



**LEBANON BUILDING CODE BOARD OF
APPEALS
MONDAY, JULY 28, 2025 - 7:30 PM OR
IMMEDIATELY FOLLOWING THE ZONING
BOARD MEETING
COUNCIL CHAMBERS, CITY HALL OR
REMOTE VIA VIRTUAL PLATFORM
LEBANONNH.GOV/LIVE**

-
- 1. Call to Order**
 - 2. Approval of Minutes**
 - A. None
 - 3. Public Hearing Items**
 - A. **XYZ Dairy, LLC, 0 River Park (Tax Map 44, Lot 21), Zoned CBD:**
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 is invalid due to work having been suspended for more than 180 days and the denial of an extension request. **BCBA2025-01**
 - 4. Staff Comments**
 - 5. Adjournment**

The order of agenda items is subject to change.

Meetings are open for in-person and remote attendance. Members of the public who wish to attend remotely may do so by going to [LebanonNH.gov/Live](https://lebanonnh.gov/live) where you will find instructions on how to enter the meeting. Members of the public will be able to participate and ask questions through the City's virtual platform or by phone. Please note: Should technical difficulties occur during the meeting that disrupt virtual or phone connection(s), the meeting will continue without remote access capabilities.

Any person with a disability who wishes to attend this public meeting and needs additional accommodation, please contact the ADA coordinator at City Hall by calling 603-448-4220 at least 72 hours in advance so that the City can make any necessary arrangements.

If you have any questions or would like to view the files for the application identified above, please contact the Planning & Development Department by sending an e-mail to planning@lebanonnh.gov, or by calling 603-448-1457, or by visiting the Planning and Development Office located in City Hall during regular work hours, Monday through Thursday, 7AM to 5PM. The application materials will also be posted to the City's website at [LebanonNH.gov/Agendas](https://lebanonnh.gov/Agendas).

**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: Leigh Hays, Chief Building Official & Health Officer,
(Name/Title of Official)
made on this date: May 30, 2025.

(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 work has been suspended
for more than 180 days and the permit has become invalid, and denying the request for extension.

In Relation to Article(s): _____, Section(s): _____ of the City of Lebanon Zoning Ordinance.

**CITY OF LEBANON
ZONING BOARD OF APPEALS
APPLICATION**

SPECIAL EXCEPTION ☐	☐ BUILDING CODE BOARD OF APPEALS
WETLANDS SPECIAL EXCEPTION ☐	☒ APPEAL OF AN ADMIN DECISION
VARIANCE ☐	☐ REHEARING REQUEST
EQUITABLE WAIVER ☐	☐

PROPERTY OWNER (APPLICANT):

NAME: XYZ Dairy, LLC

TEL.#: [REDACTED]

MAILING ADDRESS: PO Box 310, Etna, NH 03750

E-MAIL ADDRESS: [REDACTED]

CO-APPLICANT, AGENT, OR LESSEE:

NAME: Lyme Properties 2, LLC

TEL.#: [REDACTED]

MAILING ADDRESS: PO Box 310, Etna, NH 03750

E-MAIL ADDRESS: [REDACTED]

PROJECT LOCATION:

TAX MAP #: 44

LOT#: 21

PLOT #:

ZONE: CBD

STREET ADDRESS:

IS THIS PROPERTY LOCATED IN THE: **WETLANDS** ☐ YES ☒ NO **HISTORIC DISTRICT** ☐ YES ☐ NO
FLOOD PLAIN ☐ YES ☒ NO

REQUEST DESCRIPTION:

Phase 1 of River Park, 64,000 SF Mixed-Use Building. Lebanon Building Permit #2016-00293

USE TYPE:

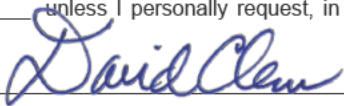
EXISTING: ☒ VACANT ☐ ONE FAMILY ☐ TWO FAMILY ☐ MULTI-FAMILY ☐ COMMERCIAL ☐ INDUSTRIAL

PROPOSED: ☐ VACANT ☐ ONE FAMILY ☐ TWO FAMILY ☐ MULTI-FAMILY ☒ COMMERCIAL ☐ INDUSTRIAL

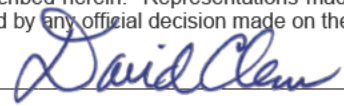
If use is **COMMERCIAL OR INDUSTRIAL** please note specific use: Life Science Research, Office, Childcare, Retail

SIGNATURE BLOCK:

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 August 4, 2025 unless I personally request, in writing, that the Board delay its determination of completeness to a later date.

Owner Signature:  DATE: June 26, 2025

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.

Owner Signature:  DATE: June 26, 2025

⁰⁰²
DATE RECEIVED:

APPLICATION #:

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 PO BOX 310 ETNA, NH 03750	Applicant, Co-Applicant, Agent, or Lessee: LYME PROPERTIES 2, LLC PO BOX 310 ETNA, NH 03750
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 & 58-92
193 NMWL LLC PO BOX 310 ETNA, NH 03750	CAESD LLC PO BOX 310 ETNA, NH 03750

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 162 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
KCC COMMERCIAL LLC 32 LEBANON ST, STE A HANOVER, NH 03755	CUMMINGS, SANDRA L 66 CRAFTS AVE WEST LEBANON, NH 03784
Map & Lot Number: 58-27 & 58-97	Map & Lot Number: 44-3
MCINTYRE, JOHN 11 WOLFEBORO ROAD ETNA, NH 03750	FRIENDS OF RIVER PARK 57 MAIN STREET WEST LEBANON, NH 03784
Map & Lot Number: 58-98	Map & Lot Number:
CITY OF LEBANON 51 NORTH PARK ST LEBANON, NH 03766	

(Revised 2/8/2024)

FEE SCHEDULE ZONING BOARD OF ADJUSTMENT

SPECIAL EXCEPTION:		
		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

VARIANCE:		
		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

APPEAL OF ADMINISTRATIVE DECISION:		
		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x 19 notices	105.26
TOTAL DUE		\$505.26

REHEARING REQUEST:		
*Per section 802.5 of the Zoning Ordinance		TOTALS
FILING FEE	\$100.00	\$100.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

REHEARING:		
*Application fee waived if Board made a prejudicial technical or legal error in its original decision		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

EQUITABLE WAIVER OF DIMENSIONAL REGULATIONS:		
		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

BUILDING CODE BOARD OF APPEALS:		
		TOTALS
FILING FEE	\$300.00	\$300.00
ADVERTISING FEE	\$100.00	\$100.00
CERTIFIED NOTIFICATION FEE*	\$5.54	
	x notices	
TOTAL DUE		\$

* See Certified Notification List for notification requirements and definitions. Certified notification fee updated 7/15/2024.

STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

XYZ Dairy, LLC

v.

City of Lebanon, NH, et al.

Docket No. 215-2024-CV-00311

**AFFIDAVIT OF DAVID CLEM IN SUPPORT OF
PLAINTIFF XYZ DAIRY LLC'S EMERGENCY MOTION FOR TRO, PRELIMINARY
INJUNCTION, A FINDING OF CONTEMPT, AND A WRIT OF MANDAMUS**

I, David Clem, state the following under oath based on my own personal knowledge or information and belief:

1. I am the Manager of XYZ Dairy, LLC ("XYZ"), and the founder and managing partner of Lyme Properties Inc. ("Lyme Properties"), which is XYZ's development manager for the River Park project in West Lebanon New Hampshire (the "Project"). I have been a real estate developer for most of my professional career, and my company Lyme Properties has permitted, developed, and leased over three million square feet of space, including Genzyme Center in Cambridge, Massachusetts, and the Center for Life Science in Boston's Longwood Medical Area.

2. In terms of my background, I received my A.B. degree from Dartmouth College in 1971, thereafter did graduate work at MIT in Cambridge, MA and was elected to the Cambridge City Council in 1975, served as Chief of Staff to then Lt. Governor of Massachusetts Thomas P. O'Neill III from 1978 to 1980, retired from full-time work in 2007, and since then have continued to oversee the operations of my company Lyme Properties, concentrating on mixed-use projects with a life science component such as the project in issue in this case, River Park.

3. I have previously testified to this Court in the preliminary injunction hearings in this case on October 17 and October 25, 2024, and reviewed this Court's November 25, 2024 decision reinstating XYZ's building permit, and extending its site plan approval for 11 months, shortly after it was issued. Based on the decision, I immediately began planning for and taking steps to recommence the construction of the River Park Project.

4. To that end, in mid-December of 2024, I contacted Engelberth Construction, Inc. ("Engleberth"), one of the largest commercial builders in Northern New England, to restart construction of the as-planned and approved mixed-use office/research building on Lot 1 of the Project site (the "Building"). I then had a series of on-site meetings with Engelberth, and its subcontractor Notts Excavating ("Notts"), in Dec. 2024 and early Jan. 2025, to discuss this work.

5. The first stage of the work was going to be installing the necessary construction fencing, entryways, and staging areas, and then proceeding to excavate the foundation area of the Building in accordance with the geotechnical excavation requirements of the Building Permit that I obtained for XYZ in 2019, which included the excavation specs and requirements shown below:

**Table 1704.7
Required Verification and Inspection of Soils**

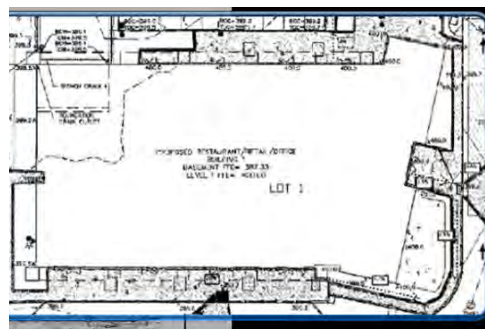
Verification and Inspection Task	Frequency of Inspection	Agent
1. Verify materials below shallow foundations are adequate to achieve the design bearing capacity.	Periodic	GER
2. Verify excavations are extended to proper depth and have reached proper material.	Periodic	GER
3. Perform classification and testing of compacted fill materials.	Periodic	GER
4. Verify use of proper materials, densities and lift thicknesses during placement and compaction of compacted fill.	Continuous	GER
5. Prior to placement of compacted fill observe subgrade and verify site has been prepared properly.	Periodic	GER

APPLICATION FOR PROPOSED EXCAVATION

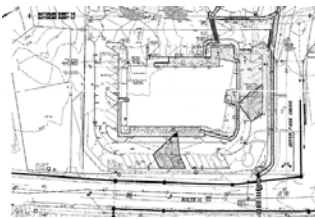
Applicant Name: David Clem
 Company: XYZ Dairy, LLC
 Mailing Address: 57 Main Street,
 West Lebanon, NH 03784

The area to be disturbed is approximately:

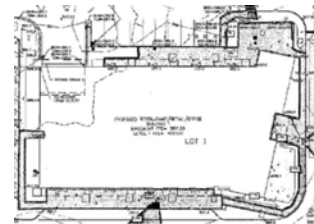
220	feet in length
165	feet in width
15	feet in depth



6. This work commenced during the week of January 6, 2025, and actual excavation of the foundation for Building 1 commenced during the week of January 13, 2025 as shown in the below photographs of portions of that work, some taken later and some taken at the time, and some of the corresponding parts of the Building Permit requirements:



APPLICATION FOR PROPOSED EXCAVATION	
Applicant Name:	David Clem
Company:	XYZ Dairy, LLC
Mailing Address:	57 Main Street, West Lebanon, NH 03784
The area to be disturbed is approximately:	
	220 feet in length
	165 feet in width
	15 feet in depth



7. While this work authorized by the Building Permit was ongoing, XYZ's contractors were making preparations to bypass, into a new temporary drainage line during construction, an old stormwater pipe that the City had installed underneath the Property years ago without an easement or permission of the Owner. That pipe, which was decaying, was located underneath the area where the new Building 1 was to be located, and had to be removed before the excavation

could be dug down to its required depth, and foundation of Building 1 poured. XYZ had already obtained an Alteration of Terrain (“AoT”) permit from New Hampshire Department of Environmental Services (“NHDES”) authorizing it to make the bypass, and to remove the old stormwater pipe, and did not require any other permit from the City, which had a received copy of the AoT permit for its files years earlier.

8. The City had been aware of the bypass work we had to do to construct Building 1 for years, was notified of it again by XYZ’s subcontractor Notts during the week of January 13, 2025, and at that time, according to newly produced City emails that I have just seen, reviewed and approved the slope of the temporary drainage line, and did not object to it in any way. My understanding then was that the bypass to the temporary line was to be performed early the next week, followed by continued excavation and pouring of concrete for Building 1. I was excited that after so many years of difficulty, we were about to make significant new progress at River Park.

9. Late in the afternoon on Tuesday of the following week, January 21, 2025, however, I was informed by Engelberth, to my shock and disappointment, that without copying or notifying XYZ (or Lyme Properties, or me), and without any advance warning, or attempt to discuss the matter, and without citing any law or regulation allowing him to do so, the City Engineer Brian Vincent had sent an email only to XYZ’s excavation subcontractor Notts, ordering that before the temporary connection to the bypass could be made the City would “require” a 30 foot wide easement for the length of the entire temporary bypass pipe system, to which the City had no right and which the subcontractor could not provide, plus “a \$100,000 performance bond,” to which the City also had no right, to cover what he called “potential maintenance,” which the subcontractor also could not provide.

10. In response, I requested and was sent a copy of the email Vincent had sent to Notts on January 21, 2025 from Engelberth, who had in turn obtained its copy from Notts Excavating.

A copy of that email is attached hereto as *Exhibit A*. The effect of this communication being sent to our subcontractor was that the subcontractor, who does a lot of work in and for the City, would not proceed to perform the bypass of the old city stormwater pipe that was essential for all our construction of Building 1 to further proceed. This, in turn, shut down all our planned construction efforts that month, and forced XYZ to suspend construction of the River Park project generally, because it precluded us from bypassing the obstructing City stormwater drain.

11. It was clear to me at the time, and it is certainly clear now having seen recently-produce City internal records about River Park, that this action by the City was intended, in direct violation of this Court's November 25, 2024 order, to unexpectedly disrupt and delay XYZ's just-resumed on-site work, and confuse and paralyze its key subcontractor, so that the City could begin to "run out the clock" on the time allowed to XYZ by this Court to get the Project moving again under a reinstated building permit and an extended site plan approval .

12. Negotiations of any kind with the City usually took months, and because the City had no easement rights in the old stormwater pipe being removed, it had no right to demand that they be created as to a temporary pipe being employed to accomplish that removal. It also had no right to demand a one hundred thousand dollar (\$100,000) bond to secure "performance" of a temporary drainage pipe. It was therefore clear to us at the time that the City sent the demand to XYZ's subcontractor not to actually obtain these things, but to shut down the work by putting pressure on the subcontractor not to proceed with the stormwater drain bypass, which it did.

13. But there is something else. I believe that the City's clear intent in making this last-minute, unexpected demand, directly to XYZ's on-site contractor without copying XYZ, was to subvert the Court's Nov. 25, 2024 Order granting XYZ a preliminary injunction, which the City officials knew was intended to allow XYZ to proceed with construction, because they were well aware that XYZ's local contractors would immediately cease work in the face of the demand,

which they did. I believe City officials also knew that by not copying or alerting XYZ of their demand, it would cause confusion and disorganization at the construction site, and deprive XYZ of the chance to quickly respond, which in fact happened.

14. Once I learned of the City's action, I protested to the City, in a letter dated January 24, 2025, attached hereto as ***Exhibit B***, telling Vincent that I considered this action to be "another example of bad faith action on the part of Lebanon municipal employees," particularly after the Court had reverse the City's previous termination of XYZ's building permit and that "your recent communication to our contractor denying the temporary connection makes the construction of one River Park impossible," and that "I doubt you acted unilaterally in denying the connection of the temporary stormwater line on XYZ property."

15. It took a full week for the City to respond, and when it did, it responded with a letter that appeared to be from the City Engineer Vincent, attached hereto as ***Exhibit C***, but that its internal records later showed was written by the same group of City officials, including the City Manager Mulholland and Deputy City Manager Brooks, that have been trying to kill the River Park Project for years. The letter admitted that Vincent "did not act unilaterally" in issuing his email order to XYZ's subcontractor, argued about what the supposed "purposes" of the demanded easements and \$100,000 bond "would be," but provided no explanation of what right the City had to demand them in the first place, or why the City tried to do so in this abrupt and malicious way, shutting down XYZ's construction until it got them.

16. The letter also completely ignored the City's intentional act in sending the Jan. 21, 2025 work stoppage email **only to XYZ's subcontractor**, who could not provide any of the items listed, but could only stop work, which it did. Obviously this was the City's intention, and it worked, and in the months that followed, the City and its officials repeatedly used the January

2025 work stoppage **that the City itself had caused** on the River Park project against XYZ in Planning Board proceedings, meetings, and other public settings.

17. This negative publicity, and work stoppage itself, and all of the City’s misconduct over the last two years as described in XYZ’s Amended Complaint, and in the memorandum filed in support of XYZ’s current motion, both of which I have read and believe are accurate accounts of the what happened, have had a terribly negative effect on the marketability of the River Park property from which it has become impossible to recover unless XYZ again has its Building Permit reinstated, and its two-year Site Plan Approval period restarted.

18. XYZ’s Building’s Permit needs to be reinstated **again** because in his attached letter to me of May 30, 2025 marked ***Exhibit D***, almost unbelievably, the City’s new building inspector, Leigh Hays (“Hays”) -- obviously directed, as the previous building inspector was in 2023 and 2024, by the same City officials who have been conspiring to shut down the Project for years, including Nathan Reichert, Timothy Corwin, David Brooks, Shaun Mulholland, and Brian Vincent -- **has again wrongfully declared XYZ’s building permit “invalid”** – in complete disregard of this Court’s Order of November 24, 2024 reinstating that Permit after the City wrongfully declared it expired last year on February 1, 2024.

19. In an effort to cover up his and the City’s bad faith in again declaring XYZ’s building permit “invalid,” Hays has used an irrational and insupportable argument that the excavation work on the foundation of Building 1 performed by XYZ this past January 2025, which was authorized by specific excavation provisions in the Building Permit, as shown on pages 2-3, paragraphs 4-5, above, somehow is not “considered” by him to be “authorized by the permit” – and that XYZ should “apply for a new one.” But it is indisputable that this work **was** authorized by XYZ’s building permit – there are whole sections of the permit file with detailed excavation

and geotechnical requirements that XYZ was following in January 2025, including the dimensions and specifications for the foundation excavation itself.

20. Both the City and its new building inspector are fully aware of this because after I confirmed in writing to them on May 8, 2025, in a letter attached hereto as *Exhibit E*, that “XYZ re-commenced construction at River Park earlier this year, and this fact can be corroborated by municipal personnel of the city,” referring to XYZ’s commencement of construction on the site in January 2025, I received a response from Hays on May 15, 2025 (the drafts of which are missing from the City files produced to XYZ so far), attached hereto as *Exhibit F*, in which he said “I disagree with your statement that XYZ recommenced construction of the 1 River Park building in January 2025,” supposedly because

“I cannot reasonably consider this excavation to constitute “work” under the building permit,” because I do not find textual support in the Building Code to conclude that excavating a foundation hole, without more, requires a building permit. (I’m sure you would agree that if you dug a foundation hole while lacking a building permit, I would not be able to cite you for performing work without a permit.)

but this was not true, **because new excavation work does require permit** under New Hampshire law, specifically N.H. Rev. Stat. Ann. §155-E:2 Permit Required (“No owner shall permit any excavation of a earth on his premises without first obtaining permit a therefore ...”), and the geotechnical specifications and inspection for the Building 1 excavation that XYZ commenced in January of this year (2025) were specifically set forth in the XYZ’s Building Permit authorizing that excavation. So Hays’ argument was clearly a fabricated one with no support in the Building Code or anywhere else, but the City’s action threatens to destroy XYZ’s efforts to market the property successfully to the life sciences commercial tenants that we have been trying to obtain lease commitments from for years.

21. I responded to Hays’ fabricated argument in a letter back to him on May 16, 2025, attached to this affidavit as *Exhibit G*, strenuously objecting to it, and pointing out that “the work

we did in this past January 2025 and before that was physical work on-site in pursuit of the project described in our building permit... and “obviously does count purposes of the 180 day work requirement.” I also said:

In your letter, you seem to want to assume the power to decide what on-site physical work in pursuit of our project “counts” for purposes of the 180-day requirement, and to use that power to declare the permit expired unless we convince you otherwise. But you do not have that power, we do not have that obligation, and you are violating the law in trying to obstruct us in this way.

Exhibit G (emphasis added)

22. Then the following week, in a belt and suspenders approach, I sent Hays another letter, dated May 22, 2025, requesting, in the alternative, an extension of the Building Permit on account of XYZ having been delayed through matters not within its control, which is attached as ***Exhibit H***. But Hays and the City denied that as well in their attached ***Exhibit D*** letter of May 30, 2025 – despite the clear evidence that XYZ was delayed by the City’s actions in January 2025.

23. As a result, all the optimism and hope that we at XYZ had for the future of River Park following entry of the Court’s November 24, 2024 preliminary injunction order has been frustrated, our ability to promote the Project to prospective tenants has been stopped, and many opportunities to secure tenants are being lost right now because of this **third** wrongful declaration by the City that XYZ’s building permit is somehow expired or invalid, when it is not. And an administrative appeal will simply not be possible in time to prevent this irreparable harm, which is growing exponentially with every passing day.

24. The last administrative appeal in this matter took many months, and even after XYZ prevailed before the City’s own Building Code Board of Appeals, the City pursued the matter further to the state level, which it is clear it would do so here as well simply to delay the Project further, and kill XYZ’s opportunities in the marketplace. Also even if XYZ were to try an administrative appeal of the City’s May 30, 2025 invalidation of its building permit, it is clear that

the City will continue to attack the Project, and try to divert prospective tenants to other projects in which it has a financial interest - which we have clear evidence it has been trying to do for months.

25. I was shocked, for example, when I recently saw written confirmation from the City's own files, attached hereto as ***Exhibit I***, of a devastating fact that I had heard about several months ago – which is that while preliminary injunction proceedings in this case were ongoing in Court last November, City Manager Mulholland intentionally contacted the broker for our principal intended tenant at that time, a medical life sciences company, and falsely and maliciously told him that his client's intended use of commercial space at River Park would not be allowed, which was not true and was contrary to what he and the City had previously stated publicly, and that XYZ had no building permit, which was also not true and was being litigated at the time, and that this tenant should instead lease space at the Lebanon Airport-Tech Park TIF District, in which the City has a financial interest. This action damaged XYZ badly, and the risk of similar actions by the City, now that it is declared XYZ's building permit expired again, is real and imminent.

26. In addition, particularly over the last year, the City has coordinated its attacks on XYZ's building permit with a parallel strategy of improperly influencing its own Planning Board to improperly deny repeated and legitimate XYZ requests for site plan approval extensions to which it is clearly entitled, not only as a matter of law but also as a matter of basic fairness, in the face of the City officials' repeated attacks on and efforts to delay and disrupt the River Park project, and force XYZ to abandon it.

27. On June 9, 2025, for example, I attended a Planning Board meeting on behalf of XYZ to request reconsideration of the Board's March 17, 2025 decision to deny a two (2) year extension of our Site Plan Approval for the River Park Project based in part on (i) recently produced internal City e-mails concerning the Project, written by City officials who have also been

advising the Planning Board on all XYZ applications over the past 2½ years, showing that those officials have been severely biased against both XYZ and the Project during all that time; (ii) evidence that the Planning Board has been receiving and improperly relying on legal advice concerning XYZ and the Project from the same lawyer and law firm representing the City and its officials against XYZ in litigation and other matters; and (iii) evidence that the Chairman of the Planning Board, Andrew Faunce, who has played a key role in all its decisions against XYZ over the last two years, is demonstrably biased against the Project and XYZ.

28. Prior to the meeting, specifically on May 23, 2025, XYZ submitted a letter to the Planning Board, informing them that the “staff” of City officials on which they had been relying upon for factual information, legal opinions, and recommendations concerning XYZ and the River Park Project, including Messrs. Corwin and Reichert, are personally biased against the Project, and, as demonstrated by their internal e-mails, have been engaged for years with several other City officials in a conspiracy to delay, obstruct, and kill the Project. A copy of that letter from XYZ to the Board is attached as ***Exhibit J***.

29. At the outset of the June 9, 2025 Planning Board meeting, before representatives of XYZ even had a chance to speak, the Chairman of the Planning Board made an opening statement in which, among other things, he declared a “voiding” of the existing extension of XYZ’s Site Plan Approval, which this Court had ordered in its November 24, 2024 preliminary injunction order (describing it as an 11-month and 2 days extension, as shown on p. 2 of the transcript of that Hearing attached as ***Exhibit K*** hereto, supposedly on account of XYZ not having provided some “requested information” to the Board that **it** supposedly added as a condition to the extension, without notice to XYZ or the public, at a March 17, 2025 Board meeting that XYZ did not attend.

30. I was not aware at that time of any information that we had not already provided to the Planning Board, and internal City documents indicate that it knew it had no right to later

“condition” its compliance with Court’s preliminary injunction order of November 25, 2024 in this way. In short, this “determination” was a deliberate attempt to subvert that Order, and try to terminate the Court-ordered extension of the XYZ’s then-existing Site Plan Approval, on the basis of a “condition” subsequently invented by Planning Board staff to justify the action.

31. Importantly, recently produced internal City email records I have reviewed show that this determination by the Planning Board – that the one year extension of XYZ’s site plan approval was “void” – was made without any prior notice to XYZ or the public, in violation of the NH public meeting laws, and was intentionally referred to, but removed from the published agenda for the June 9, 2025 meeting, by City official Tim Corwin, the direct City advisor to the Planning Board, who said he would “confirm” it with the lawyer advising the Planning Board, Matthew Decker (“MD”), and later instructed the Planning Department’s administrative assistant to “leave it off the agenda” for the June 9, 2025 Planning Board meeting, which she then told him she would do in a revealing internal City email between them, attached as ***Exhibit L***, which reads:

I left this off the agenda for now:

- *Add a separate agenda item under “other business” re: **determination that one year extension approval is void?** – TC to confirm w/MD at 4/30 bi-weekly meeting.*
 - ***Please leave off the agenda for now.***

(emphasis added). This clearly shows that the intent of Corwin and the City was that this declaration by the Planning Board that the Court-ordered extension of XYZ’s site plan approvals was “void” would be announced with no prior notice to XYZ, and no formal vote of the Planning Board – and it was. The damage to XYZ, if this un-noticed, unlawful and flagrant violation of the Court’s order is allowed to stand for even a short period of time, will be incalculable, not only in terms of damage to XYZ’s reputation and financial standing, but to the public interest -- because XYZ will not be able to do anything further to resume the River Park Project, and it will fail after many years of effort, investment and public support.

32. Following the Planning Board Chairman's opening statement and above declaration that XYZ's extension was void, XYZ made a slide presentation to the Board, a copy of which is attached hereto as **Exhibit M**, presenting evidence and argument (i) that XYZ's building permit had been wrongfully declared expired by the City building inspector on May 30, 2025, warranting a two-year extension of XYZ's site plan approvals; (ii) that the Planning Board was supposed to be functioning in an independent, quasi-judicial capacity in reviewing XYZ's applications, but had been receiving and improperly relying on legal advice concerning XYZ and the Project from the same lawyer and law firm representing the City and its officials against XYZ in litigation and other matters, and (iii) that the Chairman of the Planning Board, Andrew Faunce, was demonstrably biased against the Project and XYZ based on evidence just produced by the City, and should consider recusing himself.

33. That presentation by XYZ took approximately 20 minutes, and at its conclusion, the Chairman of the Planning Board, Andrew Faunce, **formally recused himself from XYZ's case**, stating that "I'm going to take myself out, I'm recusing from this matter," and left the meeting room, returning only after the hearing of XYZ matters was concluded. Evidence as to the bias and conflicts of several other members of the Planning Board that XYZ has was not presented due to the time limitations of the hearing, but is available to be submitted when needed.

34. Based on the multiple conflicts of interest and biased legal advice which have corrupted the Planning Board's review process concerning XYZ for over two years, and the clear bias against XYZ demonstrated by City officials, the Planning Board's own Chairman, and other member of the Planning Board, some of whom who have had "special meetings" with City staff about XYZ that were never noticed to the public or XYZ, it is absolutely clear that XYZ cannot be afforded, in time to make any difference, a fair or impartial hearing of its outstanding renewed request for a two (2) year extension of its site plan approval by the City's existing Planning Board,

and that further efforts to pursue that extension by appealing the existing conflicted Planning Board's decisions would be too little, too late to save the Project, and would be futile.

35. It is also clear, based on all of the above facts and circumstances, that the City and its current officials (including its new building inspector Hays), will not ever stop unlawfully obstructing the River Park Project absent further direct intervention by the Court, and that unless we obtain that intervention very quickly, all of XYZ's years of effort and millions of dollars of expenditures, and all of the opportunity for the public to benefit from this extraordinary Project, will be lost. In fact, due to the misconduct of the City and its officials, XYZ has already suffered, and unless this Court intervenes will continue to suffer, enormous harm that will never be cured as prospective tenants of River Park, with whom XYZ has been negotiating, either already have or are close to abandoning any interest in locating there.

36. Several excellent prospective life sciences tenants, for example, have already abandoned their interest in locating at River Park on account of the City's attacks on XYZ's building permit and site plan approvals, and the City's persistent deliberate obstruction of XYZ's effort to make progress on the construction of Building 1 earlier this year. In a last-ditch effort to save the Project, XYZ is asking this Court to directly intervene and issue orders that will compel the City to preserve XYZ's right to pursue the Project, and effectively prohibit the City from unlawfully obstructing it further. Without that relief, XYZ will have no chance to save the Project, and will suffer catastrophic and irreparable harm. For all of these reasons, I believe the relief requested in XYZ's Emergency Motion is both absolutely necessary, warranted, and appropriate.

Signed under the penalties of perjury this 22nd day of June, 2025.



David Clem

From: Brian Vincent </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ED9E74B2B6C84B06B72312FA7C4A8E52-BVINCENT>
To: 'ben.nottexcavating@comcast.net' <ben.nottexcavating@comcast.net>
CC: matt.brush@engelberth.com; Jay Cairelli <Jay.Cairelli@lebanonnh.gov>; Sarah Finley <Sarah.Finley@lebanonnh.gov>; Rod Finley <rod.finley@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject: FW: [EXTERNAL] River Park Temp drainage plan
Sent: 2025/01/21 19:49:19 (UTC +00:00)
Attachments: temp drainage big.pdf

Ben,

The plan looks good as a temporary bypass until such time that the Route 10 improvements are constructed, which I understand (by court order) will be completed by October 27, 2025. Prior to making the final connection (making the temporary bypass pipe "live"), the City will also need a temporary access easement and temporary maintenance easement (30 feet wide for the length of the temporary bypass pipe/system) for pipe access, maintenance, repair, etc. and a \$100,000 performance bond to cover potential maintenance costs.

As I'm sure you know, the permanent drainage system will be required to be constructed in accordance with latest plans approved by the Planning Board.

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: Rod Finley <rod.finley@lebanonnh.gov>
Sent: Friday, January 17, 2025 10:29 AM
To: Brian Vincent <brian.vincent@lebanonnh.gov>
Cc: Jay Cairelli <Jay.Cairelli@lebanonnh.gov>; Sarah Finley <Sarah.Finley@lebanonnh.gov>
Subject: FW: [EXTERNAL] River Park Temp drainage plan

Rodrick J. Finley, P.E.
City Engineer
City Of Lebanon
Department of Public Works
193 Dartmouth College Highway
Lebanon, New Hampshire 03766
rod.finley@lebanonnh.gov
603.558.7123 mobile
603.448.3112 Ext 6146

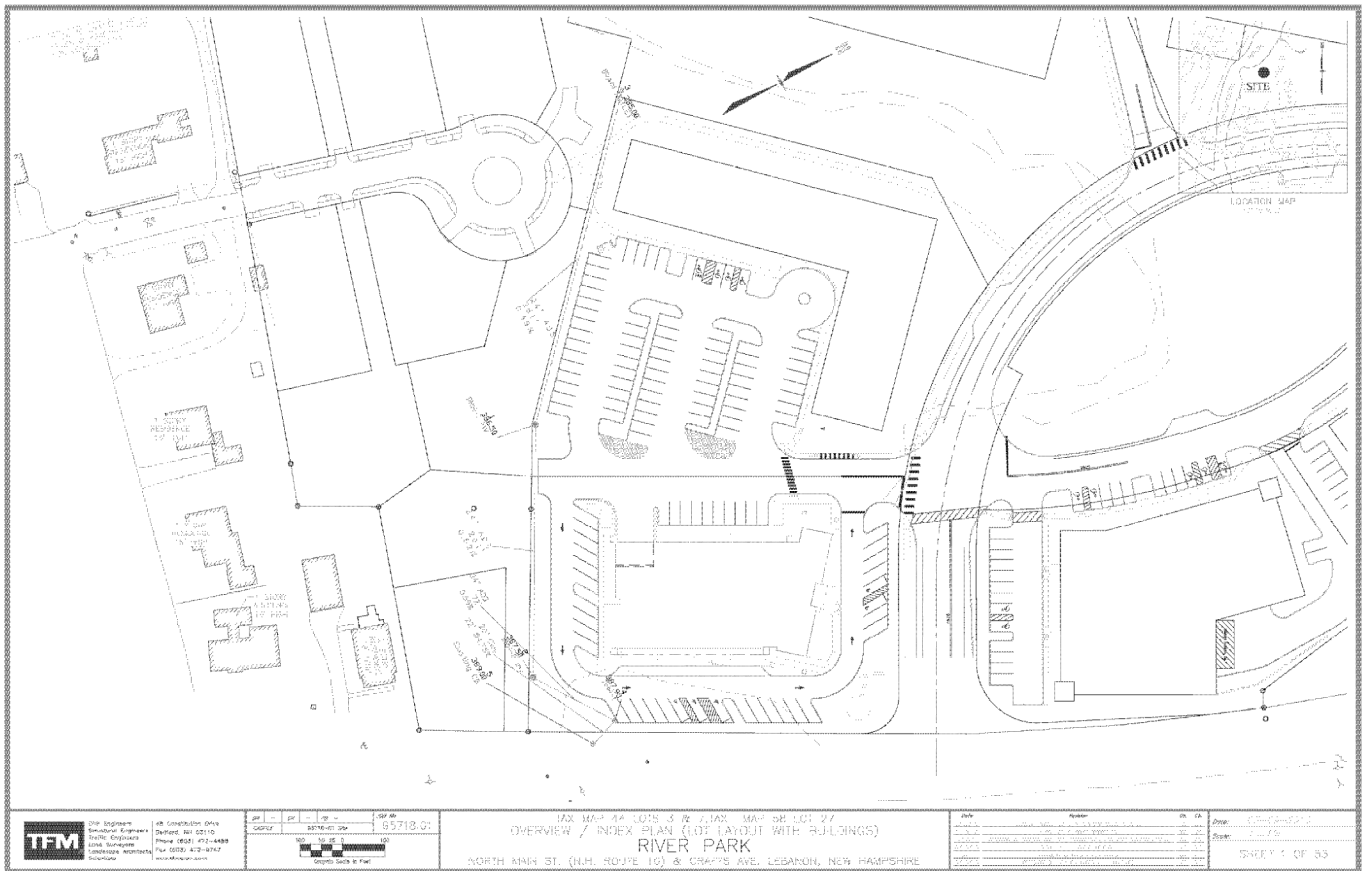
From: ben.nottexcavating@comcast.net <ben.nottexcavating@comcast.net>
Sent: Friday, January 17, 2025 9:58 AM
To: Rod Finley <rod.finley@lebanonnh.gov>
Cc: Matthew Brush <matt.brush@engelberth.com>
Subject: [EXTERNAL] River Park Temp drainage plan

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Rod,

Here is the temp drainage plan for river park. the outlet end of the run has 2' stone chinked in with 7"- to fill bigger voids and it does appear that the clay tile leaving the existing catch basin along rt 10 is 20" clay tile. all pipe we have installed is 24" ads. I confirmed elevations this morning and this drawing reflects that.

Thanks,
Ben Griggs
Notts Excavating



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From:	David Clem <dclem@lymeproperties.com>
To:	Brian Vincent <brian.vincent@ebanonnh.gov>
CC:	Philip Hastings <hastingsp@cwbp.com>; Robert Miller <rmiller@sheehan.com>; Angela McCanna <angela@lymeproperties.com>
Subject:	[EXTERNAL] Temporary Bypass of City's Stormwater Line Impacting 1 River Park Construction
Sent:	2025/01/24 22:23:25 (UTC +00:00)
Attachments:	20250124 Letter to Vincent.pdf
Task Start:	2025/01/27 00:00:00 (UTC +00:00)
Task Due:	2025/01/27 00:00:00 (UTC +00:00)
Percent Complete:	0

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Please see the attached letter.



January 24, 2025

Brian Vincent
City of Lebanon
Department of Public Works
193 Dartmouth College Highway
Lebanon, NH 03766

**Re: Temporary Bypass of City's Stormwater Line
Impacting 1 River Park Construction**

Dear Mr. Vincent,

I am now in receipt of your communication to Ben Griggs of Nott's Excavating dated January 21, 2025 at 2:49 PM. Matthew Bush of Engelberth Construction was also cc'd on your email.

I consider this another example of bad faith action on the part of Lebanon municipal employees, particularly after testimony presented to Grafton County Superior Court regarding our municipal estoppel case challenging the termination of the building permit for 1 River Park and the denial of our extension request by the Lebanon Planning Board due to delays caused by the termination of the building permit and our appeal rights. The Judge ruled in our favor on both items.

Your reference to the Court order in your communication to Nott's Excavating and Engelberth is uninformed and inaccurate.

Based on past experience with the City, I doubt you acted unilaterally in denying the connection of the temporary stormwater line on XYZ property that does not disturb any existing infrastructure in the Route 10 ROW. If you did act unilaterally, the lack of good faith is even more egregious since Nott's and Engelberth were following the engineered plans prepared by TF Moran and approved by the State in our AOT permit. Moreover, Nott's supplied additional elevation information requested by Rod Finley in your office for him to confirm the connection

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



would work as designed by professional engineers. The design, location, and elevation of the initial construction was supplied to the DPW months ago.

Once again, XYZ has been forced to suspend construction of 1 River Park due to actions by Lebanon staff that are uniformed or intentional on the part of your supervisors. Under penalties of perjury before the Grafton County Superior Court, the City's building inspector who terminated the 1 River Park building permit admitted that he alone did not decide to terminate the valid building permit, but was directed by his superiors to do so. Additionally, he testified that in his entire career as the building inspector for Lebanon he had issued approximately 10,000 permits, and the only permit he ever terminated was for 1 River Park. It is my belief that your action follows the same pattern of behavior under the Mulholland administration.

Since you have not been involved in the official capacity of City Engineer from the time of the issuance of Site Plan approval for River Park by the Lebanon Planning Board or the building permit for 1 River Park, I offer the following information for your consideration.

1. The stormwater line in question does not benefit one square foot of the River Park site; rather, it benefits the City of Lebanon and the NHDOT.
2. Neither the City of Lebanon or the NHDOT has an easement for this stormwater line on XYZ property.
3. The former City Engineer of the City of Lebanon provided false and incomplete information to the Civil Engineer retained by XYZ Dairy, LLC when we were preparing the Site Plan and Sub-division applications pursuant to the City's regulations in effect at that time.
4. XYZ voluntarily agreed to accommodate the City and NHDOT's need to comply with updated regulation regarding stormwater runoff produced in their ROW by treating this runoff on our property, and our internal circulation and open space was deliberately designed to accommodate this solution.
5. The materials for this engineered solution were purchased by XYZ well in advance of the construction schedule for Route 10 infrastructure work identified in the original Lebanon Planning Board Notice of Action for River Park. The design and construction drawings

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



for the solution were approved by the DPW, the building department, the planning department, and the NHDOT prior to the mylars being recorded for River Park.

6. XYZ has repeatedly been required to provide new sets of construction documents to the City because of a poorly coordinated record system and turnover in personnel.
7. Given the reality of increased construction costs post Covid, which I presume your department is also painfully aware of, XYZ has retained professionals to evaluate alternatives on our site, only to discover that the existing line services The Falls and no one in the City bothered to tell our engineering team.
8. The Falls does not enjoy an easement on our site to discharge their stormwater onto our property or the Connecticut River.
9. Notwithstanding all of the above, the DPW is aware that XYZ upsized the temporary stormwater line we installed, in good faith and at our expense, for the City's benefit to provide assurance that it is superior to the existing condition.
10. The City has not performed maintenance on the stormwater line since XYZ purchased the property. When the catch basins flooded a few years ago on Main Street due to a severe microburst, XYZ found and uncovered the outlet in the ravine on our property. We were told by DPW personnel to redirect the last portion of the stormwater pipe and to add riprap in the ravine which we did at our own expense. The DPW head at the time met me on site to inspect the new outlet location and the riprap installed by our contractor. There has never been an easement or a "performance bond" for this stormwater line relocation.

I fully understand that the permanent drainage system will be required to be constructed in accordance with latest plans approved by the Planning Board. You should understand that the completion of the last component of the so called Phase 1 infrastructure is required prior to the occupancy permit of 1 River Park. Your recent communication to our contractor denying the temporary connection makes the construction of 1 River Park impossible.

In view of the City Council's recent budget hearings and the recognition that double digit property tax rate increases are unavoidable without expansion of the tax base or severe budget



cuts, I am astonished by the continued efforts of staff to delay construction. The damages I have incurred are well beyond the legal expenses I have been forced to pay to protect my property rights and building permit. Your actions are in direct contradiction to testimony of staff and the City's attorney in Superior Court. I invite you to read the transcript of the evidentiary hearings.

If I have to go to court again to demonstrate this, I will redirect funds intended for infrastructure improvements that benefit the City and NHDOT, or do nothing. The River Park site will remain fenced off, public access to the river will be permanently abandoned, and the bulk of the acreage will remain in current use in full compliance with those regulations. Neither decision is a win for Lebanon taxpayers.

Sincerely,

David Clem
XYZ Dairy, LLC

Cc: Lebanon City Council
Attorney Philip Hastings, Cleveland, Waters and Bass, P.A.
Attorney Robert Miller, Sheehan Phinney, P.A.
Angela McCanna, Lyme Properties



CITY OF LEBANON
DEPARTMENT OF PUBLIC WORKS
193 Dartmouth College Highway
Lebanon, NH 03766

January 31, 2025

David Clem
River Park
XYZ Dairy Developed by Lyme Properties
57 Main Street
West Lebanon, NH 03784

Re: Stormwater Line Temporary Bypass
River Park Project
West Lebanon, NH

Dear Mr. Clem,

Thank you for your letter dated January 24, 2025 in response to an email that I sent to Ben Griggs of Nott's Excavating dated January 21, 2025. Please note that I did not act unilaterally in issuing this email and the written contents thereof.

In my email, I had indicated that the as-built plan that Ben had included in an email to Rod Finley appears to be acceptable as a temporary bypass until such time that the Route 10 improvements are constructed. My understanding was that the court order extended the Lebanon Planning Board's timeline for the completion of Phase 1 infrastructure improvements, which includes the Route 10 stormwater improvements, until approximately October 27, 2025, at which time the permanent stormwater management system as approved by the Planning Board would presumably be constructed and would be ready to be put into service. I had also indicated the need for an access and maintenance easement in favor of the City of Lebanon (City), and a \$100,000 performance bond. The purpose of the access and maintenance easement would be to ensure that the City have access to the temporary drainage system and the ability to inspect, maintain and/or repair the system if necessary. The purpose of the performance bond would be to address the risk of project abandonment subsequent to original drainage pipe disconnection and related building construction work commencing to the point that would prohibit the ability to reconnect the existing discharge pipe. In addition, the performance bond would address any potential unknown material or workmanship latent defects (my understanding is that this temporary bypass pipe has not been used as an active stormwater conveyance or discharge system since construction, and the City nor its representatives did not have the benefit of observing the temporary bypass drainage system construction in accordance with Condition #4 of the Planning Board's Notice of Action, dated September 9, 2019). We would recommend the performance bond be structured for a 1-year period with the ability to extend, if necessary.

Dept of Public Works – 603-448-3112; City Engineer – 603-448-3112; Utility Operations Water – 603-448-2514
Utilities Operations Sewer – 603-298-5986; Solid Waste Management – 603-298-6486

LEB_0117324

The Department of Public Works will promptly review the above-referenced documents upon receipt and respond with any questions or comments. Once the bond and temporary easements are accepted by the City, we will authorize the proposed temporary drainage connection.

We look forward to working with you through this process and we look forward to seeing your project advance.

Sincerely,

Brian Vincent, PE
City Engineer

Cc: Jay Cairelli, Director of Public Works
David Brooks, Deputy City Manager
Shaun Mulholland, City Manager
Nathan Reichert, Director of Planning & Development



May 30, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Dear Mr. Clem,

This letter responds to your May 22, 2025, letter requesting a further 180-day extension of XYZ Dairy's building permit pursuant to IBC Section 105.5, which is part of the NH State Building Code. Section 105.5 states:

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.

As you know, Building Permit 2016-00293 was issued on December 31, 2019, and XYZ was granted multiple extensions before my predecessor, Calvin Hunnewell, declared the permit expired as of February 1, 2024 due to more than 180 days of inactivity at the construction site. The permit was reinstated by a preliminary injunction order of the NH Superior Court with a clerk's notice date of November 26, 2024. I calculate that the 180th day thereafter was May 25, 2025.

In my May 15, 2025, letter to you, I explained that I could not consider the excavation of soil from the future foundation of 1 River Park to constitute a commencement of work on the site authorized by the permit. Therefore, per Section 105.5, work has now been suspended for more than 180 days and the permit has become invalid.

I am unable to find "justifiable cause" to grant an extension of the May 25 deadline based on the information provided in your May 22 letter. I disagree with your characterization of City Engineer Vincent's requests of January 2025 (for an easement and bond to ensure maintenance of a temporary stormwater bypass) as a "City-ordered work stoppage". Additionally, the claims in XYZ's amended complaint are not scheduled to be tried until June of 2026, and I am unable to rely on bare allegations as a basis for justifiable cause for an extension.

Please be reminded again that you are free to re-apply for a building permit if and when XYZ has resolved the stormwater pipe issue and is ready to start construction of the building. (Efforts

related to the stormwater pipe and site infrastructure fall outside of the scope of the building code and do not fall under the work on the site authorized by the building permit.) I do not expect this would be a prolonged process as previous reviews of your building plans have already been recently conducted and the only additional reviews necessary will be of the updates to comply with the 2021 IBC, the current building code adopted by the State of NH, and any updates to the uses in the building. Also, please recall that the Planning & Development Office has been offering since early 2024 to apply your previously paid permit fee of \$90,492.00 towards a new permit fee. This offer still stands.

Respectfully,

A handwritten signature in black ink, appearing to read "Leigh Hays", is positioned above the typed name.

Leigh Hays
Chief Building Official & Health Officer
City of Lebanon New Hampshire

C: Property File, Map 44 Lot 21

May 8, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park

Dear Mr. Hays:

For your information, XYZ re-commenced construction at River Park earlier this year, and this fact can be corroborated by municipal personnel of the City. In December of 2024, I executed a construction management contract with Engelberth Construction and authorized them to rebid the 1 River Park building and associated site work, including the temporary relocation of the City's stormwater line and the improvements in Route 10 associated with the southern entrance into River Park servicing the first three building phases.

In December, 2024, I met with Engelberth project managers, Chris Yandow and Matthew Brush, on multiple occasions regarding 1 River Park. XYZ also authorized the 1 River Park Design Team to upgrade the permit set of drawings to reflect any changes in the building codes, which was done.

Engelberth then released Nott's Excavating to relocate the City's stormwater line to the temporary line to the same, on-site ravine. This line was engineered by TFMoran and received an AOT permit, which the City was copied on. Nott's had previously installed this temporary line to a manhole adjacent to 167 N Main. I then authorized Nott's to order the additional materials necessary to complete the temporary connection and they were delivered in early January, 2025.

In January 2025, Engelberth and Nott's installed and secured the construction fencing to protect Lot 1 and Lot 2. They relocated and expanded the entry gate to the site to accommodate equipment deliveries and future steel deliveries and storage. Silt fencing was installed to protect the basement excavation for 1 River Park according to best practices. Additional rip rap stone was delivered and installed by Nott's in the ravine to exceed the existing drainage condition. Engelberth installed scrim protection on the security fencing on the three sides visible from public streets.

Nott's then started the excavation of the basement of 1 River Park per the permit set of construction documents. Because frost had already begun in January, 2025, this material was piled on Lot 2 until the arrival of spring weather. Per the approved plans this material was to be spread on Lot 2 to the new manhole elevations previously installed and accepted by the City of Lebanon as part of the so-called "cross country connector" servicing the first three building phases.

On January 16, 2025, Nott's on-site project foreman, Ben Griggs, contacted Rod Finley to schedule a time to witness the connection of the old line to the new temporary line solely on XYZ's Lot 1 property and not in the City's Route 10 right-of-way. On January 17, 2025 Nott's received a communication from Rob Finley asking for more as-built information and elevations of what had been installed, and this was supplied by Ben Griggs to Rod. Rod also communicated to Raymond Nott that "he had no issue with the connection but must see the as-built information first."

On January 21, 2025, Brian Vincent, City Engineer, sent an email to Ben Griggs of Nott's informing him that the City would not allow making the final connection without posting a performance bond and a legal easement, which have never been identified to us as requirements for the connection to occur. Matt Brush of Engelberth was copied on this communication but not XYZ Dairy or Lyme Properties. As a result, for the third time relocation efforts for the City's stormwater line was not allowed by municipal personnel and construction was halted.

Nonetheless, XYZ Dairy continued working on the 1 River Park site by covering the excavation of the connecting pipe from the previously installed manhole to your existing line on our property. Additionally, the piles of excavated materials, which had thawed, was spread on Lot 2 as the Lebanon approved plans called for. This work was done in April of 2025 and concluded on May 5, 2025.



XYZ Dairy cannot resume construction of 1 River Park that it commence in January 2025 until the City allows us to connect to the existing stormwater line on our property, and it will take some time to re-mobilize.

Sincerely,

A handwritten signature in blue ink that reads "David Clem". The signature is fluid and cursive.

David Clem
Manager
XYZ Dairy, LLC

Enclosures

Cc: 1 River Park File
David Brooks
Nathan Reichert













May 15, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Mr. Clem,

Thank you for your letter of May 8 providing me with an update on pre-construction site improvement work that has been performed at the 1 River Park site.

Based on the information provided in your letter, I disagree with your statement that XYZ recommenced construction of the 1 River Park building in January 2025.

As we learned from our mutual experience before the State of New Hampshire Building Code Review Board (BCRB) last year, the BCRB's July 31, 2024 decision (which XYZ did not appeal) provided some clear guidelines to define "work" authorized by a building permit:

From its use throughout the section [105 of the IBC], 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.

* * *

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.

* * *

We hold that [the] 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.

The activities you describe in your letter, such as the execution of a construction contract, rebidding of the 1 River Park building and conduct of associated site work, including the relocation of the City's stormwater line, are all examples preparatory work/site work required prior to the commencement of construction work governed by the New Hampshire State Building Code, and do not constitute "work" regulated by the Building Code.

Of particular note is your statement that “Nott’s then started the excavation of the basement of 1 River Park per the permit set of construction documents.” You omit to state the particular date on which this started, and you do not state for how many days this continued. I would also be curious to learn whether this excavation was a repeat or an enlargement of the prior excavation done in December 2022.

As you already know,¹ I cannot reasonably consider this excavation to constitute “work” under the building permit, because I do not find textual support in the Building Code to conclude that excavating a foundation hole, without more, requires a building permit. (I’m sure you would agree that if you dug a foundation hole while lacking a building permit, I would not be able to cite you for performing work without a permit.)

In addition to the BCRB decision, the 2009 IBC, Section 105.1, which applies to XYZ’s building permit, further defines the type of work that requires a building permit:

105.1 Required.

Any owner or 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 this code, or to cause any such work to be performed, shall first make application to the building official and obtain the required permit.

I cannot in good faith conclude that digging a hole fits within this description.

Building Code Section 105.5 dictates that “every permit shall become invalid” (emphasis added) if work on the site authorized by the permit has been suspended for 180 days. Because the building permit was reinstated by a court order with a clerk’s notice date of November 26, 2025, I calculate that the permit will expire at the end of the day on May 25, 2025, if construction work authorized by the permit does not commence on or before this date.

Please do not hesitate to inform me of any further efforts at the site occurring between May 9 and May 25, if you contend that any further efforts may constitute “work”. I can then provide you with a determination after May 25 as to whether the permit has expired.

I would also like to take this opportunity to remind you that, in my view, the expiration of your building permit need not be considered a death knell for your construction project. You are free to re-apply for a permit if and when you are ready to start construction of the building. I do not

¹ You will surely recall that the City attempted to flag this issue for XYZ in the City’s Motion for Clarification and Reconsideration filed with the Superior Court in the Municipal Estoppel case on December 6, 2024. In that Motion, the City took the position that, “work on the site ‘authorized by the permit’ does not include work to excavate or relocate the existing stormwater pipe, or other work on Phase I site plan work/infrastructure work. Instead, the first physical work ‘authorized by the permit’, i.e. physical construction of the building, per XYZ’s building plans approved in 2019, would be pouring concrete for a foundation. Merely digging a foundation hole would not constitute commencement of ‘work’.” Although the Court declined to rule on the hypothetical of what does or does not constitute ‘work’, it is regrettable that XYZ has not been able to perform work authorized by the permit and avoid the very situation that I foresaw and hoped to avoid.



expect this would be a prolonged process as previous reviews have already been conducted and the only reviews will be of the updates to comply with the 2021 IBC, the current building code adopted by the state, and any updates to the uses in the building. Also, please recall that the Planning & Development Office has been offering since early 2024 to apply your previously paid permit fee of \$90,492.00 towards a new permit fee. This offer still stands.

Respectfully,

Leigh Hays
Chief Building Official & Health Officer
City of Lebanon New Hampshire

C: Property File, Map 44 Lot 21

May 16, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park (the “Project”)

Dear Mr. Hays:

We have received your letter of May 15, 2025, and strenuously object to it for the following reasons.

The New Hampshire Building Code Review Board (BCRB) decision to which you refer from last July held that **off-site** activities in connection with a permitted construction project could not be considered “work” for purposes of determining compliance with the Code’s 180-day requirement for “work” to commence after a building permit is issued.

That decision does not entitle you, in an attempt to declare our permit expired, to dismiss the **on-site** physical work we have done, including actual excavation for the foundation of the first building on the project for which we have the building permit, as somehow not being “work” under the Code that you will “count” for purposes of the 180-day requirement.

The work we did in this past January 2025 and before that was physical work on-site in pursuit of the project described in our building permit, a “[n]ew mixed-use commercial building within Lot #1 of the River Park Subdivision,” so that excavation and other work we did obviously does count for purposes of the 180-day work requirement.

Nevertheless, you try to argue in your letter that our on-site work does not “count” because you say we supposedly could have done it for another purpose without a permit, but that is not the point, we cannot do such work for **this** purpose – to put up a building for our project – without a building permit, and we have one that we are working under. Your argument also ignores the fact that the City Engineer Vincent himself ordered our contractors to stop our on-site work this past January – which he could not have done if, as you now argue, no permit for the work they were doing was required.

In your letter, you seem to want to assume the power to decide what on-site physical work in pursuit of our project “counts” for purposes of the 180-day requirement, and to use that power to declare the permit expired unless we convince you otherwise. But you do not have that power, we do not have that obligation, and you are violating the law in trying to obstruct us in this way.

We are not abandoning this project, and your and the City's persistent efforts to squeeze us in this way are not right, as I explained in my Jan. 24, 2025 letter to your colleague Mr. Vincent after he ordered our contractors to stop work last January. Please stop making up improper arguments like the ones in your letter of May 15, 2025, and refrain from threatening to declare our building permit expired when you have no legitimate grounds for doing so, as it is causing XYZ severe harm.

Sincerely,

David Clem
Manager
XYZ Dairy, LLC

Cc: 1 River Park File
David Brooks
Nathan Reichert

May 22, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park (the "Project")

Dear Mr. Hays:

In case there is any question as to whether XYZ started work on the Project in January of this year, only to be stopped by the City, all of which occurred as explained to you in my letter of earlier this month, dated May 8, 2025, XYZ is hereby requesting a further 180-day extension of its building permit for 1 River Park in West Lebanon, N.H. on account of delays imposed on XYZ by circumstances beyond its control.

The circumstances beyond XYZ's control that warrant this requested further extension of its building permit are described in detail in my attached letter of January 24, 2025 to City Engineer Brian Vincent concerning the City-ordered work stoppage earlier that month, and my attached letters to the City of Lebanon Planning Board, one dated February 10, 2025 and the other dated March 13, 2025, concerning the other recent obstructions and delays imposed on XYZ's construction efforts. Additional circumstances beyond XYZ's control warranting this requested further extension of its building permit are described in detail in its Amended Complaint in the pending civil action that XYZ has brought against the City in the New Hampshire Superior court entitled *XYZ Dairy v. City of Lebanon*, Docket No. 215-2024-CV-00393 (Grafton, NH Superior Court).

In response to your May 15, 2025 letter to me asking that I inform you of "any further efforts on site between May 9 and May 25" (sic), please be advised that excavation holes to connect to the existing stormwater line were filled to eliminate a safety hazard, new fencing and delivery gates to the 1 River Park lot were added and secured after Nott's Excavating damaged the entry fence, excavated material from the basement excavation was spread and compacted on Lot 2 according to our Site Plan Approval, silt fencing was added to the Cross Country Connector location according to best practices, and all below grade water, sewer and stormwater piping, connections, manholes, and fire hydrants were moved to a secure area and covered to protect from sunlight



exposure.

If you would like to meet me on site to inspect, please advise and I will gladly do so.

Sincerely,

A handwritten signature in blue ink that reads "David Clem". The signature is fluid and cursive, with the first name "David" and last name "Clem" clearly visible.

David Clem
XYZ Dairy, LLC

Enclosures

January 24, 2025

Brian Vincent
City of Lebanon
Department of Public Works
193 Dartmouth College Highway
Lebanon, NH 03766

**Re: Temporary Bypass of City's Stormwater Line
Impacting 1 River Park Construction**

Dear Mr. Vincent,

I am now in receipt of your communication to Ben Griggs of Nott's Excavating dated January 21, 2025 at 2:49 PM. Matthew Bush of Engelberth Construction was also cc'd on your email.

I consider this another example of bad faith action on the part of Lebanon municipal employees, particularly after testimony presented to Grafton County Superior Court regarding our municipal estoppel case challenging the termination of the building permit for 1 River Park and the denial of our extension request by the Lebanon Planning Board due to delays caused by the termination of the building permit and our appeal rights. The Judge ruled in our favor on both items.

Your reference to the Court order in your communication to Nott's Excavating and Engelberth is uninformed and inaccurate.

Based on past experience with the City, I doubt you acted unilaterally in denying the connection of the temporary stormwater line on XYZ property that does not disturb any existing infrastructure in the Route 10 ROW. If you did act unilaterally, the lack of good faith is even more egregious since Nott's and Engelberth were following the engineered plans prepared by TF Moran and approved by the State in our AOT permit. Moreover, Nott's supplied additional elevation information requested by Rod Finley in your office for him to confirm the connection

would work as designed by professional engineers. The design, location, and elevation of the initial construction was supplied to the DPW months ago.

Once again, XYZ has been forced to suspend construction of 1 River Park due to actions by Lebanon staff that are uniformed or intentional on the part of your supervisors. Under penalties of perjury before the Grafton County Superior Court, the City's building inspector who terminated the 1 River Park building permit admitted that he alone did not decide to terminate the valid building permit, but was directed by his superiors to do so. Additionally, he testified that in his entire career as the building inspector for Lebanon he had issued approximately 10,000 permits, and the only permit he ever terminated was for 1 River Park. It is my belief that your action follows the same pattern of behavior under the Mulholland administration.

Since you have not been involved in the official capacity of City Engineer from the time of the issuance of Site Plan approval for River Park by the Lebanon Planning Board or the building permit for 1 River Park, I offer the following information for your consideration.

1. The stormwater line in question does not benefit one square foot of the River Park site; rather, it benefits the City of Lebanon and the NHDOT.
2. Neither the City of Lebanon or the NHDOT has an easement for this stormwater line on XYZ property.
3. The former City Engineer of the City of Lebanon provided false and incomplete information to the Civil Engineer retained by XYZ Dairy, LLC when we were preparing the Site Plan and Sub-division applications pursuant to the City's regulations in effect at that time.
4. XYZ voluntarily agreed to accommodate the City and NHDOT's need to comply with updated regulation regarding stormwater runoff produced in their ROW by treating this runoff on our property, and our internal circulation and open space was deliberately designed to accommodate this solution.
5. The materials for this engineered solution were purchased by XYZ well in advance of the construction schedule for Route 10 infrastructure work identified in the original Lebanon Planning Board Notice of Action for River Park. The design and construction drawings

for the solution were approved by the DPW, the building department, the planning department, and the NHDOT prior to the mylars being recorded for River Park.

6. XYZ has repeatedly been required to provide new sets of construction documents to the City because of a poorly coordinated record system and turnover in personnel.
7. Given the reality of increased construction costs post Covid, which I presume your department is also painfully aware of, XYZ has retained professionals to evaluate alternatives on our site, only to discover that the existing line services The Falls and no one in the City bothered to tell our engineering team.
8. The Falls does not enjoy an easement on our site to discharge their stormwater onto our property or the Connecticut River.
9. Notwithstanding all of the above, the DPW is aware that XYZ upsized the temporary stormwater line we installed, in good faith and at our expense, for the City's benefit to provide assurance that it is superior to the existing condition.
10. The City has not performed maintenance on the stormwater line since XYZ purchased the property. When the catch basins flooded a few years ago on Main Street due to a severe microburst, XYZ found and uncovered the outlet in the ravine on our property. We were told by DPW personnel to redirect the last portion of the stormwater pipe and to add riprap in the ravine which we did at our own expense. The DPW head at the time met me on site to inspect the new outlet location and the riprap installed by our contractor. There has never been an easement or a "performance bond" for this stormwater line relocation.

I fully understand that the permanent drainage system will be required to be constructed in accordance with latest plans approved by the Planning Board. You should understand that the completion of the last component of the so called Phase 1 infrastructure is required prior to the occupancy permit of 1 River Park. Your recent communication to our contractor denying the temporary connection makes the construction of 1 River Park impossible.

In view of the City Council's recent budget hearings and the recognition that double digit property tax rate increases are unavoidable without expansion of the tax base or severe budget

cuts, I am astonished by the continued efforts of staff to delay construction. The damages I have incurred are well beyond the legal expenses I have been forced to pay to protect my property rights and building permit. Your actions are in direct contradiction to testimony of staff and the City's attorney in Superior Court. I invite you to read the transcript of the evidentiary hearings.

If I have to go to court again to demonstrate this, I will redirect funds intended for infrastructure improvements that benefit the City and NHDOT, or do nothing. The River Park site will remain fenced off, public access to the river will be permanently abandoned, and the bulk of the acreage will remain in current use in full compliance with those regulations. Neither decision is a win for Lebanon taxpayers.

Sincerely,



David Clem
XYZ Dairy, LLC

Cc: Lebanon City Council
Attorney Philip Hastings, Cleveland, Waters and Bass, P.A.
Attorney Robert Miller, Sheehan Phinney, P.A.
Angela McCanna, Lyme Properties

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).



March 13, 2025

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

Re: River Park West Lebanon, Request for Extension

Dear Board Members:

As I noted at the last hearing, I will not be able to attend the third scheduled hearing on XYZ Dairy's request for a 2-year extension (PB2025-05-EXT) on Monday, March 17, 2025. I respectfully ask that the Board make a final decision, as it is impossible for XYZ to make business decisions and/or advance this project while kept in this limbo.

Despite this matter now requiring a third public hearing— in addition to the four hearings held on the previous request (PB2024-34-EXT) from July to November, 2024— the question before you is quite simple: does the Planning Board support River Park or not?

Granting a two-year extension request allows the River Park project a chance to proceed, acknowledges XYZ's property rights and investments to-date in the project, and accommodates for the obstructions XYZ has faced from the City of Lebanon Administration.

Denying the requested extension— or seeking to rationalize a shorter extension— would align the Board with the disproven opinions and overturned actions of the Lebanon Planning Staff, create further obstructions for the project, and further diminish any chances of progress at River Park.

XYZ Dairy does not believe the opinions expressed in the latest Staff Memo and previous communications are relevant to your decision and misstates some of the facts and history of this project. XYZ has continued to provide this board with all necessary information.

Whether the Staff and Board believe that XYZ has provided too much information, or too little information, has varied from hearing to hearing. We can't solve that Goldilocks dilemma, other than to reiterate that XYZ has been transparent and provided all relevant information to the Board, Staff, and public throughout the 18 years that we have pursued Mixed Use, Smart Growth, and Public Access to the Connecticut River in West Lebanon.

XYZ Dairy will continue to protect our property rights and approvals as necessary and fulfill all conditions in our Notice of Action as long as municipal action does not continue to put roadblocks in the way of implementation.

This application is before the Planning Board and has been duly advertised and noticed to all abutters pursuant to regulations of the City of Lebanon.

Additional information is provided herein.

Sincerely,



David Clem
Manager, XYZ Dairy, LLC

The logic and business realities of the requested two-year extension

River Park was approved as a Phased Development in the original decision by the Lebanon Planning Board. There were seven (7) phases with two years between phases to file a building permit application for the next phase. The logic of the two year time period, as discussed in numerous public hearings during the entitlement process, was twofold: first, to allow the previous phase to be absorbed/rented by the marketplace; second, to allow one year for the architects/engineers to prepare construction drawings for the subsequent phase sufficient for the Lebanon Building Inspector to grant a building permit.

This was clearly outlined in the Notice of Action, prepared by the Lebanon Planning Staff and voted on by the Planning Board duly constituted at the time of the Site Plan and Subdivision Applications. It is my presumption that the Notice of Action and the Motions for Site Plan and Subdivision Approval were reviewed by municipal counsel at the time.

There have been amendments to the original Notice of Action regarding River Park, including one to amend the phasing to allow the multi-family residential to be the second phase of River Park. No amendments have changed the two-year time period between phases.

Appeal of Staff Actions, leading to N.H. Superior Court Decision

As this Planning Board is aware, the City of Lebanon Building Inspector on February 1, 2024, just prior to retiring, sent XYZ Dairy, LLC a letter terminating our building permit for 1 River Park, the first building phase of the development. A decision the former Building Inspector would later testify involved numerous members of the Lebanon Planning Department and City Manager's office and was an unprecedented action during his decades in the Lebanon Planning Department.

The Staff's decision was appealed to the Lebanon Building Code Board of Appeals and was overturned 4-1.

The City subsequently appealed their decision to the State Building Code Board of Appeals and they reversed the decision on narrow grounds. This Planning Board has been provided the information regarding all of the administrative appeals. However, in that State Building Code Board of Appeals decision, the Assistant N.H. Attorney General who wrote the decision suggested that XYZ may have a municipal estoppel claim against the City of Lebanon; namely, that we had relied on information previously provided by City officials regarding the building permit,

commencement of construction, and the long standing precedent in Lebanon that "off site work" including the modification of design drawings and bidding by construction managers constituted work.

Based on the language of this decision, XYZ did file a municipal estoppel claim in Grafton County Superior Court. The Court ruled that the City had improperly terminated our building permit and the permit was restored. The Court also ruled that our Site Plan expiration date be extended by eleven months and two days for the first phase, due to the building permit appeals process, the only matter before the Court at the time. This Grafton County Court decision overturned the previous action of this Planning Board not to grant an extension of the time allowed to complete the so-called Phase 1 Infrastructure improvements.

11 Months vs. 2 Years: either way, 3 months have already gone by

On November 12, 2024, the Planning Board voted to deny River Park's first request for extension while the N.H. Superior Court had the municipal estoppel case under consideration. The timing of the Board's decision was up to the Board, Staff, and Legal Counsel.

On November 25, 2024 the N.H. Superior Court judge provided an 11 month extension for Phase 1 as part of the Omnibus Order granting a Preliminary Injunction and Temporary Restraining Order

The Court was not asked to address the Phasing Schedule for the entire project, which is why XYZ resubmitted the application to extend each phase of River Park to this Planning Board by two years.

The Judge's decision specifically countered the logic the City of Lebanon Planning Staff, Legal Counsel, and Planning Board in it's November 12, 2024 Notice of Action:

"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." *N.H. Superior Court Omnibus Order, 11/25/2024, pg. 24.*

Having now had our position on these matters confirmed by the Court, and the City's request for reconsideration rejected by the Judge on December 24, 2024, XYZ must once again seek to re-start the multifaceted processes necessary to re-commence the project yet again.

On January 13, 2025, the Planning Board determined that the Judge's decision was sufficient "new, material information" to take up the second requested extension.

Additional roadblocks since Superior Court decision

Subsequent to the Judge's November 25, 2024 decision granting the 11 month extension related to Phase 1, XYZ has been faced with the following additional challenges from the Lebanon Administration and Planning Processes:

1. The Lebanon Planning Director questioned the life science research use at River Park, in issuing an opinion on December 6, 2024 that risked putting other, existing life science companies in Lebanon at risk of non-conformity.
 - a. As a result, the Lebanon City Council brought forth a Zoning Amendment to address these issues.
2. The Lebanon DPW has proposed a new, additional \$100,000 requirement prior to the temporary relocation of the City's no-easement pipe. This falls outside of the Conditions of the Site Plan Approvals, and is outside of the City's regulatory authority as it is the State of NH DES that regulates stormwater, and the October 30, 2020 memo from the NH DES that addresses the relevant State requirements.
3. In the 112 days (3.5 months) since that ruling, the Lebanon Planning Board has convened three public hearings (January 10, 2025, February 24, 2025, March 17, 2025) on this matter without resolution or decision. That 3/11ths of the extension granted by the Superior Court has been spent navigating Lebanon's procedural process speaks to the pace of municipal delay that makes it impossible for the project to proceed.
 - a. Had the extension been granted in 2024 as requested, XYZ could have re-mobilized for the start of the 2025 construction season in two weeks, April 1, 2025.
 - b. Instead, as this process drags out and additional challenges are posed, XYZ cannot enter into contractual relationships with necessary project partners.

Staff's Faulty and Disproven Determinations; information previously provided

Of note, in defense of our property rights and in pursuit of this project, for the past 18 years, XYZ has had to repeatedly and successfully disprove the Staff's faulty assumptions and failure to support a project the citizens of Lebanon voted overwhelmingly in favor of. Most recently, in the November 12, 2024 Notice of Action **PB2024-40-AAD**, this Board overturned the Staff's faulty determination that XYZ had failed to complete Conditions necessary for construction of Phase 1 to commence. XYZ had, in fact, complete the four material conditions.

The remaining two conditions, as XYZ acknowledged throughout, were pending and dependent upon the Staff completing its review of the Security Agreement (third party inspection, Condition #4) to allow the Construction Manager to proceed with all on-site conditions (e.g. silt fencing, Condition #5).

In its February 24, 2025 Staff Memo the Lebanon Planning Staff raise the same issues that XYZ already addressed in its August 12, 2024 presentation and September 5, 2024 email. This material was provided to the Staff and Board, *again*, via email on February 25, 2025.

Staff's failure to support the project

The Lebanon Planning Department– ostensibly charged with facilitating economic development in Lebanon– has proposed no alternative solution, does not seek to solve the issues they have created, and in their latest Staff Memorandum now request to forgo their job responsibilities as it relates to the River Park project.

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. *Staff Memorandum, PB2025-05-EXT, February 24, 2025 PB Mtg.*

The Planning Board's suggestion at the last hearing that XYZ was "only delayed 11 months" misses the point, ignores the burdensome reality faced by a private property owner seeking to pursue an approved project against unnecessary and disproven obstructionist actions, and only substantiates our concern that further costly delays will follow since only XYZ feels any repercussions from the Staff's actions and delays.

From:	Rohrer, Robert <bob.rohrer@colliers.com>
To:	Shaun Mulholland <Shaun.Mulholland@lebanonnh.gov>
Subject:	[EXTERNAL] River Park
Sent:	2024/11/06 20:57:00 (UTC +00:00)
Attachments:	NH Business Review.docx

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Hi Shaun,

Thank you for taking the time to discuss my client's requirement for bio-med space in the Lebanon area.

I was particularly interested and surprised when you told me that our client's planned use was not an allowed (permitted) use at River Park. That is counter to what we have understood from the beginning and what we understood the Town's position to be (please see attached article). We have spent the last eight months working with our client to carefully define their needs and to begin lease negotiations with two Landlord/developer owners. We truly hope that we can continue to move forward at River Park as it is one of (maybe the only) site in the area that has the potential to meet our client's timing needs and financial requirements.

I did reach out to Carl Gross regarding the Lebanon Airport Business Park. He agreed to get me some additional information once he returns to the office next week. That said, the Park is a tough fit for my client. The City is offering to lease the land to entities that would then construct a building to presumably meet their needs or their tenant's needs. Our client is a pharmaceutical company and is not interested in building and holding real estate. That means a third-party owner/developer would have to be found that has the financial wherewithal and the expertise to build bio-med space. That combination is hard to find, and is why we didn't initially pursue the Park.

Interestingly, the owner of River Park has the required expertise and, we thought, the right permits to be able to develop space that fits our client's requirements. We are still hopeful that the Town and the owners of the Park can sort out their differences and we can continue to pursue locating our client in your Town.

Thanks for your time.

Thanks,

Bob

Robert L. Rohrer, Jr.
 Managing Director | New Hampshire
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 175 Canal Street, Suite 401 | Manchester, NH 03101 | United States

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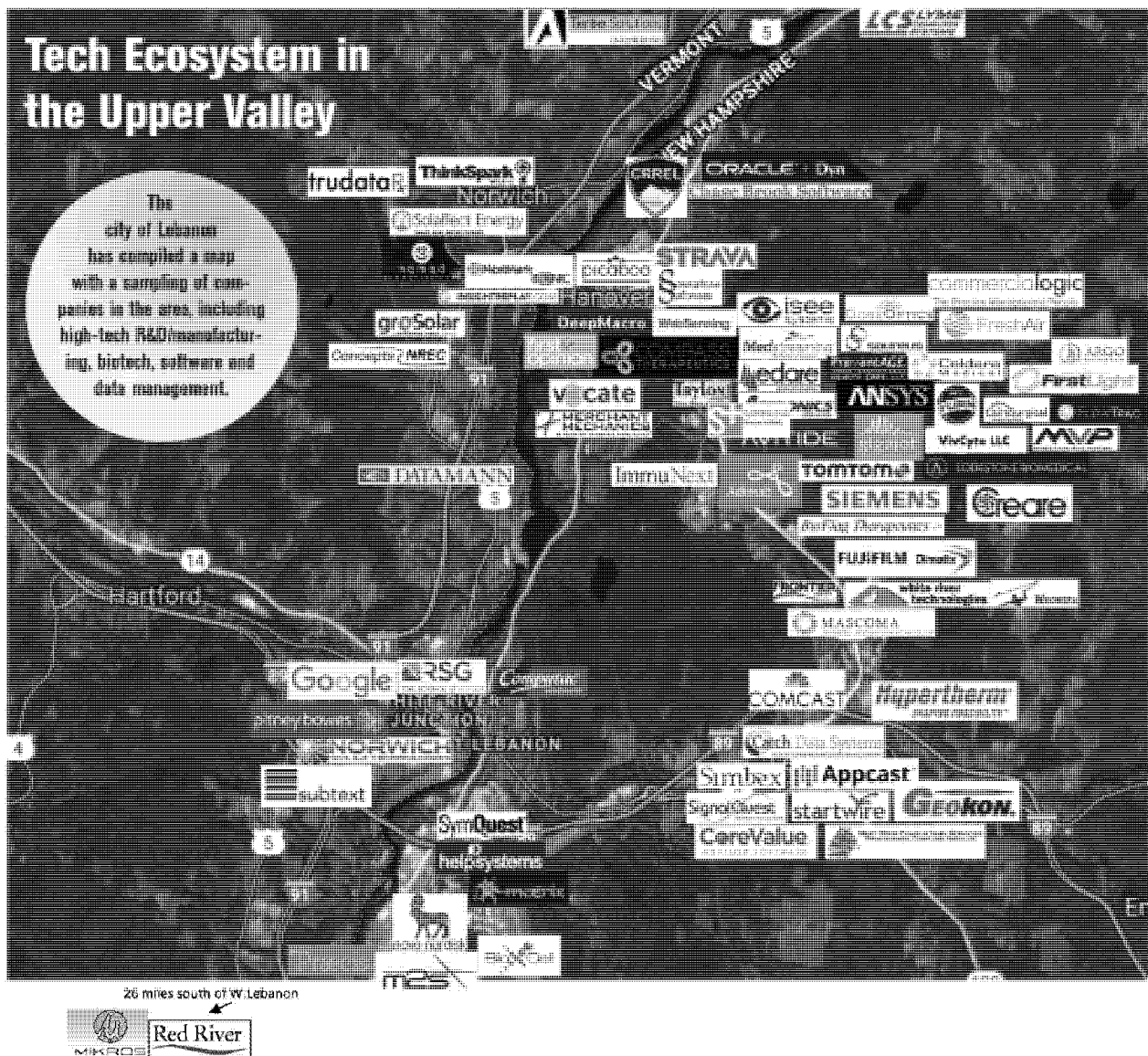
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A hub for tech entrepreneurship

Companies grow and thrive in the Upper Valley

March 28, 2019
Liisa Rajala





The city of Lebanon has compiled a map with a sampling of companies in the area.

With 120 software, biotechnology and medical technology companies in the Upper Valley, a variety of stakeholders are energized to expand the region's connection to the global industry of biomedical innovation.

"The economy of the Boston metropolitan area directly impacts us here," said Lebanon City Manager Shaun Mulholland. "Boston is the hub of medical research. We have Dartmouth-Hitchcock Medical Center and the Thayer School of Engineering at Dartmouth — we have the brain trust up here to move more of these businesses into the area. Mr. Clem's park is the ideal spot for those."

David Clem, a developer who previously built lab space at the Massachusetts Institute of Technology, is moving forward on a property that has been in the works for several years. River Park, an 850,000-square-foot mixed-use space, would provide life science lab and office space as well as retail, housing and potentially a hotel. Last fall, Clem installed a sewer line and the city of Lebanon took the opportunity to upgrade its 60-year-old water main.

In addition, “we’re spending \$1 million in 2019 to make upgrades to allow for another 200,000 gallons of sewer capacity, and we’re going to follow up next year for additional capacity for the city,” said Mulholland.

He also noted the city’s goal of encouraging mixed-used development downtown and zoning approval for building heights to allow for an additional floor of construction, and the planning board has also approved an additional industrial park, adjacent to an existing park on municipal land by the airport.

The infrastructure investments have been sparked by growing demand for commercial space in the area.

“The Dartmouth Regional Technology Center is full. They don’t have enough space,” said Mulholland, referring to the nonprofit incubator that is run in partnership with Grafton County Economic Development Corp. Centerra Business Park is also completely filled, he said.

“We have businesses that want to move out of the DRTC and they need a place to do that,” said Mulholland.

Self-sustaining ecosystem

One such business is FreshAir Sensor, which sells devices that detect tobacco or marijuana smoke in real time and send immediate notifications to hotel and apartment managers.

The company was launched in 2013 by a 33-year Dartmouth chemistry professor, who now serves as the company’s chief technology officer, and a graduate of the Tuck School of Business at Dartmouth. Initially, the company rented 100 square feet of space at the DRTC. It now takes up 5,000 square feet.

“We’re seeing a super-positive response from hoteliers that have tested it and we have over 6,000 devices sold and installed in the market now across about 150 properties in the United States,” said CEO Trip Davis. “I would say FreshAir Sensor would be ecstatic to develop a building with David Clem and River Park in the years to come. That would be a natural graduation.”



Trip Davis, CEO of FreshAir Sensor, says the company plans to stay in Lebanon, where there is a “sense of community.”

Davis, a technology entrepreneur who attended Dartmouth as an undergrad, had been working informally with FreshAir and was recruited back to the area by Dartmouth professor and bioengineering entrepreneur Tillman Gerngross.

Gerngross was instrumental in helping rewrite Dartmouth’s tech transfer policy that awards professors the license to commercialize their technology developed in Dartmouth’s labs, as was Nila Bhakuni, director of the Technology Transfer Office at Dartmouth.

“We have significantly increased the startup activity at Dartmouth. We have completed one license and one option already this fiscal year and we currently have four startup licenses in process [with] another three that are coming up in due diligence,” said Bhakuni. “When I started three years ago, we noted that Dartmouth had an average of one to two startups per year for the last 10 years.”

The expansion of the Dartmouth Coach bus line and Cape Air’s direct flights to Boston make it easy for Upper Valley companies to make global connections.

“There are a number of biotech companies in the Lebanon area and one of the running jokes with those entrepreneurs is how often they get asked the question, ‘When are you

moving to Cambridge?’ And they say ‘Well we’re not. We want to stay in Lebanon,’” said Davis, citing firms like Gerngross’ protein engineering firm Adimab and drug purification company Avitide, which remain in the DRTC.

“People like Tillman and other entrepreneurs feel that sense of community,” said Davis. “DRTC in itself is a community where we have 18 ventures, and they range from one person in a 75-square-foot office to 55 people in a 35,000-square-foot lab space.”

‘A lot of possibilities’

“We, over a period, have built a powerful technology that the rest of the pharmaceutical world of technology wants access to,” said Gerngross of Adimab, whose previous startup GlycoFi was sold to Merck for \$400 million in 2006. “There are partners in China, in Japan and all over Europe. Most pharmaceutical companies come to us and we send them the output and we’ve done it in such a way that we’re profitable.”

“By and large, I think companies look to where the expertise is, and in the engineering world, it’s not always necessarily immediately right next to the client,” said Rick Greenwald, CEO and co-founder of Simbex, an engineering consulting firm that works on medical devices and consumer health products. “We work virtually with [clients] and we work closely with their engineering teams on-site and here — it’s just an extra ride up the highway.”

Simbex was founded by entrepreneurs with no affiliation to Dartmouth College — a sign of a flourishing tech ecosystem that attracts employees in its own right.

Greg Lange moved to the area 15 years ago for a quality control position with M2S, a 3D medical imaging technology company, rising in the ranks to CEO. He now serves as chief business development officer for Simbex.

“The challenge of bringing somebody from the Boston area up here is overcoming the ‘Is this the only job in the Upper Valley?’” said Lange.



Simbex CEO and Co-founder Rick Greenwald, Senior Program Administrator Cassie Brugger and Chief Business Development Officer Greg Lange sit in their Lebanon office. Early-on, Simbex partnered with Riddell to create a youth football helmet with sensors to detect hard hits and improve player safety. It currently is working with a client on high-end hospital bed that would reduce pressure ulcers using novel technology.

(Photo by Liisa Rajala)

In the region, he said, “there are a lot of possibilities, but it’s hard to know. You know on 128 in Boston if you’re a software engineer there are lots of big companies you could go from X to Y to Z. That’s pretty common. Up here it’s not so in your face.”

Jake Reder, the CEO of Celdara Medical — a company in the DRTC that partners with investors and their institutions to guide early-stage innovations into high-potential medical companies — came to the area as trailing spouse, another common method that expands the employment base.

“I’m sure it’s easier to get 1,000 resumes for a position in Cambridge, but to actually keep someone here, it’s much, much easier,” said Reder. “If you look at the CVs in Boston, they’re 18 to 36 months on the job — whereas up here you’ve got more stability, which is great for the employers and great for the employees.”

Moving to commercialization

Dartmouth College and Dartmouth-Hitchcock Medical Center bring “a very well-educated, diverse workforce” to the Upper Valley and create a community of “really interesting people to interact with,” said Greenwald of Simbex. “You go to a youth soccer game and you’re surrounded by medical doctors, nurses, engineers, technology professionals ... It’s the density of people in this area that are highly educated and want to do things that are interesting.”

A community of dedicated professionals also produces a network of entrepreneurial resources.

Last year, Celdara Medical and the University of Vermont were awarded a three-year, \$3.5 million National Institutes of Health grant to identify commercialization gaps for biomedical researchers and set up an entrepreneurial ecosystem. Sub-awardees include the University of New Hampshire, Dartmouth College, Maine Medical Center, Mount Desert Island Biological Laboratory, University of Rhode Island, University of Delaware and Simbex.

“In biotech and medical more generally, you require an educational foundation that just takes time,” said Reder. “Most of these things are coming out of professors’ research labs who have spent decades getting trained and then decades pushing the envelope in their own specific subjects.”

For students and faculty at Dartmouth, one avenue is the Dartmouth National Science Foundation I-Corps program, which is co-managed by Caroline Cannon.

Researchers receive \$3,000 and hands-on assistance from the Magnuson Center for Entrepreneurship. They are also directed to conduct 100 interviews with potential customers over 10 weeks to find a target customer outside of academia.

“Many, many, many of our teams have moved on to commercialization and starting companies,” said Cannon.

Simbex also manages the Center for Translation of Rehabilitation Engineering Advances and Technology and the New England Pediatric Device Consortium.



Celdara Medical's Special Projects Manager Julie Coleman and CEO Jake Reder are managing a \$3.5 million grant to identify commercialization gaps for biomedical researchers and setup an entrepreneurial ecosystem.

Funded by the National Institutes of Health, among others, the programs assist researchers and entrepreneurs with the prototyping and early business development for ideas that could benefit smaller subsets of the population.

“In these days of tight capital, government funding provides an incredible non-dilutive source of revenue for small businesses to get to the next stage that’s often followed by matches in angel, venture or foundation funds — critically important,” said Greenwald.

“The opportunities coming out of Dartmouth and their focus on technology and innovation and entrepreneurship have grown in the last five to 10 years exponentially,” he said. “We provide services through our federally funded commercialization centers, and the Dartmouth professors and clinicians coming over for that help; they’re great and they’re eager to learn.”

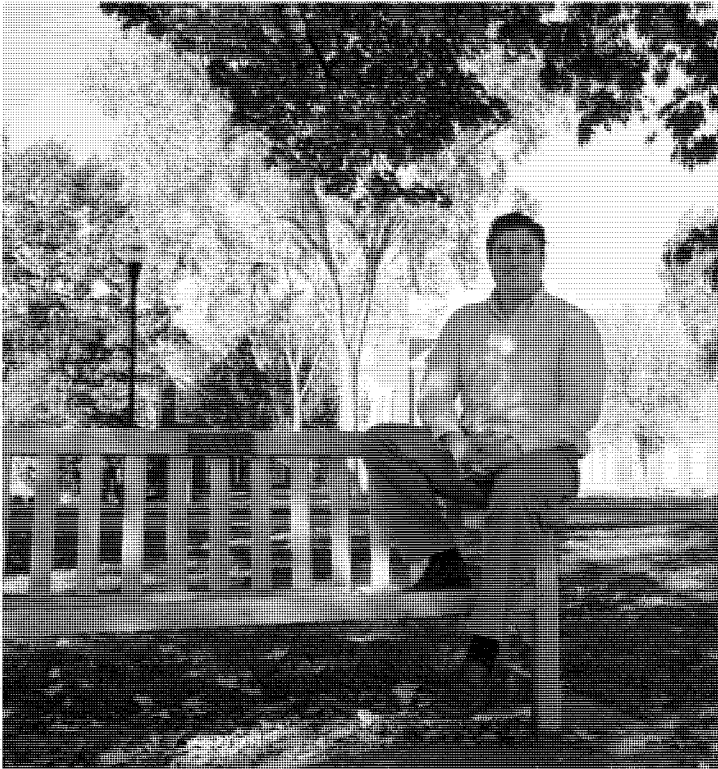
Dartmouth’s impact

The \$3.5 million grant received by Celdara is aimed at setting up a regional technology transfer accelerator hub in the Northeast, which will collaborate with 10 research institutions in the Northeast and the other three hubs in Central, Southeast and Western regions.

“Currently there are a lot of resources that exist, but there’s no one centralized place to go and find them for biomedical entrepreneurs,” said Julie Coleman, special projects manager at Celdara.

The committee working on the project will nominate individuals and programs to partner with, and has already assembled a committee of VCs and pharmaceutical companies for investment and mentorship opportunities.

One of the individuals Coleman is partnering with is Jamie Coughlin, director of the Magnuson Center for Entrepreneurship.



Jamie Coughlin, director of the Magnuson Center for Entrepreneurship at Dartmouth.

On its own, the Magnuson Center has raised \$44 million to encourage entrepreneurship, whether it be students, faculty or the community at large through programming and grants.

“All of these ideas and companies require a significant amount of capital, and Dartmouth has an unbelievably good venture capital network,” said Gerngross. “A very large fraction of venture capitalists went to Dartmouth disproportionate to the Ivies. You certainly have access to the right people to critique and fund your ideas more so than at other universities.”

While students may not be most likely to keep their companies in New Hampshire, “our faculty and staff are often times grounded here and the pursuits of their ventures oftentimes stay here,” said Coughlin.

“Without Dartmouth, there would be no activity,” summarized Gerngross. “Academic standards are the nucleus by which new ideas and insight into basic science leads to these opportunities that some people are able to translate into other drugs or platforms. Why are things happening at Dartmouth? The answer is because there is Dartmouth and it’s able to attract people and attract the talent.”

Liisa Rajala can be reached at lrajala@nhbr.com.

CATEGORIES: TECHNOLOGY



May 23, 2025

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

Request for Extension: #PB2025-05-EXT

Members of the Lebanon Planning Board,

Lyme Properties, development agent for XYZ Dairy, LLC ("XYZ"), in its letter to this Board dated April 16, 2025, has requested further consideration of its Dec. 19, 2024 request for a two (2) year extension of the River Park West Lebanon Site Plan. This letter and its enclosures, **which include dozens of internal emails recently produced by the City in response to Court orders**, are submitted in support of that request and in preparation for the Board's June 9, 2025 Hearing on it. For the reasons set forth below, XYZ's requested two (2) year extension should be granted at this time.

Introduction

Internal emails recently produced by the City in *XYZ Dairy v. City of Lebanon*, et al., Docket No. 215-2024-CV-00393 (Grafton, NH Superior Court), and attached as exhibits to XYZ's Amended Complaint ("AC") in that action, reveal that the "staff" of City officials on which this Planning Board has been relying for factual information, legal opinions, and recommendations concerning the River Park Project (the "Project"), including Tim Corwin ("Corwin"), Nathan Reichert ("Reichert"), and Brian Vincent ("Vincent"), are personally biased against the Project, and have been engaged for years, along with several other City officials, in a conspiracy to delay, obstruct, and derail the Project, using carefully constructed "cover stories" at every turn to conceal their efforts.

It is the improper and illegal actions of these "staff" members, and not any fault of XYZ, that has delayed and obstructed the progress of XYZ's work on the Project since 2022, and that is why XYZ is asking this Board, as part of its responsibility to ensure the integrity of the City's land use regulation process, to reconsider and grant XYZ's request for a two (2) year extension of all phase deadlines, responsibly viewing that request in light of the following previously concealed but now undeniable facts concerning the extreme bias of its own staff, as proven by their own internal emails, which are quoted directly in this submission.

Part I (2022-23)

1. XYZ began on-site excavation for the foundation of River Park's Building 1 more than two years ago, on Nov. 29, 2022, well within the then-existing 180-day deadline for commencement of work under its building permit, which at that time was Jan. 13, 2023 (having been previously extended several times twice due to COVID). As this Board is aware, XYZ was forced to stop that work when it unearthed the City's unpermitted stormwater drainage pipe running through the center of the area where the foundation for Building 1 was to be located under the Site Plan approved by this Board.

2. On Dec. 9, 2022, XYZ emailed a letter to City Engineer Brian Vincent, building inspector Calvin Hunnewell ("Hunnewell"), and Deputy City Manager David Brooks ("Brooks"), informing them that the City stormwater pipe obstruction had stopped its work. XYZ had no concerns about its building permit expiring then, or for months thereafter, because it had actually started the work on-site in November 2022, was continuing extensive Project work off-site, and was waiting for the City to respond with information on how it wanted its stormwater pipe temporarily relocated.

3. Brooks acknowledged receipt of XYZ's obstruction notice on Dec. 12, 2022, three (3) days after XYZ sent it, copying Vincent and Hunnewell, and saying he would follow up with Vincent on the pipe removal issue. XYZ then met with Vincent and another City engineer on-site on Dec. 15, 2022 and showed them the pipe obstruction that had stopped the work. There was discussion about how to remove it, and Vincent informed XYZ



that the City would respond with more information and a plan for removal of the pipe shortly. **But the City never did so until more than seven (7) weeks later on Feb 2, 2023.** As the internal City emails discussed below now prove, this delayed response was part of a deliberate effort by this Board's staff, Corwin, Reichert, and Vincent, and other City officials, to obstruct the entire River Park Project.

4. No one from the City suggested to XYZ at the Dec. 15, 2022 on-site meeting regarding the obstructing drainage pipe, nor at any other time in December 2022, nor at any time in the entire month of January 2023, that there was any deadline for removing the pipe and restarting work at the site, or that XYZ's building permit was at any risk of being declared "expired," or even possibly expired, if the work was not recommenced by Jan. 13, 2023. But the recently produced internal email exchanges between Corwin, Reichert, Vincent, Brooks and Hunnewell prove that **they were planning to try to declare XYZ's permit "expired" all along** – even though, in his entire 36-year career, the Lebanon building inspector **has never revoked a building permit, or declared that it was expired**, as he later admitted under oath in Court in the above-referenced case.

5. Unbeknownst to XYZ, the same week that it had its Dec. 15, 2022 on-site meeting with City engineers about the City's obstructing stormwater pipe, Reichert, Corwin, and Hunnewell were discussing how that obstruction could create an opening for them to declare the "possible expiration" of XYZ's building permit, even though they knew XYZ had started construction following completion of the necessary Cross Country Connector work the previous month, and was fully prepared to proceed further once the obstruction was cleared.

6. As Reichert described it in an email he sent to the others on Dec. 22, 2022:

Calvin and Tim.

We need to circle back on the project at 1 River Park Drive.

Calvin one of the questions that arose during our discussions last week was a simple one, However, this [the stormwater drainage problem] does have a major impact on the possible expiration of the Building permit for the project. As you know the Building Permit for the project is due to expire in February [sic January]. It is likely that the builder will be attempting to craft an argument that the project has begun construction because they dug a hole and hit a City owned pipe. The simple question is: **Has the project started? What do you see as the necessary criteria that must be met to constitute the start of construction?** If construction has begun, then how long will the project have to remain fallow **before the permit expires**. Please let me know your thoughts on the matter..

Nate

Nathan Reichert, Planning and Development

Exh. A hereto, at LEB_0052131 (emphasis added). At that time, no issue of possible expiration of XYZ's building permit had been mentioned to XYZ, so XYZ was not "attempting to craft" any argument on that issue, and it was not Reichert's legal role or responsibility under the Building Code, nor was it Corwin's, to be inventing and promoting building permit expiration arguments against XYZ. **But they were.**

7. Reichert's and Corwin's internal discussions about having the City's building inspector declare the XYZ's building permit "expired" **continued in January of 2023**, and intensified after the 180-day deadline for commencing work under the building permit expired on January 13, 2023. Although XYZ was still unaware of it in January 2023, Corwin and Reichert were drafting various "permit expiration" letters at that time for the building inspector to send to XYZ – even though, as stated above, in his entire 36-year career, the building inspector had never done so.

8. Corwin himself prepared the "initial draft" of the letter, **specifically declaring in it that XYZ's building permit had expired.** He included in that draft in the following extraordinary email he sent on Jan. 30, 2023 to Reichert, Brooks, and Hunnewell, stating:



"I'm wondering whether the letter [to XYZ] regarding the building permit should be separate from the letter regarding the stormwater line location mainly because **the determination that the building permit has now expired should be made in writing by the Building Inspector, right? I've written the initial draft ... as if it's a separate letter from the Building Inspector**, but obviously that can be changed if we decide a single letter is appropriate. . . .

Dear Mr. Clem:

I am writing to follow up from my letter to you dated May 27, 2022, regarding the status of Building Permit#2016-00293 issued for 1 River Park Drive (formerly 100 River Park Drive). As noted in my May 27th letter, this office found that the COVID-19 pandemic represented adequate justification to grant your request for 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, with the subject line, "[c]ommencement of 1(00) River Park Drive (Building Permit # 2016-00293) is in conflict with City's existing municipal stormwater line[.]" The purpose of the instant letter is to address the status of the Building Permit, whereas I understand Deputy City Manager Brooks will address your concerns regarding the stormwater line under separate cover.

As outlined in my letter from May 27, 2022, the Building Permit was originally issued on December 31, 2019, but, failing to commence work within 180 days of issuance as required by Section 105.5 of the International Building Code (IBC), the permit has been reinstated and extended multiple times. Section 105.5 of the IBC 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[.]" Your December 9th letter to Mr. Brooks indicates that the purpose of your letter, "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," noting that, "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022." **Please be advised that it is the determination of this office that, because excavation work does not require a building permit under the IBC; the activity described in your letter of December 9, 2022; does not and cannot constitute the commencement of work authorized by the Building Permit.** *[n.b. At this point in the draft Corwin admits that he could not find any authority for this claim in the IBC Building Code] ("should/can we provide a fuller explanation of why the excavation work [done by XYZ] doesn't constitute commencement of the work authorized under the building permit? I took a quick look at the printed copy of the IBC and couldn't find anything helpful...)* Consequently, **the Building Permit expired on November 22, 2022** [sic Jan. 13, 2023].

Given the delay in the responding to your letter of December 9, 2022, we can extend the deadline to submit a written request for an extension of the Building Permit to February 2023. However, as noted in the May 27th letter, **please be advised that this office may not be able to justify granting an additional extension.** Also as noted in the May 27th letter, as part of any written extension request the applicant will need to submit revised and updated plans and specifications for the development to demonstrate compliance with the 2018 edition of the IBC.

Sincerely, Calvin Hunnewell, Building Inspector.

Amended Complaint ("AC"), Exh. 28 (emphasis added).

9. At that time, Corwin, Reichert, and Brooks all had actual knowledge that their scheme to declare XYZ's building permit expired after the fact was **wrong** and **unfair to XYZ**, and that **XYZ could have addressed the issue prior to the expiration of the 180-day period on Jan. 13, 2023 if it had known there was an issue.**



The fact that the “staff” knew this is proven by the incriminating email that Brooks sent privately to Corwin, Reichert and Hunnewell that same day, January 30, 2023, stating:

“... [w]e should be prepared for the potential response [from XYZ] along the lines of **‘if you’d told me this back in December, I’d have gotten more work done to prevent the building permit from expiring.’**”

AC, Exh. 25 (emphasis added), referring to the fact that XYZ would never have voluntarily let their building permit expire if it had known this argument was going to be made, as it already had millions of dollars invested in the Project.

10. Corwin and Reichert also knew that their “interpretation” that XYZ’s prior excavation for the foundation of Building 1 somehow “did not constitute commencement of work “for purposes of the 180-day requirement **had no support whatever in the Building Code**, even though they were trying in vain to find some, as Corwin admitted in his above initial draft where, in his italicized note, he said “*should/can we provide a fuller explanation of why the excavation work [done by XYZ] doesn’t constitute commencement of the work authorized under the building permit? I took a quick look **at the printed copy of the IBC and couldn’t find anything helpful...***” AC, Exh. 25 (emphasis added).

11. Corwin, Reichert and Brooks also knew that their “interpretation,” which they intended to have the building inspector falsely present to XYZ as his own, was guaranteed to be contested legally, and in the “court of public opinion” as Brooks specifically told Reichert and Corwin in his below email of Feb. 1, 2023, saying:

“I would definitely provide as many code citations and as much support as possible to justify the interpretation that is being made. In addition, you might want to run that justification past legal counsel, because **you can almost guarantee that it will be contested, either legally or in the court of public opinion.**”

AC, Exh. 26 (emphasis added)(emphasis added). Neither Corwin, Reichert and Brooks could ever find any support in the Building Code for their anti-XYZ interpretation, however, **because there was none**. They were just making up their “interpretation” as they went along to obstruct and delay the Project, and condemn XYZ to lengthy administrative “appeals” that they knew would suspend the Project.

12. Several hours after receiving Brooks’ above email saying that an outright termination of XYZ’s building permit would be contested legally, Corwin met with Hunnewell to discuss the matter, and the two “nailed it,” as Corwin described it, by coming up with a different “approach” to obstruct XYZ’s efforts to proceed with the Project, which was to put the continuing validity of XYZ’s building permit in doubt by claiming that the building inspector somehow “did not have enough information” to determine whether XYZ’s building permit had expired, and demanding “a list of things” XYZ would need to give him, or he would declare it expired.

13. Corwin admitted this secret plan in a Feb. 1, 2023 email he sent to Reichert, Brooks and Hunnewell that afternoon – 3 hours after he received Brooks’ email about how their interpretation would be contested:

Calvin and I met for a while to discuss - **we finally nailed it** (Calvin did actually) **-the best way to approach this is to reply that we don’t have enough information to make a determination that the work has commenced; and put it back on them [XYZ] to give us more** than “we dug a hole in a spot where the plans show a pipe is located”.

We came up with a list of things that they’ll need to provide (for example, evidence that the GC, site/excavation and concrete contractors were lined up and ready to go ...).



Stay tuned for an updated draft letter... !

AC, Exh. 26 (emphasis added). Brooks promptly replied to that email "Good work," id., and four hours later, Corwin sent another email to Hunnewell, Reichert and Brooks containing the "updated draft" to which he had referred in his above email, adopting the "nailed it" approach they had decided on.

14. Among other things, Corwin's "updated" draft, set forth in his Feb. 3, 2023 email (reproduced below), **falsely claimed** that the only information the City had received about XYZ's excavation work up to that point was the statement in XYZ's Dec. 9, 2022 letter that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022." AC, Exh. 26 (emphasis added). **But in fact, Corwin knew at the time that two City engineers had visited the Project Site in person six (6) weeks earlier on Dec. 15, 2022**, had seen the work that XYZ had started, and had **already reported** to the City on the work that XYZ had done. Corwin was deliberately saying otherwise in his draft simply to justify its demands for more "information."

15. Corwin's "updated" draft, set forth in his Feb. 3, 2023 email below, AC, Exh. 26, also emphasized the prospect of "an adverse decision" on the XYZ building permit expiration issue, and included demands for "steps to be completed prior to the resumption of construction activities" **which were not legally required or did not have to be completed until much later in the construction process**, effectively trying to put the cart before the horse, and prevent the re-commencing of construction on the Project entirely.

16. Corwin included his "updated draft" in an email to Hunnewell, Reichert and Brooks that day, stating:

"... **here's take 2** [of the letter]. Can you take a look, especially the language highlighted in yellow? It will definitely need some massaging.

DRAFT E-MAIL TO CHET CLEM FROM CALVIN:

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, we approved an extension of the Building Permit until January 13, 2023.

On December 9, 2022, we 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." As you know, Section 105.5 of the IBC provides that, "[e]very permit issued shall become invalid unless the work on the site authorized by such permit has commenced within 180 days after its issuance[.]" **Please be advised that we need additional information in order to make a determination as to whether work has commenced** for purposes of demonstrating compliance with Section 105.5.

At this time, **the only information that has been provided is that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022."** In order to **make a determination we ask that you 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, it would be helpful to have the following:

- Date that building footprint was staked and name of surveyor.
- Evidence that the necessary contractors - including but not limited to general contractor, excavation contractor, site contractor, and concrete contractor--were in your hire as November 29, 2022 and were prepared to perform the work.
- Evidence that a design team was in your hire as November 29, 2022.



- Your construction schedule demonstrating when the work was to have been performed including but not limited to the pouring of the foundation concrete.
- Additional information as to the nature and extent of the work performed, e.g.:
 - o For how long did work proceed?
 - o How many pieces of equipment were on site?
 - o Who performed the work?
 - o How many workers were on site?
 - o How much was dug?

We ask that you please respond at your earliest convenience so that we can make a determination and, if adverse to your position, establish a date by which the determination can be appealed.

If we are 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.** These include:

- Confirming that the statement of special inspections is still valid.
- Providing a cost estimate of remaining Phase 1 Infrastructure improve merits 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, please don't hesitate to ask.
Sincerely, Calvin Hunnewell, Building Inspector"

AC, Exh. 26 (emphasis added). Reichert, who was also involved in drafting this letter, responded a few days later on Feb. 6, 2023 by suggesting that the phrase **"it would be helpful to have the following"** be **"stiffen[ed]"** because he said **"any amount of flexibility that we give them will promote argument ... don't give them a choice."** Id. (emphasis added). Corwin responded to Reichert on Feb. 8, 2023 by stating he agreed "with your line of thinking," and that although he was busy with "Planning Board memos," he would "try to tighten up the draft email to Chet [XYZ] as soon as possible." Id.

17. The next day, Feb. 9, 2023, Corwin expanded his "updated draft" saying

"Here is the latest draft based on Nate [Reichert] and Calvin's comments. If we're all ok with this, it should probably be sent out by Monday at the latest."

AC, Ex. 28. In it, Corwin removed the **"it would be helpful to have the following"** language that Reichert had suggested be **"stiffened,"** and substituted **a mandatory directive** for XYZ to **"provide the following,"** followed by a much longer list than his previous draft had contained of still more business, financial, cost, and engineering items that XYZ was not legally required to be submitted at that time, and that the building inspector **had no right to demand from XYZ.** Again, that list was followed, as shown in the excerpt quoted below, by the extortionate demand that if all the items were not provided, **the building inspector would retroactively revoke XYZ's building permit** effective one month earlier when the 180-period had expired:

"Here is the latest draft based on Nate and Calvin's comments ...

DRAFT E-MAIL TO CHET CLEM FROM CALVIN

* * *

... In order to make a determination [as to whether XYZ's building permit was "expired"] ... **provide the following:**



- Date that building footprint was staked and name of surveyor.
- Evidence that the necessary contractors - including but not limited to general contractor, excavation contractor, site contractor, and concrete contractor--were in your hire as November 29, 2022 and were prepared to perform the work.
- Evidence that a design team was in your hire as November 29, 2022.
- Your construction schedule demonstrating when the work was to have been performed including but not limited to the pouring of the foundation concrete.
- Additional information as to the nature and extent of the work performed, e.g.:
- Confirmation that the statement of special inspections is approved by registered design professional and the inspection agency has verification of notice to proceed.
- Confirmation that the registered design professionals are ready to proceed.
- Copies of contract agreements with description of the project; payment information, the scope of work, and construction schedule.
- Construction schedule including the projects intended completion date, 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.
- Detailed cost estimates.
- Verification of notice to proceed

Without the requested information and verification that you have actively prosecuted the permit **I can not justify the continuance of the permit and [sic will] revoke the permit as of January 13, 2023.**

(emphasis added). The intended effect of this draft was to derail the Project by creating a situation in which XYZ was under permanent threat of having the City building inspector, whose letters Corwin and Reichert were drafting and who they controlled, retroactively declare XYZ's building permit "expired" – which, again, the building inspector **had never done to anyone before in his entire 36-year career.**

18. Over the next several days, this Board's "staff" exchanged and "group edited" multiple additional drafts of the letter they wanted the building inspector to send XYZ, each including the threat that "[w]ithout the requested information and verification," the building inspector would "**revoke the permit as of January 13, 2023**" – which he had no right to do under the Building Code, and Corwin, Reichert, and Brooks had no legal right to be suggesting he do in these drafts. See AC, Exh. 28.

19. Corwin and Reichert's internal email communications clearly show that they knew and intended this letter to stun and demoralize XYZ, and severely disrupt the Project – as evidenced by Corwin's email of Feb. 13, 2023 saying to Reichert, as he forwarding his final draft of the letter just before the it was sent to XYZ:

"Nate - Do you want to take a look at this before it goes out? Keep in mind it has the potential to start WWW III [World War 3] !"

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, we 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." As you know, Section 105.5 of the IBC provides that, "[e]very permit



issued shall become invalid unless the work on the site authorized by such permit has commenced within 180 days after its issuance[.]" **Please be advised that we need additional information in order to make a determination as to whether work has commenced for purposes of demonstrating compliance with Section 105.5.**

At this time, the only information that has been provided is that "[i]nitial excavation within the building footprint began on Tuesday, November 29, 2022." In order to make a determination **we ask that you 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 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 projects intended completion date, 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.

Without the requested information and verification that you have actively prosecuted the permit **I cannot justify the continuance of the permit and will revoke the permit as of January 13, 2023.**

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.

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, please don't hesitate to ask.

Sincerely, Calvin Hunnewell, Building Inspector

AC, Exh. 28. Both Corwin and Reichert knew that sending this incredibly disruptive demand notice to XYZ weeks **after** the 180-day period on which they were relying had already ended (on January 13, 2023) was patently unfair to XYZ, as evidenced by Corwin's follow-up email to Reichert and the building inspector two



days later on February 14, 2023 at 9:09 pm, saying he had prepared the “final” draft of the building inspector’s letter to XYZ, and that

“We should really get this out tomorrow ... It’s now over 2 months since we received Chef’s [XYZ’s] letter [advising that construction had been stopped by the pipe obstruction]”

(emphasis added). Corwin, a lawyer, knew that it was clear violation of XYZ’s rights to have waited over 2 months to issue this declaration, and then to make the threats he made in his draft “building inspector” letter to retroactively declare XYZ’s building permit expired – he did it anyway because he was and is biased against the Project, and committed to seeing it fail. So the letter was issued in the above form to XYZ on February 15, 2023, see AC, Exh. 7, **with the fact that Corwin and Reichert had drafted it never revealed, until now.**

20. **XYZ requests that this Board ask itself**, why was its “staff” manufacturing arguments and drafting letters of this kind for the building inspector to send to XYZ in 2023 threatening expiration of its building permit, and prematurely imposing conditions BEFORE construction could recommence that obviously did not have to be satisfied legally until well AFTER construction commenced, as XYZ’s lawyer later pointed out in filings in support of XYZ’s administrative appeal of this “letter.”

21. It was neither Corwin’s nor Reichert’s legal role to be inventing and promoting building permit expiration arguments against XYZ to the building inspector, let alone drafting new and unlawful requirements to impose on XYZ as a “condition” of the building inspector not declaring their building permit expired, and still more premature and unlawful conditions on the resumption of construction. Nor was there any precedent for it, as the building inspector later testified in Court. So why were they doing it? The obvious answer, as these emails clearly show, is that both men were engaged in an illicit effort to derail the Project because they were and are biased against it, despite the majority public support for it in Lebanon.

22. In the months that followed the issuance of the above “permit expiration” letter to XYZ, as Corwin, Reichert, and Brooks had intended, construction on the Project site came to a standstill, XYZ became bogged down in appealing from the unlawful demands in the Feb. 15, 2023 letter which, although signed only by Hunnewell, had been originated and drafted by this Board’s own staff, Corwin and Reichert. The River Park Project then stalled because they, and Brooks and several other involved City officials, would not let it proceed – instead pressing endless “information” demands, and multiple referrals of XYZ to other City departments, that had nothing to do with the building permit, and were intended to kill the Project.

23. As a result, the City’s intentionally-delayed reply to XYZ’s original Dec. 9, 2022 Letter on the stormwater drain obstruction issue, which Brooks finally sent to XYZ eight weeks later on Feb. 2, 2023, was too little, too late – having been deliberately held up for eight (8) weeks by Brooks, who finally began writing it on Jan. 26, 2023 while he was, at the same time, coordinating with Corwin and Reichert on their effort to prepare a letter for the building inspector Hunnewell to sign – so their involvement in creating it would not be known – that Corwin knew would, as he put it, “start World War III” by declaring XYZ’s building permit expired unless their illegal demands were met, and prohibiting construction from recommencing as his emails to those men quoted in paragraphs 9 and 11 above show.

24. At that time Brooks knew perfectly well that XYZ would not be able to address the stormwater drainage issue if the validity of its building permit was in doubt, and he knew it would be placed in doubt shortly after he sent his Feb. 2, 2023 reply to XYZ on the stormwater drainage issue, which it was two (2) weeks later when the Corwin letter – signed by Hunnewell – was sent to XYZ on Feb. 15, 2023. Brooks fully intended this result, noting in a January 26, 2023 email that he sent to Corwin, Reichert and others a few days before his then-draft reply to XYZ on the stormwater drainage issue was sent out, that it could be:



"coupled with the Planning Department's response as to whether the initial excavation work constitutes "starting the building" for purposes of effecting the building permit,"

AC, Exh. 24, which he knew from reviewing Corwin's drafts of Hunnewell's letter to XYZ on that issue would say either that the building permit was "expired," or that it was subject to being retroactively declared "expired" if XYZ did not comply with its unauthorized, illegal, and premature demands, which it could not do, thereby freezing the Project, and could not recommence construction until it complied with still other unauthorized, ultra vires, and premature demands that Corwin and Reichert had simply invented to prematurely impose on XYZ in order to delay its recommencement of construction.

25. To conceal their actions, Corwin, Reichert, Brooks, Hunnewell, and Vincent have repeatedly and falsely blamed XYZ for delays on the Project, and pressed this Board to deny XYZ's extension requests, sometimes in indirect and *ex parte* communications to which XYZ has not been party. Their internal emails show, however, that the information, advice and recommendations that they provide to this Board are not reliable because they have a clear bias against the River Park Project, deliberately tried to sabotage it beginning in early 2023, and want it to fail. There is also still more evidence of this in the internal emails of the Board's "Staff" concerning their attempts to delay the Project commencement **again** in the Fall of 2023, and their effort to attack XYZ's building permit **again** in early 2024, as discussed below.

Part II – 2023-24

26. After attempts to satisfy the City building inspector's demands, and an inconclusive appeal to the BCBA, on August 3, 2023, XYZ attempted to continue construction on the Site by requesting approval from the Defendants to remove the City stormwater drainage pipe whose obstructive presence on the Site had stopped on-site construction the previous year (on Nov. 29, 2022), so it could proceed with construction of the first Project building in that location. See AC, Exh. 13.

27. Specifically, XYZ asked the building inspector in writing on August 3, 2023 "we seek your approval of the temporary relocation of the municipal/NH DOT stormwater line that impacts our property without the benefit of an easement," noting that the NH state agency with jurisdiction over the matter had issued a license for the removal of the pipe, an alternative temporary drainage system had been designed and approved, the proposed excavation contractor was "an approved contractor within the City of Lebanon," and that

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. . . . **Time is of the essence for this decision. I look forward to your favorable response.**

Sincerely,

Chet Clem

Lyme Properties, on behalf of XY2 Dairy, LLC

AC, Exh. 12 (emphasis added).



28. City officials had already reviewed XYZ's plan for removal of this stormwater drainage pipe more than six (6) months earlier after XYZ discovered the pipe on the site on Nov. 29, 2022. They knew all about the issues pertaining to it, and had informed XYZ at that time that "[t]he City has no issues with the use of the alternative drainage pipe alignment on a temporary basis ... as long as the alternative alignment and design is approved by [the state agency]," and other routine information provided, AC, Exh. 32, which it was.

29. Nevertheless, the immediate internal response of Reichert, Brooks and Corwin to this XYZ request was to look for an excuse to delay in responding to it, and thereby further delay the Project, in a way that would not be appealable by XYZ. On the day XYZ's request was received, Reichert emailed the other City officials to discuss this strategy, stating:

Who should send the information about what is needed and jurisdiction? If it comes from Building (Calvin) or Zoning (Nate), **it may be appealable which is a can of worms we do not want to open. I'm game to play in any direction.** If you want me to respond I will. It might be best to have it come from Nick or David.....

AC, Exh. 33 (emphasis added).

30. Reichert then proposed how the City's Department of Public Works ("DPW") should be asked to impose "requirements" from which XYZ would not be able to appeal, and asked if they had or could "create" a "list of requirements" that they could "share with" the DPW for it to impose on XYZ:

We may wish to have DPW re-send the requirements of what they need to do to get the final City sign off and acceptance of the improvement. **I will also argue that the DPW approval, conditions or disapproval is NOT appealable to the Zoning Board** as it is not within the Jurisdiction of the Planning, Zoning or Building Official.

... **Do we have an articulated list of the requirements** that needs to be met that we can share with them [DPW] **or do we need to create one?**

AC, Exh. 34 (emphasis added).

31. XYZ's engineering firm, T. F. Moran Engineers, had already submitted drawing and certifications as to the removal of this decaying pipe in 2022 to the New Hampshire state agency with jurisdiction over the matter, the NH Dept of Environmental Services, however, and the requisite Alteration of Terrain Permit for the work to be done – which the City had in its files – had already been issued in 2022, see AC, Ex. 34, so there were no grounds for the City to impose the "articulated requirements" that Reichert wanted to impose.

32. Nevertheless, Reichert, Corwin and Brooks officials chose to delay the Project again. Although Brooks **had responded 6 months earlier to XYZ's prior request to remove the stormwater pipe after the building inspector had been asked to approve it then**, he now said that:

... 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 are also copied on your e-mail 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 2nd 2023 e-mail, which is referenced in your letter, outlined 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.

AC, Exh. 35. The intent of this “not the correct venue” argument was to continue the strategy that had begun in 2022-23 of unlawfully delaying, obstructing and hindering any effort to XYZ to re-commence construction on the Project – in this case by bouncing XYZ to another department whose restrictions it could not appeal from – in other words, pure delaying tactics.

33. XYZ promptly responded to defendant Brooks’ email on August 4, 2023, pointing out (i) that the City had been copied on all communications with the New Hampshire Department of Environmental Services, which had already granted XYZ the right to perform the relocation of the stormwater pipe as part of an Alteration of Terrain (“AOT”) permit back in 2020, (ii) that XYZ’s engineer TF Moran had already addressed the design issues that Brooks was raising at that time, and (iii) that “the city’s pipe is preventing work on one river park from continuing” and that XYZ ... look[ed] forward to receiving the city’s proposed solution for moving its pipe out of the way so our work can continue.” See AC, Exh. 36.

34. Upon receiving that response from XYZ, Brooks admitted internally that one could assume that “temporary storm drainage measures can be approved ‘under the building permit,’” as XYZ thought, but continuing his delaying tactics, he directed Reichert, Corwin, Vincent, Hunnewell and others to nevertheless consult with “DPW/Engineering,” Exh. 37, fully intending that, as Reichert had suggested to him, that they would then “share” with DPW “an articulated list of...requirements” that they would “create, see Exh. 34, which he knew at the time would be the perfect opportunity to impose further delay on XYZ.

35. Accordingly, on Aug. 8, 2023, Corwin contacted a DPW engineer, Rod Finley, and explained to him the plan to have DPW impose new conditions and requirement on XYZ, and stating

Rod – I just realized we have a meeting with DPW this morning at 9:30. Let’s discuss River Park then. It would be good for Nate [defendant Reichert] to be part of that discussion anyway (and David [defendant Brooks], if he’s able to attend)

Finley, who knew that the plan was to delay XYZ, and impose unauthorized “requirements” on it, responded to Corwin via email with the statement that he would have to meet later in the day, because:

I have Active Shooter Training from 9-11:30 (which may be timely training for Riverpark management).

AC, Exh. 38 (emphasis added).

36. Thereafter, at a delayed meeting on the Project site on August 16, 2023, XYZ met with City engineers and again explained the plan for removing the temporary stormwater drainage pipe in detail, and the history of XYZ’s effort to remove the pipe. Those engineers did not object, XYZ provided them with more information later that day, see AC, Exh. 39, and the City already had the design of the proposed stormwater relocation, and a drawing of it from TF Moran, as part of the Alteration of Terrain (“AOT”) Permit that the New Hampshire Department of Environmental Services, which had jurisdiction over the matter, had already issued to XYZ, and which XYZ had previously sent to the City Official Defendants Vincent and Brooks, and the City Engineer Rod Finley, back on June 22, 2022. AC, Exh. 40.

37. The City clearly did not need, and was not legally entitled to, any more than the above. **But Reichert, Corwin and Brooks still refused to grant approval for XYZ to relocate the City’s pipe, and continued to constantly ask for “more information” purely to delay the Project** – with the result that XYZ was effectively prevented from recommencing construction activities on the site in 2023. Nevertheless, in the Fall of 2023, XYZ proceeded with all the Project development and engineering efforts it could in preparation for restarting construction on-site as soon as the Defendants would allow them to do so – including rebidding the Project, lining



up subcontractors, working with two civil engineers, VF Moran and VHB, and spending over \$500,000 on project development costs, project materials, etc., and entering into contracts for another \$300,000 worth of additional preparatory work necessary to recommence the Project the following Spring.

38. On January 5, 2024, XYZ notified City officials, including Hunnewell, Brooks, Reichert, Corwin, Vincent and others that it was engaged in the above activities, and was actively pursuing construction of 1 River Park, noting that the City's own Building Code Board of Appeal ("BCBA") had affirmed on July 11, 2023 that its building permit was valid and "active," and explaining

"... 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 11th 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."

AC, Exh. 16.

39. At that time, Corwin, Reichert and Brooks knew that the building inspector Hunnewell **had specifically told XYZ earlier in the year, in a letter he delivered to XYZ on March 23, 2023**, that this kind of off-site "preparation work" "with [its] construction partners" **constituted "commencement of work" by XYZ under its Building Permit**. See AC, Exh. 9. They also knew that XYZ had been following this directive in pursuing off-site Project development activities throughout 2023, as communicated to the staff on August 3, 2023.

40. Nevertheless, they responded to XYZ's above Jan. 5, 2024 letter by immediately conspiring to attack XYZ again with another bogus notification that its Building Permit had supposedly "expired" – all to further their long-time unlawful objective to obstruct, delay and "kill" the Project. Specifically, two days after they received the above-quoted Jan. 5, 2024 letter from XYZ, Hunnewell emailed Reichert telling him

"If we're going to act on this, we should probably try and do so quickly."

AC, Exh. 45. The Defendants then had a meeting on the subject at City Hall, after which Reichert reported to Brooks that **"We will be working on a response to Chet's [XYZ's] letter over the next days."** AC, Exh. 46 (emphasis added).

41. On January 12, 2024, Brooks responded deceptively to the XYZ email, telling XYZ's representative Chet Clem simply:

"Thanks for your letter. We will get back with you next week. If you have any questions please feel free to contact me,"

AC, Exh. 46. In fact, however, Brooks, Corwin, Reichert, and other city officials had already decided to try to declare the Building Permit expired, and had already begun drafting proposed notice letters to XYZ challenging whether it had met the 180 day requirement. The first draft of that letter, prepared on January 12, 2024 to be sent to XYZ, was a suggestive information request, stating only that:

Thank you for your letter dated January 5th 2024. As a reminder, the issuance of the permit was and is a license to proceed with the work.

The permit becomes invalid under 2 distinct situations, both based on a 180 days. The first of which the city has granted several extensions, due to COVID-19, that is the



work on the site authorized by the permit was not commenced within 180 days of the permit issuance. **The second situation is when the authorized work on the site has stopped for 180 days.**

We request you as the applicant provide documentation demonstrating code compliance to the second situation noted that work has not been suspended or abandoned for a period of 180 days 2015 IBC and commentary section 105.5...

AC, Exh. 49 (emphasis added). That draft was then revised by Corwin, however, on the same day, **to go much further**, and to present an argument that the work at River Park appeared to have stopped, and to overtly threaten to declare the Building Permit expired unless XYZ presented documentation that the work had not been suspended. Corwin's revised draft read as follows:

Dear Mr. Clem:

Thank you for your letter dated January 5th 2024. As a reminder, the issuance of the permit was and is a license to proceed with the work. 2015 IBC and commentary section 105. The Permit becomes invalid if the authorized work on the site has stopped for a period of 180 days.

Per my letter to you dated March 24th 2023, I acknowledged that work pursuant to building permit number 2016-00293 had commenced as of November 29, 2022. In your letter dated December 9, 2022, you wrote that, "work has now ceased," although you did not provide a specific date as to when that occurred. Assuming the work ceased on the date of your letter, then work would have needed to re-commence by no later than May 9, 2023. If your appeal to the Building Code Board of Appeals [sic] stayed the 180 [sic day] period – which is not the city's position – then the 180 day period would have begun as of the date that the ZBA dismissed your appeal on July 11, 2023, and work would have needed to recommence no later than January 11, 2024.

Based on a drive-by inspection of the property, **it does not appear that any work has proceeded** in some time. We request that you, as the applicant, provide documentation demonstrating that work recommenced sometime following December 9, 2022, and was not suspended or abandoned for any period longer than 180 days. 2015 IBC and commentary section 105.5

If documentation demonstrating that work has not been suspended or abandoned for any period of 180 days following December 9th 2022, **is not or cannot be provided by February 15th 2024, I will issue a determination that the permit is invalid** and will identify what is needed in order to have the permit reinstated.

Sincerely,
Calvin Hunnewell
City of Lebanon

AC, Exh. 49 (emphasis added). In circulating this draft for further comments on Jan. 12, 2024, Corwin said to Hunnewell: "I made some edits your letter and saved it as a version 2 (attached and also saved in the River Park file). Please let me know what you think." AC, Exh. 50.

42. **Corwin and Reichert continued the ghost-writing this draft of their proposed letter for the building inspector to send to XYZ the following week**, and on January 16, 2024, Corwin forwarded a further revised draft to Reichert and Hunnewell, stating in an e-mail to Reichert at that time:



"Nate -- Regarding the attached letter from Chet Clem -- here is Calvin's draft reply, which I'm thinking he can just send via e-mail."

AC, Exh. 51 (emphasis added). That further "draft reply" from Corwin **removed the discussion in the previous draft** admitting that XYZ's 2023 appeal to the City's BCBA had stayed the 180 period for commencing work under XYZ's building permit, such that it would not have commenced until July 11, 2023, in which case according to the previous draft, "work would have needed to recommence no later than January 11, 2024." **Instead, this new draft affirmatively argued only that the work had "ceased" much earlier, on Dec. 9, 2022, making the end of the 180-day period run only from that date**, and demanded proof that "work on the site recommenced" during that earlier period:

Dear Mr. Clem:

Thank you for your letter dated January 5, 2024. As a reminder, the issuance of the permit was and is a license to proceed with the proposed work. The permit applicant is responsible for code compliance. (IBC Section 105.4) Once issued, the permit become invalid if the authorized work on the site has stopped for a period of 180 days. (2009 IBC Section 105.1).

Per my letter to you dated March 24, 2023, I acknowledged that work pursuant to building permit #2016-00293 had commenced as of November 29th 2022. In your letter dated December 9th 2022, you wrote, work has now ceased, although you did not provide a specific date as to when that occurred.

I request that you, as the applicant, provide documentation demonstrating the authorized work on the site recommenced sometime following December 9th 2022, and was not suspended or abandoned any period longer than 180 days. 2015 IBC Section 105.5. **If such documentation is not provided by February 15th 2024, I will issue a determination that the permit is invalid** and will provide appropriate steps to have the permit reinstated.

Sincerely,
Calvin Hunnewell, Building Inspector

Exh. 51 (emphasis added).

43. Corwin and Reichert knew at this time that for XYZ to get a new Permit reinstated would have required it to pay another \$90,000 permit fee, and satisfy a whole series of other requirements again, pushing their Project back to square one, and inflicting enormous harm on XYZ. And this was exactly their intent -- despite the fact that they knew XYZ was desperately trying to move the Project forward, and had repeatedly tried to re-commence construction, only to be stopped from doing so by the Defendants themselves.

44. The Defendants also had actual knowledge at the time that this course of conduct on their part was malicious, illegal, and wrong. This was clearly evidenced by Corwin's admission made, at the end of his above-referenced Jan. 16, 2024 email forwarding his above "draft reply" to the Hunnewell and Reichert, when he said to them:

what do you think? Also, should we run by legal counsel? **This response could very well be the foundational document in what becomes a much larger lawsuit ...**

AC, Exh. 51 (emphasis added), acknowledging that XYZ would have grounds to sue the City over this latest bad faith, "without warning" attempt to declare the Permit expired.

45. During this period, Corwin and Reicher knew full well that XYZ had not been allowed to resume construction on the site, and that it could not do so because it could not proceed due to the City's stormwater



pipe still not having been cleared by the City to be removed. They also knew that XYZ would appeal their attempt to invalidate the Permit, as evidenced in part by the fact that on January 18, 2024, defendant Corwin wrote to the --stating:

We're getting ready to deem the building permit expired and the Clems [XYZ] are going to argue that they couldn't proceed because of the city's stormwater pipe. We don't believe that argument has any merit at all, but **it's most likely to be litigated -- and it will certainly be a major issue before the building code of appeals.** So we need to understand where things left off."

AC, Exh. 40 (emphasis added).

46. In recognition of this fact identified **Corwin himself** dramatically altered and expanded the draft letter, and generated a new draft on January 23, 2024, **which omitted entirely giving XYZ the chance to respond** with documentation proving that the Permit had not expired. Instead, Corwin's new 3-page draft letter **first** abruptly declared, at the outset, that the Building Permit **had already "expired"** and was **"invalid,"**

"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 2009 international Building Code ("IBC"), provides as follows:

105.5 Exploration. 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."**

AC, Exh. 52 (emphasis added), and **then** Corwin added the following **extremely lengthy discussion** (reduced in type size below due to its length) purporting to set forth a "history" of the River Park Project, and including one subheading entitled "*Suspension or Abandonment of Work*," which in all important respects was false, misleading, and deliberately slanted by Corwin to support his argument that his declaration that XYZ's building permit had "expired" was somehow justified (which it was not, as the NH Court later held in ordering the permit reinstated):

[Continuation of Corwin Draft]

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 , 2016. The building permit was issued on December 31, 2019. as Building Permit #2016-00293. In response to a written request dated December 9, 2021, from Lyme Properties, a 180-day extension of Building Permit #2016-00293 was approved by memo from the Building Inspector dated January 18, 2022.

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, this office found that the COVID-1 9 pandemic represented adequate justification to grant your request and, therefore, I approved an extension of the Building Permit until January 13, 2023. In an e-mail from the Planning & Development Director sent on May 27. 2022, you were advised



that "past and imminent changes to the State Building Code as well as other local regulations, may impact the City's ability to grant further extensions beyond this one."

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." 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, in a letter dated February 15, 2023, I asked you to provide additional information needed to determine that work had commenced for purposes of demonstrating compliance with Section 105.5 of the 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, I made a determination 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, I also noted that certain additional steps would need to be completed in order to maintain activation of the building permit without jeopardizing the 180-day allowance from November 29, 2022.

On April 10, 2023, you e-mailed a response to my 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 that no decision had been made in the March 24, 2023 letter.

Following the dismissal of your appeal, you wrote to me 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".

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:

- 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 7/11/23 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 provide a specific date as to when work was suspended. Assuming the work ceased on the date of your letter (i.e. on December 9, 2022), then work would have needed to re-commence by no later than May 9, 2023. If you believe your appeal to the Building Code Board of Appeals stayed the 180 period, then the 180 day period would have begun as of the date that the ZBA dismissed your appeal on July 11, 2023, and work would have needed to recommence no later than January 11, 2024. However, as noted above, you have



indicated on multiple occasions that work has been suspended since at least December 9, 2022. Based on prior drive-by inspections of the property, it appears that work has indeed been suspended since well before July 11, 2023, i.e. for a period of greater than 180 days.

I also note that there has been no effort to address the items identified in my letter of March 7, 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 security agreement
- Providing a construction schedule to the City Engineer for purposes of retaining a thirdparty 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.

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 my 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.

If you have any questions, I can be reached at (603) 448-1524 or by e-mail at Calvin.Hunnewell@lebanonnh.gov.

Sincerely,
Calvin Hunnewell, Building Inspector
Attachments

Id. (AC, Exh. 52).

47. In circulating this last lengthy draft of this 2024 “building permit expiration” letter, Corwin, as he had done with his 2023 draft “building permit expiration” letter to XYZ, told the Reichert, Hunnewell, and Brooks that he had prepared it for Hunnewell to sign, and that they should review and give him comments on it:

“All - I’ve prepared the attached draft letter to Lyme Properties [XYZ’s development agent]. Please feel free to edit or let me know what edits you’d like me to make. Once we have a draft ready, we can loop in Christine Fillmore [the City’s lawyer], and ask her to review.” If we should get together to discuss, please let me know and I’ll schedule a time to do so. Tim [Corwin]

AC, Exh. 52 (emphasis added). Brooks responded on January 24, 2024 stating as to the draft:

“[o]verall, this is very good. I have offered some suggestions in the attachment regarding the cover letter.”

AC, Exh. 54 (emphasis added), and his “suggestions” included **that the Building Permit itself be marked “EXPIRED”** before being sent with the letter:

Comment [TIC] I do not have a copy of the building permit yet (**nor have we marked the building permit “expired” as I’m suggesting.**)”

Id. (emphasis added).



Exh. 55. And thereafter, Brooks' immediate superior, **the City Manager Shawn Mulholland**, who was fully aware of and directed what Brooks, Corwin, Reichert, Hunnewell and Vincent were unlawfully doing to XYZ, **deliberately contacted the commercial real estate broker representing XYZ's major intended commercial tenant in late 2024**, and falsely told that broker that XYZ had no Building Permit, when in fact it did, and the matter was still being adjudicated in Court, which ruled a few weeks later that XYZ did have a valid Building Permit, and made other false, misleading and damaging statements to the broker suggesting that XYZ's Intended Tenant, instead of completing the process of leasing space at the building in River Park that XYZ had a permit to build, should relocate to the City's Airpark TIF District, where Mulholland said the City would be the developer of that site and wanted to work with Intended Tenant, or should consider another site "over behind the Hilton Hotel" **being developed by a different developer other than XYZ**. AC, ¶¶ 226-237.

52. When Corwin, Reichert, Brooks, Vincent, Hunnewell, and Mulholland took the actions described above in 2023-24, and arranged for XYZ's building permit to be declared "expired" and invalid in February of 2024, with no prior notice to XYZ, they all knew that Hunnewell had previously represented to XYZ, in a letter he wrote to XYZ on March 24, 2024, that off-site engineering and Project development work done by XYZ on the River Park Project **"constitutes commencement of work at 1 River Park Drive in accordance with City of Lebanon Building Permit #2016-00293."** AC, Exh. 9 (emphasis added).

53. They also knew that XYZ had relied on that representation by Hunnewell, and had been thereby assured in late 2023 and early 2024 that its extensive off-site engineering and Project development work, especially when combined with its actions in starting construction only to be stopped by the City drainage pipe issue, more than satisfied the 180-day commencement of work requirement of XYZ's building permit – as the New Hampshire Superior Court later found those XZ actions did in *XYZ Dairy v. City of Lebanon*, Docket No. 215-2024-CV-00393 (Grafton, NH Superior Court)

54. Nevertheless, in a shocking departure from their public duties and obligations, the "staff" of this Board, Corwin, Reichert and Vincent, in concert with other City officials like Brooks, Mulholland and Hunnewell, deliberately planned, drafted documents for, and conspired, to wrongfully declare XYZ's building permit expired twice, once in 2022-23, as described in ¶¶ 1-25 above, and again in 2023-24, as described in ¶¶ 26-52 above – and to publicize that they had done so, even though the building inspector, as he later admitted in Court, had never done so before in his entire 36-year career. They did so because they are severely biased against the Project, and are committed to obstructing and delaying XYZ's efforts to resume construction. This is a serious flaw in the processes of this Planning Board's consideration of the River Park Project, and it appears that the efforts of these Planning Board staff members to kill the Project are continuing.

Part II – 2025

55. Specifically, earlier this month, Leigh Hays, the successor City building inspector who now reports to Corwin and Reichert, delivered yet **another** letter to XYZ incorrectly claiming, a third time, that XYZ did not commence construction within the meaning of the building permit's 180-day requirement when it excavated the entire foundation area of the site for Building No. 1 last year, and did further on-site physical work on the Project in January of this year.

56. This "claim" is based on a groundless and misleading argument in Hays' letter that is very similar to the groundless arguments that his superiors Corwin and Reichert drafted and put into the final building "permit expiration" letters they wrote for Hunnewell to send to XYZ in 2023 and 2024. XYZ has responded to Hayes' letter denying its claim that XYZ's building permit is expired, and explaining why, but in case he adheres to that mistaken claim, XYZ has also requested a further 180-day extension of the building permit.

Conclusion

Under all of the above circumstances, and on the basis of all of the above-cited evidence, XYZ respectfully submits that, as stated at the outset of this submission, the "staff" of City officials on which this Board has been



relying for factual information, legal opinions, and recommendations concerning the River Park Project, specifically Corwin, Reichert, and Vincent, are personally biased against the Project, and have been engaged for years, along with several other City officials, in a joint effort to delay, obstruct, and derail the Project, using carefully constructed but legally insupportable “cover stories” at every turn to conceal their efforts. It is this conspiracy, and not any fault of XYZ, that has delayed and obstructed the progress of XYZ’s work on the Project since 2022.

For this reason, XYZ is asking this Board, as part of its responsibility to ensure that the land use regulation process in Lebanon is fair and impartial, to reconsider and grant XYZ’s request for a two (2) year extension of all phase deadlines – responsibly viewing that request in light of the previously concealed facts concerning the pre-existing extreme bias of the Planning Board’s staff against the Project, as proven by their own internal emails recently produced by Court Order, available on the public record as exhibits to XYZ’s Amended Complaint in *XYZ Dairy v. City of Lebanon, supra.*, and submitted herewith.

We remain available to discuss these issues with this Board at its earliest convenience, and in any event at the hearing on June 9th 2025. Thank you.

Sincerely,

Lyme Properties 2, LLC
XYZ Dairy LLC

A handwritten signature in blue ink that reads "David Clem".

By: David Clem
Authorized Officer

City of Lebanon, Planning Board Meeting - June 09, 2025

SPEAKERS

Speaker 5, Speaker 8, Speaker 7, Speaker 4, Board Member Speaker 10, Speaker 6, Speaker 13, Speaker 2, Andrew Faunce (PB Chair), Kathy Romano (PB Member), Speaker 1, Speaker 11, Speaker 3, Speaker 12, Speaker 9

Andrew Faunce (PB Chair) 00:00

Amended on September 9, 2019 [PB2018-34-SPA]

Andrew Faunce (PB Chair) 00:09

PB2025-25-EXT which was postponed from May 12, 2025

Kathy Romano (PB Member) 00:15

and I'm recusing myself.

Andrew Faunce (PB Chair) 00:17

Kathy Romano is recusing from this particular hearing item.

Andrew Faunce (PB Chair) 00:26

Good evening, um just for a level set, and before we get started, I just want to introduce what our what our process is for this evening, because the request for extension follows a March 17, 2025 ruling on the same matter, the Applicant has the burden to present at an initial, limited public hearing some new material fact or change in circumstance the majority of the board determines by vote to be sufficient to open a new hearing on the same request. That's where we're that's where we're heading to tonight.

Andrew Faunce (PB Chair) 01:03

I'd also like to offer just the briefest of history. On March 17, 2025 the Lebanon Planning Board granted a 1-year extension of all deadlines that applied to the River Park project. The Superior Court's decision to grant 11 months and two days of injunctive relief was both the necessary new material fact cited by the Board to justify its rehearing of that 2024 extension request and the basis of its decision to approve a 1-year extension of all phases, restoring the originally agreed upon amounts of time for all phases of the project.

Andrew Faunce (PB Chair) 01:35

A majority of the board perceived no case had been made by the applicant to support a 2-year extension.

Andrew Faunce (PB Chair) 01:40

The condition of approval in the September 9, 2019 Notice of Action, which is a foundational agreement of record for the project, is that an updated phasing schedule shall be provided with any extension request. And while XYZ did not provide an updated phasing schedule in its most recent extension request, the board expedited its March 17, 2025 decision by making the subsequent submission of that schedule within 30 days a condition of approval. In doing so, the board relaxed a requirement of that 2019 governing agreement to the applicant's benefit.

Andrew Faunce (PB Chair) 02:12

While notified of the board's decision in the customary fashion, XYZ did not provide the requested information, effectively voiding that one year extension that the board had approved, and additionally, XYZ did not file an appeal within the allowable 30 day period, which voided the opportunity to contest the Board's decision on its merit.

Andrew Faunce (PB Chair) 02:30

So consequently, for tonight, the first decision to be made by vote of the board is whether the applicant has offered a new material fact or change in circumstances to warrant a rehearing of the previously settled matter.

Andrew Faunce (PB Chair) 02:55

We are first determining whether we are holding a hearing, by virtue of holding a limited public hearing to determine what new material fact or change in circumstance,

Board Member ? 03:05

and that is between us?

Andrew Faunce (PB Chair) 03:05

that is through an interaction with the applicant to learn more or ask questions in order to learn more about materials that the applicant has provided for our consideration.

Andrew Faunce (PB Chair) 03:19

To that end, and perhaps we should break for introductions, because we kind of kind of skipped over that part. Appears that we have Mr. David Clem representing Lyme Properties and XYZ, and it looks like your attorney is with you this evening.

David Clem 03:33

Yes. This is Robert Kaler. This is David Clem speaking.. I'm sorry, thank you. My name is David Clem. I'm the manager of XYZ dairy, and speaking on behalf of XYZ dairy tonight, is Attorney Robert Kaler.

Andrew Faunce (PB Chair) 03:59

Thank you. I go back

Richard Ford Burley 04:06

to I have a procedural question. Is further consideration a thing,

Andrew Faunce (PB Chair)04:15

my introduction speaks to that distinction.

Speaker 3 04:17

Okay, so the answer is no,

Andrew Faunce (PB Chair)

correct.

Richard Ford Burley

So this is a new application to look for it for a two year extension, and whether we hear it hinges on whether something new,

Andrew Faunce (PB Chair)

right, correct

Richard Ford Burley

has changed, okay,

Andrew Faunce (PB Chair)correct,

Andrew Faunce (PB Chair) 04:39

which is a beautiful segue into the first question that I have, if we are ready to begin,

Robert Kaler 04:46

I just, I just need one

Robert Kaler 04:50

second.

Andrew Faunce (PB Chair) I don't want to I don't get ahead of myself

Robert Kaler 04:52

want to get presentation slides to show.

Andrew Faunce (PB Chair)05:08

I will note, as just an attempt at a brief bit of levity, that it would appear that the applicant has well used his 30 days betwixt the last opportunity to be in front of the board, and tonight, that was rather a significant package of information that you provided, and it certainly captivated my attention for many of those days between meetings. But moving to the question that I have for your new extension request, are you presenting as a new material fact that you've added tortious interference and civil conspiracy to the legal filing for the court's consideration in 2026 and in preparation for tonight's hearing that you've

presented a series of city staff emails in your interpretation of their intent as evidence to support those claims. Do we have an understanding of what it is that you're offering us?

Robert Kaler 06:13

Well, what's already been offered is the letter that Mr. Clem submitted. I propose to add some new information that justifies reviewing

Other speaker 06:20

press the button so the green light comes on your mic. Oh, sorry, thank you.

Robert Kaler 06:27

I propose to present some new information that justifies reconsideration of it and not proposing to go back through the letter or amendments things. This is new information, and I want to start just discussing recent events since the submission that raised new issues

Andrew Faunce (PB Chair) 06:48

Before we before we go there, if I may, I do have a couple of other framing questions to ask.

Robert Kaler 06:54

Could I could I make this presentation on the issue that you first raised?

Andrew Faunce (PB Chair)

Okay

Robert Kaler This new information begins with the adjustment to the building permit. And the reason it's new information relevant to the request for extension is that XYZ needs the new extension to address something that's happened with the building permit. There are three things. This is the first one. The building permit as the panel, as board knows, in 2019 contained a statement of structural special inspections, as they often do pursuant to the building code. This is from the 179-page building permit file of the city that's been produced to us. Building Permits contain all kinds of information that's incorporated into the approvals. It contained a statement of special inspections and identified the geotechnical engineer of record as McPhail Associates. This was a condition of the issuance to have a geotechnical person, because they have to look at various categories of aspects of the site, one of which was soils. And they had in the building permit, as required, the normal table from the International Building Code to verify excavations are extended to proper depth and have reached proper material. The proposed excavation had actually an application for the area 220 feet by 165 by 15, which is the footprint of the new building. And Mr. Clem recalls that he would have wanted to apply for excavation separately, but he was told no. Put it in with the building permit. So it's part of the building permit, and it identifies the area to be disturbed. It identified, by way of a drawing, the outline of the building that was to be excavated. And construction work began on that in January. And as you can see, this is the drawing from the building permit that regulates excavation. And of course, excavation requires a permit separately. In this case, it was in with the building permit. And these are photographs of the commencement of construction in January and the outline of the foundation excavation. 40 years ago, I worked on an MBTA case in Porter square. The man was killed in an open cut excavation. He

was buried just up to his waist. Excavation is part of construction, and it's a very dangerous part of construction, and it's a serious part. It was begun by XYZ in January, and the photographs prove it, the equipment's there and the outline matches what the building permit had. So the excavation was stopped in January by a email to the contractors saying, we need \$100,000 performance bond and temporary easement. XYZ's position is that's illegal. They can't do that, and it was never mentioned before. But all of this new information has just come to our attention in the last couple of weeks. And what also happened is that in early May, Mr. Clem wrote to the building inspector and said we recommenced construction at River Park earlier this year, in January. He explained that he started excavation on the basement, pursuant to specific references in the building permit authorizing that excavation. I've got skyscrapers settling in San Francisco because the excavations weren't done properly. It is part of construction of a building. The substrate supports it. The response was, this was only a couple of weeks ago. From the building inspector I disagree from the building inspector, I disagree with your statement that you commenced construction. And the argument was that the state appeals board had found that you need physical acts. Well, that's true. You need physical acts on the site. But then he claimed the activities in your letter are examples of preparatory work. They don't constitute work regulated by the building code. That's wrong. He went on to say your statement that not started excavation. He asked some questions about it never came down to the site. And said, I can't reasonably consider this excavation to constitute starting work on the building permit. And I'm sure you would agree that if you dug a foundation Hall while lacking a permit, I wouldn't be able to cite you for working without a permit. He's wrong. New Hampshire law says you can't have an excavation without a permit. And this isn't digging a hole. This is not a game. This was an excavation with heavy equipment. There's references going back commencement of construction in New Hampshire law includes excavation under the New Hampshire statutes. This is what has been XYZ dealing with in the last few weeks. We're going to deal with this. It'll be set aside, either the court will set aside it on a contempt motion, or it'll be set aside administratively in an appeal. I'm trying to find a way out of this. I'm going to say at the end. But in any event, the issue here is that the building inspector at one point, thought it was just I got a check to see whether it's required by the building permit. The argument that you only need a digging a hole is not enough. Comes from a couple of years ago as Mr. Corwin and Mr. Reichert having an exchange about the building permit will expire and so on. But digging a hole isn't enough. Well, excavation with heavy equipment is not digging a hole. It's what you saw in the photographs and back in 2023 it was either mister Corwin or Mister Reichert noted in his draft that of a letter that can we provide a fuller explanation of why excavation work doesn't constitute work under the building code? I took a quick look at the copy of the IBC, and couldn't find any, because there isn't any. I worked in construction cases for 40 years. Excavation is part of the work. But the difficulty is that the attempt to terminate this permit in this way, and they're not going to apply for a new one. That has all kinds of implications. It isn't going to happen, but we are going to correct this, but it's going to take time, hence the need for the extension, and as a practical matter, it's also a continuation of what Mr. Clem claimed in his letter, but it's I'm trying to find a way out of this, and it starts here with an extension. Whether you folks realize it or not, I'm trying to help you.

There's another major problem that requires the extension, and that is that the planning board has been acting as it's, as it should and must, in a quasi judicial capacity on these XYZ applications and but it's not acting impartially or independently due to its reliance on conflicted legal advice. It's required to be just as impartial as a court or jury, but the board has accepted and relied on legal advice provided by

Drummond Woodson, that's Mr. Decker and Christine Jones, which has been opposing XYZ in court. It would be as if any one of you sued me had your own lawyer, and my lawyer was also the lawyer for the judge. It's a conflict, and it's been talked about for years in zoning manuals. This is just evidence from the city's recent production that Christine Fillmore is communicating and representing the city in connection with matters that related to an appeal that Mr. Decker is providing advice to the board. He's counsel in the lawsuit between XYZ and the city that relates precisely to the same matters in front of this board. This isn't just a conflict, it's an obvious one. I'm not saying that you can't never talk to city staff. There's lots of cases where there's nothing that's opposed. And I've been representing the MWRA, the Mass Turnpike Authority, the convention center. You know, there are informalities, but there comes a point where you start skating. On thinner ice. It's like on a pond going too far. There comes a point where that has to stop. And it stopped a long time ago. In this case, it should not have been the city attorney providing advice to the planning board, and it was going on all the time. He they Christine walked out at the November 12 hearing with the board. And what happened? What have the courts said about this? They've said very clearly that this kind of thing is not permitted. It just presents insurmountable due process problems. Imagine how any of you would feel if your attorney - This is from the disqualification of attorney zoning manual. I mean, there's nothing new in this world, except the history we don't know. This has happened before. It was encountered recently in a case involving West Bath, the court noted that the fact the planning board's attorney also represented the town of West Bath created an obvious conflict of interest. And at the same time, in ...

Robert Kaler 16:04

I pause on the screen, share. It's a classic conflict, because the assumption is, it can only be inferred that the attorney assumed and intended from the outset that the board would act in favor of the attorney's other client. In this case, the city, and it has, you can't do that court, a court generally defers. But this is a court in Maine, John Johansson v City of Bath saying a court can't permit a violation of a party's constitutional rights. Procedural and substantive due process rights were violated when the board permitted opponents of the application to help formulate the findings of fact. We've seen that too. Counsel writing findings of fact for the panel, decisions from other jurisdictions I talked about in Maine. You know, I heard the argument. Well, gee, that's not New Hampshire law. New Hampshire, like Massachusetts, like every other state, looks to the law of other jurisdictions on issues like this. And here it's, it's a, it's a conflict of interest that has prejudiced XYZ, and I see it looking back two years.

And there's still another equally serious problem, you know, involving the board member, Mr. Faunce. The statute is clear. It says no member of the Planning Board shall participate or sit on a hearing if they have a direct interest, or if that person would be disqualified for any cause to act as a juror. I do a lot of jury I've done a lot of jury trial work, and I know about disqualification of jurors. We had an exchange Mr. Faunce I mean, it's I'm left with this. This is an exchange back in November that Mr. Corwin had with you Mr. Faunce about drafting notes for a draft motion for consideration, and that was a motion to deny the extension. And what's down at the bottom here is testimony discussed during deliberations. That's testimony from the lawsuit in which Decker was representing the city, and we took a look at the expanded version of it, and this is the testimony that you included in your email. And one planning board member can't do that and not wind up having to recuse himself or herself. I mean, for example, in this part of the testimony you were citing, you mentioned basis for the Board's decision. Testimony and evidence offered does not support the case that the circumstances that's the conclusion that this panel

reached. Every decision that this panel has reached in the last year and a half is tainted. It's questionable. Whether it applies in other cases, I don't know. Whether those applicants had adversity. I mean, you had legal counsel being the same, but in this case, we have a situation also, where among the documents that have just been produced, I was produced 3000 documents this weekend. Many of them would jump, which means I read 3000 documents. And among them were this one. I mean Mr. Faunce and Mr. Reichert are on a West Lebanon Revitalization Committee. Fine. They met in December, except that one of the items that was noted in the notes, and I think it says, Mr. Faunce, these are, these were your memories, was that we've got to urgently investigate options to encourage or enforce site condition cleanup at River Park. Okay, fine, but then also investigate taking action as necessary to preclude the potential for sale, which it's an alternative development, which its zoning allows? Well, this is a private property owner who's appearing in front of the planning board. It's XYZ. They own the property. They have the right to sell it, and a member of the board, in fact, the chairman of the board is participating in a group meeting where the idea is to take action to preclude the potential for sale, even though the zoning allows it. I mean, the procedure in these instances is that the board or panel takes a non binding vote themselves as to whether someone recuses themselves. I'm just getting this information. Try to understand the position that I'm in. It's my obligation to advocate as effectively as possible for the client that I have and to use the information that I have available to me to as quickly as I can. And I haven't had a lot of chance to look about, think about this, but this makes it look to me as if at least one member, Mr. Faunce, would have to recuse himself from a proper vote, and that as a practical matter, probably from other matters involving River Park.

There have been cases on this issue. I mean, this is the New Hampshire provision. But this case law on it in New Hampshire, *Winslow v Town of Holderness*, the planning board in this case was required by statute to notify all interested parties, and that's what you're doing. And I mean, there's no question this is a quasi-judicial proceeding, but this issue was the principal question that the New Hampshire Supreme Court dealt with. Was whether the decision of a planning board is made invalid by the participation of a board member whose earlier remarks indicate he prejudged the case. In other words, does Mr. Faunce vote have to have, have, have changed the result of the vote?

Richard Ford Burley 21:05

That does say before he became a board member, though this was while he was a board member, that that one does.

Robert Kaler 21:09

Yes, but it doesn't exclude members. We're not sophists after all, it doesn't exclude when it comes up after you're a board member. And in this case, they said, look, we've got to address the disqualification. You're supposed to be like a judge, as to a juror, has to be disqualified. And the answer that they came with is no, the entire decision is out because we we're not convinced that the one person who you're recusing didn't have an impact on the rest of you. And given the exchange that we saw in the emails that Mr. Faunce had with Mr. Corwin about it, I'm not saying people necessarily fully understood what they were doing. I don't know whether they did or didn't, but it's wrong. I mean, it's it's really wrong. And 'the conclusions are more or less the following: Mr. Clem's letter. It is what it is, and I'm not going to say any more about it. There's no need for me to say any more about it. It happened, but the past is prologue here, the building inspectors attempted to terminate the permit. That's bad. If I go back in front

of the I mean, he ordered the permit to be reinstated. It would only take one minute of explanation for me to tell him that somebody saying that this isn't the commencement of construction is contemptuous. They're just trying to end around your order. Or I could do an administrative appeal and get it set aside. Too many people have died in excavations and construction like that, not to have people realize it's the start of construction, especially when the process for excavation was laid out in the building permit in 19 and people have had the building file. I've got emails saying that the building file was sent to Hayes. I don't know how he signed that letter, but whoever had him do it, or if he did it himself, I haven't seen the drafts, but I'll get them eventually. But he's he's wrong, and the premise seems to be, well, because you could have done a trench without without a permit. That means that's crazy. Number one, you need a permit for excavation, as I've said, and then the planning board's reliance on conflicted information and improper ex parte communications with city officials have just tainted the prior decisions. I don't know to what extent it affects other cases. These are substantive due process issues, procedural due process issues. I mean, I was 20 years general counsel for a law firm of 100 lawyers in three cities. I had ethics and conflicts issues every day. This one wasn't even close once, once they were once. Mr. Decker and Miss Fillmore were involved. Their firm was involved in the litigation with XYZ. There's no way they should have been advising you, not at all, but they did, and that's tainted everything that's happened.

So we need reconsider. We need time for reconsideration of the decisions. You mean. You can't tell me that this information doesn't we can't tell ourselves that this information doesn't require a total reset and and for all of these reasons, XYZ's request, you know, should be granted, and I'd like to have it granted. Now I'm going to suggest get independent counsel. This Planning Board is entitled to and needs independent counsel even before you make decisions on what I say, although I argue against myself. But, you know, I'll invite questions. And I'll just conclude by saying you can assume that I know a great deal more about this overall situation, the city of Lebanon, than it may appear. I'm trying to help you. You just don't know it. Grant the extension. It's not going to hurt anybody. It gives us breathing room. I can't salvage a situation if I don't have time. That's why I came in up here off a plane. You know, it just I'm exhausted. You're not catching me at my best. But think about it. Grant the extension for two years. Don't listen to the city staff. Don't act on the draft motion that you have in front of you, I'm sure, from Mr. Decker's office to say, Well, gee, you really haven't done enough to procedurally even satisfy the burden you show to get us to even reconsider this. And don't even look at the other motion. Don't destroy them. File them away, because if I have to try this case, their evidence, I know they're there. I've seen enough of them. So that's our presentation that plus plus the letter that's behind it, if I go into court on appealing planning board decisions, they'll be set aside in a heartbeat, and every single one of them over the last year will be voided.

Richard Ford Burley 25:59
voided like that?

Robert Kaler 26:02

It doesn't take much to see this conflict, and my client has suffered, really suffered as a result of it. If you'd had independent counsel, if somebody had been providing independent counsel, it would have been different. I mean, I understand how these things go south. I served on boards. All of us have, but this situation is out of control. Okay, trying to get it back. So all we're asking is that you grant, I understand Mr. Burley, I understand

Richard Ford Burley

what I'm gonna make a but

Robert Kaler

I'm gonna I'm gonna finish. I'm gonna finish. Okay,

Richard Ford Burley

we're asking that I'm

Speaker 3 26:36

I'm gonna move that we extend the extend. We're seven minutes away from the meeting ending.

Robert Kaler

Oh, that's what

Robert Kaler 26:43

you're doing. Okay, sorry,

Richard Ford Burley

I can move that.

Robert Kaler

Mr Reichert and I aren't, aren't perfect. We each come up and But whatever the reason,

Different speaker

Second

Richard Ford Burley

yeah, if you have

Robert Kaler 26:53

questions, if

Robert Kaler 26:55 you have questions, favor,

Different Speaker (female)

excuse me. I'm sorry

Different Speaker (female) 26:56

I did not get what that was

Richard Ford Burley 27:01

to extend the meeting to 1015

Different Speaker

1015?

Richard Ford Burley

Yes, thank you.

Different Speaker

Second, Eric,

Richard Ford Burley

thank you all in favor.

Robert Kaler 27:17

So I'll conclude just by saying there's ample, overwhelming evidence in the record, sufficient to satisfy the procedural hurdle, which isn't exactly how it's been represented, but I know what it is, and it's more than sufficient. And there's more than sufficient evidence to warrant looking at this again without I would say, Mr. Faunce, he's got to decide for himself, and you have to decide. Just grant the extension, please. They need it, and it'll give us time that we need. If we don't, if they don't get the extension, then things kind of spiral. I can't, I can't operate in a vacuum and in that tight a time frame. I mean, I can try the case. I mean, that's what I do for a living, but that's not what my ethical obligation is. And I also have an obligation not to do anyone more collateral, you know, any unnecessary collateral harm beyond what's that, that's my personal view, beyond what's necessary to advocate for my own client's position. So I'm trying to strike that balance. If you have any questions, I'll try to answer them. It's a lot to absorb. You may not. But I can also submit a copy of the slides. I can submit memoranda or cases, but please get your own legal counsel on this matter. And it doesn't have to mean that you never use Mr. Decker on all other matters. That's not my business. This one is my business. You need independent counsel. Thank you.

Andrew Faunce (PB Chair)29:01

I'm going to listen to what has been shared with us this evening, and I'm going to take myself out. I'm recusing from this matter.

Richard Ford Burley 29:09

I am not comfortable making any decision on this matter tonight, and I'm so I'm going to move that we continue this to another night.

Robert Kaler I'd only ask that as expeditiously,

Richard Ford Burley

I'm not

Robert Kaler

be acted on

Richard Ford Burley

I'm not after what you've said. I'm not interested in pretty much discussing any of this until we talk to independent counsel.

Robert Kaler 29:33

Well, you may not be, for the sake of the other members. All that we're asking for is that it not go into limbo and you can still make a determination with the advice of counsel on the existing motion, especially if Mr. Faunce recuses himself, and that could grant us the relief that we need to we need something, because if it stays as it is for too long, you know you need a reasonable period of time. thank you.

Richard Ford Burley 30:05

Well, I think my motion still stands that we continue this to another night. What night would be good? I think, is a matter of discussion for the members of the board.

Other speaker 30:18

I'm unwilling to second it or vote for

Richard Ford Burley 30:22

it. So okay

Different speaker (female)

who seconded

Richard Ford Burley

No one

Richard Ford Burley 30:24

has seconded.

Robert Kaler

Do

Robert Kaler 30:31

you want me to stop sharing? Are we the last case?

Different speaker

No. If something

Richard Ford Burley 30:41

else with no second, the motion dies. I'm open to entertaining other motions Well,

Eric Stacy 30:44

or should we formally make a motion? I thought we were thinking about a date. Sorry. I think, I think I agree with you that it makes sense in light of what we've seen, that it seems reasonable that we seek independent legal counsel. I also think that it seems reasonable that we move on this relatively quickly.

31:07

Is there any question, oh, that they're going to get a rehearing?

Richard Ford Burley 31:12

Yes, there is. But once we need to speak to the legal counsel about Sure, I mean,

Eric Stacy 31:20

I make I'm Yes. I mean it. I mean the whole issue here is the subsequent application doctrine, right?

Richard Ford Burley

Yes,

Eric Stacy

yes.

Eric Stacy

So I if that's not meeting substantial change by the subsequent application doctrine, I don't know what is

Richard Ford Burley

I would

Richard Ford Burley 31:35

like to talk to a lawyer about it.

Robert Kaler 31:39

I will say I don't think it's necessary to talk to a lawyer about everything.

Richard Ford Burley 31:43

Well, I know you would. I'm not. You've made that very clear well, but whenever

Eric Stacy 31:47

supposed to check our emotions at the door. And I mean, so All right, let me try to rephrase the that the applicant has made an assertion with email evidence that the previous vote by the four to three vote by the planning board might have gone the other way had the member who just chose to recuse himself, Chair Faunce, been, you know, recused himself when he should have. So that's a fairly substantive matter about whether or not they get another bite at the apple. It doesn't seem, I mean, it is.

Richard Ford Burley 32:42

I would like to know from another independent legal counsel whether or not he should have accused himself or not, because I've got one side of the story. Well,

Eric Stacy 32:50

he feels like he should have recused himself. It's his choice. He's sitting.

Richard Ford Burley 32:54

Are you sure he's not just feeling very intimidated right now?

Eric Stacy

No,

Eric Stacy 32:59

presentation. No. This is No, no, I you Well, if he is feeling, it's not, doesn't matter. It's not about feelings. I'm presuming that he made his decision based on, based on, you know, his respect for the board. I mean, you know, his intention has always been, as long as I've known him, is to maintain the integrity of the board. And the last thing in the world he would want to have happen, and I'm, I've been, is to undermine the integrity of the board, and his staying up here would undermine it when he's been accused by the council, you know, I mean there, I mean, it's just the appearance.

Richard Ford Burley 33:39

I will not, I won't speak to the chairs motives, if he hasn't done so well.

Karen Zook 33:44

And, and I would say, I mean, that was a lot of digestion, small text, but in terms of, like, the content of it, you know, it's hard to know, just some, some some text is bigger than others, but I, the chair being on a board isn't to me, new information. The you know, we know. I just, I would want, I would second. I think I need more time to digest the content of the of all.

Matthew Decker 34:32

Limited recommendation to the Board? Number one, And I will just preface this with saying that I don't agree that I conflicted out of the situation that's to be expected, that requires further analysis, that requires further legal advice, whether that's for me or for independent counsel, that is for something to be figured out at another time, none of the three items that were raised tonight preview to anyone. So there was no reason why they had to be ambushed on the board tonight and couldn't have been submitted earlier. I suggest to the board that the reason for that is to intimidate the board into taking unconsidered action. Therefore my recommendation is that the board continue this matter to another hearing. Mr. Faunce not recuse himself until he's had more opportunity to consider the situation, whether that's with me, somebody else at my firm, or different counsel. The board is not prepared to address any of this ambush information tonight, none of which actually addresses the subsequent application doctrine, which is the thing that you were

Robert Kaler 35:52

okay. We just, I have to respond. We just received these documents in the last week.

Richard Ford Burley 35:57

And we just received your presentation tonight.

Robert Kaler

I just reviewed

Robert Kaler 36:01

them all over the weekend. There's been no ambush, and Mr. Decker knows it,

Richard Ford Burley 36:05

but also he only just received this information. I think that's not that.

Robert Kaler 36:09

That's not my point. My point is that there's been no ambush, and what happens here? And it's happened again and again.

Richard Ford Burley

Your objections been noted

Robert Kaler

XYZ has raised a legitimate point. You and I've seen the emails. They've been attacked for raising legitimate points. They've been characterized an ambush. No ambush. I just got the documents, the ambush, if there was any, was of XYZ and as to the conduct. Thank you, sir.

Richard Ford Burley 36:36

No Matt, please stop, everyone. Stop, you stop too

Robert Kaler 36:40

The conflict issue.

Richard Ford Burley 36:42

You stop too.

Robert Kaler

I beg your pardon?

Richard Ford Burley

Please stop talking.

Robert Kaler

Why?

Richard Ford Burley

Because I would like to discuss with the other members of the board what we are going to do in the 12 remaining minutes we have, okay, it's quite late. We've received a lot of new information, and I don't need the two of you going back and forth over it. Now, I would like to have the other members of the board discuss what we are going to do going forward in the limited time we have.

Eric Stacy 37:10

Yeah, we should make a decision. Yeah, we need to look not a matter of whose fault it is that the information God

Eric Stacy 37:16

has irrelevant. We're feeling ambushed. We're feeling ambushed, but I prepared a public statement that I was going to read into the record before. I didn't even know they were going to be speaking tonight, because in normally, in a rehearing, their public discussions, but I was not expecting them to be able to put present anything. So I thought we were just going to have a discussion amongst ourselves and then vote on whether or not it was a rehearing. Okay? So obviously that was a misunderstanding on my part, but prior to them saying a word, okay, this is what I was going to read into the record, and I'll try to get through it quickly. Tonight's decision isn't about whether we support or oppose the River Park project. It's about whether the new material submitted since March is substantially different enough to justify a rehearing, and I think it's important we keep that procedural focus at the center of our conversation. For my review, I believe the applicant has introduced enough new material to at least meet the threshold for reconsideration. This includes substantial documentation that wasn't before us in the March meeting, including new correspondence legal framing around the court injunction and a revised proposal that includes the conditional terms not previously discussed. The city also continued corresponding with the applicant and requesting documents after the permit was in the city's view, expired that makes the factual record more complex than it appeared when we voted previously. I understand some of the concerns about reopening the matter. There's a caution about how this could affect the city's posture and ongoing litigation, and I take that concern seriously. But granting a rehearing doesn't predetermine our final decision, it simply reflects that there is now additional context that arguably deserves to be considered in a formal hearing process. Taking that step could actually strengthen the city's legal position by showing that we've exhausted our administrative process in good faith. I also think we need to be mindful of our broader responsibility to protect not only the legal integrity of the city, but also its time and resources. If litigation continues, it will demand time, staff, bandwidth, and legal expense that we frankly don't have in surplus. If there's a reasonable path to resolution through reconsideration, we shouldn't avoid it out of frustration, frustration or fatigue. What I'm saying is that without any information tonight that we don't have to get emotional about, there was probably enough reason to grant the rehearing anyway, I

Richard Ford Burley 39:54

I don't agree.

Eric Stacy Okay,

Richard Ford Burley

you're you're absolutely. Entitled to that opinion.

Eric Stacy

Okay? I mean, this is actually

Eric Stacy 40:03

sort of unfortunate from my point of view.

Robert Kaler 40:07

I would ask for a vote on that issue, that procedural issue, because that, well,

Richard Ford Burley 40:11

the motion that I have made is that the item be continued, and I'm going to say based on the schedule that we have ahead of us, since we have no new items, but we also do have items that tonight we are clearly not going to get to as well. Unfortunately, that the remainder of the the docket for tonight be continued to our next regular meeting in July. That is my motion.

Robert Kaler

July is too long.

Richard Ford Burley

I didn't ask your opinion, sir. Well,

Robert Kaler 40:40

I'm, I'm gonna ask for a vote on

Richard Ford Burley

you don't get to ask for a vote, sir, the procedural

Robert Kaler

Yes, I do.

Richard Ford Burley

No, you don't

Robert Kaler

You're misapplying your own rules.

Richard Ford Burley

Do you want me to tell you to leave the room? Sir,

Robert Kaler

I'm just asking for a vote on that issue.

Richard Ford Burley 40:54

I would second your motion.

Richard Ford Burley 40:56

Okay? All in favor of continuing XYZ dairy, LLC and Lyme Properties too. This is Item E in tonight's agenda to the July meeting. Sorry, all in favor, that's four Yes. All opposed, that's one against. So the motion passes. We will see you again in July, sirs.

Robert Kaler 41:20

I'll be submitting the written material that I showed

Richard Ford Burley

Thank you

Robert Kaler 41:25

, and

Robert Kaler 41:27

anything else that's requested, so that it's part of the record,

Richard Ford Burley

understood,

Robert Kaler

and I don't want the misunderstanding by Mr. Burley or anybody else that we may submit additional material as well as I get to go through the records, as I did for the entire weekend. There's going to be more

Richard Ford Burley

okay,

Robert Kaler

and the first procedural vote we'll ask for in July is to get past this procedural business,

Richard Ford Burley 41:57

and once we have spoken with independent counsel, I will be more comfortable.

Robert Kaler

Thank you

Richard Ford Burley

knowing.

Robert Kaler 42:02

I just don't, I don't want you to misunderstand.

Richard Ford Burley 42:07

We have two items left on the docket.

Robert Kaler

Thank you.

Richard Ford Burley

So we have two items left on the docket in six minutes.

Different Speaker (female)

Can I just be clear on the dissension, the dissension the dissension was,

Richard Ford Burley

the dissension was, Eric.

Different Speaker (female)

Okay, thank you.

Richard Ford Burley

We have two items left on the docket. I do believe we can invite Chair Faunce back up if he is here, if he is not, yes.

Richard Ford Burley 42:40

Okay. Where have we left him, I believe we only we have F and G left and we don't have time to do them. Mr. Faunce has returned, Paula, so have I.

Speaker 1 43:15

Thank you. Thank you. I regret that it looks as if we are going to be running out of time they're here.

To:	Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject:	Pln Brd Draft Agenda
Sent:	2025/05/01 19:07:31 (UTC +00:00)
Attachments:	05-12-2025_Pln Agenda.pdf

I know the fonts are messed up, I fixed them all and again they didn't stick. I have to reach out to Civic Plus for help sometime, this is becoming a constant problem that I can't remedy. It's driving me nuts.

Anyway. I did not write postponed from next to the minutes, but I can if you want (the 3/17 and 3/24 ones).

I left this item off for now:

- *Add a separate agenda item under "other business" re: determination that one-year extension approval is void? - TC to confirm w/ MD at 4/30 bi-weekly meeting*
 - *Please leave off the agenda for now*

Crystal Taplin

City of Lebanon
Planning & Development Department
Administrative Assistant

Please Note City Hall is Open Monday – Thursday from 7 AM – 5 PM
We are closed on Fridays

CITY OF LEBANON PLANNING BOARD
HEARING ON XYZ DAIRY APPLICATION

XYZ DAIRY LLC
PRESENTATION
June 9, 2025

Robert J. Kaler, Esq.
Holland & Knight, LLP

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:

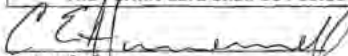
1. Foundation footings, forms and reinforcements. Lot pins must be in place at this inspection to assure the setback requirements are met. If the pins are not there or the setbacks cannot be verified, the construction will not be approved or allowed to continue. Mistakes in the location of boundary lines 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.

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

LEB_0099373

LEB_0099373

Statement of Structural Special Inspections

For compliance with the International Building Code 2009

Project: River Park – Lot 1 Construction Document Set

Location: 173 North Main Street, West Lebanon, New Hampshire

Statement of Structural Special Inspections

For compliance with the International Building Code 2009

Project: River Park – Lot 1 Construction Document Set

Location: 173 North Main Street, West Lebanon, New Hampshire

Owner: XYZ Dairy LLC

RMS (10) - 173 River Park Drive - IV, Lebanon, NH - Program of Structural Tests and Inspections (1)

Page 1

LEB_0000465

LEB_0099373

Statement of Structural Special Inspections

For compliance with the International Building Code 2009

Project: River Park - Lot 1 Construction Document SetLocation: 173 North Main Street, West Lebanon, New HampshireOwner: XYZ Dairy LLCArchitect of Record: Elkus Manfredi ArchitectsStructural Engineer of Record (SER): McNamara + SalviaGeotechnical Engineer of Record (GER): McPhail Associates, LLC

This statement of special inspections is submitted as a condition for issuance of the building permit in accordance with Section 1705.1 of the 2009 Edition of the International Building Code.

Geotechnical Engineer of Record (GER): McPhail Associates, LLC**This statement of special inspections is submitted as a condition for issuance of the building permit in accordance with Section 1705.1 of the 2009 Edition of the International Building Code.**

partial view of inspection

1545 (09) - 173 River Park Drive - W. Lebanon, NH - Program of Structural Tests and Inspections (I)

Page 1

LEB_0099465

LEB_0099373

Statement of Structural Special Inspections

For compliance with the International Building Code 2009

Project: River Park – Lot 1 Construction Document SetLocation: 173 North Main Street, West Lebanon, New HampshireOwner: XYZ Dairy LLCArchitect of Record: Elkus Manfredi ArchitectsStructural Engineer of Record (SER): McNamara + SalviaGeotechnical Engineer of Record (GER): McPhail Associates, LLC

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Geotechnical Engineer of Record (GER): McPhail Associates, LLC**This statement of special inspections is submitted as a condition for issuance of the building permit in accordance with Section 1705.1 of the 2009 Edition of the International Building Code.**

particular tests or inspections.

15145.000 – 100 River Park Drive – W. Lebanon, NH – Program of Structural Tests and Inspections (2)

The following categories of structural tests and inspections, if checked, are included in the program for structural tests and inspections for this project. The specific tests and inspections required for each checked category are listed on the page noted opposite the category.

The following categories of structural tests and inspections, if checked, are included in the program for structural tests and inspections for this project. The specific tests and inspections required for each checked category are listed on the page noted opposite the category.

- ☐ Precast Concrete Components
☐ Post-Tensioning Steel
☐ Structural Steel Connections

☐ Light Gauge Metal Framing

The following items are excluded from this program of structural tests and inspections, since they are designed by other structural engineers not under the aegis of the SER and the SER was not retained to provide performance specifications for their design. These other structural engineers must be assigned by the owner, architect, or construction contractor, as applicable, to be special SERs for their respective designs and to provide a program of structural tests and inspections for their respective designs.

Curtain Walls, Fall Protection Systems

Prepared by the Structural Engineer of Record:

Name: John G. Matuzewski, P.E.

Please type or print

Signature: _____

Firm: McNemara + Salvia

Date: July 26, 2016



Registration Seal

The following categories of structural tests and inspections, if checked, are included in the program for structural tests and inspections for this project. The specific tests and inspections

The following categories of structural tests and inspections, if checked, are included in the program for structural tests and inspections for this project. The specific tests and inspections required for each checked category are listed on the page noted opposite the category.

☐ Driven Deep Foundations ☒ Testing for Seismic Resistance (1)

The following items of construction, if checked, are specified in the structural plans or specifications on a performance basis. Their structural design will be reviewed by the SER and their construction is included in the program for tests and inspections on the attached sheets:

☐ Curtain Walls ☐ Metal Buildings
☐ Precast Concrete Components ☐ Light Gauge Metal Framing
☐ Post-Tensioning Steel
☒ Structural Steel Connections

The following items are included in this program of structural tests and inspections, unless they are designed by other structural engineers and tested by SER. If the SER was not consulted by a structural engineer, the SER will be consulted. The SER will be consulted by a structural engineer if the SER was not consulted by a structural engineer.

☐	Wood Construction	-
☒	Soils	7
☐	Driven Deep Foundations	-

Firm: McNamara + Salvia

Date: July 26, 2016

Registration Seal

Table 1704.7
Required Verification and Inspection of Soils

Verification and Inspection Task	Frequency of Inspection	Agent
1. Verify materials below shallow foundations are adequate to achieve the design bearing capacity.	Periodic	GER
2. Verify excavations are extended to proper depth and have reached proper material.	Periodic	GER
3. Perform classification and testing of compacted fill materials.	Periodic	GER

Table 1704.7
Required Verification and Inspection of Soils

Verification and Inspection Task	Frequency of Inspection	Agent
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2. Verify excavations are extended to proper depth and have reached proper material.	Periodic	GER
3. Perform classification and testing of compacted fill materials.	Periodic	GER
4. Verify use of proper materials, densities and lift thicknesses during placement and compaction of compacted fill.	Continuous	GER
5. Prior to placement of compacted fill observe subgrade and verify site has been prepared properly.	Periodic	GER

APPLICATION FOR PROPOSED EXCAVATION

Applicant Name: **David Clem**
Company: **XYZ Dairy, LLC**
Mailing Address: **57 Main Street,**
West Lebanon, NH 03784
Telephone: **(603) 676-7800**

I / We propose to disturb the surface, sidewalk, shoulders or ditches of the following street:
_____ for the purpose of

Tax Map #: **44-3** Lot #: **1**

The area to be disturbed is approximately:	220	feet in length
	165	feet in width
	15	feet in depth



Will be completed when site contractor is hired.

CITY OF LEBANON
DEPARTMENT OF PUBLIC WORKS
193 Dartmouth College Highway
(603) 448-3112

APPLICATION FOR PROPOSED EXCAVATION

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Will be completed when site contractor is hired.

CITY OF LEBANON
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APPLICATION FOR PROPOSED EXCAVATION

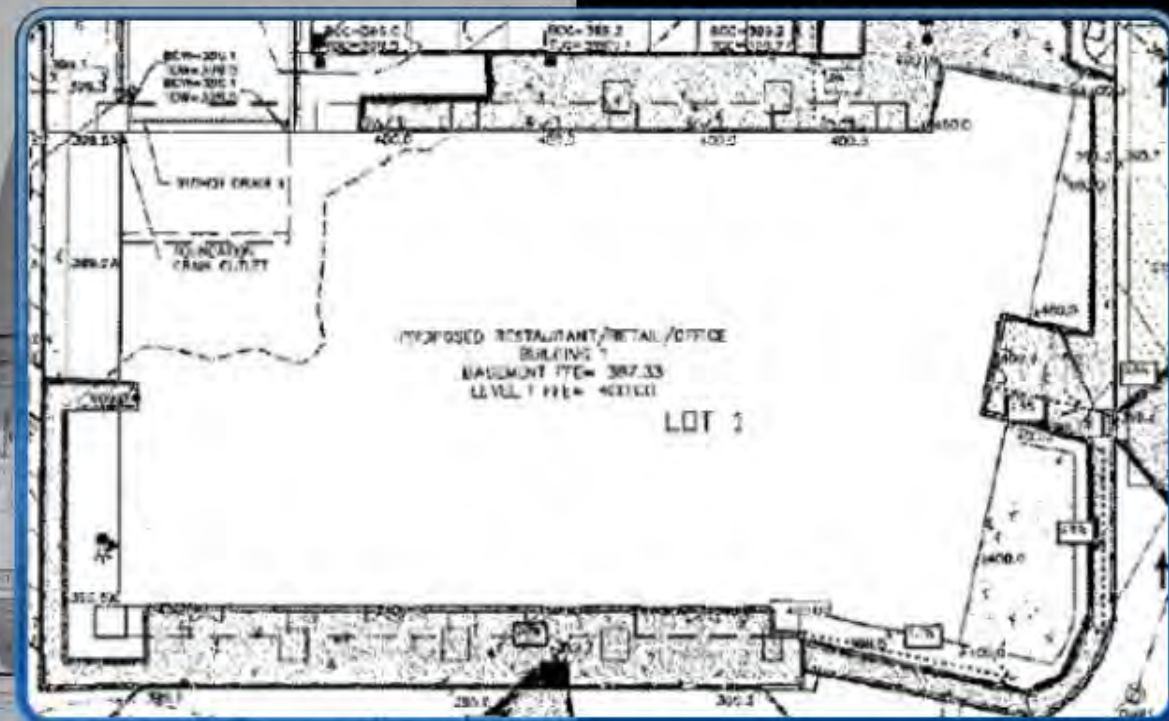
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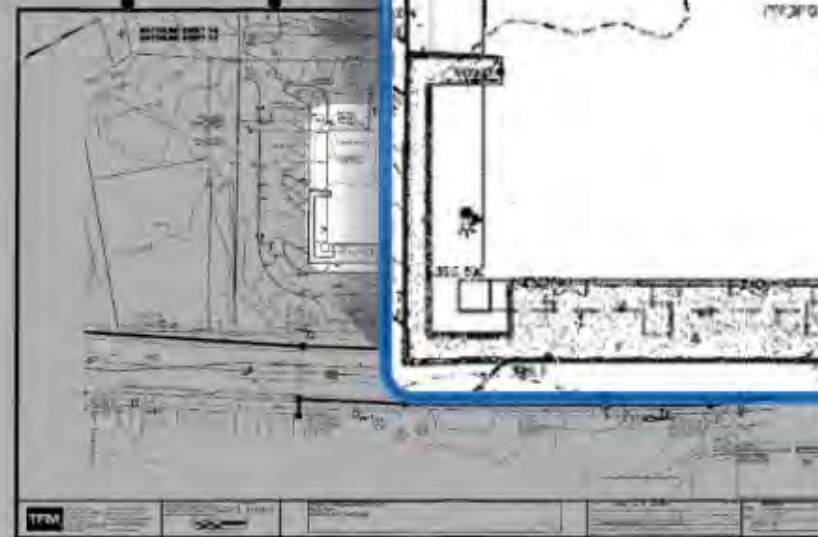
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LEB_0099503

LEB_0099373



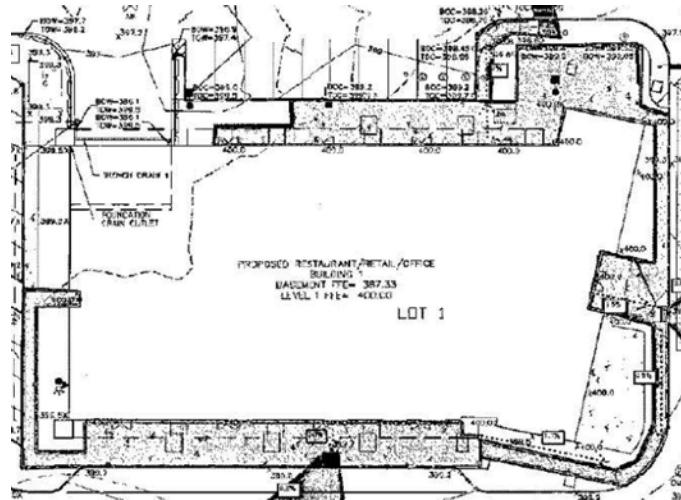
LEB 0099373



LEB_0099547

LEB_0099373

XYZ COMMENCES CONSTRUCTION WORK IN JANUARY 2025



From: Brian Vincent </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ED9E74B2B6C84B06B72312FA7C4A8E52-BVINCENT>
 To: 'ben.nottexcavating@comcast.net' <ben.nottexcavating@comcast.net>
 CC: matt.brush@engelberth.com; Jay Cairelli <Jay.Cairelli@lebanonnh.gov>; Sarah Finley <Sarah.Finley@lebanonnh.gov>; Rod Finley <rod.finley@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
 Subject: FW: [EXTERNAL] River Park Temp drainage plan
 Sent: 2025/01/21 19:49:19 (UTC +00:00)
 Attachments: temp drainage big.pdf

From: Brian Vincent </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ED9E74B2B6C84B06B72312FA7C4A8E52-BVINCENT>
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City of Lebanon
 City of Lebanon
 Department of Public Works
 193 Portsmouth College Highway
 Lebanon, New Hampshire 03755

City of Lebanon
 603.558.7113 ext. 100
 603.448.3117 Fax 6146

From: [redacted]
 Sent: Friday, January 27, 2025 9:58 AM
 To: Rod Finley <rod.finley@lebanonnh.gov>
 Cc: Matthew BRUSH <mbrush@lebanonnh.gov>
 Subject: [EXTERNAL] River Park Temp drainage plan

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe

Mod,

Here is the temp drainage plan for river park. the outlet end of the run has 2" slope chinked in with 7 1/2" to fill bigger voids and it does appear that the clay tile leaving the existing catch basin along rd 10 is 20" clay tile. all pipe we have installed is 24" dia. I confirmed elevations this morning and this drawing reflects that.

Thanks,
 Ben Grube
 Notts Excavating

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City of Lebanon
 City of Lebanon
 Department of Public Works
 193 Bartons College Highway
 Lebanon, New Hampshire 03756

Cell: 603.448.3133
 Office: 603.448.3133
 Fax: 603.448.3133

From: ben.nottexcavating@comcast.net
 Sent: Friday, January 24, 2025 9:58 AM
 To: Rod Finley <rod.finley@lebanonnh.gov>
 Cc: Matthew BRUSH <mbrush@lebanonnh.gov>
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I have reviewed the temp drainage plan for River Park. The plan shows a 24" clay tile bypass pipe with a 24" clay tile manhole at the upstream end. I have confirmed that the clay tile leaving the existing catch basin along rd 10 is 20" clay tile. All pipe was newly installed in 2024. I confirmed elevations this morning and this drawing reflects that.

Thanks,
 Ben Griggs
 Nott Excavating

XYZ COMMENCES CONSTRUCTION WORK IN JANUARY 2025

May 8, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park

Dear Mr. Hays:

For your information, XYZ re-commenced construction at River Park earlier this year, and this fact can be corroborated by municipal personnel of the City. In December of 2024, I executed a construction management contract with Engelberth Construction

XYZ COMMENCES CONSTRUCTION WORK IN JANUARY 2025

Nott's then started the excavation of the basement of 1 River Park per the permit set of construction documents. Because frost had already begun in January, 2025, this material was piled on Lot 2 until the arrival of spring weather. Per the approved plans this material was to be spread on Lot 2 to the new manhole elevations previously installed and accepted by the City of Lebanon as part of the so-called "cross country connector" servicing the first three building phases.

On January 16, 2025, Nott's on-site project foreman, Ben Griggs, contacted Rod Finley to schedule a time to witness the connection of the old line to the new temporary line solely on XYZ's Lot 1 property and not in the City's Route 10 right-of-way. On January 17, 2025 Nott's received a communication from Rob Finley asking for more as-built information and elevations of what had been installed, and this was supplied by Ben Griggs to Rod. Rod also communicated to Raymond Nott that "he had no issue with the connection but must see the as-built information first."

CITY'S POST-COURT ORDER ATTEMPT TO DECLARE BUILDING PERMIT EXPIRED



NEW HAMPSHIRE

FIL. (003) 448-

Email: leigh.hays@lebanonnh

May 15, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Mr. Clem,

Thank you for your letter of May 8 providing me with an update on pre-construction site improvement work that has been performed at the 1 River Park site.

Based on the information provided in your letter, I disagree with your statement that XYZ recommenced construction of the 1 River Park building in January 2025.

CITY'S POST-COURT ORDER ATTEMPT TO DECLARE BUILDING PERMIT EXPIRED

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

* * *

We hold that [the] 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.

The activities you describe in your letter, such as the execution of a construction contract, rebidding of the 1 River Park building and conduct of associated site work, including the relocation of the City's stormwater line, are all examples preparatory work/site work required prior to the commencement of construction work governed by the New Hampshire State Building Code, and do not constitute "work" regulated by the Building Code.

CITY'S POST-COURT ORDER ATTEMPT TO DECLARE BUILDING PERMIT EXPIRED

Of particular note is your statement that “Nott’s then started the excavation of the basement of 1 River Park per the permit set of construction documents.” You omit to state the particular date on which this started, and you do not state for how many days this continued. I would also be curious to learn whether this excavation was a repeat or an enlargement of the prior excavation done in December 2022.

As you already know,¹ I cannot reasonably consider this excavation to constitute “work” under the building permit, because I do not find textual support in the Building Code to conclude that excavating a foundation hole, without more, requires a building permit. (I’m sure you would agree that if you dug a foundation hole while lacking a building permit, I would not be able to cite you for performing work without a permit.)

New Hampshire Law

“No owner shall permit any excavation of earth on his premises without first obtaining permit therefore, except as follows:

- I. EXISTING EXCAVATIONS. The owner of an excavation which lawfully existed as of August 24, 1979, from which earth material of sufficient weight or volume to be commercially useful has been removed ...
- II. ABANDONED EXCAVATIONS. The permit and zoning exemptions under RSA 155-E:2
- III. STATIONARY MANUFACTURING PLANTS. (a) No permit shall be required under this chapter for excavation from an excavation site which ... was contiguous to ... stationary manufacturing and processing plants which were in operation ...
- IV. HIGHWAY EXCAVATIONS No permit shall be required under this chapter for excavation which is performed exclusively for the ... construction ... of a ... highway by a unit of government...”

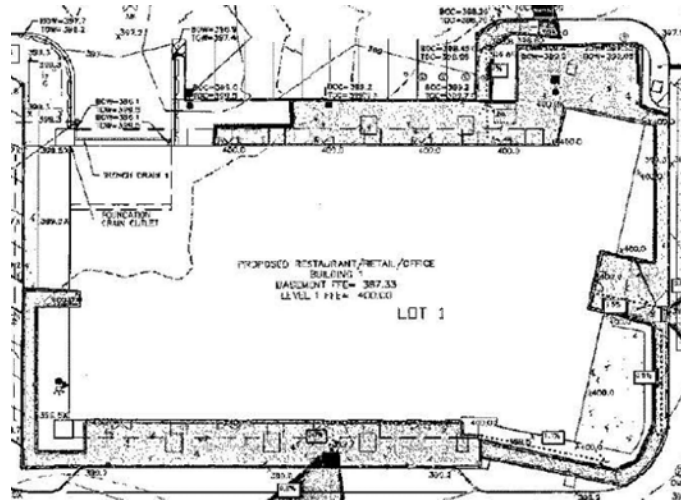
N.H. Rev. Stat. Ann. § 155-E:2 Permit Required

Title XII Public Safety and Welfare

New Hampshire Law

- **“Commencement of construction” means any** clearing of the land, **excavation** or other substantial action that would adversely affect the natural environment **of the site of the proposed facility**, but does not include land surveying, optioning or acquiring land or rights in land, changes desirable for temporary use of the land for public recreational uses, or necessary borings to determine foundation conditions, or other preconstruction monitoring to establish background information related to the suitability of the site or to the protection of environmental use and values.
- ***N.H. Rev. Stat. Ann. § 162-H:2 Definitions*** (emphasis added)

XYZ COMMENCES CONSTRUCTION WORK IN JANUARY 2025



New Hampshire Cases

- “The contract required the contractor to perform “initial work” of cutting entrance and access roads, installing water lines, and causing the digging of test pits to assess soil bearing capacity ...
We conclude that RANE commenced construction of its facility on the grounds of Concord Hospital within the required period.
- *Appeal of Rehab. Assocs. of New England*, 131 N.H. 560, 567, 556 A.2d 1183, 1188 (1989)

From: Leigh Hays </o=ExchangeLabs/ou=Exchange Administrative Group
(FYDIBOHF23SPDLT)/cn=Recipients/cn=d5682068372e4da08f4abb40a87da69b-191a9f04-d0>
Subject: Permit 2016-00293 - 1 River Park
Sent: 2025/03/20 11:52:27 (UTC +00:00)
Task Start: 2025/05/25 00:00:00 (UTC +00:00)
Task Due: 2025/05/25 00:00:00 (UTC +00:00)
Percent Complete: 0

From: Leigh Hays </o=ExchangeLabs/ou=Exchange Administrative Group
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Task Start: 2025/05/25 00:00:00 (UTC +00:00)
Task Due: 2025/05/25 00:00:00 (UTC +00:00)
Percent Complete: 0
Owner: Leigh Hays
Task Status: NotStarted
Priority: High
Reminder Time: 2025/05/26 12:00:00 (UTC +00:00)

Has work commenced onsite related to work required by the building permit.

CORWIN EMAIL AND DRAFT TO XYZ JANUARY 27, 2023

From: Tim Corwin <Tim.Corwin@lebanonnh.gov>

Sent: Friday, January 27, 2023 6:36 PM

To: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>; Calvin Hunnewell <Calvin.Hunnewell@lebanonnh.gov>; David Brooks <David.Brooks@lebanonnh.gov>

Subject: RE: [EXTERNAL] Commencement of 1(00) River Park Drive (Building Permit #2016-00293), conflict with City's existing municipal stormwater line

I believe the issue with the building permit is that it has or will very shortly expire unless work has commenced, and digging the pit does not constitute commencement of the work. So the next section of the draft letter should address this. I can work with Calvin to draft something.

And yes, adding a reminder about the PB conditions of approval that need to be satisfied prior to commencement of work is a good idea and could be the third section of the letter. The relevant conditions would include lining up a third party inspector and all that entails (that's usually taken care of prior to issuance of the BP). I'll see if there are any others.

CORWIN EMAIL AND DRAFT TO XYZ JANUARY 30 2023

I'm wondering whether the letter regarding the building permit should be separate from the letter regarding the stormwater line location – mainly because the determination that the building permit has now expired should be made in writing by the Building Inspector, right? I've written the initial draft (in bold below) as if it's a separate letter from the Building Inspector, but obviously that can be changed if decide a

2022." Please be advised that it is the determination of this office that, because excavation work does not require a building permit under the IBC, the activity described in your letter of December 9, 2022, does not and cannot constitute the commencement of work authorized by the Building Permit. *(should/can we provide a fuller explanation of why the excavation work doesn't constitute commencement of the work authorized under the building permit? I took a quick look at the printed copy of the IBC and couldn't find anything helpful...)* Consequently, **the Building Permit expired on November 22, 2022, and a new building permit is required.**

CITY'S POST-COURT ORDER ATTEMPT TO DECLARE BUILDING PERMIT EXPIRED



NEW HAMPSHIRE

TEL: (603) 448-7111

Email: leigh.hays@lebanonnh.gov

May 15, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Mr. Clem,

Thank you for your letter of May 8 providing me with an update on pre-construction site improvement work that has been performed at the 1 River Park site.

Based on the information provided in your letter, I disagree with your statement that XYZ recommenced construction of the 1 River Park building in January 2025.

Points

- **The Building Inspector's 30 May 2025 Attempt to Terminate the XYZ Permit is a misconstruction of the Building Permit, the Building Code, and NH Law that will take time to correct – hence the need for the 2-year extension. It's also a contempt of the Court Order reinstating the Building Permit.**

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- **And there is also another major problem that requires the requested extension...**

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The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Conflicted Legal Advice from City Counsel

- **The Planning Board Has Been Acting in a Quasi-Judicial Capacity regarding the XYZ Applications Concerning River Park that the City Has Opposed.** *Appeal of City of Keene*, 141 N.H. 797, 800, 693 A.2d 412, 414 (1997) (“An act is judicial in nature if officials “are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments, as the parties choose to lay before them.”

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- Although it is required to be just as impartial as a Court or Jury, N.H. Rev. Stat. Ann. § 673:14, **the Board has accepted and relied upon legal advice provided to it the City’s Legal Counsel Drummond Woodsum, which has been opposing XYZ concerning River Park** on behalf of the City both Administratively and in Court.

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

To: C. Christine Fillmore <CFillmore@dwmlaw.com>; Matthew C. Decker <MDecker@dwmlaw.com>
CC: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Subject: FW: [EXTERNAL] BCBA Appeal - Building Permit #2016-00293
Attachments: 2024-02-01 XYZ Dairy Permit Expiration Letter.pdf, 20240229 XYZ Dairy - BCBA - Appeal of Building Inspector Decision .pdf

Christine/Matt --

REDACTED

Thank you! -Tim

From: Philip Hastings <hastingsp@cwbp.com>
Sent: Wednesday, March 6, 2024 9:55 AM
To: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Cc: Shaun Mulholland <Shaun.Mulholland@lebanonnh.gov>; David Brooks <David.Brooks@lebanonnh.gov>; Chet Clem <chet@lymeproperties.com>; Tim Corwin <Tim.Corwin@lebanonnh.gov>; Angela McCanna <amccanna@lymeproperties.com>; City of Lebanon-Planning <Planning@lebanonnh.gov>
Subject: RE: [EXTERNAL] BCBA Appeal - Building Permit #2016-00293

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

From: Tim Corwin </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BD3C289255C9424C9C5FD006E6058756-TIM.CORWIN>
To: Andrew Faunce <andrew.g.faunce@gmail.com>
Subject: RE: [EXTERNAL] Quick check in 2/10 am?
Sent: 2025/02/10 18:01:41 (UTC +00:00)

Hi Andrew —

I'm going to let Matt take the lead relatively to provide advice to the Board. My intent is to simply observe and not participate to the maximum extent possible. If we did not have legal counsel, I would have to take a different posture of course, but fortunately we do.

Regarding your second question, that's my inclination as well, but let's confirm that with Matt at our meeting with him at 6.

Thanks, Tim

From: Andrew Faunce <andrew.g.faunce@gmail.com>
Sent: Monday, February 10, 2025 12:26 PM
To: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject: Re: [EXTERNAL] Quick check in 2/10 am?

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

I didn't make it in today.

I have two procedural questions, which you may be able to answer this afternoon or in our limited time with Counsel tonight.

1. For the benefit of the public, will you or Legal Counsel provide a brief introduction to the frame within which the Board will consider the XYZ request?

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

From: Shaun Mulholland </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A7B2518D94254E4D8BFA2205CA9B5C09-SHAUN.MULHO>
Subject: M.Decker/PLN review of XYZ lawsuit
Sent: 2024/10/02 13:28:25 (UTC +00:00)
Appointment Start: 2024/10/08 12:30:00 (UTC +00:00)
Appointment End: 2024/10/08 15:00:00 (UTC +00:00)

From: David Brooks </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7FB542EB07154BB4A49E55BCC0CF9179-DAVID.BROOK>
Subject: M.Decker/PLN review of XYZ lawsuit
Sent: 2024/10/02 13:28:20 (UTC +00:00)
Appointment Start: 2024/10/08 12:30:00 (UTC +00:00)
Appointment End: 2024/10/08 15:00:00 (UTC +00:00)

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City’s Counsel

From:	Tim Corwin </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BD3C289255C9424C9C5FD006E6058756-TIM.CORWIN>
To:	Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject:	PB Mtg w/ C Fillmore (River Park)
Sent:	2023/07/11 09:00:01 (UTC -05:00)
Appointment Start:	2023/07/24 17:15:00 (UTC -05:00)
Appointment End:	2023/07/24 18:15:00 (UTC -05:00)
Location:	Microsoft Teams Meeting: Council Chambers

Microsoft Teams meeting

Join on your computer, mobile app or room device

[Click here to join the meeting](#)

Meeting ID: 226 639 184 259

Passcode: oU4Kdg

[Download Teams](#) | [Join on the web](#)

Join with a video conferencing device

lebanonnh@m.webex.com

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

From: Matthew C. Decker <MDecker@dwmlaw.com>

Sent: Wednesday, March 20, 2024 3:30 PM

To: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>; Cordell Johnston <cordell@cajohnston.com>

Cc: Tim Corwin <Tim.Corwin@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>

Subject: [EXTERNAL] XYZ Dairy/River Park BCBA Appeal

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Nathan and Tim,

Cordell Johnston has agreed to represent the Lebanon ZBA/BCBA with respect to the River Park appeal of revocation of building permit. Cordell is cc'd on this e-mail and his phone number is 603-748-4019.

Cordell is out of the country from March 29-April 17. He and I discussed that he could be available during the day on March 28 for a Zoom conference with the ZBA chair and vice chair to discuss preparations for the April 1 hearing, and after he is back in April, he can assist with the remainder of appeal, such as deliberations and crafting of a written decision.

I am going to send Cordell the key documents that we have in my firm's file relevant to this appeal. I will also forward an e-mail from XYZ's attorney, Phil Hastings, that is more appropriately addressed by the BCBA's attorney. I suggest as a next step that Nathan and Cordell speak to nail down a plan for the March 28 prep meeting.

Thanks very much,
Matt

Matthew C. Decker

Attorney

O: 603.792.7421

MDecker@dwmlaw.com

1 Court Street, Suite 320, Lebanon, NH 03766

800.727.1941 F: 603.448.5949 dwmlaw.com

DrummondWoodsum

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

From: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Sent: Wednesday, March 20, 2024 3:51 PM
To: Matthew C. Decker <MDecker@dwmlaw.com>; Cordell Johnston <cordell@cajohnston.com>
Cc: Tim Corwin <Tim.Corwin@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject: RE: [EXTERNAL] XYZ Dairy/River Park BCBA Appeal

Cordell

I want to transfer to you the base docs that we have developed for background on the XYZ Dairy appeal.
I'll call you with further information.
See attachments. More will follow.

Nate

From: Matthew C. Decker <MDecker@dwmlaw.com>
Sent: Wednesday, March 20, 2024 3:30 PM
To: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>; Cordell Johnston <cordell@cajohnston.com>
Cc: Tim Corwin <Tim.Corwin@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject: [EXTERNAL] XYZ Dairy/River Park BCBA Appeal

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Thanks very much,
Matt

Matthew C. Decker

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

From: Nathan Reichert </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C20B7D67472D416FA384C306D86340BB-NATHAN REIC>
To: Cordell Johnston <cordell@cajohnston.com>
CC: Tim Corwin <Tim.Corwin@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject: RE: [EXTERNAL] XYZ Dairy/River Park BCBA Appeal
Sent: 2024/03/21 10:59:20 (UTC -05:00)

The Board packet will likely ship out late next week.
Lets say Wednesday end of business.

I would also warn him that the Appeal is scheduled after the regular Zoning Meeting. There are 6 applications on the Zoning Board agenda. The Board usually is hesitant to work much past 10:00 PM with a 7:00 PM start time. It is highly unlikely we will be able to burn through all 6 items in 3 hours. My guess is that the Board will be tired and highly likely to continue the hearing after anything other than opening remarks.

Nate

The Planning Board Has Not...

From: Cordell Johnston <cordell@cajohnston.com>
Sent: Thursday, March 21, 2024 9:35 AM
To: Nathan Reichert <Nathan.Reichert@lebanonnh.gov>
Cc: Tim Corwin <Tim.Corwin@lebanonnh.gov>; Tiffany Adams <Tiffany.Adams@lebanonnh.gov>
Subject: Re: [EXTERNAL] XYZ Dairy/River Park BCBA Appeal

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Nate—

I emailed Phil Hastings yesterday and asked again whether he would agree to postpone the hearing until May. He said no. Also, he asked whether there is a deadline to provide supplemental materials to the board for the hearing. What should I tell him? Thanks.

Cordell

Cordell A. Johnston
Attorney at Law
P.O. Box 252
Henniker, NH 03242
603-748-4019

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Conflicted Legal Advice from City Counsel

- The Planning Board Has Been Acting in a Quasi-Judicial Capacity regarding the XYZ Applications Concerning River Park that the City Has Opposed. *Appeal of City of Keene*, 141 N.H. 797, 800, 693 A.2d 412, 414 (1997) (“An act is judicial in nature if officials “are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments, as the parties choose to lay before them.”

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- Although it is required to be just as impartial as a Court or Jury, N.H. Rev. Stat. Ann. § 673:14, the Board has accepted and relied upon legal advice provided to **It the City’s Legal Counsel** Drummond Woodsum, **which has been opposing XYZ concerning River Park** on behalf of the City both Administratively and in Court.

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- This presents insurmountable procedural and substantive due process problem under both federal and state law that have severely prejudiced XYZ, and provided the City with an unfair advantage that has tainted the Planning Board’s prior decisions against XYZ – **and the law on this is very clear.**

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

First, the fact that the Planning Board's attorney also represented the applicant Town of West Bath on the same subject matter ... created an obvious conflict of interest.

His duty to represent West Bath's interests regarding the subdivision project prevented him from advising the Planning Board in any manner contrary to West Bath's interests, whereas his duty to the Bath Planning Board was to give good independent advice, even that if that advice was contrary to West Bath's interests.

§ 38:18. Disqualification of attorneys, 4 Am. Law. Zoning § 38:18 (5th ed.), n. 1

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That is a classic conflict of interest—exactly the conflict the court flagged in its remand order. Second, the Board's attorney's actual role during remand was such as to raise a significant doubt as to whether the Bath Planning Board engaged in the meaningful review the court expected to occur.... **It can only be inferred that the attorney assumed and intended from the outset that the Board would act in favor of the attorney's other client on all issues.**

§ 38:18. Disqualification of attorneys, 4 Am. Law. Zoning § 38:18 (5th ed.), n. 1

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Legal Advice from the City's Counsel

... a court cannot permit the violation of a party's constitutional rights, such as where municipal action is “taken without according **procedural and substantive due process.**” ... **the applicant's due process rights were violated** when the Board **permitted the opponents of the application to help formulate the findings of facts**, without notice or an opportunity for the applicant to be heard. 468 A.2d at 992. ... **The court, in upholding the Superior Court's decision to vacate the Board**, held: “It cannot be determined from the record of the Planning Board ... **if the opponents unduly influenced members of the Board** in making findings of fact unfavorable to the applicant's proposal.” Id.

Johansen v. City of Bath, 2011 WL 1748535 (Me.Super. Jan. 04, 2011)(vacating PB action)

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Decisions from other jurisdictions make it clear that **a conflict of interest on the part of an attorney advising a board can render adjudicative decisions of the board vulnerable to challenge on due process grounds.**

Johansen v. City of Bath, 2011 WL 1748535 (Me.Super. Jan. 04, 2011)(vacating PB action)

The Planning Board Has Not Acted Impartially and Independently Due to Its Reliance on Conflicted Legal Advice from City Counsel

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- **This Has Been an Improper Conflict of Interest, has Severely Prejudiced XYZ, and Has Provided the City With an Unfair Advantage That has Tainted the Planning Board’s Prior Decisions against XYZ– Which Will Require Additional Time to be Revisited. XYZ Was Entitled to have the PB Receive Independent Unbiased Legal Advice Not Constrained by Lawyers Obligated to Prioritize the City’s Interests at the same time**

**The Planning Board's Prior Decisions Against XYZ Are Voidable Due
to the Prejudgments and Personal Interest of a Member**

**AND there is still another equally serious problem involving a Planning
Board Member --**

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

AND there is still another equally serious problem involving a Planning Board Member --

I. No member of a . . . planning board . . . shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest 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. N.H. Rev. Stat. Ann. § 673:14

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

From: Tim Corwin </O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BD3C289255C9424C9C5FD006E6058756-TIM.CORWIN>
To: Andrew Faunce <andrew.g.faunce@gmail.com>
Subject: RE: [EXTERNAL] Re: RP Draft Motion
Sent: 2024/11/11 18:42:11 (UTC +00:00)

Ah, fantastic, thank you Andrew!

From: Andrew Faunce <andrew.g.faunce@gmail.com>
Sent: Friday, November 8, 2024 9:30 AM
To: Tim Corwin <Tim.Corwin@lebanonnh.gov>
Subject: [EXTERNAL] Re: RP Draft Motion

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender and know the content is safe.

Hi, Tim,

I think we misconnected earlier this week. Hoping these notes are still useful for staff/counsel to create a draft motion for the Board's consideration on Tuesday. Please share as helpful toward those ends.

Thanks,

-A

Testimony Discussed During Deliberation:

Upon gaining the original 2-yr extension, the applicant demonstrated no early attention to or sense of urgency for completing the infrastructure, which was/is the deliverable for completing phase one within the new deadline. Instead, the applicant spent considerable time attempting to find alternative ways to cover these costs. The applicant testified that it was only early in 2024 when

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Upon gaining the original 2-yr extension, the applicant demonstrated no early attention to or sense of urgency for completing the infrastructure, which was/is the deliverable for completing phase one within the new deadline. Instead, the applicant spent considerable time attempting to find alternative ways to cover 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 early in 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 his inactivity was its cause. Twice in the testimony the applicant referenced the intention to align the infrastructure work and expense with progress on a tenancy agreement and/or on the actual building construction on lot 1 to shorten the gap between incurring costs and the producing revenue to defray them - seemingly to explain why no new work was advanced until this eleventh hour to complete the infrastructure. A natural consequence of not doing work on site is the loss of the building permit. The developer's business decisions are what delayed work activity necessary for completion. And these delays also contributed to the loss of the building permit - not the other way around.

The preparation for work on the southerly entrance was poorly managed. Early in the newly extended phase one construction period the applicant conveyed to NH-DOT an argument against the need for an additional updated traffic study or other forms of reporting to NH-DOT to obtain a permit for that entrance work. That was not responded to or corroborated by NH-DOT, and the developer let the matter hang without resolution. Upon the applicant's contact this year to pursue an excavation permit with NH-DOT, the need for a summary report on the traffic study was reiterated. Getting clarity on the requirements and then more quickly taking action was entirely within the applicant's control. Inexplicably, the applicant mishandled this task, resulting in the setback to his plans in the eleventh hour of discovery.

Basis for the Board's Decision: the testimony and evidence offered does not support the case that the circumstances were beyond the applicant's control.

1. The applicant didn't promptly advance the outstanding infrastructure work given (1) considerable time spent on a failed attempt to develop partnerships, a TIF, or other methods for defraying the infrastructure expense and (2) a decision to perform this remaining work (and the expense) proximate to and contingent upon promoting a building one tenant and commencing work on the actual building (sources of revenue). The applicant claimed twice in his testimony that the 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 NH-DOT for the southerly entrance by failing to follow up on his misunderstanding of the viability of an existing traffic study or report. That communication gap spanned several years without evidence of any effort by the applicant to obtain confirmation. The "surprise" need for an up to date study or report based upon an earlier traffic study - which the applicant discovered upon seeking a permit in 2024 - was demonstrably in the applicant's control to know and to plan for had he simply pursued the matter to its conclusion several years ago when the matter was raised but not resolved. That overlooked attention would have supported timely action.
3. The applicant doesn't have a building permit because he hadn't done any work on site in the most recent 6-month period for construction ahead of the permit's revocation - and because he chose to litigate this decision rather than to reapply upon notice to quickly resume the work he claimed to have queued up.

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

infrastructure work and expense with progress on a tenancy agreement and/or on the actual building construction on lot 1 to shorten the gap between the producing revenue to defray them - seemingly to explain why no new work was advanced until this eleventh hour to complete the infrastructure consequence of not doing work on site is the loss of the building permit. The developer's business decisions are what delayed work activity necessitates completion. And these delays also contributed to the loss of the building permit - not the other way around.

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The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

West Lebanon Revitalization Advisory Committee

To: West Lebanon Revitalization Advisory Committee
Prepared By: Andrew Faunce and Nathan Reichert
Date: December 16, 2024 – Regular Meeting
Discussion Topic: Action Items for West Lebanon
Agenda Item: 3.A

The following is a breakdown of the WLRAC discussion from the November meeting as noted by Mr. Faunce.

Near Term Actions:

- Halt further blight to the West Lebanon Main Street downtown that is manifest in empty storefronts; or business transitions that are not focused on meeting the neighborhood needs. This is a "code red" need to preclude an even more severe downward spiral.
- Develop "destination" experiences - notably make use of the SAU building (the Theater, gym, and abundant open space for activities under tents) as a community center for film, entertainment, and civic events.
- Regroup on current plans to redevelop the three Main St. lots currently owned by the City. Consider short term plans to fill those spaces pending the long-term plan's execution.
- Market WL restaurants as a convenient alternative to WRJ restaurants. ("Draft" on that success.)
- Collaborate with Littleton, NH to see which of their successful approaches will work here.
- Parking - identify if there is an actual or a perceptual problem with finding parking along WL Main St. Take steps to remedy, which may include creating parking or negotiating shared use agreements with property owners.
- Develop the capacity (ideally a specific role and person with marketing skills) within the City Manager or Planning and Development office to regularly and continuously engage, promote, and explain efforts to improve WL. (Having plans and executing them is not sufficient.)
- Engage with the EDC (and the above mentioned role) to create a vital community and partnership with WL business owners and property owners. Any improvements beyond those already in the pipeline rely entirely on their buy in and support.
- Gather/regather the neighborhood needs to identify businesses to attract to WL Main St.
- **Urgently investigate options to encourage or enforce site condition clean up at River Park. ALSO... Investigate, taking action, as necessary, to preclude the potential for sale and alternative development of this property which its zoning allows but that does not comport with resident expectations as defined by the River Park subdivision and site plans.**
- Revisit with EDC and City staff how a TIF will support the above activities. (eg: Which of the above costs can be defrayed by it?)

**CITY OF LEBANON ~ PLANNING & DEVELOPMENT****West Lebanon Revitalization Advisory Committee**

To: West Lebanon Revitalization Advisory Committee
Prepared By: Andrew Faunce and Nathan Reichert
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- explain efforts to improve WL. (Having plans and executing them is not sufficient.)
- Engage with the EDC (and the above mentioned role) to create a vital community and partnership with WL business owners and property owners. Any improvements beyond those already in the pipeline rely entirely on their buy in and support.
 - Gather/regather the neighborhood needs to identify businesses to attract to WL Main St.
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CITY OF LEBANON ~ PLANNING & DEVELOPMENT

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alternative development of this property which its zoning allows but that does not comport with resident expectations as defined by the River Park subdivision and site plans.

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CITY OF LEBANON ~ PLANNING & DEVELOPMENT

West Lebanon Revitalization Advisory Committee

To: West Lebanon Revitalization Advisory Committee
Prepared By: Andrew Faunce and Nathan Reichert
Date: December 16, 2024 – Regular Meeting
Discussion Topic: Action Items for West Lebanon
Agenda Item: 3.A

- Market WL restaurants as a convenient alternative to WRJ restaurants. ("Draft" on that success.)
- Collaborate with Littleton, NH to see which of their successful approaches will work here.

- **Urgently investigate options to encourage or enforce site condition clean up at River Park. ALSO... Investigate, taking action, as necessary, to preclude the potential for sale and alternative development of this property which its zoning allows but that does not comport with resident expectations as defined by the River Park subdivision and site plans.**

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The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

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Prepared By: Andrew Faunce and Nathan Reichert
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The following is a breakdown of the WLRAC discussion from the November meeting as noted by Mr. Faunce.

Near Term Actions:

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

Urgently investigate options to encourage or enforce site condition clean up at River Park. ALSO... Investigate, taking action, as necessary, to preclude the potential for sale and alternative development of this property which its zoning allows but that does not comport with resident expectations as defined by the River Park subdivision and site plans. Revisit with EDC and City staff how a TIF will support the above activities. (eg: Which of the above costs can be defrayed by it?)

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of a Member

- I. No member of a . . . planning board . . . shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has **a direct personal** or pecuniary **interest** in the outcome which differs from the interest 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. **N.H. Rev. Stat. Ann. § 673:14**

The Planning Board's Prior Decisions Are Voidable Due to the Prejudgments and Personal Interest of its Chair

...**the planning board** in this case was required by statute to notify all interested parties and to hold public hearings before ruling on the Raymond proposal. The statute reflected the fact that the board's decision would have a disproportionately great impact on Raymond and on owners of land abutting his, but comparatively little impact on other town residents. **We conclude that action of this type must be characterized as judicial or quasi-judicial**, see *Ehrenberg v. City of Concord*, 120 N.H. 656, 659, 421 A.2d 128, 130 (1980), at least for the purpose of deciding whether the rights of the parties were adequately protected; i.e., whether due process requirements were met. Other jurisdictions have adopted a similar view.

The principal question before us on this appeal is **whether the decision of a planning board is rendered invalid by the participation of a board member** whose earlier remarks, before he became a board member, **indicated that he had prejudged the case**. The superior court ruled that the remarks in question were sufficient evidence of prejudgment to disqualify the board member, and *265 that his participation rendered the board's decision voidable under the rule of *Rollins v. Connor*, 74 N.H. 456, 69 A. 777 (1908). We affirm. ***

Winslow v. Town of Holderness Plan. Bd., 125 N.H. 262, 264–65, 480 A.2d 114, 115 (1984)

The Planning Board's Prior Decisions Are Voidable Due to the Prejudgments and Personal Interest of its Chair

We first address the matter of Mr. Mastro's disqualification. **Our State Constitution demands that all judges be “as impartial as the lot of humanity will admit.”** N.H. CONST. pt. I, art. 35. This applies similarly to members of boards acting in a quasi-judicial capacity. N.H. Milk Dealers' Ass'n v. Milk Control Board, 107 N.H. 335, 338–39, 222 A.2d 194, 197–98 (1966). The defendant does not contest the master's finding, based on Mr. Mastro's remarks in favor of the Raymond proposal, that **Mr. Mastro had prejudged the facts of the case** before joining the board. **“There is no doubt that [this type of prejudice] **117 constitute[s] a cause for disqualification” from a quasi-judicial function of a board.** N.H. Milk Dealers' Ass'n v. Milk Control Board, supra at 339, 222 A.2d at 198; Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 591 (D.C.Cir.1970); see Appeal of Lathrop, 122 N.H. 262, 265–66, 444 A.2d 505, 506–07 (1982); 3 E. Yokley, Zoning Law and Practice § 18–8, at 160 (4th ed. 1979).

We would reach the same result if we applied the test established by State law for members of zoning boards of adjustment, that is, that they meet the standards that would be required of jurors in the trial of the same matter. RSA 31:73 (repealed by Laws 1983, 447:5, I, and replaced by RSA 673:14 (Supp.1983), eff. Jan. 1, 1984.... **A juror may be disqualified if it appears that he or she is “not indifferent,”** RSA 500–A:12, II, and there was ample evidence in this case to support such a finding as to Mr. Mastro. **Accordingly, the master's ruling that Mr. Mastro was disqualified from acting on the Raymond proposal was proper.**

The Planning Board's Prior Decisions Against XYZ Are Voidable Due to the Prejudgments and Personal Interest of its Chair

This brings us to the principal question raised in this appeal: whether the master erred in applying to this case the rule that “judicial action by a tribunal one of whose members is disqualified to act is voidable if the disqualified member participates therein, without reference to the fact whether the result is produced by his vote.”

The Rollins court held that mere **participation by one disqualified member was sufficient to invalidate the tribunal's decision** because it was impossible to estimate the influence one member might have on his associates. ... In view of the important property rights involved, and the State constitutional mandate for judicial impartiality, **we consider this rationale sufficient to justify application of the Rollins rule to this case.**

The defendant's argument, that bias of a single board member should not void the board's decision unless his participation produced the decision, rests on this court's dictum in *Totty v. Grantham Planning Board*,. **We now believe this to be a misstatement of the law. ... we believe that the requirement of impartiality demands application of the Rollins rule to planning boards** in cases like this one, we overrule *Levesque* and reject the dictum in *Totty*, to the extent that they are inconsistent with this opinion.

Winslow v. Town of Holderness Plan. Bd., 125 N.H. 262, 265–69, 480 A.2d 114, 115–18 (1984)

CONCLUSIONS

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- 3. The Planning Board's improper reliance on conflicted attorneys, and the PB Chair's bias and improper *ex parte* communications with City Officials, have tainted the PB's prior decisions against XYZ – hence the need for those those decisions to be reconsidered by impartial members only, with help from independent counsel.**

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- 1. For all of these reasons, XYZ's request for reconsideration of the Board's prior denial of XYZ's request for a 2-year extension should be granted, and that request should be allowed as soon as possible.**
- 2. And the draft decision that has likely already been drafted by Messrs. Corwin and Faunce denying the request should be returned to them for filing.**
- 3. Questions?**

THE STATE OF NEW HAMPSHIRE
GRAFTON COUNTY
Docket No. 215-2024-CV-00311
SUPERIOR COURT
XYZ Dairy, LLC
v.
CITY OF LEBANON, et al.

OBJECTION TO “EMERGENCY” MOTION

NOW COMES the City of Lebanon (the “City”)¹, by and through its attorneys, Drummond Woodsum & MacMahon, and hereby submits the following objection in response to the motion of plaintiff XYZ Dairy, LLC (“Plaintiff” or “XYZ”) for a temporary injunction and other relief. In opposition to XYZ’s motion, the City says as follows:

Introduction/Summary

As has been the case for the past 15 years, the City stands ready to assist XYZ with its desired construction of the River Park development project, so long that such construction complies with the law and local rules and regulations. Meanwhile, the City defendants have filed their answer denying XYZ’s allegations of a conspiracy to prevent such construction, and the City intends to put XYZ to its proof at the 15-day trial XYZ has requested for the summer of 2026.

Following the Court’s Omnibus Order of November 25, 2024, XYZ had a clear path forward to commence construction of its Phase 1 site plan/infrastructure improvements and construction of its first building at the 1 River Park site. For reasons unknown to the City,

¹ The City itself, as a New Hampshire municipality, is the sole proper defendant to this action. The building inspector and other officials of the City named as defendants are not separate legal entities, but instead officers/departments of the City, whose powers or authority are set forth by statute, ordinance, and/or the City’s administration. *See, e.g., Stone v. Cray*, 89 N.H. 483, 484 (1938); *Kelley v. Hopkinton Village Precinct*, 108 N.H. 206, 207 (1967); *N.H. Highway Hotel, Inc. v. City of Concord*, 119 N.H. 122, 124 (1979).

however, XYZ has instead chosen to vehemently object to the Department of Public Works' routine and inexpensive requests for a temporary easement and maintenance bond for a temporary stormwater bypass pipe, and, in turn, to allow its entire project to stall.

The accompanying affidavits of Brian Vincent, a City Engineer, Leigh Hays, the Chief Building Official, and Nathan Reichert, the Planning & Development Director, explain the relevant circumstances and occurrences since the Omnibus Order reset the 180-day clock on XYZ's building permit, and show that XYZ's own decisions and inaction are the cause of its current circumstances.

The Court should deny XYZ's requests for preliminary injunctive relief and instead order that (i) if XYZ wishes to implement its proposed temporary stormwater bypass solution, it must provide the requested easement and security, (ii) if XYZ then wishes to commence construction of its planned 1 River Park building, it can either apply for a new building permit when it is actually ready to proceed, which can readily be made available, or it can appeal via RSA 674:34 and RSA 155-A:11-b the building inspector's determination that its 2019 building permit has expired, and (iii) if XYZ wishes to seek an extension of its site plan deadlines, it must follow planning board application procedures and RSA 677 appeal procedures.^{2,3}

² Even if, *arguendo*, XYZ were to meet the standards for temporary relief to again reinstate its building permit, it would still not be entitled to the further requested relief with respect to the Planning Board, *i.e.* that the City's Planning Board should be required to reset a two-year clock on all entitlements granted to XYZ through subdivision approval and site plan approval. XYZ currently has pending before the Planning Board its third serial application for a two-year extension of its planning approvals, where the first application was denied and not appealed, and where the second application was conditionally granted to extend all deadlines for one year, has not been appealed, and has been voided due to XYZ's refusal to comply with a condition of approval. *See* Affidavit of Nathan Reichert, ¶4. XYZ's claims and arguments about the stormwater bypass and building permit do not implicate the Planning Board process. Also, as discussed elsewhere in this brief, the Planning Board's proceedings to date have not been tainted by any conflict.

³ If XYZ is not granted further extensions to its site plan deadlines, it is nevertheless not foreclosed from updating its site plan to comply with present day/2025 requirements and standards and reapplying for approval from the planning board.

Relevant Facts

The City in its Answer to the Amended Complaint has generally and specifically denied XYZ's claims of a conspiracy to delay or "kill" the River Park project, and continues to do so. Further, the City asserts that the written statements of City officials and employees as reflected in the many documents XYZ has filed before this Court speak for themselves, and do not point to a conspiracy in action, but rather depict the normal efforts of the various persons to carry out their duties with respect to a complicated development project made more complicated by XYZ's chosen courses of action.

The Court's Omnibus Order of November 25, 2024, granted XYZ the preliminary relief it sought, and was intended to put XYZ back in the position it would have been in if its 2019 building permit had not been declared expired on February 1, 2024. XYZ represented to the Court at the hearings on the preliminary injunction motion that this relief would be sufficient to enable the project to proceed.⁴ Therefore, the only facts relevant to XYZ's request for injunctive relief are those pertaining to events after the Omnibus Order.

Rather than copy and paste large chunks of other documents into a statement of facts, the City respectfully refers the Court to the accompanying affidavits of City Engineer Brian Vincent, Chief Building Official Leigh Hays, and Planning & Development Director Nathan Reichert. To briefly summarize the testimony of the three affidavits:

Temporary Stormwater Bypass Pipe:

1. Mr. Vincent testifies in his affidavit that the Department of Public Works ("DPW") requested an easement for the bypass pipe as early as February 2023, after XYZ had

⁴ Even if XYZ claims that it was unaware of an alleged improper motive behind the City's actions and decisions until 2025, at the end of 2024 XYZ was nevertheless fully aware of the timing and effect of the actual actions and decisions.

first proposed the temporary solution. The request for an easement did not vary between February 2023 and January 2025. Vincent Aff. ¶¶ 15, 21, 23, 25, 30, 32.

2. The request for a \$100,000 performance bond was necessitated because the bypass pipe was installed without an inspection, because XYZ did not provide a detailed as-built survey for the bypass pipe, and, if security was not provided, then public tax dollars might have to be used to maintain/repair/replace the temporary pipe. Vincent Aff. ¶¶ 26, 30.

3. DPW regarded the request for an easement and a bond as routine and non-controversial, and the cost of providing the bond would not have been significant. Vincent Aff. ¶¶ 25-28. XYZ may still avail itself of these options to achieve its desired temporary bypass.

Expiration of the Building Permit:

4. Mr. Hays testifies in his affidavit that in January 2025, XYZ removed soil from the footprint area of its planned 1 River Park building to uncover the same clay stormwater pipe that it had previously uncovered and re-covered at the end of 2022. After Mr. Vincent requested the easement and bond for the temporary bypass pipe, XYZ did not proceed with the temporary bypass and the clay stormwater pipe remained in place. Hays Aff. ¶¶ 14-16.

5. XYZ told the City's building inspector in December 2022 and again in August 2023 that the clay stormwater pipe was preventing all further work on the building site beyond the unearthing of the pipe itself. XYZ then made similar statements in January and May 2025. Hays Aff. ¶¶ 14-16.

6. Mr. Hays concluded that unearthing the clay stormwater drainage pipe does not constitute "work on the site authorized by the building permit" as required by the State Building Code, IBC Section 105.5. Accordingly, Mr. Hays concluded that XYZ's building permit expired

under the 180-day work suspension clause in IBC Section 105.5 as of May 25, 2025, 180 days after the Omnibus Order reinstituted the permit. Hays Aff. ¶¶ 6-7.

7. XYZ remains eligible to apply for a renewed permit whenever it is prepared to actually proceed with building construction. Given Mr. Hays's current familiarity with the building plans, he estimates that a new permit could be issued within four weeks after the plans are revised for compliance with current state building code (IBC 2021) requirements. Hays Aff. ¶¶ 22-25.

Planning Board Proceedings:

8. Mr. Reichert testifies in his affidavit that XYZ's first of three serial applications for two-year extensions to each of its phased site plan deadlines was denied by the Planning Board in November 2024, before the Omnibus Order extended only the Phase 1 site plan deadline by 11 months and 2 days from the date of the Order, to October 27, 2025. Reichert Aff. ¶¶ 4(b), 7. XYZ did not appeal this denial. Reichert Aff. ¶ 4(c).

9. XYZ's second serial application for two-year extensions was partially granted in March 2025 – one-year extensions were approved rather than two-year extensions – but then voided due to XYZ's refusal to comply with a condition for approval. Reichert Aff. ¶¶ 4(d)-(g). XYZ did not appeal the March 2025 decision. Reichert Aff. ¶ 4(i).

10. XYZ's third serial application for two-year extensions was filed in April 2025 and is currently pending before the Planning Board. Reichert Aff. ¶ 4(j) The Planning Board must consider whether the *Fisher v. Dover* subsequent application doctrine bars a review of the application on its merits. *Id.*

11. The Omnibus Order extension of the Phase 1 deadline by 11 months and 2 days remains in effect and the Planning Board has not purported to alter this. Reichert Aff. ¶¶ 6-7.

Argument

- I. XYZ is not entitled to a preliminary injunction to reinstate its building permit or extend all of its site plan deadlines. However, it is not foreclosed from re-applying for a building permit under the 2021 version of the IBC or re-applying for site plan approval consistent with present-day requirements.

“The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” *New Hampshire Dep’t of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007) (citation omitted). “A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits.” *Id.* (citation omitted). To be entitled to preliminary injunctive relief, the plaintiff must show that: (1) he would likely succeed on the merits; (2) that there is an immediate danger that he will suffer irreparable harm; and (3) that there is no adequate remedy at law. *Id.* Courts also consider whether the public interest would be served by granting the injunction. *See UniFirst Corp. v. Town of Nashua*, 130 N.H. 11, 14 (1987). XYZ cannot show that any of the four factors for temporary injunctive relief are in its favor.

A. XYZ does not have a likelihood of success on the merits. XYZ has not defined the merits.

XYZ’s argument on the likelihood of success on the merits is confusing and difficult to parse because it does not identify a particular claim in its Amended Complaint about which it argues that it will likely succeed at a trial. Instead, XYZ seems to argue that it will succeed on the merits of new(?) claims concerning the expiration of the building permit and concerning the Planning Board’s alleged declaration that “XYZ’s site plan approval was void” (XYZ Memorandum, p. 47) (which did not happen, *see Reichert Aff.* ¶¶5-7, and discussion *infra*). When and how will the merits of these new claims, which do not appear in the Amended Complaint, be adjudicated?

To the extent that XYZ disagrees with the building inspector's determination concerning the expired building permit, as set forth in his letters to XYZ and in the Hays Affidavit, ¶¶6-19, the proper course is to seek review of the decision from the local building code board of appeals (BCBA) and potentially appeal to the State of NH Building Code Review Board (BCRB) per RSA 674:34 and RSA 155-A:11-b. Based on these state laws, this Court does not have original jurisdiction to review the meaning and interpretation of "work on the site authorized by the permit" in Section 105.5 of the building code. This Court also decided in its December 24, 2024 order on the City's motion for clarification that "the State Building Code Review Board's definition of 'work' under Section 105.5 controls in this case" and "[t]he Court declines to weigh in on what activities constitute 'work'."

XYZ does not explain in its motion why it believes appeal to the BCBA and BCRB would be futile. For example, XYZ does not indicate whether a potential tenant demands immediate construction, or why the lack of an active building permit at this moment would interfere with marketing. If XYZ requires a quicker resolution, it continues to be welcome to apply for a new building permit whenever it is ready to actually begin construction. *See Hays Affidavit* ¶¶24-25.

Before the local BCBA and state BCRB, XYZ will also not have a likelihood of success on the merits on the issue of interpretation of the meaning of "work on the site authorized by the permit" for the reasons set out in the Hays Affidavit, ¶¶6-19. The facts clearly show that XYZ was not excavating a foundation; it did nothing more than uncover a stormwater pipe that it had already uncovered and re-covered. Also, it is Mr. Hays's good faith determination as a matter of law that excavation of a foundation hole is not covered by the building permit in this case. *Id.*

B. XYZ’s argument for “irreparable” harm is belied by its Amended Complaint demands for damages (\$135,000,000!).

XYZ has not described a clear and imminent risk of “irreparable” harm (harm not compensable by money damages) proximately caused by the latest expiration of the building permit. David Clem’s June 22 affidavit at ¶23 alleges that “our ability to promote the Project to prospective tenants has been stopped, and many opportunities to secure tenants are being lost right now” due to the expiration of the building permit. This is a conclusory assertion, and it is not clear why a building permit with a 180-day ticking clock must be active and running before XYZ can promote the project or secure tenants. Again, the building inspector has affirmed that a new building permit can be issued in about four weeks after a new application. *See Hays Affidavit* ¶23.

David Clem’s other assertion of “irreparable” harm, at ¶36 of his affidavit, alleges that “[s]everal excellent prospective life sciences tenants... have already abandoned their interest in locating at River Park”, but an injunction at this point will not prevent this harm, if true. Otherwise, Mr. Clem alleges in a conclusory manner that “XYZ will have no chance to save the project” (why?). But if the project fails, XYZ has already sued for tremendous damages. The City is unable to understand, and Mr. Clem never seems willing to explain, why applying for a new building permit, or applying for new site plan approval, would “kill” the project.

C. A temporary injunction to reinstate the building permit again is not in the public interest.

A temporary injunction to reinstate the building permit again is not in the public interest, because the public interest is served by fair and even enforcement of the state building code requirements with respect to construction projects in the City of Lebanon. With the reinstatement of the building permit through the Omnibus Order as of November 25, 2024, the Court has already given XYZ a clean slate opportunity to begin construction of its first building.

Per the facts in the Vincent Affidavit and the Hays Affidavit, XYZ seems to have squandered the opportunity, for reasons unknown to the City.

II. XYZ is not entitled to a mandatory injunction concerning the extension of planning board deadlines or the temporary stormwater bypass.

Although these items do not appear to be discussed in the Argument section of its memorandum of law, XYZ's motion includes prayers for relief that (3) "XYZ's site plan approval for the River Park project is reinstated as of the date of this Court's order for a period of two (2) years"⁵ and that (4) "the City shall allow XYZ to connect the old clay stormwater drainage pipe on XYZ's property into the temporary stormwater drainpipe that XYZ has already installed there without the City imposing bond, easement or any other conditions".

These items, if granted, would constitute a mandatory preliminary injunction. A mandatory preliminary injunction "requires affirmative action by the non-moving party in advance of trial." *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36, 41 (1st Cir. 2010). "Because a mandatory preliminary injunction alters rather than preserves the status quo, it 'normally should be granted only in those circumstances when the exigencies of the situation demand such relief.'" *Id.* (quoting *Mass. Coal. of Citizens with Disabilities v. Civil Def. Agency*, 649 F.2d 71, 76 n.7 (1st Cir. 1981)). XYZ's filings do not establish that such exigency exists in

⁵ XYZ is attempting again, as it did with its prior injunction request, to create an exigency with reference to the need to complete infrastructure improvements before its (now extended by Omnibus Order) October 27, 2025 Phase 1 site plan approval deadline. However, infrastructure improvements under the site plan are not connected to work under the building permit, except to the extent XYZ has, presumably for its own business purposes, decided not to do one without the other. Notwithstanding the expiration of the building permit, the City has not obstructed XYZ's ability to implement its infrastructure work. Further, the planning board decided in its November 12, 2024 denial of XYZ's first serial extension request, which XYZ did not appeal, that "[t]he Applicant's [XYZ'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."

this case with respect to the temporary stormwater bypass connection, the building permit, or the site plan deadlines.

With respect to the stormwater bypass, Mr. Vincent's affidavit lays out compelling reasons why the City requires a temporary easement and a performance bond before it can allow public stormwater drainage to be re-routed through a temporary bypass pipe. The City has not inspected the pipe and the City has not been given an as-built survey drawing. Without an easement to access the temporary bypass pipe for maintenance and repairs, the City would be at risk of failure of its drainage system. Without a bond, taxpayers would incur the cost of maintaining or repairing a temporary pipe that the City did not install or inspect.

The City has a right to the existing stormwater pipe in its present location, subject to replacement by the permanent solution proposed by XYZ and approved by the planning board as part of XYZ's 2011 site plan approval. XYZ introduced the concept of a temporary bypass in 2022, but has never been willing to comply with the City's reasonable requests to make the temporary solution work.⁶

With respect to a two-year extension of each phased site plan deadline (the existing site plan approval and the Court's extension of the Phase 1 deadline has not been voided, *see infra*), such action by the Court would be an improper extra-jurisdictional interference with the planning board's authority. A third serial extension application for the same relief is currently pending before the planning board. XYZ will have a right to appeal the planning board's decision, whatever that may be, to the superior court. Extending all deadlines, after the Court has already

⁶ As an aside, XYZ asserts at various points in its papers that an Alteration of Terrain (AoT) permit amendment approved by NHDES is the only approval required for the temporary bypass pipe. Mr. Vincent's affidavit, ¶14, explains why this is not so.

extended the Phase 1 deadline by 11 months and 2 days, would exceed the scope of any possible equitable relief.

This Court has also already agreed that an extension of all deadlines would be improper.

In its December 24 order on the City's motion for clarification, pp. 3-4, the Court ruled that:

The Court extended only one of XYZ's many site plan approval deadlines, for only 11 months and two days, and on one specific ground only, municipal estoppel. In contrast, the Planning Board denied XYZ's application to extend all site plan approval deadlines for two years, finding that none of three ground constituted good cause.

In other words, both these things can be, and are, true:

- (1) This Court orders the City to extend XYZ's Phase 1 site plan approval deadline by 11 months and two days because, due to its likelihood of success on the merits of its municipal estoppel claim, XYZ is entitled to this relief to return it to the status quo, and
- (2) The Planning Board determined that XYZ did not meet its burden, based on any of the three grounds it put forth, to show good cause to extend all of its site plan approval deadlines for two years.

III. Planning board proceedings have not been tainted and there are no grounds to void or vacate past decisions, which have not been appealed, or grant XYZ other relief that the planning board has declined to provide.

XYZ incorrectly asserts that past and current planning board proceedings have been tainted by (i) the law firm of DrummondWoodsum's representation of the planning board simultaneously with its defense of the City against XYZ's municipal estoppel court claim, and (ii) the planning board chairman's pre-judgment or personal interest. Neither allegation of taint is valid. (Furthermore, even if a planning board decision had been impacted by a conflict of interest, the remedy would be to vacate the decisions and remand for new proceedings, not simply grant the applicant affirmative relief to which they may not be entitled.) XYZ's sweeping

request that, due to alleged taint, it should immediately be granted all relief that the planning board denied it over the last 5+ years,⁷ has no basis in fact or law.

A. There is no attorney conflict of interest.

As for the City's and Planning Board's attorneys, no conflict of interest exists or has existed. Drummond Woodsum's client is the City of Lebanon, a municipal corporate entity created by state law and comprised of various officials and boards, including the administration/city manager's office and the planning board. They are all "the client".

NH Rule of Professional Conduct 1.7 provides that an attorney concurrent conflict of interest exists if "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client...." These circumstances do not generally exist with respect to the law firm's representation of various officials and boards within the City. These circumstances also do not exist with respect to XYZ's matters concerning the City. XYZ's municipal estoppel case narrowly concerned a written statement made by the building inspector in March of 2023 upon which XYZ claims to have relied to its detriment. Drummond Woodsum's representation of the planning board could not have been materially limited before XYZ's municipal estoppel case was filed in September 2024, nor could it have been materially limited by the separate defense of the building inspector's March 2023 letter statement.⁸

⁷ In XYZ's motion document, its prayers for relief nos. (5)(a), (5)(b), (5)(c), (6), (7) and (8) all concern either overturning prior planning board decisions on a wide range of issues, or declaring drastic permanent relief in XYZ's favor. Since these actions would not preserve or restore a status quo and are not discussed anywhere in XYZ's motion papers, the City presumes these requests for relief are not tied to a request for equitable injunctive relief. In XYZ's memorandum of law, its heading for Argument Section II indicates that the injunctive relief it seeks is a reinstatement of its building permit and an extension of site plan approvals.

⁸ Also, XYZ's amended complaint was not filed until May of this year, and Drummond Woodsum could not have anticipated the nature of XYZ's claims. Even if, *arguendo*, defense of the City against XYZ's amended claims

XYZ has been aware at all times that Drummond Woodsum represents the planning board with respect to XYZ's many various applications, and that a Drummond Woodsum attorney appeared for the City in XYZ's municipal estoppel lawsuit (the original complaint in the instant case) in October of 2024. XYZ never raised an objection until XYZ's new counsel appeared before the planning board on June 9, at which time XYZ's counsel was apparently attempting to shock and intimidate the planning board into an ill-considered snap decision.⁹

The case that XYZ cites in support of its contention that Drummond Woodsum has a conflict of interest, *Johansen v. City of Bath*, 2011 WL 1748535 (Me. Super. Jan. 04, 2011), is highly distinguishable. In *Johansen*, a single attorney simultaneously represented both a planning board and the applicant before the planning board. This would clearly be improper, and would be akin to Drummond Woodsum representing the Lebanon planning board as well as XYZ Dairy before the planning board. Drummond Woodsum's representation of the planning board on a site plan extension application, as well as the City in a separate conspiracy theory tort litigation, is entirely different.

B. There is no prejudgment or personal conflict of interest on the part of the planning board chairman.

As for XYZ's allegation that the planning board chairman, Andrew Faunce, tainted proceedings due to pre-judgment or a conflict of interest, XYZ presents no actual evidence of this. The evidence of prejudgment and personal interest cited in David Clem's affidavit, Exhibit

could conceivably materially limit Drummond Woodsum's responsibilities to the planning board (it is not clear how this could be so), the planning board has not taken any actions since the filing of XYZ's amended complaint.

⁹ The surprise assertions to the planning board included argument about the building inspector's determination that the building permit had expired, an alleged conflict of counsel, and an alleged conflict of the planning board's chairman. The weakness of each assertion is discussed in this Objection. XYZ's PowerPoint presentation is Exhibit M to David Clem's June 22 affidavit, and video of the meeting is available online here:

<https://lebanonnh.portal.civicclerk.com/event/2229/media>, with the relevant portion of the meeting beginning at 2 hours and 50 minutes into the video. The City encourages the Court to scrutinize the PowerPoint slides and the meeting video.

M, is easily refuted. Mr. Reichert's affidavit, at ¶¶ 8-12, explains in detail that the cited documentation does not evidence a conflict of interest. Mr. Faunce did not "pre" judge a case in his November 8, 2024 email. Rather, he was preparing to actually judge a case on which he had been sitting since July of 2024 and on which the planning board had already taken a straw poll vote in October of 2024. Also, Mr. Faunce did not express a personal interest about the disposition of the River Park property in a December 16 memo to the West Lebanon Revitalization Advisory Committee. Rather, he had written up notes on comments made by committee members at a previous meeting.

Unfortunately, apparently due to either shock or disgust, Mr. Faunce made a snap decision to recuse himself from XYZ's application, without due cause, immediately following XYZ's intimidating presentation at the June 9 planning board meeting. It remains to be seen whether Mr. Faunce may reconsider his recusal after having time to actually consider the flimsiness of the accusations leveled against him.¹⁰

IV. The City Has Not Acted in Contempt of the Omnibus Order.

XYZ asserts, for reasons that are unclear, that the City should be held in contempt for deliberate non-compliance with the Omnibus Order. However, the City has dutifully abided by the Order.

XYZ incorrectly asserts that the planning board purported to declare "void" the Court's 11 month, 2 day extension of XYZ's Phase 1 site plan deadline. This did not happen. Rather, on June 9, the planning board chairman declared "void" the planning board's own March 17 decision granting XYZ a one-year extension to each site plan deadline, due to XYZ's refusal to apply with a condition of approval in the planning board's decision. *See* Reichert Aff. ¶¶ 5-7.

¹⁰ Again, the City encourages the Court to scrutinize the PowerPoint slides and the June 9 planning board meeting video. *See* the prior footnote.

The Court's 11 month, 2 day extension of the Phase 1 deadline to October 27, 2025 remains in effect and is being honored by the City.

XYZ also incorrectly asserts that the building inspector declared the building permit expired as of May 25, 2025 in bad faith and in violation of the Omnibus Order. Instead, as Mr. Hays explains in his affidavit, he raised before the Court his concern that XYZ would seek to keep its building permit active solely by moving earth around, and he understood following the Court's decision on the City's motion for clarification that the Court had declined to rule on a theoretical issue that would likely become subject to review by the State of NH Building Code Review Board if it actually materialized. *See Hays Aff.* ¶¶ 20-21.

V. XYZ Is Not Entitled to a Writ of Mandamus

The City agrees with XYZ's statement of the law that a writ of mandamus is an "extraordinary remedy" to compel a public official to perform a "ministerial act". However, XYZ has not identified any "ministerial act" that the City refused to perform or did perform in bad faith. Instead, XYZ demands, without any supportive authority, that the Court should unilaterally order the building inspector to reverse his decision about the expiration of the building permit, and that the planning board should be required to grant a two-year extension to all deadlines. Neither demand makes any sense in the context of a mandamus proceeding.

In the two respective instances, the building inspector and planning board must exercise discretion. The building inspector must determine whether the uncovering of a stormwater pipe (that had already been uncovered and re-covered two years prior) in a planned building footprint constitutes "work on the site authorized by the permit" per IBC Section 105.5. State law (RSA 674:34 and RSA 155-A:11-b) provides for an appeal process for disputes concerning interpretation of the building code. The planning board must determine whether it may even entertain XYZ's third serial application for a two-year extension under the "subsequent

application doctrine” described in *Fisher v. City of Dover*, 120 N.H. 187 (1980) and its progeny, and then, if able to proceed to the merits, the planning board must exercise discretion to consider whether XYZ is entitled to more extensions according to the standards in the City’s site plan review regulations. Therefore, the request for mandamus relief is improper and must fail.

VI. XYZ Is Not Entitled to Attorney’s Fees

XYZ’s motion includes a prayer for relief (10) requesting its costs and attorney fees, but its motion includes no authority or argument as to why XYZ might be entitled to this relief.

XYZ is not entitled to attorney’s fees or costs.

Conclusion

In light of all of the foregoing, the City respectfully submits that a temporary injunction should not issue in this case, and there is no basis for a finding of contempt or a writ of mandamus. Given the enormous volume of XYZ’s motion papers and the confusing nature of the various arguments and assertions made therein, the City reserves the right to address other aspects of XYZ’s arguments at oral argument.

WHEREFORE, the City of Lebanon respectfully requests that the Honorable Court:

- A. Deny XYZ's motion in its entirety;
- B. Order XYZ to provide a temporary easement and sufficient security to cover potential maintenance and repair costs of the City if XYZ desires to proceed with its proposed temporary stormwater bypass solution; and
- C. Grant such further and other relief as justice may require.

Dated this 3rd day of July 2025.

Respectfully submitted,

CITY OF LEBANON

By its attorneys,

/s/ Matthew C. Decker

Matthew C. Decker, Esq., #267540
Drummond Woodsum & MacMahon
1 Court Street, Suite 320
Lebanon, NH 03766-1727
(603) 792-7421
mdecker@dwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection and the accompanying affidavits has been served on all appearing parties through the Court's electronic filing system on this 3rd day of July, 2025.

/s/ Matthew C. Decker

Matthew C. Decker, Esq.

GRAFTON, SS

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Case No. 215-2024-CV-00311

XYZ Dairy, LLC.

v.

City of Lebanon, et al.

AFFIDAVIT OF LEIGH HAYS

I, Leigh Hays, being duly sworn, depose and say:

1. I am the Chief Building Official & Health Officer for the City of Lebanon. I have held this position since May 20, 2024.
2. I am certified as a Building Inspector through the International Code Council.
3. I make this affidavit in response to XYZ Dairy LLC's ("XYZ") motion of June 23, 2025.
4. I am generally familiar with the status of XYZ's building permit and the lack of work authorized by the building permit at the 1 River Park building site dating back to 2019 based on the correspondence and records of my predecessor in office, Calvin Hunnewell. (I believe all such relevant records have been produced to XYZ's counsel in this litigation.)
5. I am familiar with the NH State Building Code and its adoption in NH RSA 155-A and the requirement of all new buildings to comply with its standards.
 - a. NH RSA 155-A:2 "*I. All buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code. The construction, design, structure, maintenance, and use of all buildings or structures to be erected and the alteration, renovation, rehabilitation, repair, removal, or demolition of all buildings and structures previously erected shall be governed by the provisions of the state building code. The state building code in effect at the time that the application for the building permit required by RSA 155-A:4 is received by the governing authority shall remain in effect for the duration of the work covered by that permit. This requirement notwithstanding, for a period of 6 months after the effective date of the code adopted under RSA 155-A:1, IV, a concurrency period is established, allowing building permits, and other required documents, at the election of the applicant, to show compliance using either the code in effect just prior the effective date of the code adopted under RSA 155-A:1, IV, or the code adopted under RSA 155-A:1, IV, but not a combination of the 2 codes.*"

6. I am familiar with the scope of which the State Building Code covers as noted in the 2021 IBC section 101.2.

- a. **101.2 Scope.** The provisions of this code shall apply to the construction, alteration, relocation, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected or attached to such buildings or structures.
- b. **Exception:** Detached one- and two-family dwellings and townhouses not more than three stories above grade plane in height with a separate means of egress, and their accessory structures not more than three stories above grade plane in height, shall comply with this code or the International Residential Code.

7. In my opinion, there has been no work authorized by the building permit at the 1 River Park building site in 2025, based on the scope work covered by the State Building Code as quoted above. The partial excavation in the area of the proposed building foundation, as discussed below, appears to be only the uncovering of a stormwater pipe for purposes of re-routing stormwater drainage to a temporary bypass pipe and removing the pipe from the building footprint, but has not added any physical element to the existence of a building.

8. In review of the relevant building plans and submittal documents for 1 River Park, I am aware that XYZ had completed its geotechnical investigations of the 1 River Park site through McPhail Associates on November 16 and 17, 2015 to meet the requirements of the 2009 IBC section 1803 in order to properly design the building's foundation based on the information gained from the investigation.

9. I am aware that in November 2022, XYZ uncovered a public stormwater drain pipe within the footprint of its planned building at 1 River Park.

10. Subsequently, on December 9, 2022 XYZ wrote to the City (*see* Amended Complaint Exhibit 5) that “[i]nitial excavation within the building footprint began on Tuesday, November 22, 2022” but that “[e]xcavation 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.” The letter continued “**Work has now ceased accordingly, until there is a solution for this municipal utility obstructing the foundation of 1 River Park Drive.**” (Bold type and underline added.)

11. On August 3, 2023, XYZ wrote to Mr. Hunnewell (*see* Amended Complaint Exhibit 13) requesting permission to disconnect the existing stormwater pipe and re-route stormwater drainage through a temporary bypass. Specifically, XYZ wrote, “**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.**” (Bold type and underline added.)

12. Therefore, by XYZ’s own statements, work on the site to construct a building could not continue until a bypass could be implemented and the existing clay stormwater pipe could be removed from the proposed building footprint.

13. I understand that some time after the existing stormwater pipe was excavated in November 2022, it was re-covered with earth to protect it from damage while it remained in use.

14. I am aware that XYZ claims that it “resumed construction” on the 1 River Park building site in January 2025, and that XYZ claims that its construction efforts were stalled again by an ongoing inability to agree with the Department of Public Works on a plan to bypass and remove the existing stormwater pipe.

15. I have observed the site conditions at various times between January 2025 and the present day from the Route 10 public right-of-way, and I have observed photographs of the site provided to me by XYZ and included in XYZ’s motion filings.

16. Based on my observations, I am unable to conclude that XYZ has done anything different at the site than it had already done in November 2022. In other words, in January 2025, XYZ appears to have removed, and again replaced, the same earth that it had previously removed and replaced.

17. David Clem wrote the City Engineer a letter dated January 24, 2025 (*see* June 22 Clem Affidavit Exhibit B) stating as much: “Once again, XYZ has been forced to suspend construction of 1 River Park” and “Your recent communication to our contractor denying the temporary connection makes the construction of 1 River Park impossible.”

18. David Clem also wrote me a letter dated May 8, 2025 (*see* June 22 Clem Affidavit Exhibit E) stating as much: “Nott’s then started the excavation of the basement of 1 River Park per the permit set of construction documents” but “[a]s a result [of the City Engineer’s request for a performance bond and legal easement relating to the temporary stormwater bypass], for the third time relocation efforts for the City’s stormwater line was not allowed by municipal personnel and construction was halted.”

19. I see in XYZ’s motion a statement that XYZ “excavat[ed] the entire foundation area of the building in accordance with the geotechnical excavation requirements of the 2019 Building Permit file”. This is certainly not accurate, as the foundation of the proposed building is to be 15+ feet deep, but the amount of earth (re-)removed is nowhere near this depth.

20. Following the Superior Court’s issuance of the November 25, 2024 Omnibus Order and reinstatement of XYZ’s building permit, I anticipated this very issue – that XYZ would re-excavate the stormwater pipe and argue that it had resumed “construction” on a building. For this reason, the City included in its December 6, 2024 Motion for Clarification a request that the Court should “clarify that work on the site ‘authorized’ by the permit”, does not include work to excavate or relocate the existing stormwater pipe, or other work on Phase I site plan work/infrastructure work.”¹ (Emphasis in original.”

21. The Court ruled in an order of December 24, 2024 that “Moving forward, the State Building Code Review Board’s definition of ‘work’ under Section 105.5 controls in this case.

¹ The stormwater pipe is clearly infrastructure, not part of a building. RSA 153:27, XIV provides that “the term ‘plumbing’ shall not apply beyond the first fitting beyond the foundation wall of the building or 5 feet of pipe from the building.”

The Court declines to weigh in on what activities constitute 'work'." I have therefore proceeded in attempting to apply the definition of 'work' to the River Park site in good faith in this case, consistent with my view stated in the City's Motion for Clarification.

22. I see in XYZ's motion various assertions that expiration of the building permit for the 1 River Park building will "kill" the project. I do not understand why this would be so. In general, it is my view that XYZ could apply for a new building permit whenever it is actually ready to proceed with construction.

23. I am familiar with XYZ's current building plans and have also provided XYZ with my review of their proposed updates to bring the plans into compliance with the 2018 ICC codes as adopted by the State of New Hampshire. As of July 1, 2024 the State Building Code has been updated to the 2021 ICC codes (with the exception of the Energy Code that remains the 2018), and any new building permit application would need to show compliance with the currently adopted code. I anticipate that upon receipt of a new building permit application, barring unforeseen circumstances, in the normal course I would be able to issue a new permit within four weeks.

24. The Planning & Development Department has already offered multiple times to credit XYZ's previous building permit fee of \$90,492.00 towards a new permit fee (which the City is not required to do but is being offered as a gesture of good faith).

25. The City's Building Permit Fee Schedule is attached hereto as **Exhibit A**. The permit fee for a non-residential project is calculated based on the total cost of the project (\$7.50 per \$1,000 of cost, plus a \$110 filing fee, plus 5%). Therefore, the extent to which the new building permit fee will exceed the 2019 building permit fee will depend on the increase in present-day construction costs versus 2019 construction costs, and on any changes to the building plans which increase construction costs.

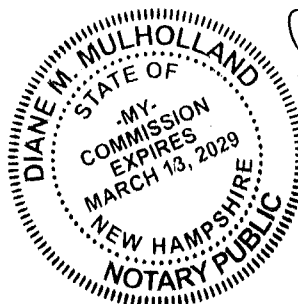
26. With regard to all of the foregoing, I would testify to the same at trial.

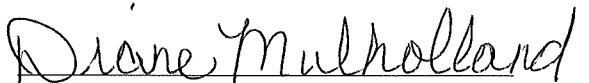
DATED this 3 day of July 2025.


Leigh Hays

STATE OF NEW HAMPSHIRE
GRAFTON COUNTY, SS:

On this 3 day of July 2025, before me, the undersigned officer, personally appeared Leigh Hays, who swore that the foregoing affidavit was true to the best of his recollection, knowledge and belief.




Notary Public
My commission expires: 3/13/2029

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit has been served on all appearing parties through the Court's electronic filing system on this 3rd day of July, 2025.

/s/ Matthew C. Decker

Matthew C. Decker, Esq.

BUILDING PERMIT FEE SCHEDULE

Permit fees are due upon submission of permit application and does not guarantee permit approval.

Residential (1- and 2-family) Projects

<u>Total Project Cost*</u>	<u>Total Permit Fee**</u>
\$0 to \$500:	\$31.50
\$501 to \$1,000:	\$36.75
\$1,001 to \$3,000:	\$57.75
\$3,001 to \$5,000:	\$78.75
Over \$5,000:	$\$6.00/\$1,000$ (.006) of the <i>total cost*</i> + \$75.00 filing fee + 5%** (see calculation example below)

Multi-family Residential (3+ family) and Non-Residential Projects

<u>Total Project Cost*</u>	<u>Total Permit Fee**</u>
\$0 to \$500:	\$36.75
\$501 to \$1,000:	\$63.00
\$1,001 to \$3,000:	\$84.00
\$3,001 to \$5,000:	\$115.50
Over \$5,000:	$\$7.50/\$1,000$ (.0075) of the <i>total cost*</i> + \$110.00 filing fee + 5%** (see calculation example below)

Permit fee calculation examples for projects over \$5,000.00

<u>Residential</u>	<u>Commercial</u>
$\$10,000.00$ (project cost) x .006 = \$60.00	$\$10,000.00$ (project cost) x .0075 = \$75.00
$\$60.00 + \$75.00$ (filing fee) = \$135.00	$\$75.00 + \$110.00$ (filing fee) = \$185.00
$\$135.00 \times 5\%$ (Fire & DPW fee) = \$6.75	$\$185.00 \times 5\%$ (Fire & DPW fee) = \$9.25
$\$135.00 + \$6.75 = \$141.75$	$\$185.00 + \$9.25 = \$194.25$
$\$141.75 =$ Permit fee due	$\$194.25 =$ Permit fee due

*The term “*total cost*” as used in this section, is subject to the approval of the Building Inspector and means the reasonable value of all services, labor, materials, and equipment necessary for the prosecution and completion of the structure ready for occupancy. It shall include the value of all structural, electrical, mechanical, plumbing, life safety and fire protection work and equipment, all interior finishes, all normal site preparation, excavation and backfill directly related to the building. On-site utilities (water and wastewater) shall not be included in the total cost of construction. In the case of an application to demolish an existing building or structure, the “total cost” shall include the cost for demolition of the building or structure and the disposal of the demolition materials. In the case of an application to relocate an existing building or structure from one lot to another, the “total cost” shall include the cost of moving the building or structure, the cost of the new foundation(s), and the value of all electrical, mechanical, plumbing, life safety, and fire protection work necessary to put the building or structure into a useable condition in its new location. (City Code 36-3.D)

** Five percent (5%) shall be added to all permit fees for Fire Department and Department of Public Works review and inspections. (City Code 36-3.C) Total Permit Fees for projects costing \$0 - \$5,000.00 reflect the added 5% fee.

If work requiring a residential or commercial building permit under Chapter 36 is commenced or completed prior to the issuance of such permit(s), the applicable building permit fee shall be increased by twenty-five percent (25%) for a company's or individual's first such occurrence, by fifty percent (50%) for the second occurrence, and by one hundred percent (100%) for any subsequent occurrence. (City Code 36-3.E)

NOTE: Other fees may apply based on project scope, such as, but not limited to, water, sewer, fire, and impact fees.



May 30, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Dear Mr. Clem,

This letter responds to your May 22, 2025, letter requesting a further 180-day extension of XYZ Dairy's building permit pursuant to IBC Section 105.5, which is part of the NH State Building Code. Section 105.5 states:

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.

As you know, Building Permit 2016-00293 was issued on December 31, 2019, and XYZ was granted multiple extensions before my predecessor, Calvin Hunnewell, declared the permit expired as of February 1, 2024 due to more than 180 days of inactivity at the construction site. The permit was reinstated by a preliminary injunction order of the NH Superior Court with a clerk's notice date of November 26, 2024. I calculate that the 180th day thereafter was May 25, 2025.

In my May 15, 2025, letter to you, I explained that I could not consider the excavation of soil from the future foundation of 1 River Park to constitute a commencement of work on the site authorized by the permit. Therefore, per Section 105.5, work has now been suspended for more than 180 days and the permit has become invalid.

I am unable to find "justifiable cause" to grant an extension of the May 25 deadline based on the information provided in your May 22 letter. I disagree with your characterization of City Engineer Vincent's requests of January 2025 (for an easement and bond to ensure maintenance of a temporary stormwater bypass) as a "City-ordered work stoppage". Additionally, the claims in XYZ's amended complaint are not scheduled to be tried until June of 2026, and I am unable to rely on bare allegations as a basis for justifiable cause for an extension.

Please be reminded again that you are free to re-apply for a building permit if and when XYZ has resolved the stormwater pipe issue and is ready to start construction of the building. (Efforts

related to the stormwater pipe and site infrastructure fall outside of the scope of the building code and do not fall under the work on the site authorized by the building permit.) I do not expect this would be a prolonged process as previous reviews of your building plans have already been recently conducted and the only additional reviews necessary will be of the updates to comply with the 2021 IBC, the current building code adopted by the State of NH, and any updates to the uses in the building. Also, please recall that the Planning & Development Office has been offering since early 2024 to apply your previously paid permit fee of \$90,492.00 towards a new permit fee. This offer still stands.

Respectfully,

A handwritten signature in black ink, appearing to read "Leigh Hays", written in a cursive style.

Leigh Hays
Chief Building Official & Health Officer
City of Lebanon New Hampshire

C: Property File, Map 44 Lot 21

May 22, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park (the "Project")

Dear Mr. Hays:

In case there is any question as to whether XYZ started work on the Project in January of this year, only to be stopped by the City, all of which occurred as explained to you in my letter of earlier this month, dated May 8, 2025, XYZ is hereby requesting a further 180-day extension of its building permit for 1 River Park in West Lebanon, N.H. on account of delays imposed on XYZ by circumstances beyond its control.

The circumstances beyond XYZ's control that warrant this requested further extension of its building permit are described in detail in my attached letter of January 24, 2025 to City Engineer Brian Vincent concerning the City-ordered work stoppage earlier that month, and my attached letters to the City of Lebanon Planning Board, one dated February 10, 2025 and the other dated March 13, 2025, concerning the other recent obstructions and delays imposed on XYZ's construction efforts. Additional circumstances beyond XYZ's control warranting this requested further extension of its building permit are described in detail in its Amended Complaint in the pending civil action that XYZ has brought against the City in the New Hampshire Superior court entitled *XYZ Dairy v. City of Lebanon*, Docket No. 215-2024-CV-00393 (Grafton, NH Superior Court).

In response to your May 15, 2025 letter to me asking that I inform you of "any further efforts on site between May 9 and May 25" (sic), please be advised that excavation holes to connect to the existing stormwater line were filled to eliminate a safety hazard, new fencing and delivery gates to the 1 River Park lot were added and secured after Nott's Excavating damaged the entry fence, excavated material from the basement excavation was spread and compacted on Lot 2 according to our Site Plan Approval, silt fencing was added to the Cross Country Connector location according to best practices, and all below grade water, sewer and stormwater piping, connections, manholes, and fire hydrants were moved to a secure area and covered to protect from sunlight



exposure.

If you would like to meet me on site to inspect, please advise and I will gladly do so.

Sincerely,

A handwritten signature in blue ink that reads "David Clem". The signature is fluid and cursive.

David Clem
XYZ Dairy, LLC

Enclosures

January 24, 2025

Brian Vincent
City of Lebanon
Department of Public Works
193 Dartmouth College Highway
Lebanon, NH 03766

**Re: Temporary Bypass of City's Stormwater Line
Impacting 1 River Park Construction**

Dear Mr. Vincent,

I am now in receipt of your communication to Ben Griggs of Nott's Excavating dated January 21, 2025 at 2:49 PM. Matthew Bush of Engelberth Construction was also cc'd on your email.

I consider this another example of bad faith action on the part of Lebanon municipal employees, particularly after testimony presented to Grafton County Superior Court regarding our municipal estoppel case challenging the termination of the building permit for 1 River Park and the denial of our extension request by the Lebanon Planning Board due to delays caused by the termination of the building permit and our appeal rights. The Judge ruled in our favor on both items.

Your reference to the Court order in your communication to Nott's Excavating and Engelberth is uninformed and inaccurate.

Based on past experience with the City, I doubt you acted unilaterally in denying the connection of the temporary stormwater line on XYZ property that does not disturb any existing infrastructure in the Route 10 ROW. If you did act unilaterally, the lack of good faith is even more egregious since Nott's and Engelberth were following the engineered plans prepared by TF Moran and approved by the State in our AOT permit. Moreover, Nott's supplied additional elevation information requested by Rod Finley in your office for him to confirm the connection

would work as designed by professional engineers. The design, location, and elevation of the initial construction was supplied to the DPW months ago.

Once again, XYZ has been forced to suspend construction of 1 River Park due to actions by Lebanon staff that are uniformed or intentional on the part of your supervisors. Under penalties of perjury before the Grafton County Superior Court, the City's building inspector who terminated the 1 River Park building permit admitted that he alone did not decide to terminate the valid building permit, but was directed by his superiors to do so. Additionally, he testified that in his entire career as the building inspector for Lebanon he had issued approximately 10,000 permits, and the only permit he ever terminated was for 1 River Park. It is my belief that your action follows the same pattern of behavior under the Mulholland administration.

Since you have not been involved in the official capacity of City Engineer from the time of the issuance of Site Plan approval for River Park by the Lebanon Planning Board or the building permit for 1 River Park, I offer the following information for your consideration.

1. The stormwater line in question does not benefit one square foot of the River Park site; rather, it benefits the City of Lebanon and the NHDOT.
2. Neither the City of Lebanon or the NHDOT has an easement for this stormwater line on XYZ property.
3. The former City Engineer of the City of Lebanon provided false and incomplete information to the Civil Engineer retained by XYZ Dairy, LLC when we were preparing the Site Plan and Sub-division applications pursuant to the City's regulations in effect at that time.
4. XYZ voluntarily agreed to accommodate the City and NHDOT's need to comply with updated regulation regarding stormwater runoff produced in their ROW by treating this runoff on our property, and our internal circulation and open space was deliberately designed to accommodate this solution.
5. The materials for this engineered solution were purchased by XYZ well in advance of the construction schedule for Route 10 infrastructure work identified in the original Lebanon Planning Board Notice of Action for River Park. The design and construction drawings

for the solution were approved by the DPW, the building department, the planning department, and the NHDOT prior to the mylars being recorded for River Park.

6. XYZ has repeatedly been required to provide new sets of construction documents to the City because of a poorly coordinated record system and turnover in personnel.
7. Given the reality of increased construction costs post Covid, which I presume your department is also painfully aware of, XYZ has retained professionals to evaluate alternatives on our site, only to discover that the existing line services The Falls and no one in the City bothered to tell our engineering team.
8. The Falls does not enjoy an easement on our site to discharge their stormwater onto our property or the Connecticut River.
9. Notwithstanding all of the above, the DPW is aware that XYZ upsized the temporary stormwater line we installed, in good faith and at our expense, for the City's benefit to provide assurance that it is superior to the existing condition.
10. The City has not performed maintenance on the stormwater line since XYZ purchased the property. When the catch basins flooded a few years ago on Main Street due to a severe microburst, XYZ found and uncovered the outlet in the ravine on our property. We were told by DPW personnel to redirect the last portion of the stormwater pipe and to add riprap in the ravine which we did at our own expense. The DPW head at the time met me on site to inspect the new outlet location and the riprap installed by our contractor. There has never been an easement or a "performance bond" for this stormwater line relocation.

I fully understand that the permanent drainage system will be required to be constructed in accordance with latest plans approved by the Planning Board. You should understand that the completion of the last component of the so called Phase 1 infrastructure is required prior to the occupancy permit of 1 River Park. Your recent communication to our contractor denying the temporary connection makes the construction of 1 River Park impossible.

In view of the City Council's recent budget hearings and the recognition that double digit property tax rate increases are unavoidable without expansion of the tax base or severe budget



cuts, I am astonished by the continued efforts of staff to delay construction. The damages I have incurred are well beyond the legal expenses I have been forced to pay to protect my property rights and building permit. Your actions are in direct contradiction to testimony of staff and the City's attorney in Superior Court. I invite you to read the transcript of the evidentiary hearings.

If I have to go to court again to demonstrate this, I will redirect funds intended for infrastructure improvements that benefit the City and NHDOT, or do nothing. The River Park site will remain fenced off, public access to the river will be permanently abandoned, and the bulk of the acreage will remain in current use in full compliance with those regulations. Neither decision is a win for Lebanon taxpayers.

Sincerely,

David Clem
XYZ Dairy, LLC

Cc: Lebanon City Council
Attorney Philip Hastings, Cleveland, Waters and Bass, P.A.
Attorney Robert Miller, Sheehan Phinney, P.A.
Angela McCanna, Lyme Properties

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).

March 13, 2025

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

Re: River Park West Lebanon, Request for Extension

Dear Board Members:

As I noted at the last hearing, I will not be able to attend the third scheduled hearing on XYZ Dairy's request for a 2-year extension (PB2025-05-EXT) on Monday, March 17, 2025. I respectfully ask that the Board make a final decision, as it is impossible for XYZ to make business decisions and/or advance this project while kept in this limbo.

Despite this matter now requiring a third public hearing— in addition to the four hearings held on the previous request (PB2024-34-EXT) from July to November, 2024— the question before you is quite simple: does the Planning Board support River Park or not?

Granting a two-year extension request allows the River Park project a chance to proceed, acknowledges XYZ's property rights and investments to-date in the project, and accommodates for the obstructions XYZ has faced from the City of Lebanon Administration.

Denying the requested extension— or seeking to rationalize a shorter extension— would align the Board with the disproven opinions and overturned actions of the Lebanon Planning Staff, create further obstructions for the project, and further diminish any chances of progress at River Park.

XYZ Dairy does not believe the opinions expressed in the latest Staff Memo and previous communications are relevant to your decision and misstates some of the facts and history of this project. XYZ has continued to provide this board with all necessary information.

Whether the Staff and Board believe that XYZ has provided too much information, or too little information, has varied from hearing to hearing. We can't solve that Goldilocks dilemma, other than to reiterate that XYZ has been transparent and provided all relevant information to the Board, Staff, and public throughout the 18 years that we have pursued Mixed Use, Smart Growth, and Public Access to the Connecticut River in West Lebanon.

XYZ Dairy will continue to protect our property rights and approvals as necessary and fulfill all conditions in our Notice of Action as long as municipal action does not continue to put roadblocks in the way of implementation.

This application is before the Planning Board and has been duly advertised and noticed to all abutters pursuant to regulations of the City of Lebanon.



Additional information is provided herein.

Sincerely,

A handwritten signature in blue ink that reads "David Clem". The signature is fluid and cursive.

David Clem
Manager, XYZ Dairy, LLC

The logic and business realities of the requested two-year extension

River Park was approved as a Phased Development in the original decision by the Lebanon Planning Board. There were seven (7) phases with two years between phases to file a building permit application for the next phase. The logic of the two year time period, as discussed in numerous public hearings during the entitlement process, was twofold: first, to allow the previous phase to be absorbed/rented by the marketplace; second, to allow one year for the architects/engineers to prepare construction drawings for the subsequent phase sufficient for the Lebanon Building Inspector to grant a building permit.

This was clearly outlined in the Notice of Action, prepared by the Lebanon Planning Staff and voted on by the Planning Board duly constituted at the time of the Site Plan and Subdivision Applications. It is my presumption that the Notice of Action and the Motions for Site Plan and Subdivision Approval were reviewed by municipal counsel at the time.

There have been amendments to the original Notice of Action regarding River Park, including one to amend the phasing to allow the multi-family residential to be the second phase of River Park. No amendments have changed the two-year time period between phases.

Appeal of Staff Actions, leading to N.H. Superior Court Decision

As this Planning Board is aware, the City of Lebanon Building Inspector on February 1, 2024, just prior to retiring, sent XYZ Dairy, LLC a letter terminating our building permit for 1 River Park, the first building phase of the development. A decision the former Building Inspector would later testify involved numerous members of the Lebanon Planning Department and City Manager's office and was an unprecedented action during his decades in the Lebanon Planning Department.

The Staff's decision was appealed to the Lebanon Building Code Board of Appeals and was overturned 4-1.

The City subsequently appealed their decision to the State Building Code Board of Appeals and they reversed the decision on narrow grounds. This Planning Board has been provided the information regarding all of the administrative appeals. However, in that State Building Code Board of Appeals decision, the Assistant N.H. Attorney General who wrote the decision suggested that XYZ may have a municipal estoppel claim against the City of Lebanon; namely, that we had relied on information previously provided by City officials regarding the building permit,

commencement of construction, and the long standing precedent in Lebanon that "off site work" including the modification of design drawings and bidding by construction managers constituted work.

Based on the language of this decision, XYZ did file a municipal estoppel claim in Grafton County Superior Court. The Court ruled that the City had improperly terminated our building permit and the permit was restored. The Court also ruled that our Site Plan expiration date be extended by eleven months and two days for the first phase, due to the building permit appeals process, the only matter before the Court at the time. This Grafton County Court decision overturned the previous action of this Planning Board not to grant an extension of the time allowed to complete the so-called Phase 1 Infrastructure improvements.

11 Months vs. 2 Years: either way, 3 months have already gone by

On November 12, 2024, the Planning Board voted to deny River Park's first request for extension while the N.H. Superior Court had the municipal estoppel case under consideration. The timing of the Board's decision was up to the Board, Staff, and Legal Counsel.

On November 25, 2024 the N.H. Superior Court judge provided an 11 month extension for Phase 1 as part of the Omnibus Order granting a Preliminary Injunction and Temporary Restraining Order

The Court was not asked to address the Phasing Schedule for the entire project, which is why XYZ resubmitted the application to extend each phase of River Park to this Planning Board by two years.

The Judge's decision specifically countered the logic the City of Lebanon Planning Staff, Legal Counsel, and Planning Board in it's November 12, 2024 Notice of Action:

"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." *N.H. Superior Court Omnibus Order, 11/25/2024, pg. 24.*

Having now had our position on these matters confirmed by the Court, and the City's request for reconsideration rejected by the Judge on December 24, 2024, XYZ must once again seek to re-start the multifaceted processes necessary to re-commence the project yet again.

On January 13, 2025, the Planning Board determined that the Judge's decision was sufficient "new, material information" to take up the second requested extension.

Additional roadblocks since Superior Court decision

Subsequent to the Judge's November 25, 2024 decision granting the 11 month extension related to Phase 1, XYZ has been faced with the following additional challenges from the Lebanon Administration and Planning Processes:

1. The Lebanon Planning Director questioned the life science research use at River Park, in issuing an opinion on December 6, 2024 that risked putting other, existing life science companies in Lebanon at risk of non-conformity.
 - a. As a result, the Lebanon City Council brought forth a Zoning Amendment to address these issues.
2. The Lebanon DPW has proposed a new, additional \$100,000 requirement prior to the temporary relocation of the City's no-easement pipe. This falls outside of the Conditions of the Site Plan Approvals, and is outside of the City's regulatory authority as it is the State of NH DES that regulates stormwater, and the October 30, 2020 memo from the NH DES that addresses the relevant State requirements.
3. In the 112 days (3.5 months) since that ruling, the Lebanon Planning Board has convened three public hearings (January 10, 2025, February 24, 2025, March 17, 2025) on this matter without resolution or decision. That 3/11ths of the extension granted by the Superior Court has been spent navigating Lebanon's procedural process speaks to the pace of municipal delay that makes it impossible for the project to proceed.
 - a. Had the extension been granted in 2024 as requested, XYZ could have re-mobilized for the start of the 2025 construction season in two weeks, April 1, 2025.
 - b. Instead, as this process drags out and additional challenges are posed, XYZ cannot enter into contractual relationships with necessary project partners.

Staff's Faulty and Disproven Determinations; information previously provided

Of note, in defense of our property rights and in pursuit of this project, for the past 18 years, XYZ has had to repeatedly and successfully disprove the Staff's faulty assumptions and failure to support a project the citizens of Lebanon voted overwhelmingly in favor of. Most recently, in the November 12, 2024 Notice of Action **PB2024-40-AAD**, this Board overturned the Staff's faulty determination that XYZ had failed to complete Conditions necessary for construction of Phase 1 to commence. XYZ had, in fact, complete the four material conditions.

The remaining two conditions, as XYZ acknowledged throughout, were pending and dependent upon the Staff completing its review of the Security Agreement (third party inspection, Condition #4) to allow the Construction Manager to proceed with all on-site conditions (e.g. silt fencing, Condition #5).

In its February 24, 2025 Staff Memo the Lebanon Planning Staff raise the same issues that XYZ already addressed in its August 12, 2024 presentation and September 5, 2024 email. This material was provided to the Staff and Board, *again*, via email on February 25, 2025.

Staff's failure to support the project

The Lebanon Planning Department– ostensibly charged with facilitating economic development in Lebanon– has proposed no alternative solution, does not seek to solve the issues they have created, and in their latest Staff Memorandum now request to forgo their job responsibilities as it relates to the River Park project.

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. *Staff Memorandum, PB2025-05-EXT, February 24, 2025 PB Mtg.*

The Planning Board's suggestion at the last hearing that XYZ was "only delayed 11 months" misses the point, ignores the burdensome reality faced by a private property owner seeking to pursue an approved project against unnecessary and disproven obstructionist actions, and only substantiates our concern that further costly delays will follow since only XYZ feels any repercussions from the Staff's actions and delays.

May 16, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park (the "Project")

Dear Mr. Hays:

We have received your letter of May 15, 2025, and strenuously object to it for the following reasons.

The New Hampshire Building Code Review Board (BCRB) decision to which you refer from last July held that **off-site** activities in connection with a permitted construction project could not be considered "work" for purposes of determining compliance with the Code's 180-day requirement for "work" to commence after a building permit is issued.

That decision does not entitle you, in an attempt to declare our permit expired, to dismiss the **on-site** physical work we have done, including actual excavation for the foundation of the first building on the project for which we have the building permit, as somehow not being "work" under the Code that you will "count" for purposes of the 180-day requirement.

The work we did in this past January 2025 and before that was physical work on-site in pursuit of the project described in our building permit, a "[n]ew mixed-use commercial building within Lot #1 of the River Park Subdivision," so that excavation and other work we did obviously does count for purposes of the 180-day work requirement.

Nevertheless, you try to argue in your letter that our on-site work does not "count" because you say we supposedly could have done it for another purpose without a permit, but that is not the point, we cannot do such work for **this** purpose – to put up a building for our project – without a building permit, and we have one that we are working under. Your argument also ignores the fact that the City Engineer Vincent himself ordered our contractors to stop our on-site work this past January – which he could not have done if, as you now argue, no permit for the work they were doing was required.

In your letter, you seem to want to assume the power to decide what on-site physical work in pursuit of our project "counts" for purposes of the 180-day requirement, and to use that power to declare the permit expired unless we convince you otherwise. But you do not have that power, we do not have that obligation, and you are violating the law in trying to obstruct us in this way.

We are not abandoning this project, and your and the City's persistent efforts to squeeze us in this way are not right, as I explained in my Jan. 24, 2025 letter to your colleague Mr. Vincent after he ordered our contractors to stop work last January. Please stop making up improper arguments like the ones in your letter of May 15, 2025, and refrain from threatening to declare our building permit expired when you have no legitimate grounds for doing so, as it is causing XYZ severe harm.

Sincerely,



David Clem
Manager
XYZ Dairy, LLC

Cc: 1 River Park File
David Brooks
Nathan Reichert



May 15, 2025

David Clem
XYZ Dairy, LLC
PO Box 310
Etna NH, 03750
dclem@lymeproperties.com

Mr. Clem,

Thank you for your letter of May 8 providing me with an update on pre-construction site improvement work that has been performed at the 1 River Park site.

Based on the information provided in your letter, I disagree with your statement that XYZ recommenced construction of the 1 River Park building in January 2025.

As we learned from our mutual experience before the State of New Hampshire Building Code Review Board (BCRB) last year, the BCRB's July 31, 2024 decision (which XYZ did not appeal) provided some clear guidelines to define "work" authorized by a building permit:

From its use throughout the section [105 of the IBC], 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.

* * *

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.

* * *

We hold that [the] 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.

The activities you describe in your letter, such as the execution of a construction contract, rebidding of the 1 River Park building and conduct of associated site work, including the relocation of the City's stormwater line, are all examples preparatory work/site work required prior to the commencement of construction work governed by the New Hampshire State Building Code, and do not constitute "work" regulated by the Building Code.

Of particular note is your statement that “Nott’s then started the excavation of the basement of 1 River Park per the permit set of construction documents.” You omit to state the particular date on which this started, and you do not state for how many days this continued. I would also be curious to learn whether this excavation was a repeat or an enlargement of the prior excavation done in December 2022.

As you already know,¹ I cannot reasonably consider this excavation to constitute “work” under the building permit, because I do not find textual support in the Building Code to conclude that excavating a foundation hole, without more, requires a building permit. (I’m sure you would agree that if you dug a foundation hole while lacking a building permit, I would not be able to cite you for performing work without a permit.)

In addition to the BCRB decision, the 2009 IBC, Section 105.1, which applies to XYZ’s building permit, further defines the type of work that requires a building permit:

105.1 Required.

Any owner or 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 this code, or to cause any such work to be performed, shall first make application to the building official and obtain the required permit.

I cannot in good faith conclude that digging a hole fits within this description.

Building Code Section 105.5 dictates that “every permit shall become invalid” (emphasis added) if work on the site authorized by the permit has been suspended for 180 days. Because the building permit was reinstated by a court order with a clerk’s notice date of November 26, 2025, I calculate that the permit will expire at the end of the day on May 25, 2025, if construction work authorized by the permit does not commence on or before this date.

Please do not hesitate to inform me of any further efforts at the site occurring between May 9 and May 25, if you contend that any further efforts may constitute “work”. I can then provide you with a determination after May 25 as to whether the permit has expired.

I would also like to take this opportunity to remind you that, in my view, the expiration of your building permit need not be considered a death knell for your construction project. You are free to re-apply for a permit if and when you are ready to start construction of the building. I do not

¹ You will surely recall that the City attempted to flag this issue for XYZ in the City’s Motion for Clarification and Reconsideration filed with the Superior Court in the Municipal Estoppel case on December 6, 2024. In that Motion, the City took the position that, “work on the site ‘authorized by the permit’ does not include work to excavate or relocate the existing stormwater pipe, or other work on Phase I site plan work/infrastructure work. Instead, the first physical work ‘authorized by the permit’, *i.e.* physical construction of the building, per XYZ’s building plans approved in 2019, would be pouring concrete for a foundation. Merely digging a foundation hole would not constitute commencement of ‘work’.” Although the Court declined to rule on the hypothetical of what does or does not constitute ‘work’, it is regrettable that XYZ has not been able to perform work authorized by the permit and avoid the very situation that I foresaw and hoped to avoid.



expect this would be a prolonged process as previous reviews have already been conducted and the only reviews will be of the updates to comply with the 2021 IBC, the current building code adopted by the state, and any updates to the uses in the building. Also, please recall that the Planning & Development Office has been offering since early 2024 to apply your previously paid permit fee of \$90,492.00 towards a new permit fee. This offer still stands.

Respectfully,

Leigh Hays
Chief Building Official & Health Officer
City of Lebanon New Hampshire

C: Property File, Map 44 Lot 21

May 8, 2025

Leigh Hays
Chief Building Official and Health Officer
City of Lebanon
City Hall
51 N Park Street
Lebanon, NH 03766

Re: 1 River Park

Dear Mr. Hays:

For your information, XYZ re-commenced construction at River Park earlier this year, and this fact can be corroborated by municipal personnel of the City. In December of 2024, I executed a construction management contract with Engelberth Construction and authorized them to rebid the 1 River Park building and associated site work, including the temporary relocation of the City's stormwater line and the improvements in Route 10 associated with the southern entrance into River Park servicing the first three building phases.

In December, 2024, I met with Engelberth project managers, Chris Yandow and Matthew Brush, on multiple occasions regarding 1 River Park. XYZ also authorized the 1 River Park Design Team to upgrade the permit set of drawings to reflect any changes in the building codes, which was done.

Engelberth then released Nott's Excavating to relocate the City's stormwater line to the temporary line to the same, on-site ravine. This line was engineered by TFMoran and received an AOT permit, which the City was copied on. Nott's had previously installed this temporary line to a manhole adjacent to 167 N Main. I then authorized Nott's to order the additional materials necessary to complete the temporary connection and they were delivered in early January, 2025.

In January 2025, Engelberth and Nott's installed and secured the construction fencing to protect Lot 1 and Lot 2. They relocated and expanded the entry gate to the site to accommodate equipment deliveries and future steel deliveries and storage. Silt fencing was installed to protect the basement excavation for 1 River Park according to best practices. Additional rip rap stone was delivered and installed by Nott's in the ravine to exceed the existing drainage condition. Engelberth installed scrim protection on the security fencing on the three sides visible from public streets.

Nott's then started the excavation of the basement of 1 River Park per the permit set of construction documents. Because frost had already begun in January, 2025, this material was piled on Lot 2 until the arrival of spring weather. Per the approved plans this material was to be spread on Lot 2 to the new manhole elevations previously installed and accepted by the City of Lebanon as part of the so-called "cross country connector" servicing the first three building phases.

On January 16, 2025, Nott's on-site project foreman, Ben Griggs, contacted Rod Finley to schedule a time to witness the connection of the old line to the new temporary line solely on XYZ's Lot 1 property and not in the City's Route 10 right-of-way. On January 17, 2025 Nott's received a communication from Rob Finley asking for more as-built information and elevations of what had been installed, and this was supplied by Ben Griggs to Rod. Rod also communicated to Raymond Nott that "he had no issue with the connection but must see the as-built information first."

On January 21, 2025, Brian Vincent, City Engineer, sent an email to Ben Griggs of Nott's informing him that the City would not allow making the final connection without posting a performance bond and a legal easement, which have never been identified to us as requirements for the connection to occur. Matt Brush of Engelberth was copied on this communication but not XYZ Dairy or Lyme Properties. As a result, for the third time relocation efforts for the City's stormwater line was not allowed by municipal personnel and construction was halted.

Nonetheless, XYZ Dairy continued working on the 1 River Park site by covering the excavation of the connecting pipe from the previously installed manhole to your existing line on our property. Additionally, the piles of excavated materials, which had thawed, was spread on Lot 2 as the Lebanon approved plans called for. This work was done in April of 2025 and concluded on May 5, 2025.



XYZ Dairy cannot resume construction of 1 River Park that it commence in January 2025 until the City allows us to connect to the existing stormwater line on our property, and it will take some time to re-mobilize.

Sincerely,

A handwritten signature in blue ink that reads "David Clem". The signature is fluid and cursive.

David Clem
Manager
XYZ Dairy, LLC

Enclosures

Cc: 1 River Park File
David Brooks
Nathan Reichert













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

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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:

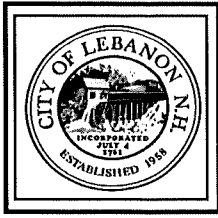
ORDERED that the decision of the Lebanon Building Code Board of Appeals is **REVERSED** and this matter is **REMANDED** for further proceedings consistent with this Order.

BY ORDER OF THE BOARD⁵

Dated: July 31, 2024

Philip 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.



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:

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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
-

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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 work^{§§}. 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.”

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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

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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, Amay 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

DRAFT

LEBANON BUILDING CODE BOARD OF APPEALS
MONDAY, April 18, 2024 7:00 PM
(Meeting Begins Immediately Following
Zoning Board of Adjustment)
Council Chambers, City Hall or
Remote Via Virtual Platform
LebanonNH.gov/LIVE

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

MEMBERS ABSENT: Chair William Koppenheffer

STAFF PRESENT: Nathan Reichert – Zoning Administrator

1. CALL TO ORDER

The meeting was called to order at 7:06 PM by Vice Chair Katz.

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

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

2. APPROVAL OF MINUTES

A. April 1, 2024

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

Seconded by Mr. Newlove.

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

3. PUBLIC REHEARING ITEMS

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

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

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

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

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

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

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

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

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

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

No one else from the Public spoke.

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

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

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

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

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

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

Seconded by Mr. Newlove.

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

4. STAFF COMMENTS

None.

5. ADJOURNMENT

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

Seconded by Mr. Morris.

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

Respectfully submitted,
Linda Billings

Recording Secretary

FINAL

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

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

MEMBERS ABSENT: Chair William Koppenheffer

STAFF PRESENT: Nathan Reichert – Zoning Administrator

1. CALL TO ORDER

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

Michael Morris was given full voting privileges for this meeting.

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

2. APPROVAL OF MINUTES

A. July 11, 2023

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

Seconded by Mr. Newlove.

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

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

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

3. PUBLIC REHEARING ITEMS

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

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

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

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

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

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

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

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

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

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

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

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

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

Seconded by Mr. Newlove.

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

4. ADJOURNMENT

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

Seconded by Ms. Barkley.

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

Respectfully submitted,
Linda Billings
Recording Secretary

FINAL

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.

Seconded by Mr. Katz.

Amendments. Page 2, Line 35; Remove ‘code’ and Add ‘officer’.

**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.

Mr. Katz said the sum total of what they need is in the February 2023 Document where the applicants were asked to provide documentation to allow the City to make a determination and to establish a date when it can be appealed. In the March 24 documents there was no decision made and no date of appeal was established. He believes this indicates this is an ongoing dialogue, and he does not believe a decision was made and he believes the Board therefore does not have jurisdiction because no decision has been made. Other members were in agreement.

David Clem spoke with all due respect; he cannot help but hark back to the previous hearing. Work has been suspended because of this hearing. The excavation of the stormwater sewer has been a part of the problem. He asked if the last extension is still in effect at this time.

Mr. Katz clarified what he sees. At the start of the June hearing Mr. Chet Clem essentially said there had been a lot of conversations. Because he worried there might be a decision against him, he filed an appeal just in case. Attorney Hastings presented the opinion that this is not a decision and should not be held against the applicants. There are two alternatives, either there was no decision rather a discussion with no finality; or there was a decision that has gone over the number of days to appeal. He believes the Board can agree that no decision has been made and therefore there is nothing to appeal.

Mr. Clem asked if the building permit is still active and is it subject only to the conditions of the original building permit or is it subject to the additional information asking for proof that any construction is occurring.

Mr. Katz MOVED, relative to XYZ Dairy, LLC, 1 River Park Dr (Tax Map 44, Lots 21-30 & Map 44, Lot 7 appeal BCBA2023-01 that the Board finds that no decision had been made in the March 2023 document that was appealed. As a result of no decision being made, the Lebanon Building Code Board of Appeals dismisses this appeal for lack of subject matter jurisdiction.

Seconded by Mr. Newlove.

****The Vote on the Motion was approved (4-1).***

Mr. Nash voted nay.

In other business relative to the legal advice sought in the ZBA meeting, Mr. Katz asked about having a nonpublic meeting prior to the August 7 meeting. It would have to be noticed, but it can be done in private session. It would be helpful if there was a document with a recommendation.

4. ADJOURNMENT

Vice Chair Katz MOVED to adjourn the meeting at 8:35 PM.

Seconded by Mr. Nash.

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

Respectfully submitted,
Linda Billings
Recording Secretary

FINAL

LEBANON BUILDING CODE BOARD OF APPEALS
MONDAY, June 5, 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, Jennifer Barkley (Alt),

MEMBERS ABSENT: Dave Newlove, Catherine Hembree (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 7:48 PM by Chair Koppenheffer.

Ms. Barkley was given voting privileges for this meeting.

2. APPROVAL OF MINUTES

A. December 6, 2021

Mr. Nash MOVED to approve the December 6, 2021, Minutes as presented in the June 5, 2023 packet, with amendments.

Seconded by Ms. Barkley.

Amendments. Page 4, Line 7; Correct name Calvin Honeywell. Page 4, Line 10; Correct name to Chet Clem.

****The Vote on the Motion was approved (4-0-1).***

Mr. Katz 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**

Phillip Hastings, Attorney, and Chet Clem with Lyme Properties appeared on behalf of the application. Attorney Hastings sent a memorandum last Thursday and there has not been an opportunity for staff or Board Members to review the memorandum. The appeal issues are not clearly stated in the filing and without the benefit of reviewing it is difficult to review the appeal. Given the Board's lack of opportunity to review, it is in the applicant's best interest to postpone. Mr. McDonough asked for clarification that if a continuance indicates the acceptance of the Board's jurisdiction. Mr. Nash said they could proceed on the record, unless the memo has information that is

critical for deliberation. Mr. Katz does not know what is in the memo, but in a construction situation a level of certainty is important.

The Attorney believes the memo was a repackaging of the prior information, and he does not believe any new information has been added. Staff believes the records had 106 pages from the time the decision was made. As a consequence, from a staff perspective, he would like time to dig into the materials provided by the attorney.

***Chair Koppenheffer MOVED to continue this meeting until July 11, 2023.
Seconded by Mr. McDonough.***

The Motion was held because the Board agreed to address the issue of jurisdiction over this appeal. Staff stated that the ordinances state that all appeals of administrative offices must be appealed within 30 days of the decision of the building inspector. The appeal was taken 31 days after the decision was made and therefore the Board cannot accept the appeal.

The attorney was taken back by the staff decision about timeliness of the appeal. There have been ongoing conversations over many years. The applicant has asked for relief or clarification several times. There has been ongoing dealing between the Staff and the applicant and there has been some fluidity in the construction permit process. That course of dealing continued after the issuance of the permit and there was correspondence regarding what constitutes timely construction. The attorney challenged if it was clear that the timeline applies given the back-and-forth dialogue. The applicant was not clear what it means and what has to be done to continue the activation of the building permit.

Mr. Katz asked the applicant to clarify the date they determined that they had 30 days to appeal. The March 24th conversation had been ongoing for 128 days. The application they filled out cited the date of March 24th. They did not know until sometime in April that it was the last word they were going to receive regarding the matter. Staff said Chapter 36 Section 13 of the Building Code establishes that an appeal must be made within 30 days.

Mr. Katz asked again about the date they determined that they had been notified. The applicant believes that as of April 25th he determined that he was aware that a response was not going to be received and that the issue needed to be raised to this hearing. Mr. Katz asked for clarification of the relief they are seeking. He believes regardless of the timing, he does not believe this Board has the jurisdiction to grant this relief. Their power is only able to state if the building office misinterpreted a code. He believes the applicants are seeking a ruling that the building inspector exceeded his authority to make the determinations he imposed.

The chair stated that the only decision the building inspector made in the March 24 letter is that work commenced November 29, 2022. Then the inspector refers to the 4 pages of conditions that are attached to the building permit, asking that they be provided. It was not said that they would not be given an give an extension of 180 days if they do not comply. The Building Permit ran out because it was issued on December 31, 2019. It was suspended during the Covid pandemic. A 180-day extension was granted on January 18, 2022, and another extension granted until January 13, 2023 on May 27, 2022 and another extension was never requested of the November 29, 2022 extension. The applicants protested that they did not need an extension nor was there a determination by the building inspector that it had expired. Some work has continued in some form since November 2022. The applicants have not shown any documentation that work has begun and what work has been performed.

The Members discussed the differences between 30 and 31 days. Some believed it is not a significant factor and others believe the 30 days is a defined date and needs to be followed. The Board can decide how they want to address this. Mr. Nash wants to look at justice and believes the applicant's made it clear that there was confusion about the timeliness. He believes the Board should take jurisdiction. Mr. Katz asked about the March 24 and April 13 letters that are in the packet. They are not signed, and they do not indicate that there is a limited time of appeal. He believes if he had received the letters, it is not clear that it is the decision of an officer. He believes the 30 days is not waivable; but it is not clear that the letter is a decision, and that the applicant has been put on notice.

Mr. Reichert said decisions and what constitutes a decision of an administrator is incredibly broad in the eye of the law. Any letter that comes from the building office is appealable. It is clear that the date starts, and a formal decision has to be appealed. In this particular case the decision was sent by email on March 24 and it is not clear if it was followed by regular mail.

***Chair Koppenheffer MOVED to continue this meeting until July 11, 2023.
Seconded by Mr. McDonough.***

The Board and applicants have discussed a multitude of comments regarding jurisdiction. Staff can review the memo and add additional comments, but he believes he has conveyed the staff's position. They have not investigated the merits of the case.

Mr. Clem said he would like the continuance. Mr. Nash said going back to March 24, the building inspector says the applicant cannot continue building. The applicants are asking if the building permit is still an active permit. The issue is that the building permit is enforce, but from the City's perspective there are many questions. What is the applicant's design? What is being built? Who are the designers and who are the contractors? Those questions have not been answered and many other conditions have not been addressed.

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

4. ADJOURNMENT

***Mr. Nash MOVED to adjourn the meeting at 8:59 PM.
Seconded by Vice Chair Katz.***

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

Respectfully submitted,
Linda Billings
Recording Secretary