

**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 April 26, 2023 decision (the “Decision”) on remand from the Zoning Board of Appeals regarding the Planning Board’s September 13, 2022 grant of Subdivision and Site Plan approval to 527 LLC’s (“Applicant”) application for Deacon Hayes Commons (the “Development”)

Procedural Background

Appellants are abutters to the proposed Development. They filed an appeal on September 19, 2022 (the “Initial Appeal”) from the Planning Board’s September 13, 2022 grant of Subdivision and Site Plan approval (the “Approval”) of Applicant’s application for the Development. The ZBA heard the Initial Appeal, and by decision dated February 1, 2023, remanded the Approval to the Planning Board for further proceedings on nine of the fifteen issues raised by Appellants.

The Planning Board considered the remanded issues at its April 12 and April 26, 2023 meetings, and on April 26, 2023, issued updated written Findings of Fact and Conclusions of Law affirming its approval of the Development (the “Decision”). On May 22, 2023, Appellants filed an appeal from the Planning Board’s April 26, 2023 Decision (the “Appeal”).

On June 26, 2023, the North Yarmouth Zoning Board of Appeals (“ZBA”) met to hear the Appeal. Present were: ZBA Secretary Kevin Robinson, Members Norman Smith, and Jim Briggs, and Alternate Member Mike Mallory.

At the beginning of the meeting, the ZBA addressed the absence of Chair Napolitano; ZBA Secretary Robinson became Acting Chair under the Bylaws and promoted Alternate Member Mallory to full Member status for this Appeal. The ZBA then heard from Sol Dostilio for the Appellants, from Applicant’s Attorney Kristin Collins, Esq., and from members of the public before closing the public hearing, beginning its deliberations, and voting on the three issues on appeal, continuing the remainder of action on the Appeal to July 13, 2023.

On July 13, 2023, the ZBA met to vote on the Appeal, to review the draft Notice of Decision, and to adopt the Notice of Decision. Member Thaddeus Day, who had been absent at the June 26, 2023 meeting, joined the proceeding, having reviewed the Planning Board Decision, the

Appeal, the Planning Board record, June 26, 2023 ZBA minutes and meeting video, and the draft Notice of Decision. After review of the draft Notice of Decision and deliberation, the ZBA voted on the second set of issues (landscaping, buffering, and screening) and continued a vote on the overall Appeal and Notice of Decision to July 26, 2023. On July 26, 2023, the ZBA voted on the overall Appeal and adopted this written 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 three arguments made by Appellants in this Appeal, 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 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 (the “Approval”).
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 an appeal from the Approval on September 19, 2022 (the “Initial Appeal”).
6. The ZBA heard the Initial Appeal, and by Decision dated February 1, 2023, the ZBA remanded the Approval to the Planning Board for further proceedings on nine of the fifteen issues raised by Appellants.
7. The Planning Board considered the remanded issues at its April 12 and April 26, 2023 meetings, and on April 26, 2023, issued its updated written Findings of Fact and Conclusions of Law affirming its approval of the Development (the “Decision”).
8. When the Planning Board considered the remanded issues and issued the Decision, it also removed from the original Planning Board Approval this bulleted sentence: “Tree clearing on the site will be minimal and limited to those trees that line Parsonage Road.” from Site Plan Review -Findings of Fact 1. Utilization of the Site.
9. On May 22, 2023, Appellants filed an appeal from the Planning Board Decision (the “Appeal”).

10. The ZBA heard the Appeal on June 26, 2023, continued action on the Appeal on July 13, 2023, and continued action on the Appeal to July 26, 2023.

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 May 22, 2023, within 30 days from the date of the April 26, 2023 Planning Board Decision, 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 Development due to potential loss of light, view and rural character of the neighborhood as a result of the Development; 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. Groundwater Impact. 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;

In the Initial Appeal, Appellants argued that the Planning Board had no indication from the Maine Department of Health and Human Services (“DHHS”) that the septic design for the Project met health and safety guidelines, that no groundwater studies were submitted, and that the lack of evidence to support the Planning Board’s decision on this standard put the Dostilios and others who rely on public water and on the aquifer at risk.

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

The ZBA determined that there was 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, the ZBA also stated that 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 ZBA therefore remanded the matter to the Planning Board for it to conclude whether the application met the groundwater standard and to state whether Mr. Cenci's report supported that conclusion.

On remand, the Planning Board accepted additional documents and comment from DHHS, from the public, and from licensed septic system designer Mark Cenci. In particular, the Planning Board made additional Site Plan and Subdivision findings on remand that at least one week before its March 14, 2023 meeting, it had received the following letters and plans:

- A letter from DHHS Sr. Hydrologist Alex L. Pugh dated November 29, 2022 approving the minimum lot size waiver for the Development's engineered septic system, stating that the Development's proposed system "is not considered to be likely to lower the quality of or otherwise pose a threat to any lake, pond, stream, river, or tidal waters, any underground water supply, or to the public health, safety, and general welfare."
- A letter from DHHS Sr. Hydrologist Alex L. Pugh dated November 29, 2022 approving the Development's engineered subsurface wastewater system design.
- A February 2023 letter from the Yarmouth Water District stating that the proposed engineered subsurface wastewater system design will provide adequate protection to the aquifer.
- An amended Final Plan of the Development.
- A November 29, 2022 memorandum by Mark Cenci Geologic, Inc. with additional hydrogeological and location summary of data, stating that the nitrogen plume analysis meets the Maine Subsurface Wastewater Disposal Rules and the State minimum lot size law.

Based on these additional documents (which the Planning Board summarized in revised Site Plan Findings of Fact 2 and revised Subdivision Findings of Fact 5 and 8), the Planning Board revised Subdivision Conclusion of Law 22 to state that:

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, including the quality and quantity of ground water within the Groundwater Protection Overlay District, as evidenced by the November 29, 2022 Hydrogeologic Assessment of Mark Cenci, the November 29, 2022 letters from DHHS and the February 2023 letter from the Yarmouth Water District. The memo regarding the additional hydrogeological and location data by Mark Cenci Geologic, Inc. that states the nitrogen plume analysis meet the subsurface wastewater disposal rules and the minimum lot size law.

In this Appeal, Appellants argue with regard to Remand Issue #4 that the Planning Board should have made its decision based upon site-specific groundwater level and elevation data from installed piezometers, that the data presented was “incomplete and inconsistent,” and that without this additional site-specific data, the Applicant failed to present sufficient evidence that the engineered subsurface wastewater system design will meet the health and safety requirements in the Groundwater Overlay District. Appellants offer their criticisms of the November 29, 2022 Mark Cenci Geologic, Inc. memorandum/report: a change in water flow direction, an alleged failure to meet setbacks, and an alleged failure to use a “mounded gradient” in system calculations, which they argue would have shown a 1 foot separation between the bottom of the system chamber and the groundwater table. They further argue that DHHS should have had that site-specific groundwater level and elevation information when it issued its approval of the Development’s engineered subsurface wastewater system design, and that the Planning Board should have requested this same information. Appellants therefore request the ZBA to remand the issue of groundwater septic system impact back to the Planning Board and argue that the ZBA or the Planning Board should request peer review of the final septic system plans and submission of updated applications by Applicant.

In conducting its appellate review, the ZBA’s role is limited to determining whether the Planning Board erred as a matter of law, whether its factual findings are supported by substantial evidence in the record below, and whether its decision was arbitrary or capricious. If the Planning Board’s findings are supported by any competent evidence in the record, then the ZBA will uphold those findings: “Substantial evidence exists if there is any competent evidence in the record to support a decision.” *Fitanides v. City of Saco*, 2004 ME 32, ¶23, 843 A.2d 8, 15, *citing York v. Town of Ogunquit*, 2001 ME 53, ¶14, 769 A.2d 172, 178. Stated another way, as in Article VI, Section 6.3(5)(b) of the LUO, “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 concludes that:

- the November 29, 2022 letter from DHHS Sr. Hydrologist Alex L. Pugh approving the minimum lot size waiver for the Development’s engineered septic system, stating that the Development’s proposed system “is not considered to be likely to lower the quality of or otherwise pose a threat to any lake, pond, stream, river, or tidal waters, any underground water supply, or to the public health, safety, and general welfare.”;
- the November 29, 2022 letter from Mr. Pugh approving the Development’s engineered subsurface wastewater system design.
- the February 2023 letter from the Yarmouth Water District stating that the proposed engineered subsurface wastewater system design will provide adequate protection to the aquifer;
- the amended Final Plan of the Development; and

- the November 29, 2022 memorandum by Mark Cenci Geologic, Inc. with additional hydrogeological and location summary of data, stating that the nitrogen plume analysis meets the Maine Subsurface Wastewater Disposal Rules and the State minimum lot size law,

constitute substantial and competent evidence supporting the Planning Board’s decision under LUO Section 5.12 B(12) that “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;”. These documents demonstrate that Mr. Cenci had used an assumed 2% gradient when measuring the predicted nitrate plume, had determined that the nitrate plume length was longer (67’), and had located the plume in a more southerly location that met setbacks. He therefore concluded that the engineered septic system for the Development met the Maine Subsurface Wastewater Disposal Rules, the State Minimum Lot Size Law, and the Primary Drinking Water Standards at the Property boundary.

The April 23, 2023 email from Mr. Pugh to Appellants and to Atty. Collins addresses each of the major concerns cited by Appellants:

- test pits -- Mr. Cenci had convinced DHHS the soils in the new disposal field area were very similar, so that new test pits were not needed;
- setbacks -- “As the plans were presented to us the design met the setbacks.”;
- groundwater direction -- Mr. Pugh characterized Mr. Cenci’s groundwater directions as “iterative” and noted “I understand that he used measured groundwater elevations to revise his Nitrate study and groundwater direction.”; and
- lack of groundwater elevation data -- although acknowledging that it “was a last-minute oversight” on his part to have received the results of Mr. Cenci’s study and not the elevations, Mr. Pugh stated “there are situations where a regulator must rely on the professional certification of the geologist or engineer.”

Finally on this issue, while some members of the ZBA may have preferred that the Planning Board had requested peer review of the Applicant’s engineered septic system plan, the decision whether to request such review is entrusted to the discretion of the Planning Board under the Zoning Ordinance, and its decision not to do so is not contrary to the Ordinance or to the facts presented.

Given this competent evidence in the record, the ZBA cannot say that the Planning Board’s April 26, 2023 Decision was contrary to specific provisions of the Ordinance or contrary to the facts presented to the Planning Board.” Therefore, on motion by Mr. Smith, seconded by Acting Chair Robinson, the ZBA voted 3-0-1 (Mallory abstaining) by roll call vote to affirm the Planning Board’s decision on this issue.

2. and 3. Parking Lot Landscaping, Buffering, and Screening. Appellants also argue that the ZBA should hear their appeal from the Planning Board’s September 13, 2022 Approval decision regarding landscaping, buffering, and screening of the parking lot because trees had

been removed after that Approval decision had been issued, and because on remand, the Planning Board removed a finding regarding tree clearing from that original Planning Board Approval. Because the issues under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) and Applicant's arguments are related, these issues are addressed together.

The Appellants did raise the issue of landscaping, buffering and screening of the parking lot under LUO Section 10.34 C (2) and (4) and under LUO Section 10.14 B.(2)(b) and (c) in their appeal from the Planning Board's September 13, 2022 Approval decision, and the ZBA in its February 1, 2023 decision determined there was substantial evidence to support the Planning Board's findings and conclusions in its September 13, 2022 Approval decision that the Applicant had met these LUO standards. Therefore, these Planning Board findings and conclusions were not remanded by the ZBA to the Planning Board.

According to the Planning Board's April 12, 2023 meeting Minutes, the Appellants recognized that issues of parking lot landscaping, buffering, and screening under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) had not been remanded to the Planning Board when they attempted to raise it at that meeting. Those Minutes also show that when the Appellants attempted to raise these issues, the Planning Board's attorney advised that the ZBA had not remanded these issues, and the Planning Board Chair and members agreed.

In this Appeal, Appellants argue that they are able to raise these issues now: 1) because of the removal of seven trees along their property line with the Applicant, which happened after the September 13, 2022 Approval (which Approval contained a finding under Site Plan Findings of Fact 1 (Site Utilization) that "Tree clearing on the site will be minimal and limited to those trees that line Parsonage Road."), and 2) because on remand, the Planning Board removed this finding and it does not appear in the Decision.

The Planning Board determined in its September 13, 2022 Approval that the Development met the parking lot landscaping, buffering, and screening requirements under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) based upon the Site and Demolition Plan, dated February 2022 and revised June 28, 2022, which showed "An 8-foot tall vinyl stockade fence ... along the northwestern property line to screen from abutting properties." The Planning Board Site Plan Finding 8 ("Landscaping, Buffers and Trees") in the Approval and in the Decision recites this, and no mention is made of the trees along the boundary line of the Property as being part of the parking lot landscaping, buffering, and screening. The ZBA relied upon this finding at pages 10 and 11 of its February 1, 2023 decision when it affirmed the Planning Board's Approval on these issues.

The ZBA had not remanded the issues of parking lot landscaping, buffering, and screening to the Planning Board, and so the Planning Board's removal of this finding regarding the tree clearing from the original Approval appears to have exceeded the scope of the ZBA's February 1, 2023 decision and remand.

However, the Planning Board's removal of the finding raises questions for the ZBA regarding the continued validity and enforceability of the tree clearing finding in the Approval and the impact, if any, of removal of the tree clearing finding upon the Planning Board's findings under

LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) that the Development met the parking lot landscaping, buffering, and screening requirements under the LUO.

At the June 26, 2023 meeting, after voting upon and reconsidering a motion to deny the appeal, the ZBA voted 2-1-1 (Smith opposing, Mallory abstaining) by roll call vote to grant the Appeal and overturn the Planning Board Decision on these two provisions. Because the vote was less than a majority of the total number of regular members of the ZBA (five), under Section 5 of the ZBA's Bylaws, the motion failed.

Because the landscaping, buffering, and screening motion at the June 26, 2023 meeting had failed, at the July 13, 2023 meeting, the ZBA again addressed the Appeal from LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c). After a motion to deny the Appeal on the issues of landscaping, buffering, and screening of the parking lot under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) failed by a vote of 2-3 (Briggs, Robinson, and Mallory opposed), the ZBA voted on unanimous roll call votes:

- 1) To remand the April 26, 2023 Planning Board Decision back to the Planning Board for further findings of fact to explain the basis for the omission of the sentence "Tree clearing on the site will be minimal and limited to those trees that line Parsonage Road." from Site Plan Review Finding of Fact 1 of the September 13, 2022 Approval, and the impact of that omission on landscaping, buffering, and screening of the parking lot under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c), and
- 2) That all other parts of the Appeal relating to landscaping, buffering, and screening of the parking lot under LUO Sections 10.34 C (2) and (4) and 10.14 B.(2)(b) and (c) are not appropriately before the ZBA because these were not remanded to the Planning Board by the ZBA previously in its February 1, 2023 Initial Decision.

IV. Decision

On July 26, 2023, the Zoning Board of Appeals voted by roll call vote _ to _ () to:

- 1) Deny the Appeal in part and to grant the Appeal in part, remanding the matter to the Planning Board for the limited purposes stated above, and
- 2) Adopt this Notice of Decision and Findings of Fact and Conclusions of Law.

Dated: July 26, 2023

By the Town of North Yarmouth Zoning Board of Appeals:

Chair Thaddeus Day

Secretary Kevin Robinson

Norman Smith

Jim Briggs

Mike Mallory

Appeal notice: Parties aggrieved by this decision may appeal it to Superior Court within 45 days from the date of the vote on the decision pursuant to 30-A M.R.S.A. §§ 2691 and 4353 and Rule 80B of the Maine Rules of Civil Procedure. Any request for reconsideration of this decision must be filed with the Town within 10 days of the date of the vote on this decision.