Zoning Board of Appeals
Agenda
February 1, 2023
Wescustogo Hall & Community Center
Appeal Hearing
5:30 PM

I. Call to Order

II. Pledge of Allegiance

III. Minutes

IV. Appeal Hearing

a. Deacon Hayes Commons Major Subdivision/Site Plan Appeal – consideration of appeal, decision on appeal, and adoption of a written Notice of Decision.

V. Any other Business

VI. Adjournment

Town of North Yarmouth
Zoning Board of Appeals

Notice of Decision and Findings of Fact and Conclusions of Law

Appeal by Sol and Alicia Dostilio of Planning Board Subdivision and Site Plan Approval of Deacon Hayes Commons

Appellants: Sol and Alicia Dostilio, 15 Parsonage Rd., North Yarmouth

Subject Property: 521 Walnut Hill Road, North Yarmouth (Tax Map 7, Lot 62), owner – 527 LLC (Laurie Bachelder) (the "Property")

Appeal Description: Appeal (the "Appeal") from the Planning Board's September 13, 2022 decision (the "Decision") to grant Subdivision and Site Plan approval to 527 LLC 's ("Applicant") application for Deacon Hayes Commons (the "Development")

Procedural Background

On November 28, 2022, the North Yarmouth Zoning Board of Appeals ("ZBA") met to hear this Appeal. Present were: ZBA Chair Paul Napolitano, Secretary Kevin Robinson, Members Thaddeus Day, Norman Smith, and Jim Briggs, and Alternate Member Mike Mallory.

At the beginning of the meeting, Attorney Kristin Collins submitted a November 28, 2022 letter requesting recusal of Chair Napolitano, Secretary Robinson and Alternate Member Mallory. The ZBA proceeded to address the questions of ZBA member conflict of interest and bias; Chair Napolitano recused himself; Secretary Robinson and Alternate Member Mallory disclosed what they had said and written regarding the Development, and the other members of the ZBA voted to allow them to participate. As ZBA Secretary, Mr. Robinson became Acting Chair under the Bylaws and promoted Alternate Member Mallory to full Member status for this Appeal. The ZBA then heard from: Attorney Keith Richard for Appellants and Attorney Kristin Collins for Applicant and from members of the public before closing the public hearing, beginning its deliberations, and continuing the meeting to a date to be determined.

On December 14, 2022, the ZBA met to hear this continued Appeal; present were: ZBA Acting Chair Kevin Robinson, Members Thaddeus Day, Norman Smith, and Jim Briggs, and Mike Mallory. At the request of Atty. Richard and the agreement of Atty. Collins, the appeal was continued to Jan. 18, 2023, when ZBA Acting Chair Thaddeus Day (chairing the meeting in the absence of Sec. Robinson and by unanimous majority vote by the ZBA members in attendance) and Members Norman Smith, Jim Briggs, and Mike Mallory met to take additional argument and deliberate. At the conclusion of the Jan. 18, 2023 meeting, the ZBA continued the matter for preparation of a draft Notice of Decision and a vote on that draft and the appeal. On Feb. 1, 2023, the ZBA met to review the draft Notice of Decision and to vote on its determinations on the issues raised, to vote on the appeal, and to adopt the Notice of Decision.

Standard of Review

Article VI, Sections 6.3(5)(b) and (6) of the Town's Land Use Ordinance ("LUO") require the following when the ZBA reviews Planning Board decisions:

5.b. When the ZBA hears a decision of the Planning Board, it shall hold an appellate hearing, and may reverse the decision of the Planning Board only upon finding that the decision was contrary to specific provisions of the Ordinance or contrary to the facts presented to the Planning Board. The ZBA may only review the record of the proceedings before the Planning Board. The ZBA shall not receive or consider any evidence which was not presented to the Planning Board, but the ZBA may receive and consider written or oral arguments. If the ZBA determines that the record of the Planning Board proceedings are inadequate, the ZBA may remand the matter to the Planning Board for additional fact finding.

6. Decision by Zoning Board of Appeals (ZBA):

- **a. Quorum**: A majority of the full voting membership of the ZBA shall constitute a quorum for the purpose of deciding an appeal.
- **b. Burden of Proof**: The person filing the appeal shall have the burden of proof.
- **c. Action on Appeal**: Following the public hearing on an appeal, the ZBA may affirm, affirm with conditions, or reverse the decision of the CEO or Planning Board. The ZBA may reverse the decision, or failure to act, of the CEO or Planning Board only upon a finding that the decision, or failure to act, was clearly contrary to specific provisions of this Ordinance. When errors of administrative procedures or interpretations are found, the case shall be remanded back to the CEO or the Planning Board for correction.
- **d. Time Frame**: The ZBA shall decide all administrative appeals and variance appeals within 35 days after the close of the hearing, and shall issue a written decision on all appeals.
- **e. Statement of Findings**: The ZBA shall state the reasons and basis for its decision, including a statement of the facts found and conclusions reached by the Board. The ZBA shall cause written notice of its decision to be mailed or hand-delivered to the applicant, and to the Department of Environmental Protection for appeals applicable to the Resource Protection and Residential Shoreland Districts, within 7 days of the Board's decision. Copies of written decisions of the ZBA shall be given to the Planning Board, Code Enforcement Officer, and the Select Board.

Determination

As to the fifteen arguments made by Appellant, the ZBA determines as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the basis of the record of the Planning Board proceedings transmitted to the ZBA (the "Record"), the ZBA finds and concludes as follows.

I. Findings of Fact

1. Applicant 527 LLC submitted a subdivision and site plan application for Deacon Hayes Commons (the "Development"), a 12-unit residential development to be located on a 2.24-acre parcel owned by it, located at 521 Walnut Hill Road, North Yarmouth (Tax Map 7, Lot 62) – the "Property." The Property is more particularly described by a deed recorded in the Cumberland County Registry of Deeds in Book 38201, Page 160 (527 LLC) and in Book 37314, Page 179 (507 LLC).

2. The Development also includes a parking lot containing 29 parking spaces and a Common Area of 75,537 square feet in area.

3. The Planning Board voted to approve the subdivision and site plan application for the Development on September 13, 2022 and adopted its written decision on October 25, 2022.

4. Appellants Sol and Alicia Dostilio are abutters to the proposed Development; they own and reside on property located at 15 Parsonage Road that is adjacent to the Applicants' Property at 521 Walnut Hill Road.

5. Appellants filed their Appeal from the Planning Board Decision on September 19, 2022 (the "Decision").

II. Conclusions of Law

A. Jurisdiction. The ZBA has jurisdiction over administrative appeals from Planning Board decisions under Article VI, Sections 6.2 and 6.3 of the LUO. This Appeal is such an administrative appeal from the Planning Board's subdivision and site plan decisions, and so the ZBA concludes that it has jurisdiction over the Appeal.

B. Timeliness. Appellants filed their appeal with the Town on September 19, 2022, within 30 days from the date of the September 13, 2022 Planning Board Decision which is memorialized in the written decision of the Planning Board adopted on October 25, 2022, and so the appeal is timely.

C. Standing. Appellants Sol and Alicia Dostilio, 15 Parsonage Rd., allege that they have standing to bring this Appeal because: 1) they are abutters to the Property; 2) they will be injured by the proposed development due to potential loss of light, view and rural character of the neighborhood as a result of the Amendment Application; and 3) they appeared before the Planning Board and spoke in opposition to the Development. The ZBA finds that all three claims are supported by the Planning Board Record and concludes that the Appellants have standing to bring this Appeal.

D. Merits. The ZBA addresses each of Appellants' arguments as follows:

1. LUO Section 3.8B. Appellants argue that the Applicant must provide a performance guarantee as set out in Section 3.8 for Site Plans (under Section 4.4 E.3.g.9) and for Subdivisions (under Section 5.7A.9.) for the total cost of all improvements, including the dwellings, and that the $100,000 performance guarantee amount set by the Planning Board "only covered a small portion of the construction costs," violates the LUO, and places the Appellants at risk if the Development is not completed. Applicant responds that the performance guarantee is intended to cover the cost of required improvements -- not the cost of the entire Development, and that requiring a performance guarantee and setting its amount are within the Planning Board's discretion.

The ZBA observes that the LUO does not define "improvements" or "required improvements" – the terms used by Section 3.8 and other LUO provisions to describe what is secured by a performance guarantee. However, from the context of Section 3.8, and particularly Section 3.8 K., "Improvements Guaranteed" (and also Section 5.10 regarding "Inspection of Required Improvements"), it appears that the intent of the performance guarantee is to secure the construction and installation of required improvements that are in the nature of public infrastructure ("Performance guarantees shall be tendered for all improvements required to meet the standards of this Ordinance, including, but not limited to, improvements for the construction of the streets, storm water management facilities, public sewage collection or disposal facilities, public water systems, and erosion and sedimentation control measures.")

Therefore, the ZBA interprets the terms "improvements" and "required improvements" as used in Section 3.8, which requires the developer to post a performance guarantee, as being limited to public infrastructure required by the LUO, and not including all Development improvements, such as the proposed dwelling units.

However, the Planning Board simply attached a condition of approval in the Decision requiring the Applicant to submit a $100,000 irrevocable letter of credit prior to the issuance of a building permit without making a finding that the letter of credit is in an "amount adequate to cover the total construction costs of all required improvements, taking into account the time-span of the construction schedule and the inflation rate for construction costs" as provided in Section 3.8 C, or explaining the basis for such a finding, if implicit in the attachment of the condition. The Record contains, with the Deacon Hayes Commons Final Application Materials dated July 25, 2022, under the heading "Financial Data Construction Costs," an undated Proposal for the Development prepared by Northeast Building and Development LLC which lists several items and their cost: water services ($48,000 for taps and $8,000 for water main service to curb stop), a catch basin ($7,500), and sidewalks on Walnut Hill Road ($26,000). The ZBA cannot tell from the Planning Board Decision whether the Planning Board reviewed the amount of the Performance Guarantee under Section 3.8 and if it did, whether it relied upon those costs and whether it took into account inflation, provisions for inspection, and provisions for guarantee release. The Planning Board's Findings of Fact are inadequate in this regard, and so the ZBA remands this issue to the Planning Board to state whether it followed LUO Section 3.8 for performance guarantees (under Section 4.4 E.3.g.9 for site plans) and for Subdivision performance guarantees in establishing a $100,000 irrevocable letter of credit for the Development and to provide the basis for that amount.

2. LUO Section 4.4E.2.e. Appellants argue that the Planning Board failed to uphold sideline setbacks, and that the Applicant therefore did not file a complete application. After discussion before the ZBA, Appellants withdrew this argument.

3. LUO Section 5.7 A.3.c. This subsection provides:

> **…**
>
> **3. Other Approvals**: Prior to submittal of the final plan application, the following approvals shall be obtained in writing, where applicable:
>
> **c.** Maine Department of Human Services, if an engineered subsurface wastewater disposal system(s) or advanced waste water treatment system is to be utilized.

Appellants argue that under this section, the Applicant was required to submit the engineered septic system plan to the Planning Board at least 7 days in advance (under Section 5.5 C. 3) of the September 13, 2022 meeting at which it was submitted and at which the Planning Board voted to approve the application, or else the application was incomplete. Appellants argue that the failure to timely submit the final subdivision plan with the "flipped" septic system component locations (which was submitted to the Planning Board at the September 13, 2022 meeting) deprived them of the ability to review and respond with their concerns about a material change to the plans, and that review by DHHS could require final subdivision and site plan changes. Applicant responds that it submitted plans for an engineered septic system after the final subdivision and site plan had been submitted, that the Planning Board thereby waived the submission requirement under Sections 5.11 (A) and (C), and that Planning Board condition of approval 3 requires the landowner or home owners' association to submit to the Code Enforcement Office a maintenance agreement with Fuji Clean for the engineered subsurface wastewater disposal system. Appellants also argue that Section 5.7 A.3.c. requires DHHS' written approval before the final plan is submitted, which did not occur here, and that the Planning Board findings show it neither granted a waiver from this filing requirement nor made the "written findings of fact that there are special circumstances of a particular parcel proposed to be subdivided" to justify a waiver under Section 5.11. Applicant replies that the waiver is implicit and there is nothing to be gained by remanding the application to the Planning Board on this point because it is DHHS, not the Planning Board, that has the approval authority for this engineered septic system.

The ZBA determines that the Planning Board Findings of Fact/Decision are inadequate to permit it to determine whether there is substantial evidence in the Record to support Subdivision Conclusion #6 that "The proposed subdivision, with conditions added by the Planning Board, will provide for adequate solid and sewage waste disposal," and so the ZBA remands this decision to the Planning Board for additional findings of fact on the sufficiency of the proposed engineered subsurface wastewater disposal system. Also, while the Record does demonstrate that the Applicant submitted a set of final plans, last revised August 27, 2022, with its August 30, 2022 submittal to the Planning Board, and that one of these plans describes an engineered system, the ZBA cannot tell whether the Planning Board followed the LUO because: 1) it did not make findings to support a waiver of the requirement of DHHS' written approval before the final plan is submitted and did not explicitly waive this requirement, 2) it did not attach a condition of approval that a building permit shall not issue until such time as DHHS approves the proposed

engineered subsurface wastewater disposal system, 3) did not specify which engineered system was to be approved by DHHS, and 4) it did not address whether the engineered septic system plan submitted to the Planning Board at the September 13, 2022 meeting had to be submitted at least 7 days in advance, or if this was waived. Therefore, the ZBA remands this application to the Planning Board to address these omissions.

4. LUO Section 5.4 A. Under this section:

> If any portion of the subdivision is located within the Groundwater Protection Overlay District, or is to be served by the public water supply, the applicant shall submit complete preliminary and final plans, as submitted to the Planning Board, to the Yarmouth Water District, and obtain written comments from the Yarmouth Water District regarding the subdivision's impact on the public water supply, and/or the District's agreement to provide public water service to the development, if applicable. The Yarmouth Water District's input shall be advisory.

Appellants argue that the Planning Board failed to follow or uphold the LUO because the Yarmouth Water District did not receive updated engineered subsurface wastewater disposal system plans until the Planning Board meeting on September 13, 2022, so that the District did not have the opportunity to submit written comments to the Planning Board. The Applicant responds that: 1) it provided the preliminary and final plans to the District as required by the Ordinance, 2) the District provided written comments on those preliminary and final plans (September 8 email from Eric Gagnon to the Planning Board) as required, 3) the LUO does not require written comments to the Planning Board on the engineered subsurface wastewater disposal system design, and 4) the District provided oral comments to the Planning Board that its opinion on the engineered subsurface wastewater disposal system design was not changed by the design submitted at the September 13, 2022 meeting.

The ZBA concludes that the Findings of Fact and the Record are inadequate to show whether the Planning Board followed the LUO and so remands the Decision to the Planning Board for further findings as to: 1) whether it waived the seven-day rule for submittals to allow submittal of the engineered subsurface wastewater disposal system design at the September 13, 2022 meeting; 2) if so, the basis upon which it granted a waiver; and 3) the findings and Record materials that support Subdivision Conclusion #3 that the that "The proposed subdivision will not cause an unreasonable burden on an existing [public] water supply."

5. LUO Section 5.6(B)(4)(b) and (d). These subsections require submission of evidence of right, title or interest in the property that is the subject of the application:

> **4. Application Requirements:** The application for approval of a Minor Subdivision shall include the following information. The Planning Board may require additional information to be submitted, where it finds necessary in order to determine whether the criteria of Title 30-A M.R.S. §4404 or Section 5.12 Subdivision Review Criteria, are met.
>
> a. **…**

b. Verification of right, title, or interest in the property.

c. **…**

d. A copy of the most recently recorded deed for the parcel. A copy of all deed restrictions, easements, rights-of-way, or other encumbrances currently affecting the property.

Appellants assert that Applicant submitted "a without a clear title, and in fact the deed included the Dostilio property. This means neither the applicant not the code enforcement office read the deed to ensure it was up to date," thus failing to meet LUO requirements.

Applicant acknowledges that "the deed submitted with the application (which is in fact the deed on record) describes more land than should have been included in the parcel," and states that "All that was necessary for the developer to meet the submission requirements of Section 5.6(B)(4)(b) and (d) was "a copy of the most recently recorded deed for the parcel." Applicant further states that "As the Town's attorney and Planning Board noted during the September 13th meeting, the Appellants have not questioned that the deed correctly includes the land which is the subject of the Development; therefore, established right, title and interest as needed for the application." Counsel for Appellants and Applicant agree that 527LLC owns the Property and that the deed submitted includes all of the property shown within the boundaries of the proposed Development.

In *Tomasino v Town of Casco*, 2020 ME 96, 237 A.3d 175, the Maine Supreme Judicial Court reviewed the state of the law as to what is required to show right, title and interest in property sufficient to apply for permits. The Law Court stated "In sum, our decisions in *Walsh* [*v. City of Brewer*, 315 A.2d 200, 205 (Me. 1974)], *Murray* [*v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 41, 43 (Me. 1983)], and *Southridge Corp* [*v. Board of Environmental Protection*, 655 A.2d 345, 347-48 (Me. 1995)] involved the question of whether the applicants had sufficient connections to the title to the properties to seek municipal or agency permits on those properties, and in each case, there was no question but that the title owner of the property, once its identity was established, would be able to make use of the property as permitted according to applicable ordinances and statutes. *Southridge Corp*., 655 A.2d at 348; *Murray*, 462 A.2d at 43; *Walsh*, 315 A.2d at 205, 207-08." Based on this and because the Applicant held and submitted a copy of record title to the Property necessary for the location of the Development, the ZBA concludes that the Applicant met the requirements of Section 5.6(B)(4)(b) and (d) and that the Planning Board complied with the LUO.

6. LUO Section 5.12 B(12) provides that:

B. **Review Criteria:** The Planning Board shall consider the following criteria and, before granting approval, must determine that:

12. Groundwater: The proposed subdivision will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of ground water on site or on

adjacent properties, and in particular the quality and quantity of ground water within the Groundwater Protection Overlay District;

Appellant argues that the Planning Board had no indication from the Maine Department of Health and Human Services that the septic design for the Project met health and safety guidelines, no groundwater studies were submitted, and so the lack of evidence to support the Planning Board's decision on this standard puts the Dostilios and others who rely on public water and the aquifer at risk.

Applicant counters that the Planning Board Record contains sufficient information and discussion to support the Board's findings in this regard; in particular, Mark Cenci's Hydrogeologic Assessment placing the disposal area 45 feet from the property line, his updated septic system engineered subsystem plans provided to the Board before the September 13th meeting, and Yarmouth Water District's comments at the September 13th meeting on the engineered system.

The ZBA determines that there is substantial evidence in Mark Cenci's August 26, 2022 Hydrogeologic Assessment to support a finding that the Applicant has met the groundwater standard in Section 5.12B(12) of the LUO. However, while the Planning Board noted Mr. Cenci's report in Site Plan Finding #2, "Utilities," it did not make a finding that the report met Section 5.12B(12) of the LUO or reach a conclusion in the Subdivision conclusions of law, even though groundwater impact is a standard in Section 5.11 of the LUO and in the State subdivision law (30-A M.R.S. § 4404(12)). The Planning Board should conclude whether the application meets the groundwater standard and state whether Mr. Cenci's report supports that conclusion, and so the ZBA remands the matter to the Planning Board to address these omissions.

7. LUO Section 5.7 B. provides:

B. Submissions: The final plan shall consist of one or more maps or drawings drawn to a scale of not more than 100 feet to the inch. Plans for subdivisions containing more than one hundred (100) acres may be drawn at a scale of not more than two hundred (200) feet to the inch provided all necessary detail can easily be read. Plans shall be no larger than twenty-four (24) by thirty-six (36) inches in size, and shall have a margin of two (2) inches outside of the borderline on the left side for binding and a one-inch margin outside the border along the remaining sides. Space shall be reserved on the plan for endorsement by the Planning Board. The final plan submission shall consist of one reproducible, stable-based transparency to be recorded at the Cumberland County Registry of Deeds, and a paper copy for review by the Planning Board. Following approval of the Final Plan by the Planning Board, the applicant shall submit a copy of the Final Plan as recorded at the Cumberland County Registry of Deeds, to include all recording information and Planning Board signatures.

In addition, the applicant shall submit eight (8) copies of the final plan reduced to a size of eleven (11) by seventeen (17) inches, and all accompanying information. A copy of the final plan(s) and all accompanying information shall be provided to each Planning Board member no less than (seven) 7 days prior to the meeting. If any portion of the subdivision

is located within the Groundwater Protection Overlay District a reduced copy of the final plan and all accompanying information shall also be provided to the Yarmouth Water District.

Appellants assert that the Planning Board erred by accepting plans submitted by the applicant at the September 13, 2022 meeting despite the 7-day submission deadline; that the Applicant did not submit a full and complete application and yet received final approval; and that the plans submitted at that meeting included a new septic design, including a "flipping" of the system.

Applicant responds that Section 5.7 B. requires the final site plan to be submitted at least seven days prior to the meeting and that this was done (see updated site and subdivision plans submitted by SJR Engineering with memo of August 30, 2022); that the engineered system plan was submitted two weeks prior to September 13 (see septic system plans submitted by SJR Engineering with memo of August 30, 2022), and that only minor changes to the engineered system were proposed; and that the revised plan showing the "flipping" of the system submitted to the Planning Board on September 13, 2022 was shared with Yarmouth Water District, which did not have any concerns so long as conditions regarding ongoing monitoring and maintenance were met, which conditions the Board attached to the approval.

The ZBA determines that it is not clear from the Record whether the Planning Board followed the LUO in this regard, and so the ZBA remands this issue to the Planning Board to address these omissions. Was there a waiver of the 7-day submission requirement? If so, are there findings to support the waiver? Did Yarmouth Water District provide its written comments to the Planning Board?

8. LUO Section 5.8(C) provides:

> C. At the time the Planning Board grants final plan approval, it may permit the plan to be divided into two or more sections subject to any conditions the Planning Board deems necessary in order to ensure the orderly development of the Plan. **…** If the superintendent of schools indicates that there is less than 20 percent excess classroom capacity existing in the school(s) which will serve the subdivision, considering previously approved but not built subdivisions, the Planning Board shall require the plan to be divided into sections to prevent classroom overcrowding. If the expansion, addition or purchase of the needed facilities is included in the town's capital improvements program, the time period of the phasing shall be no longer than the time period contained in the capital improvements program for the expansion, addition or purchase.

In its Decision, the Planning Board attached Condition of Approval 5, which reads:

> 5. Consistent with Sec. 5.8(C) of the Land Use Ordinance, the units shall be built in two phases to prevent classroom overcrowding, so that the building permits for the second half of the units shall not be issued until the calendar year following the building permits that have been issued for the first six units, subject to the Town's current building cap ordinance.

Appellants argue that the Applicant failed to submit any information to support the Planning Board's attachment of this condition of approval. In support of its position that phasing is required, Attorney Richard sent an August 8, 2022 letter by email to the Planning Board attaching a July 29, 2022 email from School District Superintendent Jeff Porter stating that the schools have "We currently do not have any excess capacity." Applicant responds that while it did not submit the email from Superintendent Porter in question and that it had received a different communication from the Superintendent indicating no concerns about handling students from the Development, the Planning Board could consider that information, which supports the Planning Board's attachment of a condition of approval under Sec. 5.8(C) requiring phasing over a two-year period.

The ZBA determines that there is substantial evidence in the Record in the form of Superintendent Porter's email to the Appellants that the schools have "no excess capacity whatsoever" to support a finding under Section 5.8(C) that the school(s) that will serve the Development have less than 20% excess capacity and to therefore attach condition of approval 5 to the Decision, calling for the units to be built in two phases. That the Appellants and not the Applicant submitted this evidence is irrelevant to the analysis – the email is in the Record and supports the Planning Board's Condition of Approval 5 (although it would have been helpful to the ZBA's review if the Planning Board had cited those emails in support of its condition of approval).

9. LUO Section 10.34(B) states:

> **B**. **General Requirements:** Proposals subject to development review shall be accompanied by plans and information making provision for off-street parking. Such plans shall attempt to balance the provision of adequate parking for the project under review while minimizing the development of visible paved areas. Parking areas must be constructed to protect the natural environment and visual character of the community, improve pedestrian safety and accessibility, and promote the quality of life in developed areas.

Appellants argue that the Planning Board, by approving the Development parking lot design, failed to enforce this standard, since it is "unprecedented in town and in no way resembles the visual character of abutting residential properties." Appellants further state that the use of one large lot instead of breaking the lot into separate parking areas for each townhouse fails to minimize "the development of visible parking areas." Applicant counters that this standard does not require the parking area to be fully screened from all sides, and observes that the parking area is screened on the northeast side by an 8-foot tall stockade fence and by a wooded area to the southeast side, and that the landscaping plan further minimizes views of the parking area, all supporting the Planning Board's exercise of its discretion to determine that the parking area meets this standard.

The ZBA determines that the plans submitted August 30, 2022 – particularly the Site and Demolition Plan -- show that the parking area will be screened by an 8-foot tall stockade fence, by the Development's buildings, by a wooded area to the southeast side, and by plantings shown

on the landscaping plan, and constitute substantial evidence to support the Planning Board's finding that these together minimize views of the parking area in compliance with this standard.

10. LUO Section 10.34 C (2) and (4) provide:

> **C. <u>Parking Layout and Design:</u>** Off-street parking must conform to the following standards:
> 1. **…**
>
> 2. Parking areas with more than two (2) parking spaces must be arranged so that it is not necessary for vehicles to back into the public road. In no instance shall off-street parking be designed so that vehicles back out into Routes 115, 9, 231 or North Road.
>
> 3. **…**
>
> 4. All plans for parking areas shall include a landscaping plan which adequately screens parking lots, and that provides interruptions of parking spaces.

Appellants argue that because the Planning Board did not force the Applicant to change its parking lot design, the parking was not and could not be adequately designed, and that this situation was made worse by septic design changes that removed previously agreed upon visual barriers, including trees. Appellants also assert that the two landscaped islands shown on the Site and Demolition Plans are inadequate interruptions. Applicant responds it provided screening and a landscape plan that minimizes views of the parking lot as required by the LUO; the subdivision and site plans also show landscaped islands in the parking lot that interrupt the area.

The ZBA notes that STR Engineering's August 30, 2022 memo states that previously proposed landscaping was moved away from the proposed engineered septic disposal system. Comparison of the August 27, 2022 and September 10, 2022 Site and Demolition plans show that the "flipping" of the septic system components in the latter plan did not change the septic system footprint and did not impact the landscaping plan or result in removal of trees. The Planning Board in Site Plan Finding # 8 made findings about the stockade screening abutting properties and "the new trees and shrubs shown on the site plan between the units and surrounding the parking area." The ZBA also observes that the landscaped islands mark the changes in parking direction for the spaces within the parking lot. Therefore, although the Planning Board could have better linked its factual findings in Site Plan Findings #s 8, 14 and 16 to Site Plan Conclusion # 15, there is substantial evidence in the Record to support the Planning Board Decision's conclusion that "Parking areas will be constructed to protect the natural environment and visual area of the community, improve pedestrian safety and accessibility and promote the quality of life in developed areas." and to demonstrate compliance with the standards in Section 10.34 C (2) and (4).

11. LUO Section 10.14 B.(2)(b) and (c) provide:

B. Standards:

…

2. Buffers and Screening:

a. …

b. Buffering must be designed to provide a year-round visual screen in order to minimize adverse impacts. It may consist of fencing, evergreens, berms, rocks, boulders, mounds, or a combination thereof.

c. Landscaping around and within parking lots shades hot surfaces and visually "softens" the hard surface look of parking areas. Parking areas must be designed and landscaped to create a pedestrian-friendly environment. A landscaped border must be created around parking lots. Any parking lot containing ten (10) or more parking spaces must include one or more landscaped islands within the interior of the lot. There must be at least one (1) island for every twenty (20) spaces. Landscaping must screen the parking area from adjacent residential uses and from the street. Sight vision, safety and appearance should be considered in determining landscaping plans.

Appellants assert that the Planning Board failed to uphold this standard because the Applicant has failed to show the type of visual screening it intends to place around the lot and has only shown two interruptions in the lot that are not islands, but peninsulas. Applicant responds that the stockade fence and buildings provide opaque year-round screening and that the substantial wooded area at the southeast corner and landscape plan provide screening that minimize views of the parking area. The subdivision and site plans also show landscaped islands in the parking lot that interrupt the parking area.

The ZBA determines that there is substantial evidence in the Record to support its Site Plan Conclusion # 15 and Decision and to comply with the letter, if not the spirit, of Section 10.14B (2)(b) and (c). The parking lot is proposed for 29 spaces, and accordingly, two islands are provided. These islands, though small, are interruptions that serve to separate angled from perpendicular parking spaces. As previously discussed, the Planning Board found that the stockade fence, buildings, and landscaping will provide visual screening. ZBA Member Brigg, however, believes that these landscaped islands are insufficient to meet the LUO requirements.

12. LUO Section 9.2 H.(4)(a) states:

H. Best Management Practices:

4. Road Maintenance, Parking Areas and Storm Water:

a. Storm water from frequently used parking lots (e.g., for commercial establishments, and workplaces) shall be diverted away from the Groundwater Protection Overlay District, if possible, and shall not be channeled into bodies of

water. Filter strips and vegetated areas shall be installed and maintained wherever possible.

Appellants assert that the Planning Board has failed to enforce the LUO because the parking lot will be frequently used and storm water from it should be diverted away from the Groundwater Protection Overlay District (GPOD) and shall not channeled into the pond on the Site that has not been used before for such a purpose. Applicant states that the Development's location within the GPOD makes it impossible to divert the stormwater from that District, and so the stormwater is properly channeled into a manmade pond to be used for stormwater retention and infiltration.

The ZBA observes that Site Plan Finding # 12 states that "Drainage flows southwest towards the manmade stormwater pond." However, the Planning Board did not state whether or how this finding supports a conclusion that the requirements of Section 9.2 H.(4)(a) have been met. Therefore, the ZBA remands this matter to the Planning Board to address this omission.

13. LUO Section 10.23 D.(2) states:

> **D. Ownership and Maintenance of Common Open Space and/or Recreation Land**:
>
> 1. All common open space and/or recreation land, facilities and property shall be owned by:
>
> a. The owners of the lots or dwelling units by means of a lot owners' association;
>
> b. An association which has as its principal purpose the conservation or preservation of land in essentially its natural condition; or
>
> c. The town.
>
> 2. Further subdivision of the common open space and/or recreation land and its use for other than non-commercial recreation, agriculture, forestry and/or conservation purposes, except for easements for underground utilities and subsurface wastewater disposal systems, shall be prohibited. Structures and buildings accessory to non-commercial recreational or conservation uses may be erected on the common land. When open space is to be owned by an entity other than the town, there shall be a conservation easement deeded to the town prohibiting future development.

Appellants argue that the Planning Board failed to enforce this LUO requirement by not requiring the Applicant to provide a deeded conservation easement prohibiting future development. Applicant states that the Development proposal does not include any common recreational open space and recreational land, that nothing in the LUO requires the establishment of permanently protected conservation land, and that the subdivision and site plan limit areas for

future development. Subdivision Finding # 7 states that "The development will not include land for recreation or open space development."

At the hearing, Applicant stated that this is not an open space subdivision (under Section 11.3 of the LUO) and that this is what the Planning Board was trying to say through Subdivision Finding # 7; some recreation area is proposed. The ZBA has questions about ownership and maintenance of common areas for parking and recreation, whether declarations of covenants and restrictions and homeowners association documents to provide for these common areas and facilities should be provided, what the lots and common areas and facilities are (depending upon the form of unit ownership), and whether lot setbacks are met. For these reasons, the ZBA remands the issue of compliance with Section 10.23 D.(2) to the Planning Board for clarification.

14. Section 11.2 C.(7) provides:

> **7. Long-Term Affordability Required for All Affordable Housing**: Long-term affordability must be assured for a period no less than twenty-five (25) years through deed restrictions or some other recorded instrument acceptable to the Town Attorney. The developer of affordable housing shall include provisions for preserving affordability, which shall be reviewed by the town attorney prior to Select Board and Planning Board review of the proposed long-term affordability agreement. A third party that has the expertise and resources to undertake and continue the task of assuring the long-term affordability of the housing may administer the affordability program. The following standards shall be applied to affordable owner occupied and rental housing:
>
> a. **Owner Occupied Residences:** When the affordable housing includes units to be sold as residences, the developer shall use legal mechanisms such as, but not limited to, restrictive covenants, ground leases, or "soft" mortgages to ensure that the residences are owner- occupied and that the initial and subsequent sales prices are affordable to target groups for a minimum of twenty-five (25) years. Preserving long-term affordability may mean restrictions on resale to qualified buyers, if available, granting a right of first refusal to the town, or the town's designee. Additional restrictions limiting the owner's ability to improve the property and/or to recoup some part of the costs of the improvements at resale are also to be considered.
>
> b. **Rental Units:** When an affordable housing includes rental units, provisions shall be made to ensure that the rental price of units remains affordable to the target groups for a minimum of twenty five (25) years.

Appellants argue that the Planning Board failed to establish provisions for assurance of affordability prior to granting final subdivision approval and did not enforce the requirement of providing deed restrictions. Applicant argues that the application materials demonstrate that the affordable units will be deed-restricted to ensure continued affordability, that the LUO does not require provision and review of deed restrictions prior to final approval, and that a proposed

Declaration of Covenants has been provided to the Town Attorney for review as to this requirement with the building permit application.

The ZBA understands that the Development includes some affordable housing units, whether as owned or rental units, but that the Planning Board made no findings as to how these units would continue to be affordable in compliance with Sections 11.2 C. 7 and 11.2 B., and so remands this issue to the Planning Board to address this omission. The Planning Board needs to have reviewed and approved a plan to keep any affordable housing units affordable.

15. Section 11.9 B.(1)(a,d,e) provide:

> **B. Standards and Requirements**:
>
> 1. If any of the open space, recreational or other facilities are to be reserved by the individual residential unit owners as common open space or facilities, each unit owner shall own a fractional interest in the common open space or facilities, and the developer shall be required prior to final subdivision plan approval to incorporate a homeowners' association consisting of the individual unit owners, which incorporation must comply with the following:
>
> a. Proposed covenants shall be placed in each deed from the developer to the individual unit owner, which deed covenants shall require mandatory membership in the homeowners' association, and shall set forth the unit owners' rights, interests, privileges and obligations in the association and in the common open space and/or facilities, including homeowners association's responsibility and obligation to maintain and/or monitor the common open space and/or any facilities.
>
> b. **…** .
>
> c. **…** .
>
> d. All such proposed deed covenants and other legal documents pertaining to the common open space and/or facilities shall be reviewed by the Town Attorney, and, if approved by the Planning Board, shall be recorded in the Cumberland County Registry of Deeds, and included or referred to in the deed to each unit.
>
> e. All legal documents required under this subsection must be submitted with the final subdivision plan application.

Appellants argue that the Planning Board failed to require deed covenants to require mandatory membership in a homeowners' association (HOA) and to set forth unit owners' rights, interests, privileges and obligations, including maintenance, monitoring, and financing obligations of the HOA. Appellants also argue that the Planning Board failed to obtain Town Attorney review of the deed covenants and other legal documents regarding the common land and facilities, and failed to require submittal of these documents prior to granting final subdivision. Applicant responds that Development does not propose common open space or facilities so that these provisions are not applicable, that condominium documents provided to the Planning Board

establish joint ownership of common elements, such as the wastewater and water systems, parking lot and sidewalks, and that the LUO does not require provision and review of these documents prior to final approval.

For the same reasons cited in issue 13 above, the ZBA remands the issue of compliance with 11.9 B.(1)(a,d,e) to the Planning Board for clarification.

IV. Decision

On February 1, 2023, the Zoning Board of Appeals voted _ to _ ( ) to: 1) act on the appeal by remanding the Planning Board's Decision to the Planning Board for the Planning Board to conduct a public hearing, take additional information and evidence, consider Decision amendments to address the issues noted above, and issue a new decision with findings of fact and conclusions of law, which new decision may affirm or reverse the Decision; 2) pass jurisdiction of and over the application to the Planning Board so that it may act on the remand as well as on any amendment that may be sought by Applicant; and 3) adopt this Notice of Decision and Findings of Fact and Conclusions of Law.

Dated: _____, 2023

By the Town of North Yarmouth Zoning Board of Appeals:

_____
Acting Chair/Secretary Kevin Robinson

_____
Thaddeus Day

_____
Norman Smith

_____
Jim Briggs

_____
Mike Mallory