

FINAL

**LEBANON ZONING BOARD OF ADJUSTMENT
CITY HALL, COUNCIL CHAMBERS
MONDAY, June 3, 2019
7:00 PM**

MEMBERS PRESENT: Chair William Koppenheffer, Vice Chair Jennifer Mercer, Dan Nash, Paul McDonough (Alt), Alan Patterson Sr.

MEMBERS ABSENT: Jonathan Peress, Jeremy Katz (Alt), Dave Newlove (Alt)

STAFF PRESENT: Tim Corwin - Zoning Administrator

1. CALL TO ORDER

The meeting was called to order at 7:05 PM by Chair Koppenheffer. Mr. McDonough was appointed to participate as a regular member.

2. APPROVAL OF MINUTES: April 24, 2019 & May 6, 2019

Mr. Nash MOVED to approve the April 24, 2019 Minutes as presented in the June 3, 2019 agenda packet.

Seconded by Mr. McDonough.

**The MOTION passed unanimously (4-0).*

Mr. Nash MOVED to approve the May 6, 2019 Minutes as presented in the June 3, 2019 agenda packet as amended.

Seconded by Mr. McDonough.

Amendments: Page 1 Line 23 Add 'Alternates' before Mr. Newlove. Remove 'presided' and Add 'participated.' Page 4 Line 9 Add 'Alternates' before Mr. Newlove. Remove 'sat' and Add 'participated.' Page 7 Line 12-13 Add 'Alternates' before Mr. Katz. Remove 'presided' and Add 'participated.'

**The MOTION passed unanimously (4-0).*

Chair Koppenheffer took the hearings out of order.

3. PUBLIC HEARINGS: NEW

- A. MARY DURAND & KEVIN GARRISON, 372 POVERTY LANE (Tax Map 188, Lot 44), zoned RL-2:** Applicant proposes to construct an addition onto an existing structure which is non-conforming to the minimum required side yard. The proposed addition would be located 25 ft from the side lot line, where a minimum 35 ft is required. To permit the expansion of a non-conforming structure, the applicant requests a Special Exception pursuant to Article III, Section 313.3 of the Zoning Ordinance. **#ZB2019-12-SE**

Mr. Nash recused himself because he is an abutter to this property.

Matthew Dow and Holly West of MTD Building Contractors and the applicants, Mary Durand and Kevin Garrison appeared on behalf of the application. Mr. Dow presented a picture illustrating the enclosure they would like to construct. They would remove part of the existing structure and the new 12 foot by 22-foot addition would come into the setback less than the existing structure. He added this would make the

residence handicap accessible and easier for them to live in as they age. Ms. West added it is not substantially changing the overall coverage of the lot, it would be increased by 112 square feet.

There were no questions from the Board.

Chair Koppenheffer opened the Public Hearing.

Edwin Bagley, an abutter appeared saying they have no issues with the application.

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

Vice Chair Mercer MOVED on June 3, 2019, at a duly-noticed meeting of the Lebanon Zoning Board of Adjustment, there appeared **Matthew Dow and Holly West** of MTD Building Contractors and **Mary Durand and Kevin Garrison** on behalf of **Mary Durand & Kevin Garrison** regarding **372 Poverty Lane (Tax Map 188, Lot 44)**, zoned **RL-2**. Applicant proposes to construct an addition onto an existing structure which is non-conforming to the minimum required side yard. The proposed addition will be located 25 ft. from the side lot line, where a minimum 35 ft. is required. To permit the expansion of a non-conforming structure, the applicant requests a **Special Exception** pursuant to **Article VII, Section 703.1** of the Zoning Ordinance. **#ZB2019-12-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 subject property is improved with a one-family dwelling constructed in 1971. As shown in the materials provided by the applicant, the existing home (at its closest) is located approximately 20 ft. 7 in. from the side lot line shared with 388 Poverty Lane. As such, the existing home is non-conforming to the minimum side yard of 35 ft. required for Class 3 lots in the RL-2 District (the home is also non-conforming to the minimum required 40 ft. front rear yard requirement).
2. The applicant proposes to construct a 12 ft. x 9 ft. addition at the northeast corner of the home. The proposed addition will be located approximately 24 ft. 5 in. from the side lot line, which is approximately three (3) feet further back than the existing non-conforming setback of approximately 20 ft. 7 in. Accordingly, the addition will be slightly more conforming to the minimum required 35 ft. side yard than the existing home.
3. Class 3 lots (lots that are served by a private well and septic system) in the RL-2 District must maintain a minimum side yard (i.e. a space unobstructed by buildings and structures) of 35 ft. *See* §313.3 of the Zoning Ordinance.
4. §703.1 of the Zoning Ordinance allows the expansion of “any increase in the **footprint** and/or volume of the non-conforming part of the building or structure,” by Special Exception from the Zoning Board of Adjustment.
5. In order to grant a Special Exception for the proposed expansion, the Board must determine that the proposal meets the criteria set forth in §703.1.A.
6. Per §703.1.A.3 of the Zoning Ordinance, in order to grant a Special Exception for an expansion of a non-conforming structure, the Board must determine that the proposal meets the general Special Exception criteria, set forth in §801.3.

7. The applicants have submitted testimony addressing the §703.1.A and §801.3 criteria in an application received by the Planning Department on May 16, 2019.
8. Mr. Edwin Bagley spoke in support of this 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 Special Exception criteria set forth in §801.3 of the Zoning Ordinance:

1. The Special Exception is specifically authorized by §703.1.A of the Zoning Ordinance. (§801.3.A)
2. The following special conditions/requirements §703.1.A **are** (§801.3.B):
 - The reasonable use of abutting properties shall not be adversely affected by the proposed expansion. (§703.1.A.1)
 - The proposed expansion shall not render the lot size proportionately less adequate, i.e. any aspect of the building or structure that is currently nonconforming cannot be made more non-conforming in the absence of a variance. (§703.1.A.2)
3. There **are no** existing violations of the Zoning Ordinance on the property that the granting of the Special Exception would not remedy. (§801.3.C) Staff is not aware of any Zoning Ordinance violations on the property.
4. The character of the area **will not** be adversely affected. (§801.3.D)
5. **No** hazard or nuisance will be created. (§801.3.E)
6. The capacity of existing or planned community facilities and services (including streets and highways) **will not** be adversely impacted. (§801.3.F)
7. The granting of the Special Exception **will not** result in undue municipal expense. (§801.3.G)
8. The proposed Special Exception **will** be developed in a manner compatible with the spirit and intent of the ordinance. (§801.3.H)
9. The general welfare of the City **will** be protected. (§801.3.I)

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **3rd day of June 2019**, hereby **GRANTS** the requested relief, as set forth above and per testimony, plans, and materials submitted, and per the following conditions:

1. The applicant shall obtain a building permit.

Seconded by Mr. Patterson.

**The MOTION passed unanimously (4-0).*

4. PUBLIC HEARINGS: Continued from April 24, 201

- A. BASIC HOLDINGS, LLC, 5 & 11 OAK RIDGE ROAD (Tax Map 4, Lots 5 & 6), zoned R-3:** Request for a Variance from Section 501.1.H.2 of the Zoning Ordinance to allow an existing building at 11 Oak Ridge Road, currently located +/- 33 ft. from the side lot like shared with 15 Oak Ridge Road, to be included as part of a proposed Planned Unit Residential Development (PURD) to be located on 5 & 11 Oak Ridge Road. Section 501.1.H.2 requires all building in the PURD to be set back a minimum of 50 feet from the side lot line of the PURD property. **#ZB2019-03-VAR**

This application is continued from the last hearing, for the Board to receive the results of the survey. The comments are limited to that survey and a letter received by the Board from Jay Hutchins, a resident who lives across the street.

Nate Stearns, attorney for the applicant, Rod Finley from Pathways and Jeff Shapiro representing the applicant, appeared for the application. The survey was completed and based on the survey there are 5.08 acres in the parcel. In the R3 district the minimum size of the lot for a residence is .23 acres therefore it cannot be a standalone lot for the existing house.

Jay Hutchins appeared and restated a few comments to the letter he sent. He cited part of the City Zoning Ordinances. Chair Koppenheffer asked Mr. Hutchins if he would prefer that the developer put in single family homes that can be closer than what is currently proposed by the applicant. Mr. Hutchins says he prefers this to a high-density complex because the complex would change the character of the neighborhood.

Chair Koppenheffer re-opened the Public Hearing.

Colleen Randall, an abutter at 9 Wildwood Drive, spoke to the increased density that would change the neighborhood and the value of her home. She agrees that single family homes would be less of an impact on their neighborhood. Leaving the existing house in a PURD would impact the neighbors.

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

The Board discussed how the PURD could affect the property values. The issue relates to the setback and there is not anything particularly unique about this property that distinguishes it from the other properties in the neighborhood. The decision is whether this one house can remain as part of the PURD. They spoke of the hardship. The PURD can go forward either way and the applicant's goal is to keep a perfectly good house. This is a dimensional variance, and based on the testimony, the neighbors would prefer to have the house torn down. This is the fourth meeting and a difficult decision that needs to be made.

The Board took a break at 7:45, reconvening at 7:59.

Mr. Nash MOVED on March 18, 2019, April 24, 2019, and June 3, 2019, at duly-noticed meetings of the Lebanon Zoning Board of Adjustment, there appeared Jeff Shapiro, Nate Stearns, Esq., and Rod Finley, PE, on behalf of **Basic Holdings, LLC** regarding **5 & 11 Oak Ridge Road (Tax Map 4, Lots 5 & 6)**, zoned **R-3**. Request for a Variance from Section 501.1.H.2 of the Zoning Ordinance to allow an existing building at 11 Oak Ridge Road, currently located +/- 33 ft. from the side lot line shared with 15 Oak Ridge Road, to be included as part of a proposed Planned Unit Residential Development (PURD) to

be located on 5 & 11 Oak Ridge Road. Section 501.1.H.2 requires all buildings in the PURD to be set back a minimum of 50 feet from the side lot line of the PURD property. #ZB2019-03-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 subject properties are located in the Residential Three (R-3) District. 5 Oak Ridge Road is vacant except for a commercial radio tower, which is a nonconforming use in the R-3 District. 11 Oak Ridge Road is currently improved with a single-family home which is located approximately 33 ft. from the side lot line shared with 15 Oak Ridge Road (a minimum side yard of 15 ft. is required for Class 1 lots in the R-3 District). The home conforms with all dimensional requirements for Class 1 lots in the R-3 District.
2. §501.1 of the Zoning Ordinance regulates Planned Unit Developments (PUDs), including Planned Unit Residential Developments (PURDs) which are more specifically regulated in §501.2. A PURD is an allowed use in the R-3 District with a Conditional Use Permit from the Planning Board per §310.2.
3. The applicant proposes to merge the two properties and redevelop the merged parcel as a PURD containing 21 residential units together with related site improvements and amenities. In the R-3 District, a PURD is only permitted on properties containing five (5) acres or more. In merging 5 & 11 Oak Ridge Road, the merged property will be large enough to meet the minimum lot size for PURDs in the R-3 District.
4. As part of the PURD, the applicant proposes to construct an addition onto the existing one-family dwelling at 11 Oak Ridge Road and convert it to a two-family dwelling. The development will otherwise primarily consist of detached units.
5. §501.1.H.2 of the PUD regulations requires all buildings in a PUD to be set back a minimum of 50 feet from the side and rear lot lines of the PUD property, and to be set back a minimum of 75 feet where there is an abutting residential property of less than 40,000 sq. ft. in size.
6. 15 Oak Ridge Road is +/-30,492 sq. ft. in size. Therefore, a 75 ft. setback applies to all lot lines of the PUD property shared with 15 Oak Ridge Road.
7. Because 11 Oak Ridge Road is located +/-33 ft. from the side lot line shared with 15 Oak Ridge Road, the 11 Oak Ridge Road home will encroach approximately 42 ft. into the minimum side setback of 75 ft. required by §501.1.H.2. Therefore, a Variance is required from the PUD side setback requirement in order to include the existing home as part of the proposed PURD.
8. The proposed site layout is depicted on a plan titled “PURD Site Plan for Basic Holdings, LLC”, prepared by Pathways Consulting, LLC, dated February 4, 2019, last revised April 17, 2019, Proj. No. 11456.01. A copy of the plan was provided to the Board in the agenda packet for the April 24th meeting.
9. At the request of the Board, the applicant completed a boundary survey of the subject properties, which was provided to the Board in the agenda packet for the June 3rd meeting. The survey, titled “Boundary Survey for Basic Holdings, LLC”, prepared by Pathways Consulting, LLC, dated May 24, 2019, Proj. No. 11456-01, shows that the size of the combined properties totals +/-5.08 acres.

10. As noted in the staff memo prepared for the June 3rd meeting, the applicant’s engineer noted the following in an e-mail received by staff on May 24, 2019: “Given that the property is zoned R-3, the minimum Class 1 lot size is 10,000 square feet, or 0.23 acres. 5.08 acres – 0.23 acres = 4.78 acres. Therefore, to address a previous question from the chair of the ZBA, the existing house cannot be on a standalone lot while maintaining 5 acres for the PURD.”
11. To obtain the requested Variance, the applicant must demonstrate compliance with each of the five variance criteria as 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 criteria in an application received by the Planning Department on February 4, 2019, and in a letter and Supplemental Support Statement for a Variance from Nathan H. Stearns, Esq., dated February 27, 2019.
12. Rand Swenson, Lorraine and Lawrence Kelly, Jay Hutchins and Steven Arcone, submitted letters in opposition to the request, and spoke in opposition to the request. In addition, the following abutters and residents of the surrounding neighborhood spoke in opposition to the request: Rand Swenson, Steven Arcone, Larry Kelly, Jaqueline Pu, Jay Hutchins, Eleanor Coffey, Mardrey Swenson, Andrew Faumbe, Jeanette Hutchins, Sandy Suckow, John Walsh, Lorraine Kelly, Bob Drake, Allen Randall and Brenan Riehl.
13. Bruce Waters of McLaughry Association submitted testimony regarding property values for the applicant.
14. Ned Redpath submitted testimony on behalf of the abutters regarding diminishment of property values.

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 benefits to the developer are out-weighted by the adverse impacts of the requested variance on the abutters.
2. The spirit of the ordinance **is not** observed. (§801.2.A.2)
The project has two alternatives that can be pursued without the requested relief.
3. Substantial justice **is not** done. (§801.2.A.3)
4. The values of surrounding properties **are** diminished. (§801.2.A.4)
The burden of proof regarding diminishment is on the applicant. The applicant’s testimony presented that values would not be diminished and did not meet the burden of proof.
5. Literal provisions of the ordinance **would not** result in an unnecessary hardship.
The developers can pursue either a conventional subdivision or remove the home.
 - i. There **is** a fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property. (§801.2.A.5.a.i)

- ii. The proposed use **is** a reasonable one. (§801.2.A.5.a.ii)

III. DECISION

Now therefore be it resolved, the Lebanon Zoning Board of Adjustment, on this **3rd day of June 2019**, hereby **DENIES** the requested relief, as set forth above and per testimony, plans, and materials submitted.

Seconded by Mr. Patterson.

**The MOTION passed unanimously (4-1). Mr. Nash opposed.*

5. PUBLIC HEARINGS: NEW-continued

A. JENNIFER MERCER & JASON WEALE, 4 WOODLAND ROAD (Tax Map 136, Lot 27), zoned R3: Applicant requests a Variance from Article VI, Section 611.C of the Zoning Ordinance to allow the keeping of roosters. **#ZB2019-13-VAR**

Vice Chair Mercer recused herself and Mr. McDonough (Alternate), participated in this hearing.

Jennifer Mercer and Jason Weale appeared on behalf of the application. The property is 29.97 acres, the house is located in the center of the property and it is surrounded by dense forest and two vernal pools with peepers. It is a fairly unimproved area. They are a registered farm with the USDA for their apiary and maple syrup production. They are developing a forest management plan to preserve the land and wildlife. The property is outside the Urban Compact zone. They can keep up to 60 hens and hunt and target shoot on the property. The applicant noted that the property is in current use

Their chicken coop is 260 feet from the property line and 330 feet from the nearest home. The applicants provided testimony in the application regarding the Variance criteria. They spoke of the advantages of maintaining the chickens, the benefit of the owners' practice of protecting the land and wildlife and the general contribution their property contributes to the value of the neighborhood. The property qualifies to be subdivided into several PURDS, but they prefer to keep the property in its natural state.

They would like to breed their own chickens instead of continually purchasing them. They raise heritage and preservation chickens. They are helping to preserve these chicken breeds, in lieu of the breeds that are on mass production chicken farms.

The noise related to roosters was discussed. There is no noise restriction in the City of Lebanon. They crow during the day about 90 decibels, and hens are about 70 decibels. It's comparable to the volume of a single peeper in the vernal ponds, barking dogs and a loud bird population. Roosters only crow at night if there is a disturbance and their hen house is secure. When chickens are hatched they are male and female. They ask a restriction of 6 fully mature roosters and to maintain young roosters, up to 6 months old.

The Board asked how many hens they maintain. They plan to have about 20 adult hens but want to maintain the ability to keep 60 chickens as permitted under the ordinance. Some of the abutters are supportive and they have not heard that anyone objects. They discussed research and studies related to the volume of crowing roosters. There are several studies that have a large range of outcomes describing the noise level of roosters. The applicants were asked if they have looked into ways to muffle the crowing, such as rooster collars. Collars are somewhat effective, but not completely. The

applicants do not believe they would want to maintain a very loud rooster at their property.

Chair Koppenheffer opened the Public Hearing.

Melissa and David Leenders appeared. They are the closest neighbors, and their bedroom window is close to the chicken coop. Ms. Leenders is not opposed to chickens but does not want to wake to roosters every morning. Mr. Leenders said the additional noise would not be healthy for them due to sleep disruption. They believe the rooster crowing would start the neighborhood dogs barking. It would be more disruptive than the other natural noises such as the peepers. The property is in a neighborhood even though the house is surrounded by trees. They believe the prohibition of roosters was likely based on the noise, and there are alternatives to raising chickens without reproducing them.

Brian Fontaine and Yvette Fontaine, 23 Grandview Avenue, spoke in opposition to the application. They are also comfortable with the chickens but are not supportive of the noise from roosters. Roosters frequently start crowing a couple of hours before sunrise, which is early this time of year. Mr. Fontaine is familiar with living on a farm and understands what the noise from a rooster would cause in the neighborhood. He spoke to the health implications of reduced sleep and the value of properties that could be lowered due to the rooster noise. He feels the roosters would be a negative impact on the neighborhood. With the number of roosters the applicants are requesting to keep, the noise would be compounded, because roosters tend to respond to one another.

Kathy Lawar, residing at 6 Grandview, spoke in opposition to the application. She said she is not supportive due to the noise of the roosters.

The Board asked Ms. Mercer and Mr. Leenders to clarify the distance between the properties and the distance to the Leenders house.

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

The Board said the objections raise reasonable issues. It may be fair to say that the Ordinance was written accordingly to protect the neighbors due to the noise of roosters and members discussed if granting the variance would be in the spirit of the ordinance. Some members said it appears to be a hardship for the owners because they have a rural farm even though it is R3 zoned. The noise levels being discussed are at the source and noise diminishes over distance. It is a reasonable use. The applicants own a large piece of property and they are being restricted. The potential noise from a housing development would be even less desirable. Other members said roosters can crow before dawn and can crow anytime during the day. Once one rooster starts there is increased crowing in response. Because the neighbors are opposed, the Board was not comfortable voting for a variance. They discussed the hen house structure and if that could remedy the noise. Some members suggested that some mitigation conditions could be brought back to the Board. If there is some noise mitigation possible, it would be worth consideration.

The hearing was re-opened.

Ms. Mercer asked what the Board heard that suggests the neighbors were willing to compromise. Ms. Mercer noted that not meeting the criteria is grounds for not granting a variance. Neighbor objections are not grounds for a denial. The Board suggested they are reluctant to make a decision at this meeting because all the criteria of the variance have not been met.

The Board discussed the hardship to own this unique property and not be allowed to maintain roosters. They discussed potential mitigation of noise in the spirit of the ordinance. The Board asked the applicants

to bring some noise mitigation options back to the Board. Specifically addressing the noise concerns of the neighbors would allow them to reconsider the variance.

Mr. Nash MOVED to adjourn this application to the next meeting, Monday July1, 2019.

Seconded by Mr. Patterson.

****The MOTION passed unanimously (5-0).***

At the public hearing on July 1, the applicants will present additional evidence and any members of the public who wish to be heard will be allowed to be speak.

6. OTHER BUSINESS

- A. ZONING BOARD OF ADJUSTMENT BY-LAWS:** Discussion of letter from Jeremy Katz dated January 22, 2019.

Because Mr. Katz is not present, this will be postponed

7. STAFF COMMENTS

Mr. Corwin commented that conversations with anyone, during deliberations, is not appropriate. The public hearing should always be reopened. Issues and clarification about ordinances should be obtained outside of the session, with less than 3 members of the Board present. During deliberations, it is difficult to ask Staff for clarification. The Board can only discuss Board business during the public hearing.

8. ADJOURNMENT

Mr. Nash MOVED to adjourn the meeting at 9:18 PM.

Seconded by Mr. Patterson.

****The MOTION passed unanimously (5-0).***

Respectfully Submitted,

Linda Billings
Recording Secretary