

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
REGULAR MEETING AGENDA
REMOTE VIA MICROSOFT TEAMS
LebanonNH.gov/Live
TUESDAY, May 18, 2021
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Alan Patterson Sr., Dan Nash, Jeremy Katz, Dave Newlove, (Alt), Paul McDonough (Alt)

MEMBERS ABSENT: Vice Chair Jennifer Mercer

STAFF PRESENT: Tim Corwin – Senior Planner and Zoning Administrator

1. CALL TO ORDER

The meeting was called to order at 7:01 PM by Chair Koppenheffer.

Board Members who participated remotely are listed above.

A. Review of meeting procedures and NH RSA 91-A “Right-to-Know” requirements

Mr. Corwin delivered the Right to Know procedures to the Members and the Public.

2. APPROVAL OF MINUTES - NONE

3. DELIBERATION

A. Lyme Properties (applicant), XYZ Dairy, LLC (property owner), 215 N. Main Street (Tax Map 21, Lot 1), zoned RL-2: An appeal pursuant to Article VII, Section 702.2 of the Zoning Ordinance to allow the resumption of a discontinued non-conforming use of the subject property. ZB2021-12-AAD - Deliberation continued from May 18, 2021

Philip Hastings appeared on behalf of the application. The Public Hearing was closed at the previous meeting and the Board is in Deliberation.

Mr. Newlove was given voting privileges for this hearing.

Mr. Katz MOVED on May 3, 2021, at a duly noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared Attorney Philip Hastings on behalf of XYZ Dairy, LLC, regarding 215 N. Main Street (Tax Map 21, Lot 1), zoned RL-2. Pursuant to Article VII, Section 702.2 of the Zoning Ordinance, applicant seeks to resume a discontinued non-conforming use of the subject property [two (2) one-family dwelling principal buildings where only one (1) principal building is allowed in RL-2 District per Section 205]. ZB2021-12-AAD

I. FINDINGS OF FACT

Based on testimony given, application materials presented, and supporting documents submitted, the Lebanon Zoning Board of Adjustment makes the following findings of fact:

1. The subject property is a 1.07 acre lot, which is non-conforming to the minimum 3-acre lot size required for Class 3 lots in the RL-2 District. Until 2019, the subject property was improved with

two (2) one-family dwellings. With two principal buildings, the property was non-conforming to Section 205 of the Zoning Ordinance which provides that, “[t]here shall be only one principal structure on a lot in the residential districts.”

2. A building permit for the demolition of the two homes was issued on December 6, 2018 (#BP2018-00397), with a condition providing, in part, that, “[r]esumption of non-conforming use [...] must occur within two (2) years of issuance of demolition permit[.]” According to the applicant, the homes were demolished on April 25, 2019.
3. The applicant proposes to construct two (2) one-family dwellings on a lot of the type and specifications submitted in their application packet, thereby resuming the non-conformity with respect to Section 205 of the Zoning Ordinance which prohibits more than one (1) principal building on properties in the residential zoning districts.
4. Section 702.2 of the Zoning Ordinance (“Resumption of Use”) provides that, “[a]ny non-conforming use shall not be re-established if such use has been discontinued for a period of two (2) years; provided, however, that the Zoning Board of Adjustment, upon an appeal from the Zoning Administrator’s decision concerning such discontinuance, may permit the re-establishment of the same use if it finds: (a) that no action incorporating an intent to abandon the non-conforming use has been taken by the owner or occupant, including but not limited to a change to a permitted use or razing or remodeling of a building; and (b) that the failure to continue or re-establish the use during the two-year period was due to economic, regulatory or other forces beyond the control of the owner or occupant.”
5. On December 2, 2020, the applicant sent a memo via e-mail to the City’s Building Inspector “outlining [the applicant’s] intent to proceed with resuming the non-conforming use at [the subject property].” In response, the Zoning Administrator issued an administrative decision to the applicant via e-mail on December 9, 2020, that the applicant would need to apply to the Zoning Board in order to resume the non-conforming use.¹
6. On March 18, 2021, the applicant submitted an application to the Zoning Board (ZB2021-08-AAD) appealing pursuant to Section 801.1 of the Zoning Ordinance the Zoning Administrator’s determination that the two-year period within which a non-conforming use must resume has passed.
7. Application ZB2021-008-AAD was scheduled to be heard by the Board at its April 5, 2021 meeting, but it was withdrawn by the applicant following the Board’s decision to postpone the hearing as result of the late hour. The applicant’s voluntary withdrawal of the appeal rendered the Zoning Administrator’s administrative decision final and binding.
8. On April 15, 2021, the applicant submitted the subject application to the Zoning Board (ZB2021-12-AAD) requesting per Section 702.2 of the Zoning Ordinance that the Board permit the re-establishment of the non-conforming use.
9. Section 702.2 allows the Zoning Board to approve the resumption of a non-conforming use beyond the two (2) year timeframe. In order to grant such an appeal, the Board must find:

¹ The Board notes that in the e-mail sent on December 9, 2020, the Zoning Administrator intended to refer to Section 702.2 (“Resumption of Use”) of the Zoning Ordinance but mistakenly referred to Section 702.5 and mistakenly quoted from Section 703.2 (“Abandonment, Discontinuance, Destruction”) which applies to the resumption of non-conforming structures.

- a. that no action incorporating an intent to abandon the non-conforming use has been taken by the owner or occupant, including but not limited to a change to a permitted use or razing or remodeling of a building; and
 - b. that the failure to continue or re-establish the use during the two-year period was due to economic, regulatory or other forces beyond the control of the owner or occupant.
- 10. In addition to the application materials, Attorney Hastings presented applicant's position to the Board and answered questions from the Board. In relevant part, Attorney Hastings testified that:
 - a. At all times, applicant intended to continue the lawful nonconforming use and had planned to construct two single family homes on the property.
 - b. Applicant engaged in activities after razing the prior structures to move the construction project forward and resume the use.
 - c. The COVID-19 pandemic was not a situation of Applicant's making, Applicant could not have reasonably known about or avoided it, and the delay in progress was reasonably tied to the impact caused by the pandemic.
- 11. Multiple Board members with personal experience in engineering, construction and real estate investing additionally confirmed that:
 - a. The New Hampshire/Vermont border area (where this property is located) suffered exceptionally during the pandemic as Vermont implemented a travel restriction that prevented Vermont workers from coming into New Hampshire to work at construction sites.
 - b. Pandemic shutdowns not only affected trade labor negatively, but also severely impacted the supply chain of the requisite goods and materials in the building supply market.
- 12. No other members of the public spoke either for or against the application.

II. CONCLUSIONS OF LAW

As a result of the above findings of fact and based on testimony given, application materials presented, and supporting documents submitted, the Board concludes the following with respect to the criteria set forth in Section 702.2 of the Zoning Ordinance:

- (a) Action incorporating an intent to abandon the non-conforming use **was not** taken by the owner or occupant, including but not limited to a change in non-conforming use to razing or remodeling the building or structure. The Applicant has credibly demonstrated that there was no intent to abandon the nonconforming use. Additionally, although the Board acknowledges that the Applicant razed the previous structures, the Board finds that the razing alone is not (in and of itself) irrebuttable evidence of an intent to abandon. In doing so, we rely upon the language in finding of fact #2 (above) where City staff issued a demolition permit to raze the structures that explicitly referenced the resumption of the use after the razing. The Applicant's statement that "but for the pandemic" this use would have been resumed within the previously allocated two-year timeframe is credible.

- (b) The failure to resume or restore the use during the two-year period was due to economic, regulatory, or other forces beyond the control of the owner or occupant. See Findings of Fact 10 and 11, above.

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **18th day of May 2021**, hereby **GRANTS** the request made per Section 702.2 of the Zoning Ordinance to resume the non-conforming two (2) principal building use, as set forth above and per testimony, plans, and materials submitted, and per the following conditions:

1. The structures and resumed use shall match in all material respects the building type, size and plans proposed in Applicant's written submission.
2. The use shall be resumed in full no later than May 17, 2023. For the avoidance of doubt, "resumed in full" means that all applicable permissions and consents from any applicable authority shall have been applied for and received, all construction completed, all certificates of occupancy/completion issued and both structures residentially occupied as dwellings prior to that date.
3. The proposed homes shall meet the minimum required setbacks for Class 3 lots in the RL-2 District, in addition to complying with all other applicable zoning requirements (other than the resumed non-conformity with Section 205).

Seconded by Mr. Patterson.

Chair Koppenheffer asked about the "resumed in full," language; requiring the dwellings are occupied, may be outside the applicant's control. Mr. Katz said to maintain the non-conforming use, it has to be fully vested within two years, which is standard for any non-conforming use.

Roll Call Vote

Mr. Newlove, Mr. Katz, Mr. Patterson, Mr. Nash, and Chair Koppenheffer all voting Yea.

None voted Nay.

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

Mr. Hastings was asked if he is prepared to move forward with the second hearing, the appeal. Based on the vote that just took place, the Board will dismiss this unless the applicant would like to withdraw it. The applicants continue to have questions of law that they believe the Board should address.

4. PUBLIC HEARING ITEMS

- A. Lyme Properties (applicant), XYZ Dairy, LLC (property owner), 215 N. Main Street (Tax Map 21, Lot 1), zoned RL-2:** An appeal pursuant to Article VIII, Section 801.1 of the Zoning Ordinance regarding a communication made by the Zoning Administrator on April 7, 2021 in regard to a building permit application filed by Lyme Properties on April 6, 2021 for the subject property. **ZB2021-13-AAD - Continued from May 18, 2021**

Mr. Newlove was given voting privileges for this hearing.

This arose because of the application to build two dwellings. There are two issues pertaining to this appeal, one is the Zoning Administrator's jurisdiction to opine and has since been recognized. And the second one is if a building permit can be deemed complete without the Zoning Board review process for a non-conforming use. The legal question is whether the ordinance prohibits a building permit from being deemed complete without the Zoning Board review. Mr. Corwin said he is confused about what issues remain to be determined. Staff agrees there is nothing necessary from the Zoning Board before it can be determined to be complete. There is no issue of dispute that he is aware of.

The specific issue on appeal is not whether it is complete or not, the issue is a statement that Staff said he could not sign off on a building permit until the Zoning Board made a ruling and he incorrectly used the words the "application is complete." He has since then stated that the choice of words was not correct, and that Staff does not have the ability to rule if it is complete. It has been resolved. Mr. Hastings stated he is asking that a full and accurate record is made of the circumstances.

Chair Koppenheffer stated the Board is not inclined to make judgements on communications.

Mr. Katz MOVED that this appeal is dismissed for lack of subject matter jurisdiction, for the following three reasons. The issue discussed in this appeal was not an administrative decision as it is traditionally defined. The applicant has already stated that their grievance was satisfied through the previously granted decision. And this is in effect asking for an advisory opinion and the Zoning Board has no ability to issue advisory opinions. And three, the removal of the dispute makes the applicant no longer aggrieved and since being aggrieved by an administrative decision is a prerequisite to being able to bring forth an appeal, that prerequisite is no longer met, and as a result this Board should refuse to accept this on the basis it has no subject matter jurisdiction to hear this appeal.

Seconded by Mr. Nash.

Chair Koppenheffer opened the Public Hearing. Hearing no one, the Public Hearing was closed.

The motion remains as originally stated. There was no additional discussion.

Roll Call Vote

Mr. Newlove, Mr. Katz, Mr. Patterson, Mr. Nash, and Chair Koppenheffer all voting Yea.

None voted Nay.

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

4. STAFF COMMENTS

The Board asked to discuss second meetings in a month. Chair Koppenheffer stated he believed they would only do this when all the materials have been submitted and that it was not possible to make the decision. Having a second meeting would normally not require more Staff work, whereas there would be additional work for Staff if other hearings were addressed on a second meeting during the month.

Mr. Corwin agreed that staff time is a consideration, but there are times when it is important to serve the needs of the community. Whatever the Board determines is necessary will be done by the City Staff. Chair Koppenheffer believes that it is appropriate when the hearing is a continuation. Mr.

Nash is of the opinion that two meetings a month are better for the Public, especially if the meetings are running over time or there is an overload. Some other members agreed to give the appropriate time for the public needs.

The Board discussed the in-person meetings. It is likely that State law will continue to allow Boards to meet remotely if a Board would like to continue virtually. It seems for at least the short term, the City Manager will allow the Boards and Committees to determine for themselves. City Staff will be bringing forth what they believe the options are and the pros and cons of meeting in person or virtual. It is likely that the Board will have to decide about this next month. There may be a recommendation for in person meetings for regulatory Boards and allowing the public to participate virtually.

5. ADJOURNMENT

***Mr. Patterson MOVED to adjourn the meeting at 7:41 PM.
Seconded by Mr. Nash.***

Mr. McDonough was given voting privileges for this motion.

Roll Call Vote

***Mr. McDonough, Mr. Katz, Mr. Patterson, Mr. Nash, and Chair Koppenheffer all voting Yea.
None voted Nay.***

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

Respectfully submitted,
Linda Billings
Recording Secretary