

Cassandra Bacon

From: Ben Smith <bsmith@northstar-planning.com>
Sent: Tuesday, August 8, 2023 10:01 AM
To: Benjamin Scipione
Subject: Fwd: FW: Planning Board Process Concerns

Good morning, Ben,

You have asked me to weigh in on Natalie's opinion from July 18, below.

We agree on the first point on the Board's ability to consider a waiver from Section 10.3. This type of inconsistency has been addressed in the past by considering - and at least occasionally granting - such waivers. There is no obligation for the Board to approve/disapprove a waiver request like this but our opinion is applicants should have the ability to make their case for a waiver request and for that request to be acted on by the Board. We also agree that the ordinance needs to be clarified as noted.

We also agree on the second point, as wetland setbacks are only applicable to post development wetlands. In other words, wetland alterations permitted through Army Corps of Engineers during the course of the project work can change the shape of a given wetland or fill it in entirely. In this project's case, if the ACoE permits a wetland to be completely filled, there are no setbacks required.

Thanks,
Ben

----- Forwarded message -----

From: Diane Barnes <dbarnes@northyarmouth.org>
Date: Tue, Jul 18, 2023 at 2:27 PM
Subject: FW: Planning Board Process Concerns
To: Ben Smith <bsmith@northstar-planning.com>, Benjamin Scipione <bscipione@northyarmouth.org>
Cc: Amy Haile <ahaile@northyarmouth.org>, Chris Byers <cbyers@branchrenewables.com>

Hi everyone,

Please see below for the legal opinion from Jensen Baird. I hope this answers your questions.

Thank you,

Diane

Diane Barnes

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From: Natalie L. Burns <nburns@jensenbaird.com>

Sent: Tuesday, July 18, 2023 2:20 PM

To: Diane Barnes <dbarnes@northyarmouth.org>

Subject: Planning Board Process Concerns

Hi Diane,

Mark asked me to get back to you on this question. As I read the Ordinance, Section 10.3 covers natural resource areas not regulated under the Residential Shoreland District and the Natural Resource Protection District Standards. The RSD and NRPD regulate specific identified bodies of water and wetlands. In addition those sections regulate tributary streams to those identified water bodies. Sec. 10.3 regulates those other resources defined in Subsection B. According to the information that you have provided, this situation falls within the definitions in Sec. 10.3.

While Section 4.3 of the Ordinance addresses waivers of submission requirements for site plan, it does not address waivers of standards. This differs from the subdivision requirements, which can be waived. This is an issue that should be addressed in future versions of the Ordinance since small fills of this type are very common and are not always associated with subdivision development. If a subdivider asked for a waiver to allow a fill, the waiver could be granted, including on this property. However, if a subsequent site plan on the same subdivided property sought approval for a

small amount of fill, then it arguably could not get a permit. Land use ordinances are supposed to be internally consistent and not have this type of differing result.

Regardless of the above, the answer here is relatively simple due to the specific facts presented. The Army Corps of Engineers is reviewing the fill permit and the proposed fill does not meet the jurisdictional requirements for a NRPA permit. The Town's Ordinance does not establish any standards for filling of wetlands and so the Town does not have jurisdiction over this issue. If the ACE grants its approval, there will no longer be a wetland that triggers setbacks or other requirements of Section 10.3. The Town cannot prohibit the issuance of a permit that meets the requirements of ACE, or DEP when applicable. If ACE has not granted its approval when the Planning Board next takes up this issue, the Board may condition any approval upon the issuance of the ACE permit.

Thanks,

Natalie

Natalie L. Burns, Esq.
Attorney



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