

FINAL

**CITY OF LEBANON
ZONING BOARD OF ADJUSTMENT
October 15, 2018
City Hall—Council Chambers
7:00 p.m.**

MEMBERS PRESENT: Chair William Koppenheffer, Dan Nash, Travis Griffin, Alan Patterson Sr. (joined at 7:13pm)

MEMBER ABSENT: Vice Chair Jennifer Mercer

STAFF PRESENT: Zoning Administrator Tim Corwin

I. CALL TO ORDER

The meeting was called to order at 7:00 p.m. by Chair Koppenheffer. Chair Koppenheffer clarified that with three members present, the applicants would need all three members to vote in the affirmative in order to gain an approval. Chair Koppenheffer offered that any applications before the Board would be continued without prejudice if the applicants so chose.

II. APPROVAL OF MINUTES: September 17, 2018

Dan Nash moved to approve the minutes of the Lebanon Zoning Board of Adjustment meeting of September 17, 2018.

Seconded by Travis Griffin.

**The motion passed unanimously 3-0.*

- A. TRIPP/WILCOX REVOCABLE TRUST, 10 PERSHING STREET (TAX MAP 78, LOT 58), ZONED IND-L: A Special Exception was granted in 2006 pursuant to Article III, Section 303.2 of the Zoning Ordinance to operate a contractor's yard (#ZB2006-21). The applicant requests an amendment to the Special Exception in order to remove the condition that the hours of operation will be from 7:30 am to 5:30 pm. #ZB2018-21-VAR**

Chair Koppenheffer referenced a request made by Mr. Wayne Greenwood to continue the hearing because he is traveling. Mr. Greenwood filed the complaint which caused the applicant to file the application for the variance.

Linda Wilcox, Steven Tripp, and Rebecca Richard appeared on behalf of the application. Ms. Richard said that the Greenwoods did receive proper notice and could have had a representative attend tonight's meeting. She asks that the applicants be able to testify since the issue is impacting the applicant's business.

Mr. Griffin asked if Mr. Greenwood consulted staff in the Planning Department. Mr. Corwin said that Mr. Greenwood did submit a request to continue the hearing. Mr. Griffin said that he would support a continuation, given that the complainant is not available.

*Travis Griffin MOVED to continue the hearing to the November 19, 2018 meeting.
The MOTION was seconded by Chair Koppenheffer.
MOTION passed unanimously, 3-0. Hearing was continued.*

III. PUBLIC HEARINGS (Continued)

- B. ROUTE 120 REALTY, INC., 0 NH ROUTE 120 (TAX MAP 10, LOT 9), ZONED IND-L: Request for a Variance from Article III, Section 303.2 of the Zoning Ordinance to allow a +/- 26 unit multi-family dwelling which is not a permitted use in the IND-L District. #ZB2018-20-VAR**

Mark Mulowski appeared on behalf of Route 120 Realty. He requested a continuance.

*Dan Nash MOVED to continue the hearing to the November 19, 2018 meeting.
The MOTION was seconded by Travis Griffin.
MOTION passed unanimously, 3-0. Hearing was continued.*

Alan Patterson joined the meeting at 7:13pm

IV. PUBLIC HEARINGS – New:

- C. COTE SWENSON & SAMANTHA MEDINA (applicants) & LEBANON FARM MARKET LLC (property owner), 397 DARTMOUTH COLLEGE HIGHWAY (TAX MAP 111, LOT 9), ZONED RL-S: A Special Exception was granted in 2009 pursuant to Article VII, Sections 702.1 and 702.5 of the Zoning Ordinance to operate a contractor's yard (#ZB2009-01). A request to amend the Special Exception was approved in 2017 (#ZB2017-13-E). The applicants request a further amendment to the Special Exception in order to remove the conditions that: (a) limit the scope of permitted activity to loading and unloading material; (b) require the building to be a non-heated, unoccupied storage space; and (c) prohibit vehicle maintenance on site. #ZB2018-22-E**

Cote Swenson and Samantha Medina appeared in support of the application. Ms. Medina said that they are requesting that the garage be heated so that they can continue to work. Mr. Swenson discussed the request to maintain his equipment and work on projects inside.

Chair Koppenheffer asked for questions or comments from the Board.

Mr. Nash asked if the applicants would be living on the property and they indicated that they would not be living there. Mr. Patterson asked what type of projects would be done inside the building. Mr. Swenson said they have equipment for the contracting business and they would like to be able to do regular and routine maintenance on the equipment.

Chair Koppenheffer asked about a memo that was included with the application. Ms. Medina said that they would be willing to put up a fence and clean up the property to improve aesthetics, referenced on page 13 of the application. Mr. Nash said that there have been attempts to improve the property in the past and asked the applicants to discuss a timeline for improvements. Ms. Medina discussed the timeline for the proposed improvements. Mr. Swenson said that they would like to engage the neighbors to see what the neighbors were hoping for in terms of improvements.

There were no further comments or questions from the Board.

Chair Koppenheffer opened the public hearing.

Mary Lou Childs and Linda Wadleigh are neighbors of the property. They discussed the concerns that were noted previously; unregistered cars, accidents, and traffic, continue to be an issue. Chair Koppenheffer asked if the neighbors have approached the Planning Department. Ms. Childs said they had discussed the concerns approximately two years ago and that continued commercial development has been an issue. Ms. Wadleigh said that there are concerns that commercial activities will continue in the evening hours. Ms. Wadleigh and Ms. Childs said that the same concerns that were voiced in 2009 still exist and they would like the issues remedied before commercial operations are allowed to begin again.

Don Koury, the owner of the property, discussed the history of its use. The property was vacant until the mid-60's and were impacted by fires in Lebanon; debris from the fires was disposed there and the property was used as a disposal site. Mr. Koury said that he had much of the scrap metal removed and extensive cleanup was done. He handed out 5 photos/images depicting the cleanup results.

Mr. Nash said that he was consulted regarding erosion on the property and asked Chair Koppenheffer to determine if a conflict exists. Chair Koppenheffer did not find a conflict existed.

Chair Koppenheffer said that the pictures are older and that it does not speak to the neighbor's current concerns. Mr. Koury said that he spoke with a prior Zoning Board member and that it was determined that a landscaping plan was not necessary.

Mr. Swenson and Ms. Medina spoke again and said that they did not realize the extent of the issues and they are willing to work with the neighbors. They said their intention is to purchase the property. Chair Koppenheffer asked about the use of the sawmill. Mr. Swenson confirmed that they would not operate during the evening and confirmed that typically the sawmill is used at other locations as part of their business. They said that they want safety and harmony with the neighbors.

Hearing no comments from the public, Chair Koppenheffer closed the public hearing.

DELIBERATION:

Mr. Nash discussed the conditions that were put into effect previously. He does not see an issue with heating the building but does not support outside storage of materials or operations outside of normal business hours. He also said that NHDOT should be consulted. Mr. Griffin agreed that heating is not an issue but there should be clarification regarding commercial operations. Mr. Patterson voiced concerns over the issues being addressed and the timeline for improvements. He said that there is going to be more traffic at the location. Mr. Patterson would agree to the application if there could be some additional clarification on the conditions.

The Board discussed the various components of the Special Exception request. Mr. Nash asked if landscape and access requirements could be addressed through a site plan review. Mr. Corwin said that this application would not trigger a site plan review. Mr. Patterson noted concern over noise from loading and unloading, as well as the use of pneumatic tools. There was discussion regarding appropriate hours of operation and the scope of maintenance activities.

Dan Nash MOVED that on October 15, 2018, at a duly-noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared Cote Swenson & Samantha Medina on behalf of the Lebanon Farm Market LLC regarding 397 Dartmouth College Highway (Tax Map 111, Lot 9), zoned RL-2. A Special Exception was granted in 2009 pursuant to Article VII, Sections 702.1 and 702.5 of the Zoning Ordinance to operate a contractor's yard (#ZB2009-01). A request to amend the Special Exception was approved in 2017 (#ZB2017-13-SE). The applicants request a further amendment to the Special Exception in order to remove the conditions that: (a) limit the scope of permitted activity to loading and unloading material; (b) require the building to be a non-heated, unoccupied storage space; and (c) prohibit vehicle maintenance on site. #ZB2018-22-SE

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 property contains two principal uses: (1) an apparent retail use/farmer's market of unknown legal status; and (2) a contractor's yard which was approved by the Zoning Board of Adjustment in 2009 pursuant to Article VII ("Non-Conformities"), §702.1 ("Change of Use") and §702.5 ("Expansion of Use") (#ZB2009-01).***
- 2. The contractor's yard Special Exception was reapproved in 2017, for the purpose of removing a condition of the 2009 approval prohibiting the parking of vehicles overnight (#ZB2017-13-SE).***
- 3. The applicants propose to utilize the property for their landscape construction company, pursuant to the 2009 and 2017 Special Exception contractor's yard approvals. However, the applicants seek to amend several of the Special Exception conditions of approval.***
- 4. The 2017 approval "supersedes and replaces the Notice of Decision for #ZB2009-01 [...] dated January 10, 2009." See 2017 Notice of Decision, condition of approval #1. By oversight or by design, the 2017 approval does not specifically incorporate the Findings of Fact from the 2009 approval. At the same time, however, Finding of Fact #3 in the 2017 Notice of Decision provides that, "[t]he applicant proposes to utilize the contractor's yard for his landscape construction company, pursuant to the 2009 Notice***

of Decision.” This infers that the Findings of Fact from the 2009 approval were incorporated into the 2017 approval.

5. The Notice of Decision for the 2017 Special Exception to operate a contractor’s yard provides that the “building will remain a non-heated, unoccupied storage building,” and that “[n]o vehicle maintenance will occur on site” (see Conditions of Approval #3 and #6, Staff Exhibit “B” page 4). The applicants propose to amend the 2017 Special Exception approval to remove these conditions.
6. Additionally, the Notice of Decision for the 2009 Special Exception to operate a contractor’s yard provides that no work will be performed other than loading and unloading material (see Finding of Fact #7, Staff Exhibit “A” page 2). A finding of fact functions in the same manner as a condition of approval and, therefore, requires an amendment to the approval in order to be removed.
7. To amend the 2009 and 2017 Special Exception approvals, the applicants must demonstrate that the proposed contractor’s yard with the removal of the conditions will continue to meet all general Special Exception criteria set forth in §801.3 of the Zoning Ordinance.
8. The applicants have submitted testimony addressing the §801.3 criteria in an application received by the Planning Department on October 1, 2018.
9. Two abutters, Mary Lou Childs and Linda Wadleigh, spoke in opposition to the application regarding unregistered vehicles, failure to comply with previous requirements, mainly landscaping and fencing, and lack of a drive permit. They expressed a prospective concern regarding noise.

II. CONCLUSIONS OF LAW

As a result of the above findings of fact, testimony given and supporting documents submitted at the hearing, and application materials presented, the Board concludes the following with respect to the Special Exception criteria set forth in §702.1 and §801.3 of the Zoning Ordinance:

- A. The Special Exception is specifically authorized by §702.1 and §702.5 of the Zoning Ordinance. (§801.3.A)
- B. The following special condition/requirement is met: (§801.3.B)
The proposed use is equally appropriate or more appropriate to the district than the existing non-conforming use. (§702.1)
- C. There are no existing violations of this ordinance on the property that the granting of the Special Exception would not remedy. (§801.3.C)
- D. The character of the area will not be adversely affected. (§801.3.D)
- E. No hazard or nuisance will be created. (§801.3.E)
- F. The capacity of existing or planned community facilities and services (including streets and highways) will not be adversely impacted. (§801.3.F)
- G. The granting of the Special Exception will not result in undue municipal expense. (§801.3.G)
- H. The proposed Special Exception will be developed in a manner compatible with the spirit and intent of the ordinance. (§801.3.H)
- I. The general welfare of the City will be protected. (§801.3.I)

Additionally, as a result of the above findings of fact, testimony given and supporting documents submitted at the hearing, and application materials presented, the Board concludes the following with respect to the Special Exception criteria set forth in §702.5.A of the Zoning Ordinance:

- A. The proposed alteration or expansion does reflect the nature and purpose of the existing non-conforming use, and is closely related to the manner in which the property was used at the time the restriction was enacted. (§702.5.A)*
- B. The proposed alteration or expansion is merely a different manner of utilizing the same use, and does not constitute a use which is different in character, nature, or kind. (§702.5.B)*
- C. The proposed alteration or expansion will not have a substantially different effect on the neighborhood in which the property is located. (§702.5.C)*

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this 15th day of October, 2018, hereby GRANTS the request, as set forth above, subject to testimony, plans, and materials submitted, and per the following conditions:

- 1. This approval replaces the 2009 and 2017 Notices of Decision.*
- 2. Conditions from the 2017 Decision shall remain in full force and effect specifically as it pertains to numbers 2,4,5,7,8 and 9, as follows:*
 - A. The applicant shall submit an updated site plan, including landscaping, to the zoning administrator for approval.*
 - B. If the owner intends to isolate the access to either side of the property as suggested on supplemental site plan, that proper permits be obtained for driveway modifications.*
 - C. At no time will storage of box trailer or shipping containers be permitted.*
 - D. All vehicles and towable trailers will maintain current registration and road worthiness.*
 - E. All outside storage will conform to the boundaries set forth in the supplemental site plan submitted to the Lebanon Zoning Board of Adjustments. Said storage is to be screened by a 6-foot, 0-inch high privacy fence.*
 - F. No storage of construction/demolition dumpsters will be allowed onsite.*
- 3. Operating hours shall be 6:30am to 6:30pm.*
- 4. Applicant's shall submit a landscaping plan that demonstrates and complies with commitments made on pages 13 and 14 of the applicant's application labeled "extra memos". If the plan is not submitted, approved, and improvements not completed by the applicant, as reviewed by the Zoning Administrator within 12 months, this decision shall become void.*

The MOTION was seconded by Al Patterson.

The MOTION passed unanimously, 4-0.

- D. ***REHEARING***: WILLIAM & LORI GRIZZAFFI, 351 MERIDEN ROAD (TAX MAP 167, LOT 16), ZONED RL-1: Request for a Variance from Article III, Section 312.2 of the Zoning Ordinance to allow a towing business and vehicular impound yard. #ZB2018-12R-VAR**

Mr. Patterson recused himself.

William Grizzaffi and Nick Burke Esq., representing William Grizzaffi, appeared on behalf of the application. Mr. Burke spoke about the history of the hearings on the Grizzaffi application and the supporting information that has been submitted since the last hearing. Test results from the State of New Hampshire show no soil contamination. Mr. Burke summarized their position that commercial operations have been conducted there for many years and discussed the history of commercial businesses that have operated from the property. Mr. Burke testified regarding the use of the property and the current operations. Mr. Burke reviewed the concerns that had been brought before the Board and noted that there are letters of support from abutters.

Chair Koppenheffer asked for clarification regarding whether the lot is open to the public. Mr. Grizzaffi stated that impound vehicles go to the Meriden yard. Mr. Burke the timing of the request for a variance and noted that a similar variance was granted to a competitor. Mr. Burke said that responses to the concerns were addressed in the application.

Chair Koppenheffer asked for questions or comments from the Board.

Mr. Nash asked Mr. Grizzaffi to speak to the issue of fencing and landscaping. There was discussion regarding the number of trucks that are on the property. Mr. Nash said that in keeping with the rural neighborhood feeling, the trucks should be parked out of sight. Mr. Burke indicated that the applicant would be amenable to parking conditions. Mr. Griffin discussed the previous hearing and the matter of precedent in Mr. Carter's case. Mr. Burke said that if there had not been a complaint, there would have been no enforcement action. Mr. Griffin noted that to be a dubious argument. Mr. Burke said that the application on its own supports the request for a variance. Chair Koppenheffer said that the Board cannot grandfather an illegal use and Ms. Hennessy notified the applicant that they were in violation more than five years ago. Nothing was done until the applicant received the most recent notification and the violation should have been remedied when it was brought to the applicant's attention prior. Mr. Burke said that to limit the use of the building now would create a hardship to the applicant. He asserts that if the Board were to look at the application today, it would support the variance request. Chair Koppenheffer asked about parking at the property. Mr. Grizzaffi said that he has six trucks, three of which go home with the drivers.

There were no further comments or questions from the Board.

Chair Koppenheffer opened the public hearing.

Matt Maughan lives at 341 Meriden Road and is an abutter. He said that the property is zoned for Residential and is being used a commercial property. He acknowledged that although there were no contaminants found in the soil, there is an issue with allowing commercial use in a residential area. He said that operations continue throughout the night and the Board cannot enforce restrictions, so the responsibility is placed on neighbors to make a complaint. Mr. Maughan referenced an aerial view which demonstrated the lack of vegetation between the properties. When he purchased the home, he believed he was buying in a residential area.

Darren Carter discussed the differences between his property and the Grizzaffi property. He previously submitted photos showing the topography, vegetation, and fencing. Mr. Carter referenced his prior application and letters of support, which he said that the Grizzaffi application does not have. He also noted that Mr. Grizzaffi had been notified by the Zoning Board that he was in violation and did not address the concerns. When Mr. Carter was notified of a violation, he said that he was quick to address the issues.

Mark Horn, the previous owner of the property, said that he sold the property to Mr. Grizzaffi. He spoke to Ms. Hennessy and was told that certain things were okay if no one from the City said anything. He said that the Zoning Board's action should be based on the ordinance, not on what either Mr. Grizzaffi or Mr. Carter thinks. Mr. Griffin said that the difference between the applications, despite their similarities, is that granting relief after the applicant was duly notified of a violation and chose to remain in violation instead of remedying it, sets a dangerous precedent.

Hearing no further comments from the public, Chair Koppenheffer closed the public hearing.

DELIBERATION/DECISION

Mr. Griffin said that granting a variance would set a dangerous precedent that Zoning Board notices are able to be ignored. Mr. Nash suggested mitigating the factors that are impacting abutters. Chair Koppenheffer agreed with Mr. Griffin and said that years of illegal use did not create a hardship defense if it was required to conform without a variance.

Mr. Nash suggested adding fencing and obscuration landscaping to mitigate impact from operations. Chair Koppenheffer asked Mr. Corwin what the consequences would be of not having three votes. Mr. Corwin said that if the grounds for not granting the variance remain the same, he would have to look into the right of appeal. If the grounds for not granting the variance have changed, the applicant could appeal. Mr. Corwin recommended using the motion to reflect the majority opinion of the sitting Board members. Mr. Corwin noted the by-laws that state "any motion to receive at least 3 votes will automatically constitute grounds for a rehearing."

On October 15, 2018, at a duly-noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared William Grizzaffi and Nick Burke Esq., on behalf of property owners William & Lori Grizzaffi regarding 351 Meriden Road (Tax Map 167, Lot 16), zoned RL-1. The applicants request a Variance from Article III, Section 312.2 of the Zoning Ordinance to allow a towing business and vehicular impound yard. #ZB2018-12R-VAR

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 property is zoned Rural Lands One (RL-1) and is improved with a one-family dwelling used as the applicants' home. According to the application materials, the***

applicants have also used the property for a towing business and as a vehicular impound yard since their purchase of the property in 2003.

- 2) A portion of the property of the property is located in the Wetlands Conservation District.*
- 3) A towing business and vehicular impound yard is not a permitted use in the RL-1 District either "by right" or by Special Exception. Therefore, in order to continue the applicants' commercial use of the property, a Variance is required.*
- 4) To obtain the requested Variance, the applicants must demonstrate compliance with each of the five variance criteria set forth in §801.2 of the Zoning Ordinance and NH RSA 674:33, I(b). The applicant has submitted testimony addressing the §801.2 Variance criteria in an application dated May 7, 2018.*
- 5) This application was originally heard by the Zoning Board on May 21, 2018 and July 16, 2018, and was denied by a vote of 3-0-1. The Zoning Board of Adjustment By-Laws adopted on 4/3/2017 provide that "[i]n all cases where the applicant is heard by less than a full 5 member Board, the failure of any motion to receive at least 3 votes will automatically constitute grounds for a rehearing." Consequently, the applicants are entitled in this case to apply for a rehearing without having to first file a motion for rehearing.*
- 6) An application for a rehearing was originally received on August 10, 2018. Subsequently, staff agreed to allow additional time for the applicants to prepare revised application materials, including preparation of a site plan by a professional. The additional materials were received on October 1, 2018 in time for placement on the October 15, 2018 Zoning Board meeting agenda.*
- 7) As noted in a letter from Nicholas Burke, Esq., dated October 1, 2018, included with the application materials, the applicants request that all submissions previously submitted for the original hearing be incorporated as part of the rehearing application.*
- 8) There appeared from the public Matt Maughan, an abutter, to voice concerns regarding enforcement and noise. Darren Carter spoke against the application. Mike Horn, the previous property owner, spoke in favor of the application.*
- 9) Pursuant to approved minutes of the November 4, 2013 Zoning Board of Adjustment meeting, the Zoning Administrator pointed out that the Meriden Rd. property is not commercial, and a tow yard is not permitted there either. Notice of violation has previously been sent to the owner.*

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 Variance criteria set forth in §801.2 of the Zoning Ordinance:

- 1. The variance will be contrary to the public interest. (§801.2.A.1)
The zoning ordinance typically separates commercial areas from residential.*
- 2. The spirit of the ordinance is not observed. (§801.2.A.2)
Residential areas are established to be generally free of commercial intrusion.*
- 3. Substantial justice is not done. (§801.2.A.3)
Applicant was informed in 2013 of non-compliance and chose not to respond.*
- 4. The values of surrounding properties are not diminished. (§801.2.A.4)*

5. *Literal enforcement of the provisions of the ordinance would not result in an unnecessary hardship. Owing to [the following] special conditions of the property that distinguish it from other properties in the area (§801.2.A.5.a):
The property is clearly residential in a residential zone; the issue was made clear to the applicant in 2013.*

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this 15th day of October, 2018, hereby DENIES the requested relief, subject to testimony, plans, and materials submitted.

*The MOTION was seconded by Chair Koppenheffer.
The MOTION was approved, 2-1. Mr. Nash opposed.*

Mr. Patterson rejoined the meeting at 9:17pm

Mr. Patterson recommended that the City make enforcement a priority.

- V. OTHER BUSINESS: None**
- VI. STAFF COMMENTS: None**
- VI. ADJOURNMENT**

*Dan Nash moved for adjournment. Seconded by Alan Patterson.
The motion passed unanimously, 4-0.

The meeting was adjourned at 9:20 p.m.

Respectfully submitted,
Brandy Sailors-Dow
Recording Secretary