conditions of approval to be satisfied at various points during the construction process, with no stated deadlines for completion or other requirements except that “work shall not proceed until the City inspectors have approved the following stages of construction:

- (1) Foundation footings, forms and reinforcements. Lot pins must be in place at this inspection to assure the setback requirements are met. If the pins are not set and the setbacks cannot be verified, the construction will not be approved or allowed to continue. Mistakes in the location of boundary lines are the sole responsibility of the owner. **DO NOT POUR CONCRETE UNTIL THE ABOVE HAS BEEN APPROVED!**
- (2) Foundation insulation, waterproofing, and drainage, prior to backfilling.
- (3) Structural rough frame, rough electrical and rough plumbing, prior to covering.
- (4) Prior to concealing any work authorized under this permit.
- (5) Final inspection for Certificate of Occupancy, to include plumbing, heating, electrical, and any other code issue or miscellaneous item as applicable to the project, including site improvements. PLEASE SCHEDULE THIS AT LEAST 5 DAYS IN ADVANCE. A building or structure shall not be used or occupied in whole or in part until a CERTIFICATE OF OCCUPANCY has been issued.

Compl. ¶11.

***The International Building Code, as Adopted by the New Hampshire Building Code,
Establishes the Requirements for Building Permits in New Hampshire***

Section 105.5 of the New Hampshire Building Code, which adopts the language of the International Building Code, (the “Code”) states, in its entirety:

“Every permit issued shall become invalid **unless the work on the site authorized by such permit is commenced** within 180 days after its issuance, or if **the work authorized on the site by such permit is suspended or abandoned** for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions for time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”

Per this requirement, in order for a building permit to remain valid, the “work” authorized by the building permit must (1) begin within 180 days of its issuance *and*, once that work has begun, (2) it must neither be “suspended” nor “abandoned” for any period of 180 consecutive days (or longer) without permission of the Building Inspector, in writing, upon demonstration of justifiable cause. Neither the term “work” nor the terms “suspended” or “abandoned” are defined anywhere in the Code or in the local regulations.

The Building Permit Was Twice Extended Due to the Covid-19 Pandemic

On December 9, 2021, XYZ applied for a written extension of the Building Permit citing the Covid-19 pandemic as justification. Compl. ¶ 13 (Exh.2) By memo dated January 18, 2022, the Building Inspector approved a 180-day extension of the Building Permit. *Id.* The Building Inspector’s January 18, 2022 approval memo acknowledged that the COVID-19 pandemic represented adequate justification for granting an extension of the Building Permit through July 17, 2022, and clarified that the Building Inspector was also granting the multiple retroactive extensions required to date back to the original December 31, 2019 date of issuance of the Building Permit. *Id.* In the City of Lebanon, the authority to review the adequacy of the justification for the extension of a building permit, and for the issuance of all such extensions,

lies with the Building Inspector.

On May 3, 2022, XYZ submitted a written request for a second 180-day extension of the Building Permit, again citing various Covid-19-related justifications. Compl. ¶ 16. By letter dated May 27, 2022, the Building Inspector granted this second 180-day extension of the Building Permit. Compl. ¶ 17. The Building Inspector's May 27, 2022 letter again noted that the COVID-19 pandemic represented adequate justification for granting XYZ's request and extended the Building Permit through January 13, 2023. Compl. ¶18.

The 2022 construction season was adversely impacted by both an exceptionally tight labor market and rampant supply chain issues due to the lingering effects of the Covid-19 pandemic. As such, XYZ experienced months-long delays in obtaining materials and securing the on-site contractors needed to proceed with construction. Compl. ¶ 19 (*Exh. 3 at 4*).

On-Site Construction Begins at River Park on November 29, 2022

XYZ was finally able to begin on-site construction activities at River Park on November 29, 2022. Compl. ¶ 19. These construction activities included the staking out of the foundation area and excavation of a portion of the basement area of the planned mixed-use commercial building on Lot #1 at River Park. Compl. ¶ 20. This excavation work was also done to locate the City's stormwater line running from catch basins on Route 10 to a ravine on the River Park site for which the city neither had an easement nor sufficient documentation as to its precise course. Compl. ¶21.

During this excavation work, XYZ's excavation contractor encountered the City's stormwater line. Compl. ¶22. The depth of the stormwater drainage pipe put the pipe in direct conflict with XYZ's foundation excavation for the planned mixed-use commercial building on Lot #1 at River Park and as such, the pipe could not simply be abandoned in place. Best

construction practices called for the removal of the City’s stormwater drainage pipe and accommodating the stormwater runoff through some other temporary means of stormwater management. Compl. ¶23 (*Exh. 4 at* ¶7). XYZ’s excavation contractor expressed significant concern that the City’s stormwater pipe was made of clay, posing significant additional risk of crushing the pipe, and increasing both the time and cost to move it. Compl. ¶ 24. XYZ’s civil engineer sought and received permission from the State of New Hampshire to install a temporary bypass line in compliance with all code and regulatory requirements and amended XYZ’s Alteration of Terrain permit to reflect those changes. Compl. ¶ 25. The City of Lebanon was kept in the loop and copied on all of these efforts.

With the State’s permission in place, all that remained was for the City of Lebanon to grant permission to XYZ to disconnect the stormwater drainage line and permit XYZ to make the connection to the temporary bypass line that XYZ had already installed for this purpose. Compl. ¶ 26. The temporary line was entirely contained on XYZ’s property and did not require any disturbance of state or municipal property. *Id.*

In furtherance of this outcome, on December 9, 2022, XYZ sent a letter to Deputy City Manager David Brooks, DPW Engineer Brian Vincent, and Building Inspector Calvin Hunnewell, stating that XYZ had “commenced construction on 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293.” Compl. ¶ 27 (*Exh. 5*). The letter specified that “[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022,” and solicited feedback from the City of Lebanon as to how to handle the stormwater bypass issue on a temporary basis, as the pipe constituted municipal infrastructure. *Id.*

The City of Lebanon did not respond to XYZ’s December 9, 2002 letter for nearly *two months* – importantly, until *after* the Building Permit’s January 13, 2023 expiration date. Compl.

¶ 28. Finally, on February 2, 2023, Deputy City Manager David Brooks sent an email back to XYZ addressing the stormwater management issue and providing additional information regarding options for addressing the conflict. He then added that “[w]ith respect to the commencement of the construction on Lot 1, I understand that the Planning Department will be reaching out separately to request additional information” on that issue. Compl. ¶29 (*Exh. 6*).

***The Building Inspector Then Attempts to Impose Burdensome
Retroactive Conditions on XYZ’s Active Building Permit***

Two weeks later, on February 15, 2023, 68 days after XYZ’s December 9, 2022 initial communication on the issue, the Building Inspector sent a letter to XYZ addressing XYZ’s November 29, 2022 “commencement of construction” and attempted to unlawfully impose retroactive conditions on the already active Building Permit in order for the permit to “remain active.” Compl. ¶30 (*Exh. 7*). Among those conditions were requirements that XYZ produce:

- Private contract agreements with description of the project, the scope of work, and construction schedule
- The names of our Construction Manager and architectural firm that we had engaged
- A “Construction schedule, including the project’s intended completion date, and start and finish times for each phase of the project;” and
- “cost estimates” and other financial information

Id. The Building Inspector’s letter also imposed “several other steps that need to be completed prior to the resumption of construction activities (and which should have been completed prior to the commencement of any construction).” Compl. ¶ 31. Those “steps,” however, were NOT related to the Building Permit in question, but rather to the Phase 1 Infrastructure work that was subject to a *different* permitting process and, per the written conditions of approval from the City of Lebanon, only needed to be completed prior to being granted a Certificate of Occupancy for 1 River Park. *Id.*

Nevertheless, the Building Inspector stated, in his February 15, 2023 letter, that without XYZ satisfying these additional requirements, I “will revoke the permit as of January 13, 2023.” Compl. ¶ 32. This letter from the Building Inspector, however, was dated nearly a month *after* the date that he threatened to revoke the permit. *Id.*

By letter dated March 7, 2023, XYZ provided some of the requested additional information to the Building Inspector, but also asked the Building Inspector to provide the source of the authority, either in the Building Code or in the City of Lebanon’s regulations, that supported the additional conditions the Building Inspector was attempting to place on XYZ in order to for its Building Permit to “remain active.” Compl. ¶33 (*Exh. 8*). The Building Inspector never provided XYZ with the source of any authority allowing him to impose retroactive conditions on an already issued and active building permit. Compl. ¶34.

XYZ Meets with the Building Inspector on March 16, 2023

On March 16, 2023, representatives of XYZ met with the Building Inspector to discuss this situation. Compl. ¶ 35. The Building Inspector refused to accept XYZ’s excavation work on the River Park site as evidence of “work” having commenced under the Building Permit. Compl. ¶ 36. Instead, the Building Inspector requested that additional evidence, including receipts for project materials, be provided to substantiate the preparatory work that XYZ claimed to be doing. XYZ provided those receipts to the Building Inspector later that same day. *Id.*

The Building Inspector’s March 24, 2023 Letter

The Building Inspector memorialized the subject matter covered at this meeting in a critically important March 24, 2023 letter from the Building Inspector to XYZ. Compl. ¶37 (*Exh. 9*). That March 24, 2023 letter acknowledges that XYZ and the Building Inspector had discussed the following topics at their March 16, 2023 meeting:

- Determination of commencement of work
- Timing and continuance of work
- Existing stormwater situation
- Inability to complete the excavation of the building
- TF Moran designing potential solutions
- Meetings with project partners
- Project expenses and requested documentation

Compl. ¶38.

None of these topics established that the City was relying on any actual *physical* on-site construction work done by XYZ at River Park to establish that “work” had occurred under the Building Permit. Compl. ¶ 39. To the contrary – all of these topics involved work preparatory to actual, on-site construction. *Id.* Critically, the Building Inspector’s March 24, 2023 letter to XYZ concluded as follows:

“we agree that you have justified [that] 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.”

Compl. ¶ 40(emphasis supplied).

Accordingly, in his March 24, 2023 letter to XYZ, the Building Inspector took the position, unequivocally, that the “preparation work” that XYZ had “been preparing with [its] construction partners” constituted “commencement of work” under the Building Permit. Compl. ¶ 41. The Building Inspector acted within the scope of his authority in making such a finding, as it was his duty to administrate building permits in the City of Lebanon – including XYZ’s Building Permit at issue here. Compl. ¶42.

In the very next paragraph of his March 24, 2023 letter to XYZ, however, the Building Inspector re-introduced the unlawful conditions that he again claimed “need to be completed in order to maintain activation of the building permit.” These unlawful conditions included:

- “Design of the storm water solution”

- “Confirmation that the registered design professionals are in your hire and ready to proceed
- “contract agreements with description of the project, the scope of work, and construction schedule
- Construction schedule, including the project’s intended completion date and start and finish times for each phase of the project
- “Scope of work, including which contractors and subcontractors are responsible for each component of work,” and
- “Cost estimates”

Compl. ¶43. The Building Inspector’s March 24, 2023 letter contained no reference to the authority permitting him to impose these additional retroactive requirements on XYZ after he had *already concluded* that the preparatory work that XYZ had been engaging in with its construction partners constituted the “commencement of work” sufficient to keep the Building Permit active. Compl. ¶ 44.

By email dated April 10, 2023, XYZ again sought a response from the Building Inspector seeking clarity about (1) the date that the Building Inspector was using to determine the “commencement of work” under the Building Permit; (2) the need for the City’s permission to make the bypass line connection; (3) the re-started work on the Civil Engineering; and (4) the legal basis for the Building Inspector’s demand for this additional information as a condition of maintaining the Building Permit’s “activation.” Compl. ¶45 (*Exh. 10*). The Building Inspector did not respond to XYZ’s April 10, 2023 email. Compl. ¶46.

XYZ Appeals the Building Inspector’s Imposition of Additional Requirements on its Approved and Active Building Permit

XYZ was concerned, given the lack of a response from the Building Inspector, the four months of uncertainty that had already transpired, and the Building Inspector’s ongoing attempt to improperly impose retroactive conditions on the issued and active Building Permit, that the Building Inspector would again attempt to revoke the Building Permit. Compl. ¶ 47. As such, on April 25, 2023, XYZ took an administrative appeal of the Building Inspector’s retroactive

imposition of these additional requirements on its Building Permit to the City of Lebanon's Building Code Board of Appeals (the "BCBA") (Docket #BCBA2023-01). Compl. ¶ 48 (*Exh. 11*). XYZ took this action in order to (1) protect its investment-backed interests; (2) get clarification as to XYZ's obligation to comply with these requirements; and (3) determine the source of authority, if any, for the Building Inspector's imposition of these requirements. *Id.*

The BCBA held a hearing on July 11, 2023 and *dismissed* XYZ's appeal, holding that the Building Inspector's March 24, 2023 letter to XYZ imposing the additional conditions on XYZ did not constitute an actual "administrative decision." Compl. ¶ 49 (*Exh. 12*). In so doing, the BCBA concluded that the Building Permit remained in full force and effect without the additional conditions. *Id.*

XYZ Immediately Restarts Work on River Park

With that necessary clarification in hand, XYZ immediately re-started its development activities in furtherance of the work authorized by the Building Permit. Compl. ¶ 50. XYZ memorialized the re-initiation of these efforts in an August 3, 2023 letter to the Building Inspector, explaining that XYZ had reengaged with XYZ's contractors, architects, engineers, and consultants. Compl. ¶51 (*Exh. 13, 14*). In parallel with these efforts, XYZ re-started negotiations with prospective tenants to obtain leasing commitments for the completed building. Compl. ¶53 (*Exh. 15*). The Building Inspector did not respond to XYZ's August 3, 2023 letter.

On August 17, 2023, XYZ held an on-site meeting with engineers from the City of Lebanon's Department of Public Works with respect to connecting the temporary stormwater line to allow work on the site to continue – another example of XYZ's active engagement in work on the site. Compl. ¶ 55. The City of Lebanon's Department of Public Works engineers had no issues with XYZ's proposed temporary solution, requesting only that as-builts and

elevations ultimately be provided,¹ but XYZ could not get signoff from the City of Lebanon's Planning and Development Department. *Id.* These delays pushed XYZ's commencement of construction out of the 2023 construction season due to the City of Lebanon's ordinance imposing restrictions on winter excavations. *Id.*

On January 5, 2024, XYZ provided another written update to the Building Inspector, documenting that its contracted architects, Elkus Manfredi, and its General Contractor, Engleberth Construction, were actively and diligently working on the plans and specifications for the commencement of construction activities in the Spring of 2024 as soon as the City's seasonal excavation moratorium was lifted. Compl. ¶56 (*Exh. 16*). Other than the above-referenced August 17, 2023 site meeting, there had been no other response, dialogue, or other written or oral inquiry between the Building Inspector or any other official from the City of Lebanon and XYZ.

The Building Inspector Improperly Revokes the Building Permit on February 1, 2024

Despite hearing nothing from the Building Inspector since his March 24, 2023 letter, and despite the Building Inspector's failure to respond to multiple communications from representatives of XYZ, on February 1, 2024, the Building Inspector sent a letter to XYZ stating that:

"It is my determination that the work on the site authorized by Building Permit #2016-00293 has been suspended or abandoned for a period of 180 days. Consequently, Building Permit #2016-00293 has expired and is invalid."

Compl. ¶57 (*Exh. 2*).

During the 180-day period preceding the Building Inspector's February 1, 2024 letter determining that the Building Permit had expired, XYZ had been actively engaged in a wide variety of continuing preparatory activities for the River Park site in accordance with XYZ's

¹ As-builts and elevations were included in XYZ's June 5, 2024 plan set submitted to the City of Lebanon.

previous communications to the City of Lebanon and following the delays and constraints imposed by the City of Lebanon’s winter excavation moratorium. Compl. ¶ 58. In connection with those preparations, XYZ spent \$221,838 in direct costs for the site and entered into contractual obligations to pay another \$652,303 in professional and contracting fees. Compl. ¶ 58 (*Exh. 17*). During that same 180-day period, XYZ had formally engaged three subject-specific engineering firms, a code consultant, and one architectural firm to move the River Park project forward as soon as the Spring 2024 construction season could begin. XYZ had also solicited bids from the number of trades required to construct the contemplated complex life sciences building at 1 River Park. Compl. ¶ 59. The amount of money XYZ invested in the River Park project in the 180 days immediately preceding the Building Inspector’s revocation of the Building Permit equates to more than *nine times* the original cost of the Building Permit and more than *seven percent* of the original \$12,296,100 budget for the entire 1 River Park project. Compl. ¶ 60.

The February 1, 2024 decision by the Building Inspector to revoke XYZ’s Building Permit was wholly inconsistent with the position he took in his March 24, 2023 letter that off-site preparatory work undertaken by XYZ to advance the project within a 180-day window was *sufficient* to maintain XYZ’s active Building Permit. Compl. ¶ 61. Nothing in the Building Inspector’s March 24, 2023 letter suggested that he was making an exception, or that his decision was limited to that one occasion. The Building Inspector’s letter simply acknowledges that XYZ’s preparatory work constituted “work” under the Building Permit. As such, without some indication to the contrary, XYZ acted reasonably in relying on the Building Inspector’s March 24, 2023 determination and spending nearly \$900,000 based on its reasonable assumption that XYZ’s *continued* preparatory work, of the same type and scope, would be sufficient to keep its

Building Permit active.

***XYZ Appeals the Building Inspector's February 1, 2024
Revocation of XYZ's Building Permit***

The Building Inspector's arbitrary decision to revoke XYZ's Building Permit required XYZ to once again suspend the work of its contractors, architects, engineers, and consultants and file *another* administrative appeal. Compl. ¶ 62. The timing of this appeal, however, jeopardized XYZ's ability to move forward with the River Park project during the 2024 construction season. Compl. ¶62 (*Exh. 19 at ¶11*). The Building Inspector's decision also interfered with XYZ's leasing activity, since the disruption of XYZ's construction activities affected XYZ's ability to project the completion of the space for lease, jeopardizing time-sensitive tenant needs and expectations, and the overall financial viability of the River Park project. Compl. ¶63.

XYZ timely filed its administrative appeal of the Building Inspector's decision with the City of Lebanon's BCBA pursuant to NH RSA 674:34 on February 29, 2024. Compl. ¶64 (*Exh. 20*). In an effort to mitigate its rapidly accruing financial damages caused by the Building Inspector's actions, however, XYZ, through XYZ's prior counsel, contacted the Building Inspector and Planning Director via the City's attorney and asked the Building Inspector to either rescind his February 1, 2024 decision, or to permit work to continue under the Building Permit on a temporary basis while the appeal was pending. The Building Inspector refused both requests. Compl. ¶65 (*Exh. 19 at ¶13*).

The City of Lebanon BCBA held hearings on April 1, 2024 and April 18, 2024. Compl. ¶ 66. The Board heard testimony from XYZ representatives David Clem and Chet Clem, and legal argument from XYZ's prior counsel. *Id.* The Board also heard legal argument from the City's attorney, and from the Building Inspector himself. *Id.* All parties were invited to submit

additional briefing and any information that they wanted to provide to refute, rebut, or clarify any arguments. Compl. ¶66 (*Exh. 18*).

The City of Lebanon’s Building Code Board of Appeals REVERSES the Building Inspector

On May 17, 2024, the City of Lebanon BCBA issued its written decision, overturning the decision of the Building Inspector that XYZ’s Building Permit had expired on February 1, 2024 due to inactivity on the site, and granting XYZ’s request to reinstate the Building Permit. Compl. ¶67 (*Exh. 18*). In its written decision, the City of Lebanon BCBA made several factual findings relevant to the claim at Bar. First, the BCBA found that:

“[t]he development of a new building on a previously undeveloped site is a complex, multi-part endeavor. This endeavor requires engineering, architectural planning, multi-agency coordination, materials procurement, and contractor scheduling. Although not unusual for any major construction project, these complex activities are distinguishable from common, single-action activities that also require permits, such as a minor residential electrical upgrade or heating furnace installation.”

Compl. ¶68 at ¶5 (emphasis added). Second, the BCBA found that:

“the Building Official issued a letter to XYZ on March 24, 2023. That letter identified 8 bullet-pointed topics discussed on March 16, 2023. None of the eight topics discussed involved actual completed physical work at the building site.”

Compl. ¶69 at ¶6. Third, the BCBA observed, the written determination of the Building Inspector in his March 24, 2023 letter, after reviewing those 8 bullet-pointed topics, was 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.

making it clear that the Building Inspector considered the engineering, architectural planning, multi-agency coordination, materials procurement, and contractor scheduling that XYZ had been engaged in to constitute “work” sufficient to keep its Building Permit active. Compl. ¶69.

Finally, the BCBA found that the City *conceded* ALL of the following points in the hearings:

- a. “Section 105.5 does not set a high bar for ‘work’
- b. That it is “obvious that there are aspects of construction projects that are supported by offsite operations and preparation to perform”
- c. That “‘one day of work every 179’ would be sufficient to keep the permit active”
- d. That the “City believes that it ‘must do what the law says even when it makes no sense’”
- e. That “there are items of work that could occur offsite that the City would accept as work”
- f. That Section 105.5 of the IBC “does not purport to regulate the intensity or pace of work progress”

Compl. ¶70 at ¶9.

The City of Lebanon Appeals the Decision of its Own Building Code Review Board

Amazingly, at 4:30pm on June 5, 2024, the very last day of the appeal period, the City of Lebanon appealed *its own BCBA’s decision* to the State Building Code Review Board (the “New Hampshire BCRB”). Compl. ¶71 (*Exh. 21*). The City of Lebanon did not provide the BCBA with independent counsel to defend its decision at the New Hampshire BCRB, but *did* provide counsel for the Building Inspector in his appeal of the BCBA’s decision. Compl. ¶72. As such, XYZ found itself in the very unusual position of defending the decision of the City of Lebanon’s BCBA on its own and having to formally intervene in the proceeding to advocate for its own rights under the Building Permit that the City of Lebanon’s BCBA had reinstated. Compl. ¶73.

The City of Lebanon’s appeal from its own Building Code Board of Appeals was based on the interpretation of the word “work” in the New Hampshire Building Code – specifically, what actions qualify as “work” sufficient to keep an issued building permit active under Section 105.5 of the International Building Code as adopted by the New Hampshire Building Code. Compl. ¶74. As the New Hampshire BCRB observed in its Final Order, a plain reading of the relevant code sections provides a member of the public with no clarity on the subject:

“[s]ubsection 105.5 uses the term ‘work’ three times. And Section 105, Permits, as a whole uses the term ‘work’ nineteen times. Yet the term is undefined in this section and throughout the Code.”

Compl. ¶75 (*Exh. 22*). The New Hampshire BCRB’s decision thus, would have to turn on a question of statutory construction – specifically, whether the Lebanon BCBA **incorrectly interpreted** the language of Section 105.5 of the IBC – which states, in its entirety:

“Every permit issued shall become invalid **unless the work on the site authorized by such permit is commenced** within 180 days after its issuance, or if **the work authorized on the site by such permit is suspended or abandoned** for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions for time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”

(emphasis added). Compl. ¶76.

The New Hampshire BCRB Overturns the Decision of the City of Lebanon’s BCBA, but Suggests a Claim of Municipal Estoppel

No part of the IBC, the New Hampshire Building Code, or any other provision of the City of Lebanon’s ordinances, rules, or regulations sets forth definitions or standards for what constitutes “work,” or the “commencement,” “abandonment” or “suspension” of such work under a building permit. Compl. ¶77. As such, there was no way for an applicant to clearly understand its rights when confronted with the question that XYZ faced in this case.

In the absence of specific provisions in the IBC, the New Hampshire Building Code, or the City of Lebanon’s Code of Ordinances, the New Hampshire BCRB resorted to the application of New Hampshire’s common law rules of statutory construction. *See Trottier v. Lebanon*, 117 N.H. 148, 150 (1977); *see also* Loughlin, O., 15 New Hampshire Practice, Land Use Planning and Zoning (4th Ed.) § 6.01. Under this rubric, “words and phrases must be given their ordinary meaning unless it appears from the context that a different meaning was intended. *Greenland v. Bunker*, 118 N.H. 783, 785 (1978). “Doubt about the meaning of an ordinance is determined in accordance with the intent of the ... body that enacted it, and any ambiguity is to

be resolved by reference to the apparent object of the provision.” *Id. citing Storms v. Eaton*, 131 N.H. 50 (1988)(emphasis added). Thus, in undertaking a proper legal analysis of this question, the New Hampshire BCRB was first required to discern the *object* of Section 105.5 of the IBC based on its administrative history. As the City of Lebanon Building Code Board of Appeals had correctly found, the intent of Section 105.5 of the IBC is “primarily administrative” in nature. Compl. ¶80 (*Exh. 18, Ruling of Law #1*).

The City of Lebanon’s Director of Planning and Development admitted in testimony before the City of Lebanon’s BCBA that the Planning and Development Office has to dispose of “voluminous numbers of permits that are applied for and never acted upon” – in other words, to administratively dispose of permits where *no work at all* is ever undertaken in pursuit of the permit. *That*, as the City of Lebanon’s BCBA concluded, is the object of Section 105.5. Compl. ¶81. There is nothing in Section 105.5 to suggest that its object is to regulate the *pace* of construction pursuant to a building permit where activities in pursuit of that permit, whatever their pace, have actually been undertaken by the permit holder within the 180-day timeframe. Compl. ¶82. As the City of Lebanon BCBA concluded:

“It is possible that one developer may believe it to be economically advantageous to hyper-accelerate a project and complete a project quickly, paying substantial overtime and expedite fees in doing so. Conversely, it is also possible that a different developer could elect to proceed at a more leisurely pace. To the extent that the City is concerned about “slow rolling” projects or “system gaming” and wishes to enact a policy to regulate construction intensity, this is best pursued through legislative process.

Compl. ¶ 83 (*Exh. 18, Ruling of Law #1*).

Pursuant to New Hampshire’s rules of statutory construction, “words and phrases must be given their ordinary meaning unless it appears from the context that a different meaning was intended. *Bunker*, 118 N.H. at 785. The plain and ordinary meaning of the word “work” is

broad. According to Black’s Law Dictionary, “work” is “physical and mental exertion to attain an end.” *Black’s Law Dictionary* (11th Ed. 2019), or as the City of Lebanon BCBA defined it, “effort, exertion, or activity.” Compl. ¶84 (*Exh. 18, Ruling of Law #4*).

In seeking to develop a reasonable interpretation of “work” under Section 105.5, the City of Lebanon BCBA, as New Hampshire law directed them to do, looked at the *purpose* for which the Building Permit was issued. *See Bunker*, 118 N.H. at 785 (in defining words, a Board should refer to the apparent “object” of the provision). The approved “Description of Work” in the Building Permit states that the Building Permit is for a “New mixed-use commercial building within Lot #1 of the River Park Subdivision.” Therefore, the BCBA concluded, when the project is completed, the resulting “New mixed-use commercial building” would be the product of all of the “effort, exertion, or activity” required to bring it about. Based on this working definition, the BCBA stated, a reasonable interpretation of the “work” contemplated by Section 105.5 would be “any effort, exertion, or activity directed to accomplish the “New mixed-use commercial building.” Compl. ¶85 (*Exh. 18, Ruling of Law #4*).

Importantly, the Building Inspector’s own March 24, 2023 letter to XYZ completely *supports* the City of Lebanon BCBA’s interpretation of Section 105.5. Compl. ¶86. In that March 24, 2023 letter, the Building Inspector interpreted the word “work” in Section 105.5, and acknowledged to XYZ that “the **preparation work** you have been preparing with your construction partners **constitutes commencement of work** at 1 River Park Drive in accordance with the City of Lebanon Building Permit #2016-00293” (emphasis added). Compl. ¶87. As the City of Lebanon’s BCBA properly observed, in order not to be arbitrary and capricious, the decisions of the building inspector must either adhere to precedent or state a compelling and valid reason why a different result must be reached on essentially the same set of facts. Here,

since the Building Inspector in this case **had already concluded that XYZ’s “preparation work” constituted “work” under Section 105.5**, XYZ’s *continuing* preparatory work, which occurred in the 180-day window prior to the Building Inspector declaring the Building Permit expired, must *also* count as “work” under Section 105.5. As the City of Lebanon BCBA determined in its May 6, 2024 decision:

“we hold that since “work” as previously found by the City in the March 2023 letter includes “preparation work”, similar “preparation work” must also count as work in the absence of a valid justification of a different approach.”

Compl. ¶88 (*Exh. 18, Ruling of Law #2*).

There is nothing obvious in the language of Section 105.5 that required XYZ to engage in specific, physical, on-site construction activities in order to keep its Building Permit from expiring. Compl. ¶89. The City of Lebanon BCBA found that the “work” contemplated by that Building Permit was any action taken that advances the project toward the end result of the creation of that “New mixed-use commercial building.” *Id.* XYZ had assumed the same to be true because the Building Inspector had so concluded in his March 24, 2023 letter, and XYZ acted reasonably in continuing to rely on the Building Inspector’s interpretation as XYZ continued its required development work preparatory to the construction of the River Park building. *Id.* The City of Lebanon BCBA also found, in its review of the record of this case, that the City had already conceded this several times and had recognized that there are multiple off-site activities that could constitute “work” under Section 105.5. Compl. ¶89 (*Exh. 18, Finding of Fact #9*).

The New Hampshire BCRB, however, disagreed with the City of Lebanon BCBA’s analysis of Section 105.5, holding that “the BCBA incorrectly interpreted the word “work” given the context and use of the word throughout Section 105 of the Code. As the New Hampshire

BCRB stated in its Final Order:

the term “work” refers to activities that are regulated by the Code. The activities range from constructive acts to destructive acts and vary from large to small. But it does not include all efforts, exertions, or activities directed toward an ultimate end result. Nor does the term “work” encompass efforts and activities that occur beyond the identified and definitively located site listed in the permit and where the permit must be posted... the BCBA interpreted the term “work” as used within Subsection 105.5 to encompass more than physical activities and favorably cited a North Carolina decision holding the word “work” includes the mental effort to overcome obstacles... We conclude this interpretation of “work” goes too far. **We find the meaning of the term “work” within Section 105 to be more limited.... Qualifying activities are those that are authorized by the permit and occur at the identified location, i.e., physical acts that take place at the physical site where the permit must be posted.**

Compl. ¶96-97 (*Exh. 22 at 4*).

The New Hampshire BCRB, however, recognized the fact that the City of Lebanon BCBA had based its interpretation and ultimate holding, at least in part, on the fact that the Building Inspector and other City Officials had made affirmative, written representations to XYZ about what qualified as “work.” As such, the New Hampshire BCRB recognized that:

Because the City previously communicated in a March 2023 letter to XYZ that “preparation work” was sufficient to meet the requirements of “work” under Subsection 105.t, the BCBA held similar “preparation work” must also suffice as “work” in 2024. It is beyond our jurisdiction to opine on whether there are equitable claims against the City of Lebanon for representations to XYZ. Here, our authority is limited to reviewing the interpretation of the text of the Code by the BCBA. And it is beyond our authority to waive or grant variances to requirements of the code. Accordingly, we do [not] review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials concerning the types of conduct that would qualify as work under Subsection 105.5.

Compl. ¶98 (*Exh. 22 at 5*).

As the New Hampshire BCRB decision plainly demonstrates, this is *not* a case where XYZ could have simply looked up Section 105 of the New Hampshire Building Code and determined that the Building Inspector had given XYZ an improper reading of that Code section

in his March 24, 2023 letter. Here, as already established, neither the New Hampshire Building Code, nor the International Building Code defines what “work” or the “commencement” or “suspension,” or “abandonment” of “work” is. No local ordinance provision provides any greater clarity. And the only recorded judicial decision interpreting Section 105.5’s definition of “work” found that a local permit had *not* expired simply because there had not been on-site work. See *Morris Communications Corp. v. City of Bessemer Zoning Board of Adjustment*, 365 N.C. 152, 157 (2011). In the *Morris Communications* case, the North Carolina Supreme Court held that the fact that the zoning administrator did not observe construction-like activities on the site was not dispositive, because the term “work” had a broader meaning than mere visible evidence of on-site construction. The City of Lebanon’s BCBA seized on this, observing:

“[a]lthough out-of-state rulings have no precedential value over us, the Board references the highly informative ruling from the North Carolina Supreme Court in *Morris Communs. Corp v City of Bessemer*... ruling in favor of the landowner who argued that “work” encompasses the border range of activities necessary [to complete a project]... and Webster’s Dictionary defines ‘work’ to include ‘sustained physical or mental effort to overcome obstacles and achieve an objective or result...’ Applying this definition to the Bessemer City ordinance, the term “work” has a broader meaning than mere visible evidence of construction.”

Compl. ¶100 (*Exh. 18*).

Here, XYZ has never demonstrated, either by any overt act, or by any failure to act, any intention *whatsoever* to stop or abandon or suspend “work” on the River Park project for 180 days. To the contrary, XYZ has, at all times, continuously, diligently, and in good faith pursued completion of the “work” authorized by the Building Permit. XYZ completed two Code Compliance reports and has made all necessary updates and adjustments to its building plans to bring those plans into full compliance with the updated IBC and submitted those changes to the City of Lebanon. XYZ’s building plans are fully up to date with the latest code requirements, and there is no risk to the health, safety, or welfare of the public, or any other pragmatic reason

for the City of Lebanon to invalidate the Building Permit, and the City of Lebanon has never identified a single such justification for its curious but insistent effort to invalidate XYZ's Building Permit.

For all of the aforementioned reasons, XYZ's development of River Park should be allowed to continue under the existing Building Permit.

ARGUMENT

XYZ DAIRY IS ENTITLED TO A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Under New Hampshire law, injunctive relief requires a movant to show: (1) it is likely to succeed on the merits of its claims; (2) there is an immediate danger of irreparable harm if an injunction is not granted; (3) it has no adequate remedy at law; and (4) the public interest would be served by granting the injunction. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–14 (1987); see also Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998); 5 G. MacDonald Wiebusch on New Hampshire Civil Practice and Procedure §§ 19.05-19.16.

“A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case.” N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007)(citing Kukene v. Genuardo, 145 N.H. 1, 4 (2000)). The “granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity.” DuPont v. Nashua Police Dep't, 167 N.H. 429 (2015).

Here, XYZ seeks a temporary restraining order and a preliminary and permanent injunction (1) immediately reinstating its Building Permit so that XYZ can re-commence work before the end of the 2024 construction season in order to have any chance to potentially retain

its anchor tenant for the 1 River Park building; (2) extending its subdivision and site plan approvals for a period of two years to permit the approved construction at the River Park site to be carried out without further interruption; and (3) awarding to XYZ its legal fees and costs incurred in being required to pursue this clearly defined right.

A. XYZ is Likely to Succeed on Its Claim of Municipal Estoppel

To prevail on a claim of municipal estoppel under New Hampshire law, the plaintiff bears the burden of proof to establish (1) that a municipal official (here the Building Inspector) made a representation of material fact with knowledge of those facts; (2) that the party to whom the representation was made (here XYZ) was ignorant of the truth of the matter; (3) that the representation was made with the intention of inducing the other party to rely on it; and (4) that the other party was induced to rely on the representation to its injury. See Concord v. Tompkins, 124 N.H. 463, 467-68 (1984); Aranosian Oil Co. v. City of Portsmouth, 136 N.H. 57, 59 (1992); Thomas v. Town of Hooksett, 153 N.H. 717, 721 (2006).

1. The Building Inspector Made a Representation of Material Fact with Knowledge of Those Facts

The Building Inspector, in his March 24, 2023 letter to XYZ, stated:

“we agree that you have justified [that] 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.”

Compl. ¶ 40 (*Exh. 9*)(emphasis supplied). The Building Inspector’s unequivocal written statement makes clear that he concluded that XYZ’s off-site engineering, architectural, materials sourcing, and other preparatory work undertaken to advance the River Park project within a 180-day window was *sufficient* to maintain an active Building Permit. Nothing in the Building Inspector’s March 24, 2023 letter suggests that his decision was a “one-time-only” conclusion, or that his decision was limited to that one occasion. The Building Inspector’s letter simply

acknowledges that XYZ’s preparatory work constituted “work” under the Building Permit. The Building Inspector acted within the scope of his authority in making such a finding, as it was his duty to administrate building permits in the City of Lebanon – including XYZ’s Building Permit at issue here.

2. XYZ had no Reason to Believe that the Building Inspector’s Representations in his March 24, 2023 Letter were Incorrect, and Reasonably Relied on the Building Inspector’s Written Statement that XYZ’s Preparatory Work Constituted “Work” Under the Building Permit

As the New Hampshire BCRB decision plainly demonstrates, this is *not* a case where the XYZ could have simply looked up Section 105 of the New Hampshire Building Code and determined that the Building Inspector had given XYZ an improper reading of that Code section in his March 24, 2023 letter. Neither the New Hampshire Building Code, nor the International Building Code defines what “work” or the “commencement” or “suspension,” or “abandonment” of “work” is. No related state statute or local ordinance provision in the City of Lebanon provides any greater clarity, and the only recorded judicial decision interpreting Section 105.5’s definition of “work” supports the conclusion in the Building Inspector’s March 24, 2023 letter. *See Morris Communications Corp. v. City of Bessemer Zoning Board of Adjustment*, 365 N.C. 152, 157 (2011)(holding that the fact that the zoning administrator did not observe construction-like activities on the site was not dispositive, because the term “work” had a broader meaning than mere visible evidence of on-site construction).

The City of Lebanon’s BCBA seized on this, observing:

“[a]lthough out-of-state rulings have no precedential value over us, the Board references the highly informative ruling from the North Carolina Supreme Court in *Morris Communs. Corp v City of Bessemer*... ruling in favor of the landowner who argued that “work” encompasses the border range of activities necessary [to complete a project]...

and Webster’s Dictionary defines ‘work’ to include ‘sustained physical or mental effort to overcome obstacles and achieve an objective or result...’ Applying this definition to the Bessemer City ordinance, the term “work” has a broader meaning than mere visible evidence of construction.”

Compl. ¶101 (*Exh. 18*).

Without any clear indication to the contrary, XYZ acted reasonably in relying on the Building Inspector’s March 24, 2023 letter and governing its actions in accordance with it – namely by assuming that XYZ’s *continued* preparatory work, of the same type and scope, would, without more, be sufficient to keep its Building Permit active.

3. The Building Inspector’s March 24, 2023 Letter was Clearly Issued with the Intent that XYZ Dairy Would Rely on it

As explained above, on February 15, 2023, the Building Inspector sent a letter to XYZ addressing XYZ’s November 29, 2022 “commencement of construction” and attempted to unlawfully impose retroactive conditions on the already active Building Permit in order for the permit to “remain active.” Among those conditions were requirements that XYZ produce:

- “contract agreements with description of the project, the scope of work, and construction schedule”
- A “Construction schedule, including the project’s intended completion date, and start and finish times for each phase of the project;” and
- “cost estimates” and other financial information

The Building Inspector stated, in his February 15, 2023 letter, that without XYZ satisfying these additional requirements, I “will revoke the permit as of January 13, 2023.”

By letter dated March 7, 2023, XYZ provided some of the requested additional information to the Building Inspector, but also asked the Building Inspector to provide the source of the authority, either in the Building Code or in the City of Lebanon’s regulations, that supported the additional conditions the Building Inspector was attempting to place on XYZ in

order to for its Building Permit to “remain active.” This dispute precipitated a meeting between XYZ and the Building Inspector on March 16, 2023 to discuss the situation.

During that meeting, the Building Inspector specifically refused to accept XYZ’s excavation work on the River Park site as evidence of the commencement of “work” under the Building Permit. Instead, the Building Inspector requested that XYZ produce additional evidence, including receipts for project materials, to substantiate the preparatory work that XYZ claimed to be doing. XYZ provided those receipts to the Building Inspector later that same day.

The Building Inspector memorialized the subject matter covered at this meeting in the critically important March 24, 2023 letter from the Building Inspector to XYZ. That letter acknowledges that XYZ and the Building Inspector had discussed, at their March 16, 2023 meeting, the many things that XYZ had been doing to get the River Park site ready for construction, and concludes that

“we agree that you have justified [that] 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.”

This was the acknowledgement that XYZ had been seeking from the Building Inspector, and the Building Inspector put this conclusion in a letter directed to XYZ. Given the history that led to this letter being written, there can be no reasonable argument that the Building Inspector did not expect XYZ to rely on it.

4. XYZ Dairy was Induced to Rely on the Building Inspector’s March 24, 2023 Letter and has been Injured as a Result of its Reliance Thereon

As David Clem’s affidavit to the City of Lebanon BCBA makes clear, Compl. ¶58 (*Exh. 17*) XYZ was induced to rely on the Building Inspector’s March 24, 2023 letter, and did so to its substantial injury. After receiving the letter, XYZ actively engaged in a wide variety of

continuing preparatory activities for the River Park site, spending \$221,838 in direct costs for the site and entering into contractual obligations to pay another \$652,303 in professional and contracting fees. *See* CR164; CR176. XYZ also formally engaged three subject-specific engineering firms and one architectural firm to move the River Park project forward as soon as the Spring 2024 construction season could begin. The amount of money XYZ invested in the River Park project after receiving the Building Inspector's March 24, 2023 letter equates to more than *nine times* the original cost of the Building Permit and more than *seven percent* of the original \$12,296,100 budget for the entire 1 River Park project.

B. XYZ Has Shown an Immediate Danger of Irreparable Harm and that it has No Adequate Remedy at Law.

As the attached Affidavit of David Clem establishes, *see Exh. 1 hereto*, the revocation of XYZ's Building Permit and subsequent reversal of XYZ's successful appeal of the Building Inspector's revocation decision has placed XYZ in immediate danger of irreparable harm. First, the termination of XYZ's Building Permit will allow Engleberth and/or any of the subcontractor bidders to withdraw from the project, which will then it impossible for XYZ to complete the necessary infrastructure work by the deadline of January 5, 2025 imposed by the City of Lebanon. This would cause irreparable harm to XYZ by erasing XYZ's hard-fought entitlement approvals for the entire seven-phase, mixed use development, which totals over 1.0 M rentable square feet. Given the many regulatory changes that have occurred since XYZ's initial approvals, this project would likely not be approved again in the current regulatory environment.

The owner of Engleberth visited David Clem at home last week to warn him that the selected contractor bids were now at risk due to the delays in the start date, and that Engleberth is also receiving pushback from some subcontractors that their bids are no longer fixed due to the delays. All of this immediately imperils the project.

Unless XYZ's Building Permit is immediately restored, it will cause irreparable damage to XYZ and the River Park development. XYZ will lose the contractors needed to complete the necessary infrastructure work before winter. That, in turn, will cause XYZ to fail to meet its January 5, 2025 deadline, and thus, to lose its entitlements for the entire project. And that will irreparably harm XYZ's credibility as developers in the marketplace. See *Soukup v. Brooks*, 2006 N.H. Super. LEXIS 35 at *5-6 (Because the subject of this litigation involves the Plaintiffs' ability to use real estate, "there is a presumptive lack of an adequate, alternative remedy at law and of irreparable harm" which cannot be redressed by a damage award).

In addition, XYZ is at a critical lease negotiation phase with two tenants, one a national life science company, and the other a nationally recognized operator of childcare facilities. Both are publicly traded companies. Their combined tenancies would occupy over 50% of the building, but have occupancy deadlines due to expiration of current leases and the need for additional space/facilities. XYZ cannot meet their occupancy needs if the Building Permit is invalidated. This would pose irreparable damage to XYZ's reputation and a loss of the revenue necessary to get construction financing for 1 River Park by a local lender.

This is the textbook case of irreparable harm for which there is no adequate remedy at law and for which an injunction is required to prevent damage.

C. XYZ Dairy Has Shown That a Preliminary Injunction Is in the Public Interest.

A grant of injunctive relief is in the public interest where the offending conduct violates the public policy of the State of New Hampshire. See, e.g., *Control Techs., Inc. v. ENE Sys. of N.H., Inc.*, No. 217-2019-CV-849, 2020 N.H. Super. LEXIS 8, at *25 (Mar. 26, 2020). Here, the Building Inspector went on record, within the scope of his authority, after holding a meeting with representatives of XYZ, and wrote a letter to XYZ stating, unequivocally, that the preparatory

work XYZ was engaged in on the River Park site was sufficient to keep the Building Permit active. XYZ then relied on that affirmative representation from the person imbued with the authority to make it, and spent nearly \$900,000 in development costs in the ensuing months in reliance on it.

On these facts, public policy and the public interest is advanced by holding the Building Inspector to his written statement. There is no damage or downside whatsoever to the public interest in doing so. XYZ's building plans are fully up to date with the latest code requirements, and there is no risk to the health, safety, or welfare of the public, or any other pragmatic reason for the City of Lebanon to invalidate the Building Permit, and the City of Lebanon has never identified a single such justification for its curious but insistent effort to invalidate XYZ's Building Permit.

D. The Court Should Not Require the Posting of an Injunction Bond.

New Hampshire Superior Court Rule 48(c) requires the posting of an injunction bond unless good cause exists. "The purpose of an injunction bond is to mitigate the harm caused to the defendant by an erroneously issued injunction." *Deere & Co. v. State*, 2013 N.H. Super. LEXIS 32, *35-36 (N.H. Super. Sept. 19, 2013) (excusing injunction bond requirement). Thus, "a bond is required where the injunction exposes the defendant to a risk of monetary loss." *Id.* (quoting *Crowley v. Local No. 82. Furniture and Piano Moving. Furniture Store Drivers. Helpers. Warehousemen, and Packers*, 679 F.2d 978, 1000 (1st Cir. 1982)). Here, there is no risk of monetary loss to the City of Lebanon in excusing the injunction bond. As noted, XYZ was proceeding under a fully-approved Building Permit, and a full set of approved entitlements from the City of Lebanon's Planning Board. All that XYZ is seeking through this injunction is the right to proceed under those previously-approved entitlements. Therefore, the Court should not require the Plaintiffs to post an injunction bond.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction should be granted. An evidentiary hearing is requested if needed by the Court to make a ruling on the Plaintiffs' request for a preliminary injunction.

Respectfully submitted,

XYZ DAIRY, LLC

By its attorneys,

SHEEHAN, PHINNEY
Professional Association

Dated: September 13, 2024

By: /s/ Robert H. Miller
Robert H. Miller, Bar No. 13881
1000 Elm Street, 17th Floor
Manchester, NH 03105-3701
603.627.8145
rmiller@sheehan.com

EXHIBIT 1

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY, SS.

SUPERIOR COURT

XYZ Dairy, LLC

v.

The City of Lebanon, New Hampshire

and

Calvin Hunnewell, in his official capacity as
Building Inspector for the City of Lebanon, New Hampshire

Docket No. _____

AFFIDAVIT OF DAVID CLEM

1. I am over 18 years of age, possess personal knowledge of the facts contained herein, and am competent to testify to the facts thereto.
2. I am the Manager of XYZ Dairy, LLC ("XYZ").
3. There are several exigencies associated with the improper revocation of our Building Permit for 1 River Park that are creating the risk of irreparable harm, both to the River Park project, and to our professional reputations as developers.
4. XYZ hired Engelberth Construction ("Engleberth") to act as our construction manager for 1 River Park.

5. We identified two scopes of work for Engleberth to bid and manage: (1) the completion of the last component of the so-called Phase 1 Infrastructure Work for River Park to vest the entire project and to remove the restriction against the transfer of any lots created by the subdivision plan for River Park, and (2) the construction of the base building core and shell for 1 River Park with associated site improvements on Lot 1 of River Park according to the construction documents submitted to the City of Lebanon and the terms of the building permit based on those stamped drawings issued by Calvin Hunnewell as Building Inspector. The work noted above for the last component of the Phase 1 Infrastructure Scope had a completion deadline of January 2025 found in the Notice of Action of both our Site Plan and Subdivision Approvals voted by the Lebanon Planning Board.

6. XYZ represented to Engleberth and others that we had a valid Building Permit when Engleberth was hired, and they, in turn, represented the same to all of the approved subcontractors. All of these companies have relied on our representation to their detriment, and have lost work, profits, and marketing and networking opportunities while sidelined during this process.

7. Our Building Permit only requires that the infrastructure work be completed as a condition precedent to the issuance of a certificate of occupancy for the 1 River Park building. It does not require that the infrastructure work be completed before the construction of the 1 River Park building.

8. The termination of our Building Permit will allow Engleberth and/or any of the subcontractor bidders to withdraw from the project, which will have the effect of making it impossible for us to complete the necessary infrastructure work by January 5, 2025. This would cause irreparable damage to XYZ by erasing our hard-fought entitlement approvals for the entire

approved, seven-phase, mixed use development, which totals over 1.0 M rentable square feet, which we may never be able to get approved again.

9. Engelberth “went to the street” and solicited bids from multiple trades to perform the work based on the Building Permit construction documents and the site plan engineering documents previously approved and recorded by the City of Lebanon and the NH DOT. Engelberth informed all bidders that their bids should be based on a May 1, 2024 construction start.

10. This start date was critical because the City of Lebanon has an ordinance that allows the City Engineer to shut down work in a municipal street on November 1 in order to ensure that all paving is completed before the asphalt plants shut down due to cold weather.

11. XYZ reviewed the bids and recommendation of Engelberth and selected the contractors who could commit to performing the infrastructure work over the summer in order to meet our January, 2025 deadline and to avoid any risk of work being shut down in the Route 10 ROW in early November.

12. The contractor selected for the critical path infrastructure work is Nott’s Excavating. Nott’s has completed all of the Phase 1 Infrastructure Work to date at River Park (Crafts Avenue, Crafts Avenue Extension and the Cross Country Connector) and is on the list of approved contractors published by the NH DOT. Additionally, Nott’s work completing the first three components of the Phase 1 Infrastructure Work was approved and accepted by the City of Lebanon without exception and without any subsequent corrective work required under the one-year warranty for the work provided to the City of Lebanon. Nott’s was not the low bidder amongst the multiple site work bids submitted to Engelberth; however, Nott’s was willing to commit to the critical path completion schedule required by XYZ Dairy and was willing not to

bid on other jobs that might jeopardize the necessary schedule. The contract negotiated by Engelberth on behalf of XYZ Dairy, with the necessary deadline for the 100% completion of the work required by the City of Lebanon and the NH DOT, obligated XYZ to pay Nott's in full for any partial completion of the scope of work and, potentially, for Nott's lost revenue and lost profit in foregoing other work if their contract was terminated without cause.

13. Engelberth and Nott's have requested that XYZ immediately release the acquisition of all infrastructure materials (pipe, subsurface stormwater collection systems, catch basins) not currently on site in order to meet the January 2025 deadline. This has presented XYZ with a Catch-22 situation if the Building Permit is not restored and the City is allowed to impose new infrastructure conditions on any future permit which the Director of Planning and Building has already told our Construction Manager will be required.

14. Engelberth was authorized to meet with the Lebanon DPW and City Engineer and to submit the appropriate excavation permit application as required by the City of Lebanon. Engelberth was also authorized to meet with the NH DOT regional office engineer and staff and to submit the appropriate permit application they required since the improvements in Route 10 (North Main Street) involved both jurisdictions. The City of Lebanon Planning Department has not signed off on the work required to allow the final component of the infrastructure work to begin, notwithstanding the City's previous acceptance of language for the necessary completion bond agreement for the first three components of the Phase 1 Infrastructure Work already completed by XYZ and accepted by the City of Lebanon.

15. The uncertainty caused by the City of Lebanon's challenge to the 1 River Park Building Permit and the delays in approving the Excavation Permit application by imposing new conditions have not allowed XYZ to release Engelberth and their subcontractors to execute the

required infrastructure work or to enter into a Security Agreement with the City and to post a Letter of Credit as successfully done on the three prior occasions.

16. The owner of Engelberth came to my home last week to notify me that the selected contractor bids were now at risk due to the delay in the start date. Engleberth is also now receiving pushback from some subcontractors that their bids are no longer fixed due to the delays. The completion schedule is now at risk as well.

17. Unless our Building Permit is restored in September, it will cause irreparable damage to XYZ and the River Park development, as we will almost certainly lose the contractors needed to complete the work on deadline necessary to secure an anchor tenant. That, along with the impending expiration of the River Park Site Plan, will cause us to lose the entitlements for the entire project. And that will irreparably harm our credibility as developers in the marketplace.

18. XYZ is also at a critical lease negotiation phase with two tenants, one a national lifescience company, and the other a nationally recognized operator of childcare facilities. Both are publicly traded companies. Their combined tenancies would occupy over 50% of the building, but both have occupancy deadlines due to expiration of current leases and the need for additional space/facilities. XYZ cannot meet their occupancy needs if the Building Permit is invalidated. This would pose irreparable damage to XYZ's reputation and a loss of the revenue necessary to get construction financing for 1 River Park by a local lender.

19. The first phase of River Park is in excess of \$30.0M, excluding tenant buildout costs. The latter will require construction documents and additional building permit fees to the City of Lebanon. Based on two previous large-scale mixed use projects that we have developed in Cambridge and Boston, the estimated value of the seven phases of development approved for

River Park over the next 15+ years is estimated to be in excess of \$500M. If the Building Permit is revoked and the January 5, 2025 infrastructure completion schedule cannot be achieved, the \$1.2 M in architectural and engineering fees already paid for the 1 River Park building alone, and are site specific, will be lost, and the project, and all of its employment opportunities and other contributions to the local economy, will be dead.

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: _____

9/13/24


David Clem

STATE OF NEW HAMPSHIRE
COUNTY OF GRAFTON

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




Notary Public/Justice of the Peace

Name: Alysha Webster
My Commission Expires:

June 26th, 2029



September 23, 2024

Planning Board
City of Lebanon
51 N Park Street
Lebanon, NH 03766

Re: Appeal of Administrative Decision: #PB2024-40-AAD

In response to the Planning Staff's position in the August 12, 2024 Staff Memorandum, the discussion at the September 9, 2024 Planning Board hearing, and subsequent communication from the Planning Staff on September 10, 2024, XYZ Dairy provides the following additional information.

All of the conditions identified in Mr. Corwin's communications related to the Phase 1 Infrastructure have been previously satisfied. XYZ does not bear responsibility for the City's file management, nor should consideration or approval of **PB2024-34-EXT** before the Planning Board be withheld. These conditions, apart from having already been satisfied as outlined in **Appendix A**, are not germane to the extension request at hand.

I take umbrage at the Staff's position that XYZ is deficient in meeting these requirements while XYZ has not only provided the information previously, but also continues to address the larger issues resultant from the Planning Staff's own decisions and actions this year. This determination is disingenuous and a distraction from the matter at hand.

The two gating issues for XYZ are 1) the Extension of the Site Plan approvals (#PB2018-34-SPA,) and 2) the status of the Building Permit (#2016-00293). If those overarching permits are invalidated, there is no reason for XYZ or Lyme to expend effort addressing these minor issues and redundant requests for information.

Only the extension of #PB2018-24-SPA is before the Planning Board. Building Permit #2016-00293 is separate matter and is being addressed in a different venue.

Mr. Corwin's September 10, 2024 email references his June 10, 2024 and June 13, 2024 emails regarding these "outstanding" items, and he now asks why XYZ hasn't responded to previous requests for this information. A review of the timeline of events (**Appendix B**) provides a logical answer: these items were superseded by more pressing matters and were to be addressed in the Security Bond / Performance Agreement process necessary to complete the last portion of Phase 1 Infrastructure work.

Thus is the subject of Appeal #PB2024-40-AAD, Mr. Corwin's September 10, 2024 decision via email "So that there's clarity, unless you provide satisfactory information to the contrary, **it is my determination that Conditions 1, 2, 4, 5, 7 and 14-4 from the 9/19/19 Notice of Action for PB2018-34-SPA have not yet been satisfied and, consequently, construction of Phase 1 may not commence.**"



Mr. Corwin's Staff Memo and subsequent emails confuse the issue. The matter before the Planning Board is not whether Phase 1 can commence, but rather whether the underlying Site Plan and Subdivision approvals for River Park are to be extended to account for the delays incurred beyond XYZ's control.

We request that this "decision" be overturned, so that the Planning Board may continue its review of the Extension request before them.

Should the Board grant the requested extension and the Building Permit be reinstated, further requests for information will be addressed by XYZ's Construction Manager or Design/Engineering project team.

Having filed this Appeal in a timely fashion and paid all required fees, XYZ retains the right to have this Appeal heard by the Lebanon Planning Board on October 14, 2024.

Sincerely,

Chet Clem
Lyme Properties 2, LLC
57 Main Street
West Lebanon, NH 03784



Appendix A: Status of conditions

1. The applicant shall submit final designs, including construction drawings, of all infrastructure features associated with each phase, including proposed on- and off-site roadway and parking areas, sidewalks, water and sewer utilities, and storm drainage systems, to the City Engineer for approval, which shall not be unreasonably withheld.

July 28, 2016:

1 River Park and Phase 1 Infrastructure plans originally submitted to City of Lebanon.

December 21, 2018:

Amended drawings for re-routed path of Cross Country Connector submitted.

August 4, 2022:

Amended connection from Lot 29/30 to CCC submitted, following Lebanon DPW catching error made by previous City Engineer.

June 7, 2024:

Updated drawings submitted to City of Lebanon DPW and State of NH DOT for 2024 commencement, reflecting full review of any code changes by XYZ project team, with any changes denoted in the updated package.

2. The applicant has submitted sufficient site and building information to obtain Site Plan approval for development of the site. However, the applicant shall be required to submit updated site plans, building elevations, and phasing information sufficient to demonstrate compliance with the approval to the City for review and approval by the Planning Department, prior to the issuance of Building Permits for each phase and prior to the start of any construction activities for development shown or described in all remaining phases as depicted on the New Phasing Plan. For purposes of this decision, construction activities shall include any construction, excavation, or other site work associated with the construction or installation of buildings, roadways, parking, water, sewer, or storm drainage infrastructure. All such plans and information shall be in accordance with the Site Plan Review Regulations dated last revised November 9, 2009. Such Planning Department review shall be for the purpose of ensuring that the proposed building design and uses are in substantial conformance with the approved phased development project and with the Site Plan Review Regulations referenced above.

April 13, 2015:

Updated Site Plan showing the designed 1 River Park Drive footprint and change from massing footprint in original Site Plan approvals submitted by XYZ to City. (Note: the footprints shown in the original Site Plan application were not based on actual building designs; rather, they were shown to



demonstrate that each building would meet the setback requirements in each zone).

June 8, 2015:

Amended plans accepted by City of Lebanon Planning Board.

December 29, 2019:

Building Permit issued, further implying that this condition had been satisfied.

June 6-7, 2024:

Plan set confirms no change to site and building information.

4. Prior to the start of any construction activities for which construction inspection is required pursuant to this decision or any applicable ordinance or code for each phase of the project, the City shall retain the services of an independent 3rd party inspector, for which the applicant shall be responsible for all inspection fees related to construction and installation of on- and off-site roadways, parking, sidewalks, water and sewer utilities, storm drainage, and erosion control, in accordance with Chapter 181 of the City Code and Section 14 of the Subdivision Regulations unless waivers have been granted. The applicant shall provide funding for inspection services in a form acceptable to the City. Third party engineer inspection reports and as-built drawings provided by the applicant (using NH State Plane Coordinate system), including tie sheets and Northing and Easting coordinates and elevations of underground utilities, shall be reviewed and approved by the City Engineer, prior to acceptance of any utility improvements by the City and all inspection reports shall be made available to the applicant.

XYZ is aware of this requirement and has completed this for the three previous segments of the Phase 1 Infrastructure Improvements and paid a 5-14% project cost premium as a result. As in these three previous cases, the 3rd Party inspection scope of work is developed by the Planning Staff/Dept. of Public Works in parallel with the Security Bond/Performance Agreement.

Appendix B outlines the timeline of events and illustrates why the 3rd Party inspection agreement had not yet been provided: a final \$ value had not been accepted by the Lebanon DPW and Planning Department when the Appeal was filed on July 8, 2025

Crafts Avenue Sewer and Roadway Improvements (CASRI):

Total Construction Value:	\$1,048,348.54
Total 3 rd Party Inspection paid by XYZ:	\$86,080 (8%)

Crafts Avenue Extension (CAE):

Total Construction Value:	\$383,083.52
Total 3 rd Party Inspection paid by XYZ:	\$20,580 (5%)



Cross Country Connector (CCC):

Total Construction Value:	\$122,879.26
Total 3 rd Party Inspection paid by XYZ:	\$18,000 (14%)

5. **Edge-of-Disturbance fencing shall be installed and maintained before and during any site work for each phase under construction, to be verified by the City Engineer or City's third-party inspector on site.**

XYZ is aware of this condition. Historically, this condition is satisfied by the Construction Manager as the first step for mobilization and signed-off upon by the 3rd Party Inspector on-site. Mobilization has not proceeded due to regulatory actions beyond XYZ's control.

7. **Temporary parking facilities.**
 - a. **Temporary parking facilities are approved in accordance with the chart attached hereto as Exhibit "A".**
 - b. **Prior to the issuance of a building permit for any phase involving the construction of a temporary parking facility, the applicant shall provide the Planning & Development Department with plans for the proposed temporary parking facility, together with an operation and maintenance plan.**
 - c. **Each temporary parking facility shall be designed to ensure the safe movement of vehicles and pedestrians to the satisfaction of the Director of the Department of Public Works and the Director of the Planning Department, which shall not be unreasonably withheld. It shall be the responsibility of the applicant to maintain each temporary parking facility in accordance with the operation and maintenance plan.**
 - d. **The temporary parking identified in Exhibit A may be used until such parking is replaced by the permanent parking garage included in Phase 3 or December 31, 2038, whichever is earlier.**

Building Permit #2016-00293 was issued by the Lebanon Planning Department on December 29, 2019, three months after this September 9, 2019 Notice of Action. The permit confirms that this requirement is not applicable and that sufficient parking had been provided, as shown on the Building Permit Construction documents for 1 River Park Drive.

The updated Phasing Plan in the September 9, 2019 Notice of Action reflects off-site parking requirements for Lot 1, if the 125-unit multi-family building were to be constructed concurrently as



XYZ had hoped. Unfortunately, that additional housing is not presently under consideration, due to repeated delays and the rejection of XYZ's proposed Site Plan amendments in 2023 that would have enabled this housing to progress simultaneously with 1 River Park.

The Phase 1 plans before the Department of Public Works and Planning Department are consistent with plans previously approved, there has been no material change to parking whatsoever, and there is no temporary parking facility required, making Condition 7 **not applicable**.

The Permit and subsequent updated plans (Sheets 1-5 and 1-6) provided to the Planning Department on June 6-7, 2024 show the original, approved plan for 1 River Park. This provides more than sufficient parking on Lot 1 (42 spaces) and Lot 2 (140 spaces) to meet the total parking requirements for 1 River Park (149 spaces).

14-4. Prior to the issuance of a Building Permit for Phase 1 of the development, the applicant shall obtain all required State approvals including, but not limited to, the following:

- NHDES Alteration of Terrain Permit
- NHDES approval for Sewage Discharge

Note: this requirement has already been satisfied. Alteration of Terrain Permit #AoT-0994 dated October 6, 2015 and Sewage Discharge Permit #D2015-0802 dated September 10, 2015, have been issued by NH DES for Phase 1.

As the Planning Department's own Notice of Action (highlighted above) states, this requirement has already been satisfied.

NHDES Alteration of Terrain Permit: #AoT-09943A

The NH DES Alteration of Terrain Permit #AoT-09943A was issued on October 6, 2015. Following the 2018 suspension and the 2020 suspension, TF Moran submitted a request for extension on XYZ's behalf to NH DES on August 2, 2020, which was granted on October 30, 2020 with an expiration date of October 30, 2025.

As referenced numerous times previously, the August 2, 2020 letter from TF Moran included reference to the temporary stormwater line to be installed to re-direct the City's stormwater line to allow construction of 1 River Park to commence, and until the permanent solution is installed. Per the October 30, 2020 letter from NH DES, XYZ's project team must abide by N.H. **Env-Wq 1507.07**.

As stated in numerous past communications to the City, the City of Lebanon was copied on all communications related to this permit.



To eliminate any further confusion regarding jurisdiction and approval, XYZ requests that the Planning Department provide reference to any specific, applicable City regulations regarding stormwater that have not been met.

NHDES approval for Sewage Discharge: #D2015-0802

This permit was granted by the NH DES/Lebanon DPW on 9/10/2015.

A memo sent by XYZ to the Lebanon DPW on December 4, 2019 includes all previous calculations related to water & sewer connections for 1 River Park, and minor updates related to fee calculations for the core & shell construction prior to the issuance of Building Permit #2016-00293. On December 19, 2019 XYZ paid the City of Lebanon \$15,886 for a water and sewer connection fee for 1 River Park in accordance with #D2015-0802.

Work on the sewerage construction under Permit #D2015-0802 was commenced prior to the three years of the approval date in accordance with the written condition on the permit, when the Crafts Avenue Sewer and Roadway Improvement (CASRI) construction began in 2018. Work on this same scope of work has continued, with the City's implicit approval, during the Crafts Avenue Extension (CAE) work in 2020 and the Cross Country Connector (CCC) work in 2022.



Appendix B: Timeline of relevant events

February 1, 2024

The Planning Staff's memo invalidating the Building Permit jeopardized the entire River Park project, and repeat efforts by XYZ and its Attorney to address this matter to allow development activities to continue while the matter was resolved were fruitless, causing months of uncertainty.

May 6, 2024

95 days and three (3) Lebanon Building Code Board of Appeals hearings later, the BCBA reinstated Permit #2016-00293. With the project seemingly back on track after the BCBA decision overturning the Staff's actions, XYZ's project team is re-released to file necessary information.

June 5, 2024

The City of Lebanon elects to appeal the BCBA's May 6, 2024 appeal decision. This appeal is filed at 4:30pm on the 30th day of the 30-day appeal period.

June 6, 2024

Engelberth Construction on behalf of XYZ submitted an Excavation Permit Application for the portion of remaining Phase 1 infrastructure under the City's jurisdiction. A parallel application to the NHDOT was submitted the same day.

That application was required to be reviewed and approved by the Lebanon DPW, and necessary for infrastructure cost values to be determined to reach a Performance Bond/Security Agreement.

June 7, 2024

Engelberth Construction on behalf of XYZ submits updated construction drawings for 1 River Park reflecting minor code changes from the two (2) code update reviews conducted under the direction of Elkus Manfredi Architects.

June 13, 2024

Planning Director Nathan Reichert responds to Engelberth Construction regarding technical issues with the City's ongoing OpenGov software transition.

In a conversation between Mr. Reichert and Chris Yandow at Engelberth Construction, memorialized by Mr. Yandow to XYZ via email on June 13, 2024, Mr. Reichert states that the Permit would not be recognized until the appeal process is over. Mr. Reichert's decision is contradictory to NH RSA 676:6, "The effect of an appeal to the board shall be to maintain the status quo."

Thus, the Permit that was reinstated by the Lebanon Building Code Board of Appeals on May 6, 2024 should have been honored as in-place while any State appeal process brought forth by the Lebanon Planning Department played out. This *ultra vires* decision further jeopardized XYZ's ability to move forward, contributing to the numerous, unwarranted delays XYZ has faced beyond its control.



Building Permit submission

1. Documentation submission began Monday morning outside the online building application portal.
2. Discussed the following in a phone conversation with Nate Reichert:
 - a. Recognizes an earlier permit was issued, but wants to use the new building permit system for tracking/processing.
 - b. They want the permit application submission redone thru their permit portal as all other building permit applications are now done. They are establishing Building 1 with an E911 address of 1 River Park Drive and I am waiting for the creation of that address to begin the process.
 - c. With the new Inspectors in place, they will review the new plans against the conditions from the 2016-00293 permit to see which either no longer pertain (because of new codes) or have been satisfied with the new drawings.
 - d. **NOTE** – he mentioned the City is appealing the State’s decision that the past permit is still valid. That appeal was just recently filed – were you aware of this.
 - e. **He said Planning and Development would still receive, process and review the application during the appeal process – but that a permit would not be recognized or issued (if they decide to issue a new number) until the appeal process is over.**

Figure 1: Portion of June 17, 2024 memo from Chris Yandow to XYZ.

June 25, 2024

XYZ’s Attorney submitted a draft Performance Bond/Security Agreement to Mr. Corwin.

A series of emails between Attorney Hastings, Mr. Corwin, and Mr. Vincent take place regarding the required bond values, and additional information is provided by XYZ in response on 6/26/2024.

Lebanon DPW subsequently signs off on Excavation Permit and sets cost of construction to be bonded and reflected in the Performance Bond/Security Agreement.

June 27, 2024

XYZ attends pre-hearing conference with the N.H. BCRB in Concord. Attorney Rob Miller for XYZ Dairy, LLC requests that the City drop its appeal so as to not jeopardize commencement of Site Work that had been rescheduled for July in order to meet the January 2, 2025 completion deadline, and more importantly, the required schedule of the anchor tenant for 1 River Park.

The City refused. As a result, XYZ cannot proceed with work as scheduled, loses Site Work contractor, and any reasonable chance to complete requisite work by January 2, 2025.

July 8, 2024

The Lebanon Planning Staff’s actions and the delay caused by the NH BCRB process, results in XYZ filing a request for extension of #PB2018-24-SPA.



July 12, 2024

N.H. BCRB hearing in Concord. BCRB overturns Lebanon BCBA. Resultant decision from BCRB remands the issue back to BCBA, but draws attention to the matter of municipal estoppel that was central to the BCBA's decision.

Last, it is evident that the BCBA based its interpretation and ultimate holding, at least in part, on the representations of City Officials to the permittee about what qualified as work in the early stages of the project. CR177-178. Because the City previously communicated in a March 2023 letter to XYZ that “preparation work” was sufficient to meet the requirements of “work” under Subsection 105.5, the BCBA held similar “preparation work” must also suffice as “work” in 2024. *Id.* It is beyond our jurisdiction to opine on whether there are equitable claims against the City of Lebanon for representations to XYZ. Here, our authority is limited to reviewing the interpretation of the text of the Code by the BCBA. *See* RSA 155-A:11-b. And it is beyond our authority to waive or grant variances to requirements of the code. *Id.* Accordingly, we do review whether the BCBA or another body may appropriately find the City is estopped from invalidating the permit because of representations made by city officials concerning the types of conduct that would qualify as work under Subsection 105.5.

Figure 2: Excerpt from N.H. BCRB Decision, July 31, 2024

July 16, 2024

Having heard nothing for 20 days from the Planning Staff regarding the draft Performance Bond / Security Agreement prepared by XYZ and provided to the City on June 25, 2024 following submission of the relevant Excavation Permit, Attorney Hastings follows-up with Mr. Corwin regarding the status of the draft agreement.

July 25, 2024

30 days after the draft was submitted to the City, Mr. Corwin responds with a redline of the Security Bond/Performance Agreement. Mr. Corwin identifies several new issues– which had not been raised during the three (3) previous Security Bond / Performance Agreements related to earlier segments of Phase 1 Infrastructure– that require additional consideration, and perhaps being brought before the Planning Board for review and approval.

August 12, 2024

The Staff Memo, arriving two (2) days prior to the scheduled August 12, 2024 hearing, brings forth new questions and requests for information from the Applicant.

XYZ prepares the relevant information requested by the Staff for the hearing, only to have the hearing continued for a month at the suggestion of the Planning Staff and Planning Board.



September 5, 2024

XYZ responds to Mr. Corwin's Staff Memo and subsequent August 13, 2024 email communication, pointing out the disparity between the Staff's actions and the Board's previous considerations of XYZ's request for extension of #PB2018-24-SPA, and the lack of communication from the Staff prior to the August 12, 2024 hearing that could have easily avoided any delay in consideration of the requested extension.

Had the Planning Staff observed their own Staff Review and Initial Completeness Determination (SPRR Section 4.7.C.3.a-c) following XYZ's submission of the request for extension on July 8, 2024, the new requirements from the Staff would have been provided by XYZ in a timely manner.

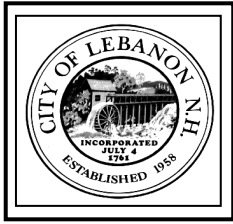
3. Initial Completeness Determination

 - a. The Planning & Development Department shall review the application for completeness pursuant to the requirements of Section 4.7.A and Section 5.1. If the Planning & Development Department finds that the application is complete, or lacks only those items or documents for which waiver requests have been submitted, then the Planning & Development Department shall make a preliminary determination of whether the waiver requests meet the standards of Section 7.1 of these Regulations, and if so, then the Planning & Development Department shall recommend to the Board acceptance of the application for review.
 - b. If the Planning & Development Department finds that the application is not complete or that one or more of the waiver requests do not meet the standards of Section 7.1, the Planning & Development Department shall so advise the Applicant, who can elect to complete the missing submission requirements. Missing submission requirements, including any necessary waiver requests, shall be delivered to the Planning & Development Department by close of business on the fourth Monday of the month (or the following business day if the office is closed) for submission to the Board the following month. Submission of additional or revised materials by this date is necessary to ensure that the Planning & Development Department has adequate time to review application materials and to prepare a staff report, as needed, for each application listed on the Board's agenda.
 - c. If the applicant elects not to complete the missing requirements, fails to deliver all missing submission requirements prior to the deadline as described above, or, if applicable, fails to pay engineering review fees, the Planning & Development Department shall recommend that the Board deem the application incomplete. Prior to acting on the recommendation, the Board shall give the applicant a reasonable opportunity to be heard on the limited issue of completeness.

Instead, the information requested on Thursday, September 5, 2024 was provided to the Planning Board at the outset of the hearing on Monday, September 9, 2024, as has been done historically by XYZ when insufficient time is allowed by the Planning Staff due to late receipt of the Staff Memorandum.

September 9, 2024

Following over 1.5 hours of answers and information provided to the Board by XYZ— including answers to the very same questions posed again via by Mr. Corwin on September 10, 2024— the second hearing of the extension request is continued another full month until October 14, 2024.



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

MEMORANDUM

TO: Planning Board

FROM: Tim Corwin, Deputy Planning & Development Director

RE: Public Hearing on Proposed Amendments to the Site Plan Review Regulations
February 24, 2025 Planning Board Work Session – *Agenda Item 3.B*

DATE: February 20, 2025

Attached please find a redline identifying proposed amendments to the Site Plan Review Regulations. The new or revised text is blue and underlined. The text to be deleted is shown as ~~red with a strike-out~~. A “clean” version is also attached. A public hearing on these amendments has been scheduled for the Planning Board’s February 24, 2025 work session, notice of which has been provided as required by the Site Plan Review Regulations and state law.

The proposed edits were last discussed and updated by the Planning Board at the Board’s meeting on February 10, 2025, and include amendments to the following:

- Section 3.2.A.2 – revising the membership of the Minor Site Plan Committee to include the Planning & Development Director and Chief Building Official and designating the Deputy Planning & Development Director as staff to the Committee.
- Section 4.3 – revising the conceptual review regulations to require conceptual review in for certain projects and establishing related procedures and requirements.

The City’s legal counsel is currently reviewing the proposed edits to Section 3.2.A. Any comments received will be provided to the Planning Board prior to the public hearing.

With respect to the Section 4.3 amendments, staff has prepared additional recommended edits and will present those to the Board for discussion at Monday’s meeting. As such, staff will recommend that the hearing for the Section 4.3 amendments is continued to a future meeting so that the Section 4.3 draft can be finalized and reviewed by the City’s legal counsel.

Attachments

- Excerpt of the Site Plan Review Regulations (3-page redline last revised February 10, 2025)
- Excerpt of the Site Plan Review Regulations (3-page “clean” version, last revised February 10, 2025)

SITE PLAN REVIEW REGULATIONS
MINOR SITE PLAN & CONCEPTUAL REVIEW
DRAFT AMENDMENTS

ARTICLE III – ADMINISTRATION

[...]

Section 3.2 – Minor Site Plan Review

A. MINOR SITE PLAN COMMITTEE

1. **Establishment.** A Minor Site Plan Committee is established in accordance with RSA 674:43, III, and the resolution passed by the City Council on September 1, 2021, for the purpose of reviewing minor site plan applications per Section 3.1.C.
2. **Membership.** The Minor Site Plan Committee consists of the [Director of Planning and Development](#), the [Chief Building Official](#), the [Director of Public Works](#), the [Fire Chief](#), and the [Police Chief](#) ~~Planning and Development Department's Senior Planner and Associate Planner, and a representative from each of the following City departments: Fire, Police, and Public Works.~~ The [Director of Planning and Development](#) ~~Senior Planner~~ shall serve as chair and may use ~~his or her~~ [their](#) reasonable discretion in coordinating the activity of the ~~C~~committee in an efficient and effective manner. ~~The Deputy Director of Planning and Development or designee shall serve as staff for the Committee.~~ The ~~Director of Planning and Development~~ [members of the Committee](#) may, at ~~his or her~~ [their](#) discretion, ~~appoint a~~ substitute representative from their respective departments to the Committee ~~for the Senior Planner or Associate Planner and may, at his or her discretion, serve as chair while substituting.~~ A majority of the [Committee](#) members shall constitute ~~the~~ [a](#) quorum necessary to transact business.

[...]

ARTICLE IV – PROCEDURE

[...]

Section 4.3 – Conceptual Review

- A. [Purpose.](#) Conceptual review pursuant to RSA 676:4, II(a) is recommended for all [land development](#) that requires Planning Board review pursuant to Section 3.1.D in order to help identify and resolve issues at an early stage and save the applicant the time and cost of changes at a later date. Conceptual review also allows the Board and applicant to identify available and qualified expertise within the City's boards and committees to help inform the variety and scope of studies or other activities that inform the project design and, in turn, the technical review of the submitted application.

B. Conceptual Review Required. Conceptual review shall be required for any land development that requires Planning Board review pursuant to Section 3.1.D and which involves any one or more of the following:

1. 20 or more new dwelling units;
2. Ten (10) or more detached one- and/or two-family dwellings;
3. More than one (1) principal multi-family, non-residential or mixed use building; and/or
4. Any development determined by the Board to have regional impact.

C. Conceptual Review Optional. For any site land development other than those identified in Section 4.3.B, conceptual review shall be optional.

~~the Applicant may request an informal discussion with the Board, to be conducted in general terms, of the basic concept of the proposed development. The Applicant may end the conceptual discussion at any time.~~

D. Notice. Conceptual reviews shall only take place at a formal meeting of the Board. Public notice of a required ~~the conceptual discussion~~ review shall be provided pursuant to Section 4.8 and shall also be provided to the following:

1. Conservation Commission
2. Pedestrian & Bicyclist Advisory Committee
3. Tree Advisory Board
4. Heritage Commission (if located within the Historic District)

Public notice is not required for optional conceptual reviews. ~~is not required, but such discussions shall only take place at a formal meeting of the Board.~~

~~Such conceptual consultation shall not bind either the applicant or the Board in any manner, and statements made by Board members shall not be the basis for disqualifying said members or invalidating any action taken.~~

~~While a Conceptual Review is optional, it is strongly recommended, particularly for larger developments, as it can help identify and resolve issues at an early stage and save the applicant the time and cost of changes at a later date.~~

EB. Submission Requirements. ~~Not less than two weeks before the date of the scheduled conceptual review, the~~ The Applicant shall provide a project description, a written statement addressing how the concept conforms with the Master Plan, and a sketch plan of sufficient accuracy and quality, based on a United States Geological Survey map or similar map, showing the following:

1. Existing property lines of the parcel(s) under review;
2. General topography, to include highlight of slopes in excess of 25%;
3. Prominent natural features of the site, including but not limited to: tree lines, watercourses, flood plains, wetlands, and ledge outcrops;
4. The approximate location and size of existing and proposed buildings, parking areas, roadways, and other improvements.

5. When conceptual review is required:

- a. A properly completed and signed application form.
- b. The appropriate fees as established by the Board's fee schedule.
- c. A list of the name(s) and address(es) of all persons to be notified by certified mail in accordance with RSA 676:4, I(d), including the following:
 - i. The Applicant(s):
 - ii. The Owner(s) of record of the site:
 - iii. The Owners of abutting properties:
 - iv. Every surveyor, engineer, architect, soil scientist, or wetlands scientist whose professional seal appears on any plan or document submitted to the Board:
 - v. All persons holding conservation, preservation, or agricultural preservation restrictions (as defined under RSA 477:45) on the subject property. (NOTE: When there are no such restrictions on the subject property, the applicant shall provide a definitive statement to that effect.); and
 - vi. The holders of any easements, rights-of-way, or other restrictions on or over the subject property. (NOTE: When there are no such easements, rights-of-way, or other restrictions on the subject property, the applicant shall provide a definitive statement to that effect.).

FG. Procedures. Conceptual review shall be an informal discussion with the Board, conducted in general terms, of the basic concept of the proposed development ~~The conceptual review shall be limited to a discussion of the concept in general terms,~~ for the purpose of familiarizing the Board with the location and type of development, and familiarizing the Applicant with the issues and concerns of the Board. The Board shall consider whether the proposed development is an allowed use in the Zoning Ordinance and in accordance with the Master Plan. The Board shall determine whether the development is compatible with any plans for existing or future roads, utilities, and services. The Board shall focus on the characteristics of the site and its relationship to the surrounding area to determine how well the proposed development fits into the natural environment and the cultural landscape, including historical resources.

Discussions held during any conceptual review shall not bind either the applicant or the Board in any manner, and statements made by Board members shall not be the basis for disqualifying said members or invalidating any subsequent action taken by the Board.

SITE PLAN REVIEW REGULATIONS
MINOR SITE PLAN & CONCEPTUAL REVIEW
DRAFT AMENDMENTS

ARTICLE III – ADMINISTRATION

[...]

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2. **Membership.** The Minor Site Plan Committee consists of the Director of Planning and Development, the Chief Building Official, the Director of Public Works, the Fire Chief, and the Police Chief. The Director of Planning and Development shall serve as chair and may use their reasonable discretion in coordinating the activity of the Committee in an efficient and effective manner. The Deputy Director of Planning and Development or designee shall serve as staff for the Committee. The members of the Committee may, at their discretion, appoint a substitute representative from their respective departments to the Committee. A majority of the Committee members shall constitute a quorum necessary to transact business.

[...]

ARTICLE IV – PROCEDURE

[...]

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- A. Purpose. Conceptual review pursuant to RSA 676:4, II(a) is recommended for all *land development* that requires Planning Board review pursuant to Section 3.1.D in order to help identify and resolve issues at an early stage and save the applicant the time and cost of changes at a later date. Conceptual review also allows the Board and applicant to identify available and qualified expertise within the City's boards and committees to help inform the variety and scope of studies or other activities that inform the project design and, in turn, the technical review of the submitted application.
- B. Conceptual Review Required. Conceptual review shall be required for any *land development* that requires Planning Board review pursuant to Section 3.1.D and which involves any one or more of the following:

1. 20 or more new dwelling units;
 2. Ten (10) or more detached one- and/or two-family dwellings;
 3. More than one (1) principal multi-family, non-residential or mixed use building; and/or
 4. Any development determined by the Board to have regional impact.
- C. Conceptual Review Optional. For any *land development* other than those identified in Section 4.3.B, conceptual review shall be optional.
- D. Notice. Conceptual reviews shall only take place at a formal meeting of the Board. Public notice of a required conceptual review shall be provided pursuant to Section 4.8 and shall also be provided to the following:
1. Conservation Commission
 2. Pedestrian & Bicyclist Advisory Committee
 3. Tree Advisory Board
 4. Heritage Commission (if located within the Historic District)

Public notice is not required for optional conceptual reviews.

- E. Submission Requirements. The Applicant shall provide a project description, a written statement addressing how the concept conforms with the Master Plan, and a sketch plan of sufficient accuracy and quality, based on a United States Geological Survey map or similar map, showing the following:
1. Existing property lines of the parcel(s) under review;
 2. General topography, to include highlight of slopes in excess of 25%;
 3. Prominent natural features of the site, including but not limited to: tree lines, watercourses, flood plains, wetlands, and ledge outcrops;
 4. The approximate location and size of existing and proposed buildings, parking areas, roadways, and other improvements.
 5. When conceptual review is required:
 - a. A properly completed and signed application form.
 - b. The appropriate fees as established by the Board's fee schedule.
 - c. A list of the name(s) and address(es) of all persons to be notified by certified mail in accordance with RSA 676:4, I(d), including the following:
 - i. The Applicant(s);
 - ii. The Owner(s) of record of the site;
 - iii. The Owners of abutting properties;

-
- iv. Every surveyor, engineer, architect, soil scientist, or wetlands scientist whose professional seal appears on any plan or document submitted to the Board;
 - v. All persons holding conservation, preservation, or agricultural preservation restrictions (as defined under RSA 477:45) on the subject property. (NOTE: When there are no such restrictions on the subject property, the applicant shall provide a definitive statement to that effect.); and
 - vi. The holders of any easements, rights-of-way, or other restrictions on or over the subject property. (NOTE: When there are no such easements, rights-of-way, or other restrictions on the subject property, the applicant shall provide a definitive statement to that effect.).
- F. Procedures. Conceptual review shall be an informal discussion with the Board, conducted in general terms, of the basic concept of the proposed development for the purpose of familiarizing the Board with the location and type of development, and familiarizing the Applicant with the issues and concerns of the Board. The Board shall consider whether the proposed development is an allowed use in the Zoning Ordinance and in accordance with the Master Plan. The Board shall determine whether the development is compatible with any plans for existing or future roads, utilities, and services. The Board shall focus on the characteristics of the site and its relationship to the surrounding area to determine how well the proposed development fits into the natural environment and the cultural landscape, including historical resources.

Discussions held during any conceptual review shall not bind either the applicant or the Board in any manner, and statements made by Board members shall not be the basis for disqualifying said members or invalidating any subsequent action taken by the Board.



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

MEMORANDUM

TO: Lebanon Planing Board

FROM: Planning Department Staff

RE: Proposed Zoning Amendments

DATE: February 24, 2025

In January, Ms. Margaret Hatch, property owner of record for the 24 Labombard Road, approached City staff to have a portion of her parcel rezoned from Light Industrial to General Commercial - One. Her letter is attached to this information packet.

During the Route 120 Study, her entire parcel was thought to be subject to a conservation easement. Ms. Hatch clarified that a front 3-acre portion of the lot was excluded from the conservation easement. She wishes to have that portion of the lot rezoned to General Commercial – One, like the surrounding parcels are proposed to be changed to as recommended by the Route 120/Northern Lebanon Community Plan (NLCP). The NLCP calls for parcels along Etna Road and LaBombard Road to be rezoned from Light Industrial to General Commercial - One. This zoning amendment was reviewed by the Conservation Commission and the Planning Board at previous meetings, but not yet approved by City Council. Please see the attached map to see the existing zoning compared to the proposed rezoning.

During their January 22, 2025 meeting, the City Council moved that the proposed Zoning Amendment be reviewed by the Conservation Commission and Planning Board before returning to City Council for public hearing and decision. The review process will take around two months.

Legal review was conducted by City Attorney, Matt Decker, and his opinion letter is included in this packet.

Schedule:

Legal Review – by February 6, 2025
Conservation Commission – February 13, 2025
Planning Board – February 24, 2025
City Council Work Session Review – March 5, 2025
City Council Public Hearing – March 19, 2025

Items Included:

1. Letter from Ms. Margaret Hatch
2. Map
3. Memo to City Council from January 22, 2025 Meeting
4. Legal Opinion Letter

My husband was a lifetime resident and we built our home at 24 Labombard Road in 1977 when area was farming/residential. Tax map 51-12. approx.10yrs later was changed to Light Industrial/commercial and we were grandfathered in as residential in LID zone which we submit a form each year to maintain this status .Our property is 50.6 acres which consists of 47.1 in Conservation Easement with UVLT and a 3 acre regulation building lot. Now there is a proposal to again to change zoning to General Commercial. Also, learned my property had been down sized to Residential zone.

This letter is to inform you I did not request this change. Rather, my wish is to be included in the initial rezoning effort that would have changed my property to General Commercial. If this cannot be done with existing proposal then I would like to request that the total 3 acres lying outside the conservation easement be Rezoned to General commercial consistent with original proposal.

In either case I wish the right to be residential in a Commercial zone to be contiguous as long as I maintain this property. I do not want the developable part of the property to be excluded from other appropriate use.

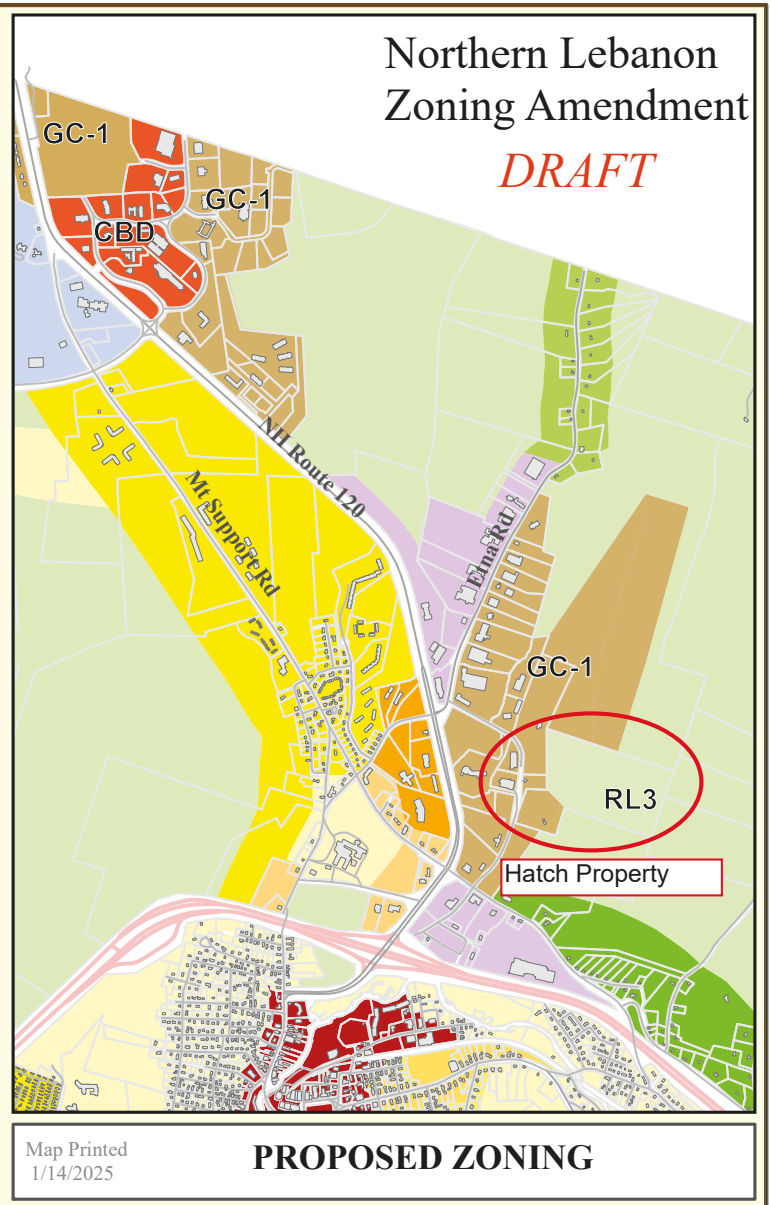
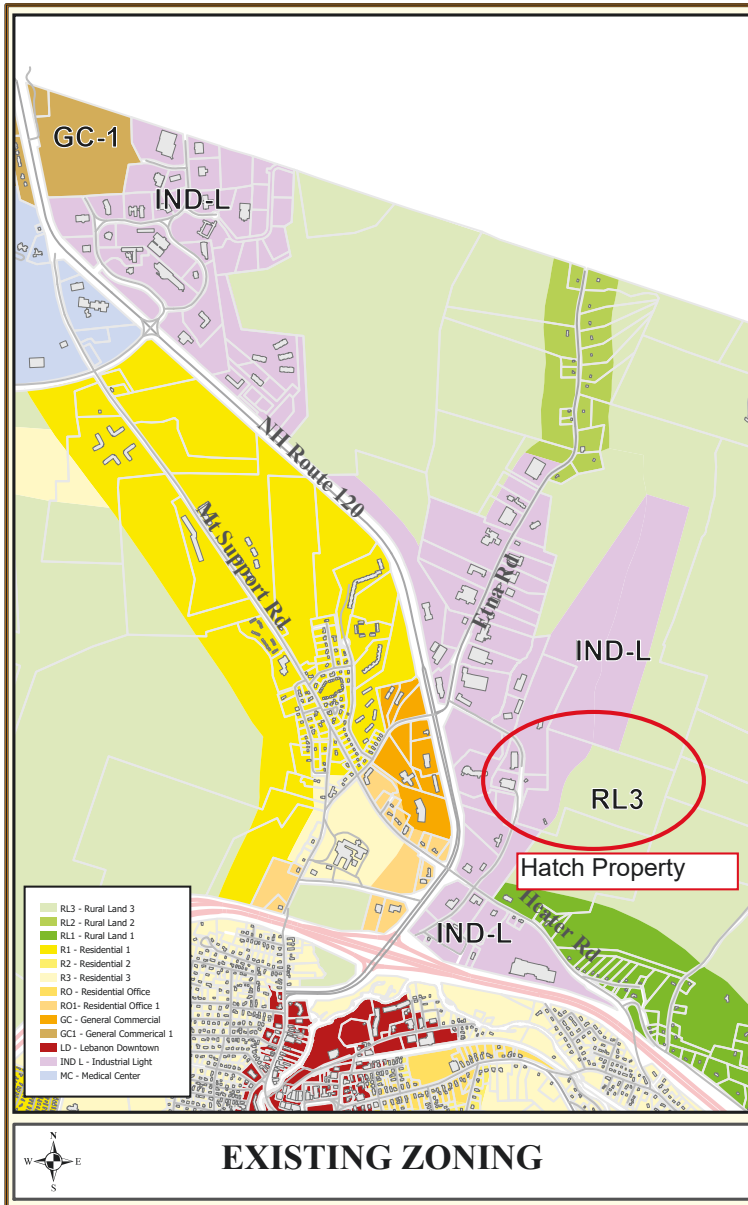
I believe my request is reasonable and appropriate for the location. It is also consistent with the surrounding properties and their intended rezoning.

Please submit my request to appropriate officials and planning staff. Thank you for your consideration.

Sincerely,

Margaret Hatch

Margaret Hatch
1/9/25



Agenda

Lebanon City Council

January 22, 2025

11. New Business:

11.D – Request for Zoning Map Amendment – Hatch Property, 24 Labombard Road, Tax Map 51, Lot 12, Lebanon, NH

Background

On January 9, 2025, Margaret Hatch requested a zoning map amendment for her property located at 24 Labombard Road, Tax Map 51, Lot 12, Lebanon, NH. The property is currently split zoned between Light Industrial (IND-L) along the road frontage and Rural Lands Three (RL-3) to the rear of the parcel.

During the recent Route 120 / Northern Lebanon Community Plan (NLCP) study, the Hatch property was not considered for potential zoning changes under the mistaken impression that the property was completely subject to conservation restrictions. However, Ms. Hatch has clarified that a 3-acre portion of the +/-50-acre parcel is not subject to any development restrictions, and the owner would like to have the property frontage rezoned to General Commercial One (GC-1) as is proposed for other surrounding properties. Attached is a draft map from the Planning & Development Department depicting the existing and proposed zoning for the property.

Since the Hatch property was not reviewed for zoning changes as part of the annual package of amendments, it was determined that the amendment request must be resubmitted to the land use boards and legal counsel for review and comment back to the City Council. The Planning & Development Department has outlined a tentative review schedule for the proposed amendment.

Action

If the Council decides to move forward with the proposed amendment request, the following motion is offered for consideration:

MOVED, that the Lebanon City Council, in accordance with the City of Lebanon Zoning Ordinance, Article X, Section 1000.3, Amendment Procedures, submits the proposed Zoning Map amendment as described in the January 9, 2025 letter from Margaret Hatch, to the Planning Board and Conservation Commission for their review and comment. The City Council hereby sets the following tentative review schedule:

Legal Review – by February 6, 2025

Conservation Commission – February 13, 2025

Planning Board – February 24, 2025

City Council Work Session Review – March 5, 2025

City Council Public Hearing – March 19, 2025

Included In This Section:

1. January 9, 2025 letter from Margaret Hatch
2. Draft Northern Lebanon Zoning Amendment map

February 5, 2025

Nathan Reichert, Director of Planning & Development
City of Lebanon
51 S. Park Street
Lebanon, NH 03766
nathan.reichert@lebanonnh.gov

**RE: Proposed Zoning Amendment –
Map Amendment for 24 Labombard Road, Tax Map 51, Lot 12**

Mr. Reichert:

This is a preliminary legal opinion as required by Section 1000.3(B)(2) of the Lebanon Zoning Ordinance concerning a proposed amendment to the zoning map. I understand the ~50-acre property at 24 Labombard Road, Tax Map 51, Lot 12, is currently split-zoned between Light Industrial (IND-L) at the front of the parcel and Rural Lands Three (RL-3) at the rear of the parcel. The proposed amendment would re-zone three acres at the front of the property, which are not subject to conservation restrictions, to General Commercial One (GC-1), as has been proposed for surrounding properties. The remaining ~47 acres subject to conservation restrictions would be RL-3.

I have reviewed the following documents in connection with this opinion:

- City Council Agenda Item 11.D from the January 22, 2025 City Council meeting;
- A January 9, 2025 letter from property owner Margaret Hatch;
- A draft map showing the proposed revised zoning map for the North Lebanon Zoning Amendment.

The Ordinance requires this legal review to cover: (a) whether such amendment is within the authority delegated to the City under State law; (b) whether the form is appropriate; and (c) whether, from an administrative point of view, the amendment can be administered and enforced.

My answer to the three questions in Section 1000.2.B(2) is “yes” and I discern no legal or administrative issues of concern with this map amendment request.

All zoning map amendments should be analyzed to determine whether they would constitute “spot zoning,” which is not a permissible exercise of the power to divide land into different zoning districts. It is, of course, within the City’s legal authority to amend its zoning map. Planning goals, the division of the City into zoning districts, and the uses to be permitted within each district are policy matters within the purview of the City. However, zoning map amendments must comply with the “rational basis” level of Due Process analysis to be

constitutional. This means map amendments must not be arbitrary and they must be in reasonable furtherance of some valid public land use regulatory purpose.

Spot zoning is not determined automatically by the size of the land being rezoned or the number of parcels affected. An area is spot zoned when it is singled out for treatment different from that of similar surrounding land which cannot be justified on the basis of health, safety, morals or general welfare of the community, and which is not in accordance with a comprehensive plan. E.g., Miller v. Town of Tilton, 139 N.H. 429, 432 (1995). The mere fact that an area is small, or that it is rezoned at the request of a single owner, or that it is of greater benefit to that owner than to others, would not necessarily make it spot zoning so long as there is a public need or a compelling public reason for the change. Id.

In considering whether rezoning constitutes spot zoning, courts may consider whether the change is made in response to some public need. See Shadlick v. Concord, 108 N.H. 319 (1967) (zoning change was made in response to growing need for multi-family housing which already existed in proximity to the rezoned area, and thus was part of a comprehensive plan rather than spot zoning). Also relevant is whether there are sufficient opportunities for the targeted use elsewhere in the community, particularly if those other areas aren't being used. See Bosse v. Portsmouth, 107 N.H. 523 (1967) (rezoning of one parcel for industrial use when it was surrounded by residential uses was spot zoning because many other areas in the city were available for industrial use but weren't being used that way). The common thread in the case law is that a court will consider whether there is a reason or combination of reasons for the change that is in the public interest and consistent with the community's development goals.

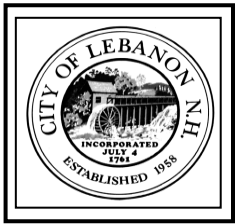
I conclude that the proposed re-zoning of Lot 51-12 does not constitute "spot zoning", as there is a rational basis and clear public purpose for the amendment. It is clear from the City staff's explanation in the Council's Jan. 22 Agenda Item 11.D that the property was excluded from the Northern Lebanon map amendment due to a mistake of fact concerning conservation restrictions. Re-zoning the front three acres not subject to conservation restrictions to GC-1 would not single out the property for treatment different from that of surrounding land. To the contrary, this re-zoning would subject this lot to the same zoning treatment as similar lots in the immediate neighborhood.

Please do not hesitate to contact me with any questions or concerns about this opinion.

Sincerely,



Matthew C. Decker



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

MEMORANDUM

TO: Lebanon Planning Board

FROM: Planning Department Staff

RE: Proposed Zoning Amendments

DATE: February 24, 2025

A request has been made to add the use, “Research Laboratory” to the use tables of the General Commercial, General Commercial One, Central Business District, and the Lebanon Downtown Districts. Also, definitions the following definitions are proposed to be added to Appendix A “Definitions” of the Zoning Ordinance:

1. Light Industry
2. Medical Research Facility
3. Research Laboratory

The definitions are included in the attachment section of this packet.

During their January 22, 2025, meeting, the City Council moved that the proposed Zoning Amendment be reviewed by the Zoning Board of Adjustment, Conservation Commission and Planning Board before returning to City Council for public hearing and decision. The review process will take around two months.

Legal review was conducted by City Attorney, Matt Decker, and his opinion letter is included in this packet.

Schedule:

Legal Review – ~~by January 24, 2025~~ February 5, 2025
Zoning Board of Adjustment – February 3, 2025
Conservation Commission – February 13, 2025
Planning Board – February 24, 2025
City Council Work Session Review – March 5, 2025
City Council Public Hearing – March 19, 2025

Items Included:

1. Proposed Use Tables: Sections 305, 305A, 306, and 307
2. Proposed Definitions: Appendix A “Definitions”
3. Memo to City Council from January 22, 2025 Meeting
4. Memo to Planning Staff: Zoning Amendment Request
5. Legal Opinion Letter

SECTION 305 GENERAL COMMERCIAL DISTRICT (GC).

305.2 Table of Uses.

<u>Permitted Uses</u>	<u>Special Exception Uses</u> (see Section 801.3)
<u>Residential</u> Dwelling unit(s) above first floor Multi-family dwelling (see Section 305.5)	<u>Commercial/Non-Residential</u> Alternative treatment center per Section 613 Bus terminal Educational facility, college/university Essential service Truck terminal
<u>Commercial/Non-Residential</u> Amusements (indoor) - Car wash Community center Drive-in restaurant, refreshment stand Drive-through facility - Drycleaning pick-up station Financial institution - Funeral home Group day care facility per Section 604 Health club Hotel - House of worship - Laundromat Local government use Membership club Motel - Movie theater Office Personal service - Publishing/printing - Radio or TV studio Recreational facility, indoor Renewable energy system per Section 612 Restaurant, sandwich shop Retail product pickup Retail store Service station Vehicular repair Vehicular sales Research Laboratory	<u>Uses by Conditional Use Permit</u> (see Section 302.4)
	<u>Commercial/Non-Residential</u> Care and treatment of animals Contractor's yard Craftsman's shop - Plumbing, electrical or carpentry shop Produce stand Recreational facility, outdoor Warehouse - Wholesale sales
	<u>Planned Developments</u> Commercial PUD per Section 501

SECTION 305A GENERAL COMMERCIAL ONE DISTRICT (GC-1).

305A.2 Table of Uses.

<u>Permitted Uses</u>	<u>Uses by Conditional Use Permit</u> (see Section 302.4)
<u>Residential</u> 1. Multi-family dwelling (see Section 305A.4)	<u>Commercial/Non-Residential</u> 1. Alternative treatment center per Section 613 2. Drycleaning pick-up station 3. Educational facility, college/university 4. Inpatient rehabilitation facility 5. Light industry 6. Research laboratory 7. Restaurant, sandwich shop 8. Retail store
<u>Commercial/Non-Residential</u> 2. Dwelling unit(s) above first floor 3. Essential service 4. Financial institution 5. Group day care facility per Section 604 6. Office 7. Personal service 8. Renewable energy system per Section 612 9. Research Laboratory	<u>Planned Developments</u> 1. Commercial PUD per Section 501 2. Manufactured Housing PURD per Section 504

SECTION 306 CENTRAL BUSINESS DISTRICT (CB).

306.2 Table of Uses.

<u>Permitted Uses</u>	<u>Special Exception Uses</u> (see Section 801.3)
<u>Residential</u> 1. Dwelling unit(s) above first floor 2. Multi-family dwelling (see Section 306.5) 3. Senior housing complex	<u>Commercial/Non-Residential</u> 1. Craftsman's shop 2. Drive-through facility 3. Educational facility, college/university
<u>Commercial/Non-Residential</u> 4. Amusements (indoor) 5. Community center 6. Drycleaning pick-up station 7. Financial institution 8. Group day care facility per Section 604 9. Funeral home 10. Health club 11. Hotel 12. House of worship 13. Laundromat 14. Library 15. Local government use 16. Membership club 17. Motel 18. Museum 19. Office 20. Personal service 21. Radio or TV studio 22. Renewable energy system per Section 612 23. Restaurant, sandwich shop 24. Retail store 25. Social service center 26. Theater, concert hall, movie theater 27. Research Laboratory	<u>Uses by Conditional Use Permit</u> (see Section 302.4)
	<u>Commercial/Non-Residential</u> 1. Essential service 2. Other uses per Section 306.4 3. Parking facility 4. Publishing/printing 5. Recreational facility, indoor 6. Recreational facility, outdoor <u>Planned Developments</u> 7. Commercial PUD per Section 501

SECTION 307 LEBANON DOWNTOWN DISTRICT (LD).

307.2 Table of Uses.

<u>Permitted Uses</u>	<u>Uses by Conditional Use Permit (see Section 302.4)</u>
<u>Residential</u> 1. Multi-family dwelling (see Section 307.5) 2. Dwelling unit(s) above or below the street level story	<u>Commercial/Non-Residential</u> 1. Craftsman's shop, art studio 2. Dry cleaning pick up station 3. Educational facility, college/university 4. Essential service 5. Laundromat 6. Other uses per Section 307.4 7. Parking facility 8. Publishing/printing 9. Recreational facility, indoor 10. Recreational facility, outdoor
<u>Commercial/Non-Residential</u> 3. Amusements (indoor) 4. Community center 5. Financial institution 6. Group day care facility per Section 604 7. Health club 8. Hotel 9. House of worship 10. Library 11. Local government use 12. Membership club 13. Museum 14. Office 15. Personal service 16. Radio or TV studio 17. Renewable energy system per Section 612 18. Restaurant, sandwich shop 19. Retail store 20. Senior housing complex 21. Social service center 22. Theater, concert hall, movie theater 23. Research Laboratory	

Proposed Definitions for Appendix A:

LIGHT INDUSTRY: The assembly, manufacture, processing, packaging or other industrial operations conducted in such manner that all resulting cinders, dust, fumes, gas, odors, smoke and vapor are effectively confined to the premises or disposed of so as to avoid any air pollution and conducted in such a manner that noise, flashing lights and vibrations will not be a nuisance or otherwise detrimental to abutting properties. Light industry includes the development and production of computer software and hardware and its associated equipment.

MEDICAL RESEARCH FACILITY: A medically related research laboratory, which may as a subsidiary function, engage in the manufacture of products within the following Standard Industrial Classifications: biological products; medicinal chemicals; pharmaceutical preparations; optical instruments and lenses; and surgical and medical instruments.

RESEARCH LABORATORY: A facility for scientific research, development, analysis, and testing in various technology-intensive fields of science including but not limited to biotechnology, pharmaceuticals, genetics, plastics, polymers, resins, coatings, fibers, fabrics, films, heat transfer, and electronics.

Agenda

Lebanon City Council

January 08, 2025

10. New Business:

10.H – Discussion of Potential Zoning Amendment to Add “Research Laboratory” as a Permitted Use in the Central Business District (CBD)

Background

The Mayor has requested that the City Council consider amending Section 306.2 of the Zoning Ordinance to add “Research Laboratory” as a permitted use within the Central Business District (CBD). This request has been made pursuant to Section 1000.2.A of the Zoning Ordinance, which provides that amendments to the Zoning Ordinance may be proposed “[f]rom the City Council at any time.”

“Research Laboratory” is currently a permitted use in the Light Industrial (IND-L) and Industrial-Rail Access (IND-RA) districts and is also allowed in the General Commercial One (GC-1) district by Conditional Use Permit from the Planning Board. Currently, the Zoning Ordinance does not include a definition for research laboratory.

The Planning and Development Department has prepared a memorandum of recommendations, which also summarizes the amendment process outlined in Section 1000 of the Zoning Ordinance. As noted in the attached memorandum, if the Council wishes to consider adding “Research Laboratory” as a permitted use in the CBD, staff recommends that the Council also consider adding the same use to the Lebanon Downtown (LD) District. Staff further recommends that the Council adopt a definition for “Research Laboratory” to avoid future miscommunication and misinterpretation concerning the use.

Action

If the Council decides to move the proposed zoning amendment forward for review, the following motion is offered for consideration:

MOVED, that the Lebanon City Council, in accordance with the City of Lebanon Zoning Ordinance, Article X, Section 1000.3, Amendment Procedures, hereby submits the proposed zoning amendment to add “Research Laboratory” as a Permitted Use in the Central Business District (CBD), to the Planning Board, Zoning Board of Adjustment, and Conservation Commission for their review and comment. The City Council hereby sets the following tentative review schedule:

Legal Review – by January 24, 2025

Zoning Board of Adjustment – February 3, 2025

Conservation Commission – February 13, 2025

Planning Board – February 24, 2025

City Council Work Session Review – March 5, 2025

City Council Public Hearing – March 19, 2025

Included In This Section:

1. Memorandum from Planning and Development Department, dated December 30, 2024, regarding the request to amend Section 306.2 of the Zoning Ordinance to add "Research Laboratory" as a Permitted Use in the Central Business (CB) District



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

MEMORANDUM

TO: Lebanon City Council

CC: Shaun Mulholland, City Manager
David Brooks, Deputy City Manager

FROM: Planning and Development Department Staff

RE: Request to Amend Section 306.2 of the Zoning Ordinance to Add “Research Laboratory” as a Permitted Use in the Central Business (CB) District

DATE: December 30, 2024

The Mayor has requested that the City Council take action to amend Section 306.2 of the Zoning Ordinance to add “research laboratory” as a Permitted Use in the Central Business (CB) District. The request has been made pursuant to Section 1000.2.A of the Zoning Ordinance which provides that amendments to the Zoning Ordinance may be proposed “[f]rom the City Council at any time.”

“Research laboratory” is currently a permitted use in the Light Industrial (IND-L) and Industrial – Rail Access (IND-RA) Districts and is also allowed in the General Commercial One (GC-1) District by Conditional Use Permit from the Planning Board. Currently, the Zoning Ordinance does not include a definition for research laboratory.

RECOMMENDATIONS

1. If “research laboratory” is to be added to the Central Business (CB) District as a permitted use, staff recommends that the Council also consider adding “research laboratory” as a permitted use in the Lebanon Downtown (LD) District. The West Lebanon Revitalization Committee’s (WLRAC’s) original recommendations included making the CB and LD Districts more consistent, and the City Council has moved in this direction with dimensional requirements and most allowed uses (except those that WLRAC preferred to retain in West Lebanon, such as drive-throughs). Adding “research laboratory” to the CB District but not to the LD District would be inconsistent with WLRAC’s stated goal.

In addition, zoning regulations may only be adopted in furtherance of the purposes enumerated in NH RSA 674:17. The most applicable purpose identified in RSA 674:17 that could be used to support the inclusion of “research laboratory” in the CB District would be to “promote health and the general welfare”. As such, a zoning regulation cannot be adopted in support of or for the exclusive benefit of any individual property. Rather, zoning regulations must be designed to support every similarly situated property impacted by the regulation.

In the context of the proposed amendment, high-tech companies that may operate as research laboratories already exist in the LD District with the benefit of zoning relief granted over the years. However, these existing uses still need additional zoning relief to expand or make changes in their operations since they are non-conforming with the underlying zoning requirements. There are no known research laboratories or high-tech companies currently operating within the CB District. Consequently, if the Council decides that adding “research laboratory” is appropriate in the CB District, it would also seem to be appropriate in the LD District.

2. Staff also recommends that the Council adopt a definition of “research laboratory” as is good drafting practice and to help avoid future misinterpretation and miscommunication. A definition will also help distinguish “research laboratory” from other similar uses such as “medical research facility” (allowed in the MC District) and “light industry” (allowed in the IND-L, IND-RA, and GC-1 Districts), which are defined in Appendix A of the Zoning Ordinance as follows:

LIGHT INDUSTRY: The assembly, manufacture, processing, packaging or other industrial operations conducted in such manner that all resulting cinders, dust, fumes, gas, odors, smoke and vapor are effectively confined to the premises or disposed of so as to avoid any air pollution and conducted in such a manner that noise, flashing lights and vibrations will not be a nuisance or otherwise detrimental to abutting properties. Light industry includes the development and production of computer software and hardware and its associated equipment.

MEDICAL RESEARCH FACILITY: A medically related research laboratory, which may as a subsidiary function, engage in the manufacture of products within the following Standard Industrial Classifications: biological products; medicinal chemicals; pharmaceutical preparations; optical instruments and lenses; and surgical and medical instruments.

In reviewing the various examples found in *A Planners Dictionary*, published by the American Planning Association (APA), staff offers the following potential definition of “research laboratory” for the Council’s consideration:

RESEARCH LABORATORY: A facility for scientific research, development, analysis, and testing in various technology-intensive fields of science including but not limited to biotechnology, pharmaceuticals, genetics, plastics, polymers, resins, coatings, fibers, fabrics, films, heat transfer, and electronics.

SCHEDULE

Should the City Council elect to proceed with consideration of the proposed zoning amendment, the Planning and Development Department recommends that the Council establish a tentative schedule for review, as is required pursuant to Section 1000.3.A of the Zoning Ordinance. Staff offers the following tentative schedule for review and comment:

City Council decision to proceed:	January 8, 2025
Legal review:	by January 24, 2025
Zoning Board of Adjustment:	February 3, 2025
Conservation Commission:	February 13, 2025
Planning Board:	February 24, 2025
City Council setting public hearing:	March 5, 2025
City Council public hearing:	March 19, 2025

TITLE LXIV PLANNING AND ZONING

CHAPTER 674 LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning

Section 674:17

674:17 Purposes of Zoning Ordinances. –

I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. Zoning ordinances shall be designed:

- (a) To lessen congestion in the streets;
- (b) To secure safety from fires, panic and other dangers;
- (c) To promote health and the general welfare;
- (d) To provide adequate light and air;
- (e) To prevent the overcrowding of land;
- (f) To avoid undue concentration of population;
- (g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;
- (h) To assure proper use of natural resources and other public requirements;
- (i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings; and
- (j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.

II. Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

III. Except as provided in RSA 424:5 or RSA 422-B or in any other provision of Title XXXIX, no city, town, or county in which there are located unincorporated towns or unorganized places shall adopt a zoning ordinance or regulation with respect to antennas used exclusively in the amateur radio service that fails to conform to the limited federal preemption entitled Amateur Radio Preemption, 101 FCC 2nd 952 (1985) issued by the Federal Communications Commission.

IV. If a municipality allows an increased density, reduced lot size, expedited approval, or other dimensional or procedural incentive under this section for the development of housing for older persons, as defined and regulated pursuant to RSA 354-A:15, VIII, it may allow the same incentive for the development of workforce housing as defined in RSA 674:58, IV. Beginning July 1, 2023, incentives established for housing for older persons shall be deemed applicable to workforce housing development.

Source. 1983, 447:1. 1989, 42:2. 1995, 176:2. 2000, 279:2. 2002, 73:2. 2011, 85:2, eff. July 15, 2011. 2022, 272:72, eff. Aug. 23, 2022.

February 5, 2025

Nathan Reichert, Director of Planning & Development
City of Lebanon
51 S. Park Street
Lebanon, NH 03766
nathan.reichert@lebanonnh.gov

**RE: Proposed Zoning Amendment –
Add “Research Laboratory” as Permitted Use in CBD, LD, GC & GC-1**

Mr. Reichert:

This is a preliminary legal opinion as required by Section 1000.3(B)(2) of the Lebanon Zoning Ordinance concerning a proposed amendment to the City’s zoning ordinance. I understand the City Council has approved a motion to begin the process of adding “Research Laboratory” as a Permitted Use in the Central Business (CB), Lebanon Downtown (LD), General Commercial (GC) and General Commercial 1 (GC-1) zoning districts.

I have reviewed the following documents in connection with this opinion:

- City Council Agenda Item 10.H from the January 8, 2025 City Council meeting;
- A December 30, 2024 Staff Memo to the Lebanon City Council;
- A set of amended Tables of Uses for the GC, GC-1, LB and CB zoning districts; and
- A draft definition for the use “Research Laboratory”.

The Ordinance requires this legal review to cover: (a) whether such amendment is within the authority delegated to the City under State law; (b) whether the form is appropriate; and (c) whether, from an administrative point of view, the amendment can be administered and enforced.

My answer to the three questions in Section 1000.2.B(2) is “yes” and, with the exception of my comment below, I discern no legal or administrative issues of concern with this proposed amendment.

The December 30, 2024 Staff Memo correctly notes that a zoning regulation cannot be adopted in support of, or for the exclusive benefit of, any individual property. Accordingly, in considering whether to allow research laboratories (which are not places of public accommodation) in the City’s Central Business, Downtown, and General Commercial zoning districts directly alongside the commercial/non-residential uses in these districts (which are mostly places of public accommodation), the City boards and commissions reviewing this proposed amendment should consider whether and how this proposed amendment would promote the health and general welfare of the City, as set forth in RSA 674:17, I (c). I recommend that the public bodies reviewing this proposed amendment should more clearly

February 5, 2025

Page 2

document how the public interest and benefit to the general welfare of the City is served by allowing the expansion of research laboratories into downtown commercial areas, where research laboratories may not have previously been considered for inclusion of the Tables of Uses for the CB, LD, GC and GC-1 zoning districts.

Please do not hesitate to contact me with any questions or concerns about this opinion.

Sincerely,

A handwritten signature in blue ink that reads "Matthew C. Decker". The signature is written in a cursive, flowing style.

Matthew C. Decker

DRAFT

**LEBANON PLANNING BOARD
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA MICROSOFT TEAMS
LEBANONNH.GOV/LIVE
MONDAY, JANUARY 27, 2025 6:30PM**

MEMBERS PRESENT: Andrew Faunce (Chair), Patrick Kennelly, Jeremy Rutter, Karen Zook (City Council Rep), Kathie Romano (REMOTE), Kellen Appleton, Eric Stacy (alt)

MEMBERS ABSENT: Richard Ford Burley (Vice Chair), Brian Ceglarski (alt)

STAFF PRESENT: Tim Corwin (Deputy Planning & Development Director), Nate Reichert (Planning & Development Director/ Zoning Administrator), Brian Vincent (City Engineer)

1. CALL TO ORDER

Chair Faunce called the meeting to order at 6:30pm. Mr. Corwin reviewed the City's meeting in-person and REMOTE attendance policies and procedures.

Ms. Romano said she was attending remotely because she was out of town. She said no one was in the room with her while she is attending the meeting.

2. PUBLIC HEARING ITEMS

A. City of Lebanon, 0 Barrows Street, Tax Map (Tax Map 77, Lot 106), zoned R-3: Request for Site Plan Review, Major Subdivision approval, and a Conditional Use Permit per Sections 310.2 and 509 of the Zoning Ordinance for a proposed 5-unit cottage development. 2025-04-FMAJSPRCUP- Continued from January 13, 2025

Deputy City Manager Brooks, Mr. Paul Simon (Park Architecture), and City Engineer Rod Finley were present on behalf of the applicant. Chair Faunce said the public hearing that began at the January 13, 2025 meeting was still open.

Mr. Corwin said he provided revised waiver request and condition of approval documents to the Board just prior to the meeting. He suggested that the group go through each during the meeting because the Board may not have had enough time to review them prior to the meeting.

Deputy City Manager Brooks said two new waiver requests have been submitted (since the January 13, 2025 meeting):

- 14.4.C of the Subdivision Regulations – Requires the last 50% of the Building Permits will not be issued until all of the approved infrastructure is completed - Dep City

1 Manager Brooks said this is a subdivision requirement that doesn't fit the cottage plan
2 because it is smaller in scope than the typical subdivision project
3

- 4 • 10.4.C.2.G – Requires the applicant to submit other approvals from other agencies (in
5 this case, water and sewer approvals from the City). Dep City Manager Brooks said these
6 applications have been filed with City Engineer Vincent that day on 27 January 2025.

7
8 Chair Faunce opened the public comment portion of the hearing. No one from the public spoke.
9 Chair Faunce closed the public comment portion of the hearing.

10
11 Mr. Corwin explained the waivers from Section 10.2.F and Section 12.3 that are requested by the
12 applicant. He suggested these waivers be discussed and approved at the outset of the discussion
13 of the other waivers.

14
15 The group discussed each DRAFT condition of approval at length.

16
17 In particular, they discussed Condition #14 (regarding the owners' association documentation
18 being provided to the Planning and Development Department for review and approval by the
19 City's legal counsel). The group considered how to satisfy this condition, given that the City is
20 the applicant, and its legal counsel is preparing the documentation. They considered alternatives,
21 including forming an LLC with-in which the City has the retains 100% ownership, and They also
22 also discussed whether to have other-alternative legal representatives to review the
23 documentation, perhaps non-involved members of the same legal team.

24
25 The group also discussed-assessed Condition # 21 (regarding third-party inspections) and
26 whether the reviewing engineer (in this case, Mr. Vincent) could conduct the inspections in order
27 to save the cost of hiring an outside inspector. The group agreed to add it-this as an option to
28 Condition #21.

29
30 NOTE: The language for conditions finalized during this discussion was approved in lieu of
31 reading it into the record during the reading of the motion. For this minutes document, the
32 conditions are included within the body of the motion. See Page pages 7 of 13 to 11 in this
33 document for the full list of the conditions of approval.

34
35 ***A MOTION was made by Kellen Appleton that for the application of the City of Lebanon,***
36 ***PB2025-04-FMAJSPRCUP, the Lebanon Planning Board approves a waiver per Section***
37 ***10.2.F of the Subdivision Regulations to waive the requirement for Design Review, and in***
38 ***support therefore, finds that because the proposed 5-unit cottage development does not involve***
39 ***the creation of any new lots or streets, preliminary review per Section 10.2 is not required.***

40
41 ***The MOTION was seconded by Patrick Kennelly.***

42
43 ***Roll Call Vote:***

44 ***Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms.***
45 ***Appleton***

46 ***Voting Against – None***

47
48 ****The MOTION was approved (7-0).***
49

1
2 *A MOTION was made by Patrick Kennelly that the Lebanon Planning Board finds the*
3 *application of the City of Lebanon for Final Major Subdivision approval of a proposed 5-unit*
4 *cottage development, PB2025-04-FMAJSPRCUP, is not scattered and premature per Section*
5 *12.3 of the Subdivision Regulations and that, based on the totality of the application*
6 *information, materials, evidence, and testimony submitted to and reviewed by the Board, the*
7 *amount of development contained in the proposed subdivision in relation to the quantum of*
8 *services available will not pose a danger to the public through insufficiency of services.*
9

10 *[12.3 Statement as to Impact of Subdivision and Determination of Whether or Not Premature*
11 *or Scattered*

12 *A. Purpose: The purpose of this section is to require the subdivider to provide information to*
13 *the Planning Board with regard to the impact of the subdivision and such other*
14 *information as to allow the Planning Board to make a determination as to whether or not*
15 *the proposed subdivision will be premature or scattered.*
16

17 *B. Areas of Study and Information: The following areas shall be considered in such studies*
18 *and such information provided to the Board to determine the effect of the proposed*
19 *subdivision. The Planning Office may provide administrative guidelines to assist the*
20 *subdivider in providing appropriate information.*

- 21 *1. Statement of impact of the proposed development on natural resources and*
22 *environmental quality including, but not limited to, water quality, air quality, wetlands,*
23 *soil erosion and agricultural soils and a statement of pollution control and*
24 *environmental impact mitigation measures.*
- 25 *2. Capacity of the school system; effect on school bus transportation and distance of the*
26 *proposed subdivision from the nearest elementary school.*
- 27 *3. Adequacy of streets and/or sidewalks in the general area of the subdivision including*
28 *major intersections providing access, and such other areas as requested by the Board.*
- 29 *4. Sufficiency, availability and capacity of utility services to provide water, fire*
30 *protection, and sewer, and further, the impact of the subdivision on the municipal solid*
31 *waste disposal facilities.*
- 32 *5. (If applicable) The impact of on-site subsurface sewage disposal systems as to adjacent*
33 *wells, water supply systems, and any known aquifers so designated by the United States*
34 *Geological Survey.*
- 35 *6. Any special fire, police and public safety problems due to location and/or special*
36 *conditions relative to the type of use.*
- 37 *7. Impact of drainage from the subdivision on abutting properties and potential drainage*
38 *problems both on the site of the subdivision and downstream from the subdivision.*
- 39 *8. Fiscal impact statement analyzing the impact of the subdivision on municipal, school*
40 *and county revenues and expenditures, including estimated potential tax revenue and*
41 *estimated number of school children.*
42

43 *C. Prohibition of Approval of Scattered or Premature Subdivisions:*

44 *The Planning Board shall not approve a subdivision if such subdivision constitutes premature*
45 *or scattered subdivision as would involve danger or injury to health, safety or prosperity by*
46 *reason of the lack of water supply, drainage, transportation, schools, fire*
47 *department, or other public services or necessitate an excessive expenditure of public funds for*
48 *the supply of such services. If a subdivision is determined by the Planning Board to be*
49 *premature and scattered, the subdivider may show through both on- and off-site improvements*

made at the expense of the subdivider, that the subdivision is not premature or scattered or, if so, is overcome by remedial action of the subdivider.

D. Board's Determination as to Premature or Scattered:

The Board shall determine based on the information presented and other information available and made part of the record whether or not the amount of development contained in the proposed subdivision in relation to the quantum of services available will pose a danger to the public through insufficiency of services.]

The MOTION was seconded by Jeremy Rutter.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

*The MOTION was approved (7-0).

A MOTION was made by Kellen Appleton that:

At duly-noticed meetings of the Lebanon Planning Board held on January 13, 2025, and January 27, 2025, there appeared representatives on behalf of the City of Lebanon regarding 0 Barrows Street (Tax Map 77, Lot 106), zoned R-3, requesting a Conditional Use Permit per Sections 310.2 and 509 of the Zoning Ordinance for a proposed 5-unit cottage development. 2025-04-FMAJSPRCUP

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Planning Board makes the following findings of fact:

1. The City of Lebanon intends to develop property it owns at the end of Barrows Street with a 5-unit cottage development and related site improvements. The units are intended to be sold and the property and site improvements will be owned and maintained by a condominium association.
2. The project does not constitute a “governmental use” as defined in NH RSA 674:54, I, and is therefore fully subject to the City’s land use regulations.
3. A “cottage development” is a type of planned development that is allowed by Conditional Use in the R-3 District per Section 310.2 of the Zoning Ordinance, subject to the criteria set forth in Section 509.
4. In order to grant the requested Conditional Use Permit, the Board must find that the project satisfies the cottage development criteria set forth in Sections 509.1 through 509.6 of the Zoning Ordinance and must also find that the project satisfies the general Conditional Use criteria set forth in Section 302.4.D.

II. CONCLUSIONS OF LAW

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Planning Board concludes the following with respect to the Enhanced Performance Standards set forth in **Section §302.4.D** of the Zoning Ordinance and the cottage development criteria set forth in **Section §509** of the Zoning Ordinance:

1. The site is suitable for the proposal. (§302.4.D.1)
2. The external impacts of the proposed use on abutting properties and the neighborhood **is-are** commensurate with the impacts of adjacent existing uses or other uses permitted in the zoning district. (§302.4.D.2)
3. The proposed layout and design of the site **is-are** not incompatible with the established character of the neighborhood and shall mitigate any external impacts on abutters, the neighborhood, and nearby public ways and infrastructure. (§302.4.D.3)
4. The design of the new buildings **are-is** not incompatible with the established character of the neighborhood. (§302.4.D.4)
5. The proposed use and layout of the site, including all related development activities, **does** to the greatest extent practicable preserve identified natural, cultural, historic, and scenic resources on the site and shall not degrade such identified resources on abutting properties. (§302.4.D.5)
6. The proposed use is allowed by conditional use on the proposed property. (§509.2)
7. The proposed number of cottages meets the minimum required and maximum permitted, **and they** are located in a cluster containing a minimum of 3 units. (§509.3)
8. The lot exceeds the 40,000 sq. ft. minimum lot size for cottage developments in the R-3 District. (§509.4)
9. The proposed development meets the density requirement of 2,500 sq. ft. of lot area per cottage and the maximum building coverage requirement of 35%. (§509.5)
10. The plan set for the proposed development delineates a building site for each detached cottage of no less than 1,500 sq. ft. (§509.6.A)
11. At least 50% of the cottages in the development will be detached units. (§509.6.B)
12. The minimum setback between units within the development will be at least 10 feet, measured from the nearest point of the exterior walls. (§509.6.C)
13. The proposed development will meet the common open space requirements for cottage developments, including the requirements that a minimum of 400 square feet of common open space per cottage and per cluster is provided, that the common open space area for each cluster is contiguous and will abut all of the cottages in the cluster, and that the cottages will be oriented around and have their main entry from the common open space. (§509.6.D)
14. The cottages will meet the requirement that the highest point of a cottage not exceed 24 feet, and the requirement that each cottage have an unenclosed, covered front primary entry and porch of at least 60 square feet in size, oriented toward a common open space. (§509.6.E)
15. The proposed development will meet the parking location and screening requirements for cottage developments, with (a) parking areas and driveways complying with applicable minimum yard requirements for the underlying zone, (b) parking areas screened from public streets and adjacent residential uses by landscaping or architectural screening, (c) no parking areas within the minimum required front yard, and (d) parking areas separated from the common open space by landscaping or an architectural screen. (§509.6.F)
16. The proposed development will meet the requirement that all cottages within 50 feet of

a public street shall have **street-facing** facades that avoid blank **walls**, and that for all such cottages, a minimum of 25 percent of the **street-facing** façade shall be comprised of windows and/or glass doors. (§509.6.H)

II. DECISION

Now therefore be it resolved that the Planning Board, on this 27th day of January, 2025, hereby grants the request of the City of Lebanon for a Conditional Use Permit per Sections 310.2 and 509 of the Zoning Ordinance for a proposed 5-unit cottage development, as set forth above and per testimony, plans, and materials submitted.

The MOTION was seconded by Jeremy Rutter.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

*The MOTION was approved (7-0).

Chair Faunce reminded the group that the waiver requests had been discussed at length during the January 13, 2025 meeting. Mr. Corwin suggested the Board make one motion to approve the requested waivers in the appropriate sections of the Site Plan Regulations and Subdivision Regulations.

A MOTION was made by Jeremy Rutter that, for the application of the City of Lebanon, 2025-04-FMAJSPRCUP, the Lebanon Planning Board approves partial waivers from the following sections of the Site Plan Review Regulations and Subdivision Regulations:

Section 5.1.E.7 of the Site Plan Review Regulations

Sections 5.1.E.8 + 5.1.E.15 of the Site Plan Review Regulations

Sections 5.1.E.16 + 6.2.B of the Site Plan Review Regulations

Section 6.2.D.1 of the Site Plan Review Regulations

Section 6.5.C.1 of the Site Plan Review Regulations

Section 6.5.C.2 of the Site Plan Review Regulations

Section 10.4.C.2.D of the Subdivision Regulations

Sections 12.2.F + 12.8.A of the Subdivision Regulations

Section 12.3 of the Subdivision Regulations

Section 10.4.C.2.B of the Subdivision Regulations

Section 14.4.C of the Subdivision Regulations

Section 10.4.C.2.G of the Subdivision Regulations

The MOTION was seconded by Andrew Faunce.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

1
2 **The MOTION was approved (7-0).*
3

4
5 *A MOTION was made by Kellen Appleton that the Lebanon Planning Board approves the*
6 *application of the City of Lebanon regarding 0 Barrows Street (Tax Map 77, Lot 106), zoned*
7 *R-3, 2025-04-FMAJSPRCUP, for Site Plan Review and Major Subdivision approval to*
8 *construct a proposed 5-unit cottage development, together with parking, utilities, landscaping,*
9 *and other related site improvements as shown on a plan set titled “Barrows Street Cottage*
10 *Development,” dated December 9, 2024, last revised January 8, 2025, including any and all*
11 *submissions and testimony provided for and during the public hearing.*
12

13 *In support of its decision, the Board finds that the applicant has submitted plans, testimony,*
14 *technical data, information, reports, and studies – variously prepared by a professional civil*
15 *engineer, licensed land surveyor, wetlands scientist, architect, and licensed landscape architect*
16 *– that together satisfactorily demonstrate compliance with the applicable requirements of the*
17 *Site Plan Review Regulations and Subdivision Regulations, except as may reasonably be*
18 *addressed through the imposition of certain conditions of approval, as set forth below, and*
19 *except as may have been waived.*
20

21 *This approval is subject to the following conditions:*
22

23 **General Conditions**
24

- 25 1. *This approval shall automatically expire and be deemed void upon failure to meet any of*
26 *the conditions of approval set forth herein within the timeframes specified. It shall be the*
27 *applicant’s responsibility to be familiar with and aware of these conditions of approval,*
28 *and it shall be the applicant’s responsibility to satisfy these conditions of approval and to*
29 *satisfy them within the relevant timeframes outlined below.*
30
31 2. *The development is subject to the Zoning Ordinance adopted January 16, 2013, last*
32 *amended April 3, 2024, the Site Plan Review Regulations adopted May 13, 1991, last*
33 *revised January 23, 2023, and the Subdivision Regulations adopted May 13, 1991, last*
34 *revised June 28, 2021, which are the land use regulations in effect at the time the*
35 *application was submitted.*
36
37 3. *This approval shall be considered void unless all conditions precedent have been met, and*
38 *the subdivision plat (Sheet 28 of the approved plan set) has been recorded in the Registry*
39 *of Deeds, within two (2) years from the date of the Notice of Action (Section 7.12.B of the*
40 *Subdivision Regulations). The plat shall be recorded in accordance with Planning &*
41 *Development Department procedures.*
42
43 4. *“Active and substantial development,” as defined in Section 14.1.B.1.a of the Subdivision*
44 *Regulations, shall be achieved within two (2) years of the date of this approval (14.1.B.1.b),*
45 *subject to an extension if applied for by the applicant and if approved by the Planning*
46 *Board per Section 14.1.B.1.c. If active and substantial development is not achieved within*
47 *two (2) years of the date of the Planning Board’s approval, the development shall be*
48 *subject to any changes in the City’s land use regulations.*
49

5. *“Substantial completion,” as defined in Section 14.1.B.2.a of the Subdivision Regulations, shall be achieved within five (5) years of the date of this approval. If substantial completion is not achieved within five (5) years of the date of the Planning Board’s approval, the development shall be subject to any changes in the City’s land use regulations and the default provisions of Section 14.1.C shall apply.*
6. *All required landscape plantings shall meet the minimum size requirements for such plantings set forth in Section 6.2.B of the Site Plan Review Regulations at the time of installation.*
7. *The applicant shall implement and maintain NHDES Site Specific Best Management Practices before, during, and after construction.*
8. *Prior to the start of any construction activities on the property, erosion control measures, including edge-of-disturbance fencing if applicable, shall be installed and maintained before and during any site work, to be verified by the Reviewing Engineer or the City’s third-party inspector on site.*
9. *The property owner’s/owners’ association is responsible for the maintenance and operation of the stormwater management system in accord with the O&M plan, and such responsibility shall run with the land. (Section 6.6.H.2.b of the Site Plan Review Regulations).*
10. *All service areas and facilities including garbage and waste disposal containers, recycling bins, electrical and mechanical equipment such as transformers and compressors, meter clusters, and other utility elements must be screened in accordance with Section 6.2.B.8 of the Site Plan Review Regulations.*
11. *Changes to underground utilities that do not impact surface conditions may be approved administratively unless determined by the Reviewing Engineer and the Planning & Development Department to materially alter the development and the approved site plan, in which case such changes shall be reviewed pursuant to Article IX of the Site Plan Review Regulations.*
12. *Construction of the proposed parking enclosure shall be optional and may proceed at any time prior to or following substantial completion of the development provided that the parking enclosure is constructed in accordance with the approved plan set and in accordance with all applicable building and life safety code requirements in effect at the time of construction.*

Conditions Precedent to be Satisfied Prior to the Signing and Recording of the Plat, Prior to Application for a Building Permit, and Prior to the Start of Any Construction Activities

13. *The drainage analysis required per Sections 6.6.C.2.1 & 2 of the Site Plan Review Regulations shall be provided to the Reviewing Engineer for review and approval.*
14. *The owner’s association documentation required by Sections 10.4.C.2(d), 12.2.F, and 12.8.A of the Subdivision Regulations shall be provided to the Planning & Development Department for review and approval by the City’s legal counsel.*

15. The following conditions shall apply as may be determined applicable by the City and by the City's legal counsel:

- a. The applicant shall sign a Subdivision Agreement in accordance with Section 7.9.B of the Subdivision Regulations.
- b. Per Section 10.4.C.2.b of the Subdivision Regulations, cost estimates for the completion of all on- and off-site improvements which shall be subject to a Performance Security Agreement pursuant to Section 7.10.c shall be provided. Pursuant to Section 14.5 of the Subdivision Regulations, the applicant shall provide a Performance Bond for all required improvements, both on- and off-site, including but not limited to: roadway and parking improvements, landscaping, lighting, utilities, bike lane/shoulder improvements, stormwater improvements, and sidewalks in an amount considered adequate by the Department of Public Works, and in a form satisfactory to the City Attorney. The Performance Bond shall be secured by a surety bond, a letter of credit, or an escrow account. This requirement shall not apply if the required improvements are constructed prior to the recording of the plat.

16. The applicant shall obtain approval from the City Council or the City Manager's office for any additional water and/or sewer flows in accordance with the applicable Chapter 136 and 182 of the City Code.

17. The applicant shall make the following revisions to the plan set to the satisfaction of the Planning and Development Department:

- a. On Sheet 28 ("Overall Subdivision Plan" – L5.0):
 - i. The 15% open space required per Section 12.2 of the Subdivision Regulations shall be delineated.
 - ii. Add a note indicating how the open space will be owned, protected, and managed;
 - iii. Add the following as plan notes: "Per Section 13.14 of the Subdivision Regulations, there shall be no depositing, dumping, or storage of waste, or other natural or man-made material, supplies or equipment, on any subdivision land designated as open space," and, "Per Section 13.14 of the Subdivision Regulations, no work, or removal, or filling shall be done, nor shall the existing natural characteristics of open space land be altered from the original condition, until a site plan shall have been approved by the Board;" and.
 - iv. Add any other information necessary to prepare the sheet for recording.
- b. Amend the cover sheet to provide description of plan revisions (5.1.E.4.d of the Site Plan Review Regulations).

The applicant shall provide the Planning and Development Department a digital copy of the revised plan set saved in a PDF-A format for archival purposes.

18. The dwelling units shall be given addresses in accordance with City of Lebanon policies and procedures.

19. The applicant shall schedule and hold a pre-building permit application meeting with

1 the Planning and Development Department, City Building Inspectors, Reviewing
2 Engineer/Department of Public Works, and Fire Department, in order to help
3 streamline the building permit review process and to review applicable code
4 requirements.

5
6 Conditions to be Satisfied Prior to the Issuance of a Building Permit
7

8 20. As depicted on the approved plan set, appropriate easements shall be provided for the
9 maintenance of the sewer line, water line and hydrants within the site, to the
10 satisfaction of the Department of Public Works.

11
12 21. Prior to the start of any construction activities on the property for which construction
13 inspection is required pursuant to this decision or any applicable ordinance or code,
14 the City shall retain the services of an independent third-party inspector, for which the
15 applicant shall be responsible for all inspection fees related to (a) on-site work related
16 to sewer, water, temporary sedimentation and erosion control, and drainage
17 improvements, and (b) all off-site work within the City's right-of-way (including but
18 not limited to water and sewer), in accordance with Section 8.2 of the Site Plan Review
19 Regulations and Section 14.2 of the Subdivision Regulations. The applicant shall
20 provide funding for inspection services in a form and amount acceptable to the City
21 and shall sign an Infrastructure Inspection Agreement. In the alternative, the
22 Reviewing Engineer may provide the required inspection services, depending on the
23 Reviewing Engineer's availability.

24
25 22. If required by the Department of Public Works, the applicant shall apply for and obtain
26 an Excavation Permit, Driveway Permit, and Stormwater Permit.

27
28 23. Prior to the start of any construction activities on the property, the applicant shall
29 record in the Grafton County Registry of Deeds notice of the stormwater management
30 and erosion and sediment control plans as required per Section 6.6.H.2.d of the Site
31 Plan Review Regulations. Such notice shall be reviewed by the Planning &
32 Development Department prior to recording.

33
34 24. The development shall be subject to City of Lebanon Impact Fees, pursuant to Section
35 213 of the Zoning Ordinance. The Impact Fee shall be calculated at the time of
36 Building Permit issuance based on the Impact Fee Schedule adopted on May 20, 2024.
37 In accordance with RSA 674:39, the approved site plan shall be exempt from any
38 future changes in impact fees and methodology for five years from the date of
39 approval; however, any building permits which are issued after the end of that five-
40 year period shall be fully subject to whatever impact fees and methodology are in effect
41 at the time of building permit issuance.

42
43 25. All water and sewer fees shall be paid as set forth in City Code Chapter 68.

44
45 26. Prior to the start of any construction activities on the property, the applicant shall
46 obtain or update (if appropriate) any required Federal or State approvals.

47
48 Conditions to be Satisfied Prior to the Issuance of a Certificate of Occupancy
49

27. *Sheet 28 (“Overall Subdivision Plan” – L5.0) of the approved plan set shall be recorded at the Grafton County Registry of Deeds pursuant to Condition of Approval #3. Prior to recording, the plat shall be revised as necessary for recording purposes, in consultation with the Planning and Development Department, and shall be signed by the Planning Board Chair.*

28. *The applicant shall prepare and record an open space covenant or deed restriction in accordance with Section 12.2.D of the Subdivision Regulations ~~and that~~ shall be in form and content acceptable to the Planning and Development Department and the City Attorney.*

29. *The impact fees calculated pursuant to Condition of Approval #24 shall be paid.*

30. *The site contractor will produce as-built drawings to the Reviewing Engineer’s satisfaction. Record drawings in a CAD .dwg format, using the NH State Plane Coordinate System, including tie sheets, shall be reviewed and approved by the Reviewing Engineer.*

31. *Except as set forth in Condition of Approval #12 above, all improvements depicted on the plan shall be completed, and shall be constructed as depicted on the approved plan, including any modifications to the plan as may be approved by the Planning Board in accordance with the Site Plan Review Regulations and Subdivision Regulations.*

The MOTION was seconded by Jeremy Rutter.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

**The MOTION was approved (7-0).*

At 8:12pm, Chair Faunce called for a brief recess.

At 8:20pm, The meeting resumed.

3. STUDY ITEMS

A. Zoning Amendment Concise Statements

Mr. Corwin explained Section 1000.4.C of the Zoning Ordinance, which allows the City Council, the Planning Board, and the Conservation Commission each to provide a brief statement for any proposed zoning amendments that are included on the March ballot. He said the statements are intended to help voters understand the proposed zoning amendments in their totality.

Mr. Corwin also reviewed the City Council’s statements, which had already been crafted and approved for the ballot.

1 *A MOTION was made by Eric Stacy to extend the meeting to 9:45pm. The MOTION was*
2 *seconded by Jeremy Rutter.*

3
4 **Roll Call Vote:**

5 *Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms.*
6 *Appleton*

7 *Voting Against – None*

8
9 **The MOTION was approved (7-0).*
10 _____

11
12 After much discussion, the Planning Board finalized the following three statements to be added
13 to the proposed Zoning Amendments for the March ballot:

14
15 **Amendment 1 – Creation of a Pattern Zone Overlay District**

16 *“The Planning Board endorses this amendment. This amendment encourages development of*
17 *architecturally designed homes in downtown areas to increase housing opportunities, grow the*
18 *tax base, and reduce individual tax burdens.”*

19
20 **Amendment 2 – Rezoning of Alice Peck Day Hospital’s campus from R-3 to MC-2 District**

21 *“The Planning Board endorses ~~the~~ this amendment. Changing the zone to MC-2 supports the*
22 *current medical center use at APD and facilitates the possibility of addressing the need ~~to~~ for*
23 *staff housing on the APD campus.”*

24
25 **Amendment 3 – Amend Use Tables in R-1, R-2, and R-3 Districts to allow “Recovery**
26 **Houses” as a use by Special Exception**

27 *“The Planning Board endorses ~~the~~ this amendment. Allowing recovery houses by special*
28 *exception in the R1, R2, and R3 districts ensures that those in need are housed in certified*
29 *facilities. This not only aids recovery for the occupants but also safeguards neighborhoods from*
30 *nuisances arising from improvised and unregulated group housing.”*

31 _____
32
33 *A MOTION was made by Andrew Faunce to extend the meeting to 9:50pm. The MOTION*
34 *was seconded by Eric Stacy.*

35
36 **Roll Call Vote:**

37 *Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms.*
38 *Appleton*

39 *Voting Against – None*

40
41 **The MOTION was approved (7-0).*
42 _____

43
44 Chair Faunce said that Staff should make tweaks to the language of the statements if needed for
45 accuracy.

46
47
48 Chair Faunce called for a voice vote to approve the statements as they had been crafted during
49 the discussion.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

***The MOTION was approved (7-0).**

4. ADJOURNMENT

A MOTION was made by Andrew Faunce to adjourn the meeting at 9:49pm. The MOTION was seconded by Jeremy Rutter.

Roll Call Vote:

Voting For – Ms. Romano, Mr. Stacy, Ms. Zook, Mr. Kennelly, Mr. Faunce, Mr. Rutter, Ms. Appleton

Voting Against – None

***The MOTION was approved (7-0).**

The meeting was adjourned at 9:49pm.

Respectfully submitted,

Paula Roux

Recording Secretary