Agenda
Bar Harbor Appeals Board
Tuesday, March 10, 2020 — 7:00 PM
Council Chambers, Municipal Building — 93 Cottage Street

I. CALL TO ORDER

II. ADOPTION OF THE AGENDA

III. EXCUSED ABSENCES

IV. APPROVAL OF MINUTES

a. February 11, 2020

V. REGULAR BUSINESS

a. Reconsideration Request: AB-2019-01 — Administrative Appeal

Applicant: Elizabeth Mills Trustee of the Collier Family Trust

Project Location: The property is located at 25 West Street Extension, Bar Harbor, Tax Map 103, Lots 048-000 and 049-000 within the Village Residential zoning district

Application: The appellee (BHAPTS, LLC), under §125-106 of the Bar Harbor Land Use Ordinance, requests that the Appeals Board meet to reconsider Finding #2 in its written decision dated February 13, 2020, said finding having been made at a public hearing and meeting held two days earlier. The February 11, 2020 hearing and meeting was held on AB-2019-01, an appeal filed by Elizbeth Mills (Trustee of the Collier Family Trust) which challenged the Planning Board's 2019 approval of a Planned Unit Development application (PUD-2017-02) from the appellee (BHAPTS, LLC) for the property located at 25 West Street.

VI. OTHER BUSINESS

VII. ADJOURNMENT

BHAPTS, LLC

Specific Request for Reconsideration as to BOA Finding #2/Application

INDEX

P. Andrew Hamilton
Direct Dial 207-992-4332
ahamilton@eatonpeabody.com

Eaton Peabody
Attorneys at Law

80 Exchange Street, P.O. Box 1210
Bangor, Maine 04402-1210
Phone 207-947-0111 Fax 207-942-3040
www.eatonpeabody.com

February 20, 2020

Bar Harbor Board of Appeals
Attention: Ellen Dohmen, Chair
Town of Bar Harbor
93 Cottage Street
Bar Harbor, Me 04609-1400

Re: Mills v. BHAPTS, LLC – Specific Request for Reconsideration as to BOA Finding # 2/ Application No. AB-2019-01

Dear Chair Dohmen and Members of the Board:

Enclosed is BHAPTS, LLC's specific Request for Reconsideration and Memorandum of Law (with Supporting Reasons for Reconsideration) as to Finding 2 (only) in the BOA's vote on February 11 and as further stated in its written decision of February 13, 2020. There are Exhibits A (BOA Decision of February 13, 2020) and B (graphic illustrating lot-related dimensional requirements in 125-20(B) to the Memorandum of Law.

Altogether, these are the respectful Reconsideration Request of BHAPTS being filed in accordance with §125-106 of the Bar Harbor Land Use Ordinance. The filing fee associated with this motion is being paid by credit card at the time of this filing; BHAPTS and the Planning Office will each have the original receipt and copy of a receipt for the payment.

We thank you for your consideration and look forward to the Board's careful review.

Very truly yours,

P. Andrew Hamilton

PAH/rah
Enclosure

cc: Daniel Pileggi, Esq.
Arthur J. Greif, Esq.
Eben Salvatore
Perry Moore

TOWN OF BAR HARBOR
BOARD OF APPEALS

Application No. AB-2019-01

REQUEST FOR RECONSIDERATION

BHAPTS, Inc. ("BHAPTS") hereby submits this written request for reconsideration pursuant to §125-106 of the Bar Harbor Land Use Ordinance ("LUO") with regard to the Board of Appeals' ("BOA" or "the Board") Finding # 2 and the supporting legal conclusions of the BOA at its hearing on February 11, 2020 and in its written decision related to this statement: "The proposed project contains at least one nonconforming structure, *as the structures do not meet the dimensional standards set forth in LUO section 125-20(B)(10)*, and the Planning Board's contrary finding[1] is clearly contrary to that section." (emphasis supplied).

This BOA interpretation in its "Finding # 2" is wrong for all of the reasons cited in this Request, but fundamentally because the standard at § 125-20(B)(10) for "area per family" is *only* a lot-related dimensional requirement per express provisions of the LUO and the BOA failed to conduct a holistic review of all relevant LUO provisions that would have supported a proper BOA conclusion and decision as to this aspect.[2] This aspect of the BOA decision must be corrected and reconsideration is the only route to do so timely before the Planning Board proceedings on remand.

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[1] The BOA's written decision containing Finding # 2 and dated February 13, 2020 does not identify which of the Planning Board's finding is the "contrary finding." The *only* finding of the Planning Board that addresses nonconformities is Section 4(a) of the Planning Board's findings and conclusions of law in its January 16, 2019 Decision is Section 4(a), which simply states:

> The Board finds that the development meets the parcel size and eligibility standards. The Board found that this is a legally nonconforming lot and the applicant is legally grandfathered for 16 dwelling units ..."

Notably, the Board did ***not*** make a finding that the individual structures permitted and sited on the parcel after approval in 1986 for 33 years were or were nonconforming under § 125-55 of the LUO. Rather, the Planning Board only stated, as quoted above, that the ***number*** of *dwelling units* were lawfully grandfathered.

[2] BHAPTS timely raised all relevant LUO provisions that this Board unfortunately overlooked in its deliberations by isolating only on the definitions of "nonconforming structure" and "dimensional requirements" and the area per family requirement in §125-20(B)(10) during its intentionally brief deliberations on this narrow but vitally important issue to BHAPTS and the Town. Additionally, both standard of review and ordinance interpretation

Specifically, the Board ignored the express provisions of LUO § 125-56 and several definitions in § 125-109 (including the definitions of "lot," "lot area," and "nonconforming lot") in seeking to redefine "area per family" as a structure-related dimensional requirement. The Board also ignored two provisions of the LUO that specifically reference the "area per family" dimensional standard as a "nonconforming lot" standard. Instead, the Board rewrote the LUO by treating the dimensional requirement at § 125-20(B)(10) as though it is somehow a structure-related standard (and it cannot be) in support of its surprise finding – that "*the structures do not meet the dimensional standards set forth in LUO section 125-20(B)(10)*" and therefore there is "at least one nonconforming structure" on the property.

This is particularly surprising in that ALL structures on the nonconforming lot were permitted by the Bar Harbor Planning Board in 1986, and it is only the "*lot*" (made subject to an increased "area per family" requirement of 10,000 square feet in 2010) that was thereby made a lawfully "*nonconforming lot*" in 2010. As noted in Footnote 1 above, that status was cited in Section 4(a) on page 5 of the Planning Board decision of January 16, 2019. However, although the Planning Board determined that the *number* of dwelling units (specifically 16) was "lawfully grandfathered," the Planning Board did not determine that structures on the Subject Property were subject to § 125-20(B(10) and thereby converted into "nonconforming structures."

In misidentifying that there was a "contrary finding" by the Planning Board,[3] this Board erred twice: (1) first, as part of its appellate review authority in misidentifying a "contrary finding" by the Planning Board (since Section 4(a) of the Planning Board Decision correctly interprets §

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principles were detailed on pages 4-6 of the April 2, 2019 Brief; the proper LUO provisions were provided in Exhibit A to the Brief.

[3] Under § 125-102 and § 125-103, while the Board of Appeals is entitled to review findings by the Planning Board to determine whether those findings are "clearly contrary" to the LUO, the Planning Board did NOT make and never could have made a finding that "at least one of" or even all of the structures at 25 West Street Extension were "nonconforming structures."

125-20(B)(10) as making the *lot* nonconforming); and then (2) in making erroneous determinations that "the proposed project contains at least one nonconforming structure" and "the structures do not meet the dimensional standards in § 125-20(B)(10)." Since§ 125-20(B)(10) is not and cannot be a structure-related dimensional requirement, the legal determinations in Finding # 2 of the BOA Decision are erroneous and must be corrected.

In rendering this portion of its decision during the February 11, 2020 hearing, this Board's interpretive rulings are based solely on the definitions of the term "nonconforming structures" and the term "dimensional requirements" in § 125-109 and then the dimensional requirement at § 125-20(B)(10). On February 11, 2020, the Board did not discuss how this legal determination squares with either § 125-56 or the specific definition of "nonconforming lot" set forth in § 125-109 or the "area per family" standard in other zoning districts where it is stated as the "minimum lot area per family" standard (which clearly it must be and is).

Treating the "minimum area per family" standard as only a "lot" standard makes holistic sense of each and all of the relevant LUO provisions, as detailed in the incorporated Memorandum of Law and Reasons for Reconsideration. But treating the Minimum Area Per Family standard as a structure-related standard makes no sense, will do harm to the uniform administration and enforcement of the LUO, and, if left uncorrected, will cause blight if misapplied to permitted and conforming structures to make them into nonconforming structures. If structure placement and configuration are inappropriately placed in the LUO § 125-55 straight jacket because the area per family is applied to both lots ***and*** individual structures, property owners will not be able to expand or even reconfigure old and outdated structures.

So, in all of these respects, this Board's legal conclusion as to "nonconforming structures" at 25 West Street Extension: (1) is based on an incorrect interpretation of § 125-20(B)(10) as a

"structure" related dimensional standard, and (2) ignores the plain language of § 125-56 and the LUO's definition of "nonconforming lot" in § 125-109 in expressly providing that "area per family" is a *lot* standard . This specific Finding # 2 the Board of Appeals rendered on February 11, 2020 in haste—that structures at 25 West Street Extension were and are "nonconforming structures"—cannot stand and so this Request for Reconsideration is being brought to correct this aspect of the Board of Appeals decision before the Planning Board is asked to take up this Board's directions as to other aspects on remand from this Board.

If this erroneous Finding # 2 is not addressed as part of this respectful request for Reconsideration, both BHAPTS and the Town will be adversely affected by this incorrect interpretation of the LUO as further detailed in the attached Memorandum of Law and Reasons for Reconsideration (which are incorporated into this written Request for Reconsideration). Appellee BHAPTS respectfully requests that the BOA correct its Finding # 2 through a motion to reverse its Finding # 2 and find that there are no nonconforming structures present on the nonconforming lot at 25 West Street Extension.

Appellee BHAPTS respectfully files this written Request for Reconsideration and Memorandum of Law (with Exhibits A and B) within 10 days of the BOA's February 11, 2020 hearing at which the BOA voted and rendered its Decision; BHAPTS has also paid the requisite Reconsideration Fee.

Dated this 20th day of February, 2020.

P. Andrew Hamilton, Esq.
Patrick W. Lyons, Esq.
EATON PEABODY
80 Exchange Street
P.O. Box 1210
Bangor, Maine 04402-1210
Attorneys for BHAPTS, LLC

Eaton Peabody
Attorneys at Law

Memorandum of Law

To: Bar Harbor Board of Appeals

From: Andrew Hamilton and Patrick Lyons, Eaton Peabody

Date: February 20, 2020

Re: AB-2019-01 (Request for Reconsideration of BOA Finding # 2)

This Memorandum of Law and associated Reasons for Reconsideration are incorporated into the BHAPTS Request for Reconsideration filed by Appellee BHAPTS within ten (10) days of the February 11, 2020 hearing at which the Board of Appeals ("BOA" or "this Board") voted and rendered its decision as to Finding #2. That Finding #2 is memorialized in a written Decision dated February 13, 2020, a copy of which BOA Decision is attached as **Exhibit A** to this Memorandum.

ISSUES FOR RECONSIDERATION

Did the Board err in interpreting § 125-20(B)(10) as imposing a structure-related (rather than a lot-related) dimensional requirement such that all structures that failed to meet the dimensional standard in § 125-20(B)(10) were somehow converted to "nonconforming structures"?

OVERVIEW OF REASONS FOR RECONSIDERATION

Under Maine law – 30-A M.R.S. § 4353(2)(A) – the Board has the authority to interpret the LUO. However, when the LUO specifically defines a term, the BOA cannot redefine the term or ignore it. *B & K Realty, LLC. v. Town of Ogunquit*, No. AP-04-58, 2005 WL 375489, at *1 (Me. Super. Jan. 13, 2005); *Malonson v. Town of Berwick*, 2004 ME 96, ¶ 9, 853 A.2d 224 ("We will not redefine the term simply because the Town now finds its definition inconvenient.").

The LUO specifically defines "LOT, NONCONFORMING" in § 125-109 to include "area per family" as a standard related to the "lot" (and not a "structure") in order to determine nonconformity. Coherent with that definition, § 125-56 of the LUO uses any one or all of seven (7) dimensional standards related to lot area to test whether a "lot" is a nonconforming lot. The dimensional standard for "area per family" is, by definition in § 125-109 and by clear terms and usage in § 125-56, only a lot-related standard. This is further made clear in the usage of the "area per family" standard in virtually every zoning district set out in the LUO.

Nothing in the LUO, whether by definition, usage or context, supports "area per family" as a structure-related standard. By isolating on the use of the term "dimensional requirements" in § 125-20 – which addresses spatial requirements for structures and lots – and by failing to consider the definition of the term "nonconforming lot" – the BOA ignored the more specifically applicable definition of nonconforming lot in the LUO and instead imported its own definition into the term "area per family" as a structure-related term. That is contrary to the applicable text

of the LUO and contrary to well established rules of ordinance interpretation. *See Malonson v. Town of Berwick*, 2004 ME 96, ¶ 9, 853 A.2d 224; *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 12, 153 A.3d 113 ("When we interpret an ordinance, we look first to the plain meaning of its language, and if the meaning of the ordinance is clear, 'we need not look beyond the words themselves.'") (*quoting Duffy v. Town of Berwick*, 2013 ME 105, ¶ 23, 82 A.3d 148).

The BOA decision at Finding #2 erroneously ignores § 125-56 and treats all "dimensional requirements" (including area per family) as structure-related requirements. In doing so, the Board conflates the lot-related dimensional requirements in § 125-20(B) and § 125-56 with the structure-related dimensional requirements as though they were the same. The interpretation that all dimensional requirements apply to both lots and structures is not supported by the language of the LUO. Some apply to lots, and some apply to structures. The concept that all apply to both also yields an absurd result – a lot cannot have height and a structure is neither subject to a minimum lot size nor area per family.

As the graphic attached as **Exhibit B** to this Memorandum of Law illustrates, all the Board needed to do is to differentiate (applying the plain language of § 125-56) the lot-related dimensional requirements separate from the structure-related dimensional requirements in § 125-(20)(B). As the graphic illustrates, the lot-related standards derived by applying the relevant lot-related standards from § 125-56 to the lot-related terms in § 125-20(B)(10) allows for the proper separation between the lot-related and the *structure-related* dimensional

standards; *the structure-related standards are all the rest of the standards of § 125-20(B)(10) that are left over after applying the lot-related standards from § 125-56).* This graphic illustrates the reasonable and logical differentiation between the two types of dimensional standards.

This graphic also illustrates how a holistic interpretation of § 125-20(B)(10) in tandem with § 125-56 would have resulted in a correct net conclusion as to how the dimensional standards generally can be reduced by taking out the lot-related dimensional standards and netting out to the remaining structure-related standards in § 125-20(B). In other words, the logic of the Ordinance is, in order to understand which dimensional standards apply to structures, one takes the entire list of dimensional standards in § 125-20(B) and deducts from that larger list those standards that § 125-56 and the definition of "non-conforming lot" in § 125-109 say are lot-related, and what you have left are the structure-related standards.

Once time is spent in looking at the two types of dimensional standards, one can then differentiate which standard is which under § 125-20(B) by applying (1) the definitions in § 125-109 of "nonconforming structure" and "nonconforming lot" and (2) the related nonconformity provisions in § 125-55 for structures and § 125-56 for lots.

It must be that only changes to structure-related dimensional standards after construction of a structure can convert an existing conforming structure into a "nonconforming structure". Practically speaking and as a matter of law, one cannot apply a single change to a "lot" related standard to convert all structures on that lot

into "nonconforming structures." This error in making a change to any lot-related dimensional requirement into a conversion of existing conforming structures into "nonconforming structures" will work absurd results and hardships for built properties all over the Town.

Under the LUO, the term "structure" broadly includes "anything built or erected" on, above, or under the land or water. That includes buildings or "roofed structures," but it also includes decks, patios, parking spaces, driveways, and sheds. If any property that is subjected to a new and tighter lot-related dimensional standard is now treated as subjecting each and all of these structures to treatment as "nonconforming structures," that could shut down all further improvement on the property. Consider the addition of a bay window. Consider the otherwise permissible minor addition to a building structure or parking structure on a nonconforming lot. In effect it would place those structures in a strait jacket and subject them to blight, since they will not draw investment for improvements that are part of redevelopment.

Practically, interpreting the LUO to bar otherwise permitted expansions or otherwise permissible reconfigurations of "structures" creates several absurd results and unintended consequences. First, if this erroneous precedent is finally established and uniformly applied, the case would apply to structures on any properties that have been made nonconforming lots by a change in any lot-related dimensional requirement. Second, that logical extension would include any change to any one or more of the 7 lot-related standards cited in § 125-56 to convert

previously conforming structures to also being treated as "nonconforming" without any change in the structure-related standard for the relevant zoning district. This cannot be and has led and will continue to lead to absurd results.

EXAMPLES OF THE ABSURD RESULTS AROUND TOWN

Here are some practical examples in Bar Harbor. Consider the Ferry Terminal, which is nonconforming as to lot coverage (a lot-related standard). If this new precedent were to be applied to the Ferry Terminal, those structures would need now to be treated as non-conforming due to lot coverage considerations. And, as was incorrectly argued in the Golden Anchor matter, parking areas at the Ferry Terminal would become nonconforming and could not be enlarged. This is an absurd result that could not have been intended by the drafters of the LUO.

On Forest Street, where there are lot-related nonconformities for upwards of 30 lots and so, for those home owners, their houses are nonconforming and could not be changed (including placement of bay windows, porches, parking spaces, etc). Similar considerations would face homeowners with otherwise conforming structures (until this new rule is applied) on Wescott and Davis Streets. And now structures on any lot that is nonconforming in Town would see any and all structures on that lot become nonconforming structures. Again, this is an absurd result that the drafter of LUO did not intend based on the plain language and usage of terms defined in LUO.

The structures (building and parking) at 64 Mount Desert Street would see otherwise conforming structures become nonconforming due to nonconformity as to

lot size and/or lot coverage, again lot-related dimensional requirement. Again, this would be an absurd result which the drafters of the LUO could not have intended.

Similarly, for any lot where the development on a lot greatly exceeds the "floor area ratio" (another lot-related dimensional requirement per § 125-56), the otherwise conforming structures would become nonconforming structures under the logic of Finding # 2 and could never be reconfigured or expanded under the rule the BOA has announced in Finding #2 of the BOA Decision. These absurd results suggest but a few of the reasons why the BOA Finding # 2 must be reconsidered and deleted or changed.

Attaching floor area ratio (FAR) to a structure also has profound implications in parts of Bar Harbor where redevelopment is likely. In-fill development is happening but could be stymied with restrictions created by converting existing conforming structures into non-conforming structures by attaching a lot standard dimension requirement to the structures themselves. An analysis of the vicinity of the intersection of School Street and Pleasant Street using Assessor's data indicates that about 45% of the structures would be made non-conforming. *See Figure 1, below.*

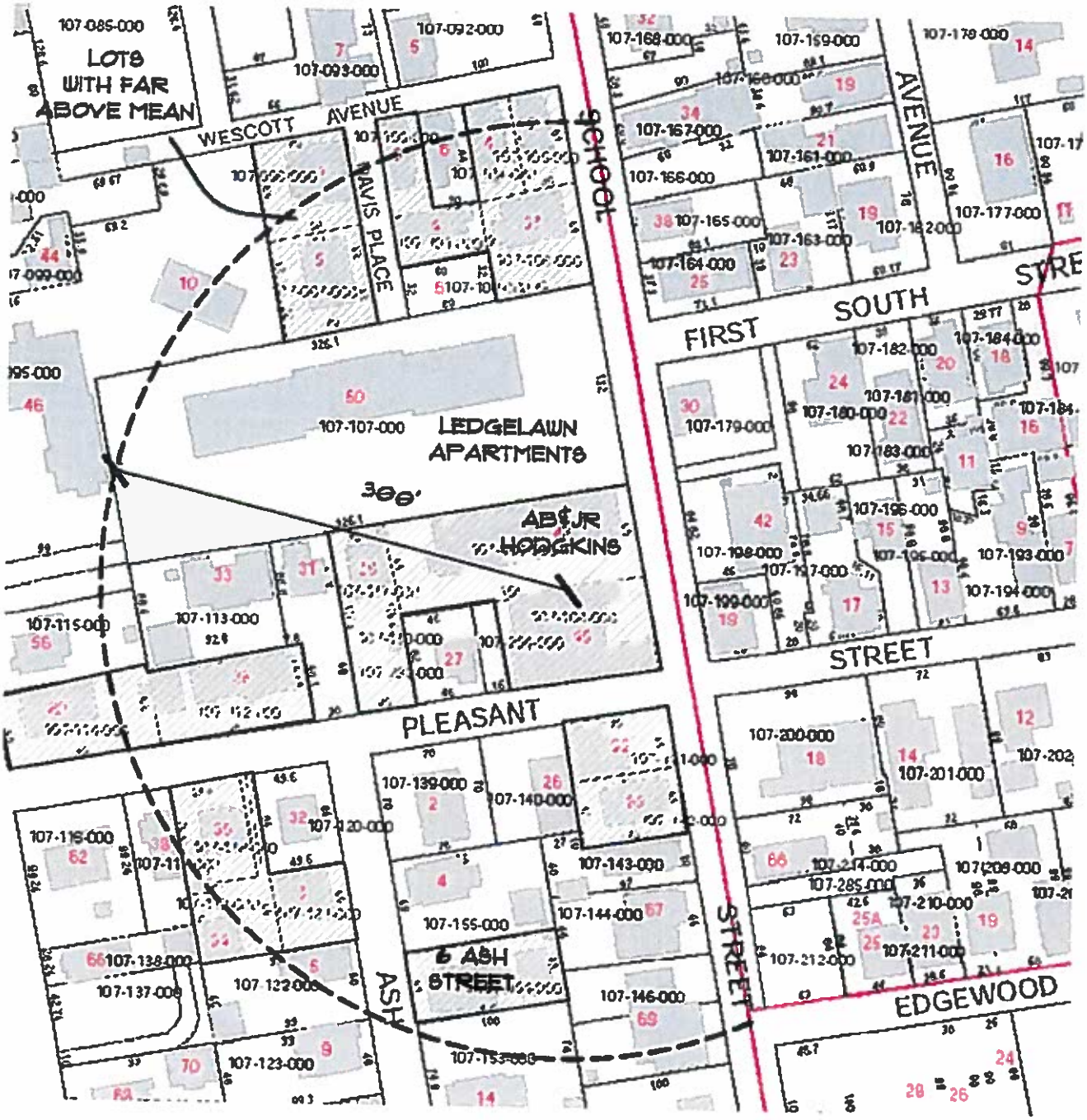

Figure 1 - Vicinity of the intersection of School Street and Pleasant Street

While Ledgelawn Apartments has a large lot/small floor area ratio (FAR=.445), the method of calculating floor area ratio statistics would create a mean of .699 and a median of .651 for most buildings within 300' of that site. This would make several properties, including the large AB&JR Hodgkins buildings (FAR of 1.143 and 1.23)

as well as modest dwellings on small lots like 6 Ash Street (FAR= .728) non-conforming. This is just one example, but the potential for buildings with FAR above .667 to be made non-conforming is very likely given that most of the Downtown Residential District has outliers where there are both large and vacant lots and modest structures on even average-sized lots scattered throughout the District.

The fair and uniform administration of the LUO mandates that the incorrect or erroneous interpretation of the LUO in Finding # 2 be corrected before the application of incorrect decisions is fairly and uniformly applied as a precedent in this and other cases.

For these and all other reasons set forth in this Request, we respectfully ask that the Board reconsider Finding # 2 that determined that individual structures at 25 Street Extension are now converted to "nonconforming structures" by virtue of the 2010 change in area per family under Finding # 2 of the BOA Decision.

PROCEDURAL SETTING

For context, it is helpful to return to the procedural setting under which the BOA made its determination that the structures at 25 West Street Extension were "nonconforming." These factors suggest that the Board hurried the determination in Finding # 2 and that there are also procedural reasons now for the Board to reconsider:

1. Limited argument by the parties (where Ms. Mills' counsel surprised all in the proceedings by arguing that the development was *not* a "nonconforming use" (and we agree) but instead a "nonconforming structure" (and we vehemently stated that we did *not* agree). The Board

required that counsel for BHAPTS address ALL aspects of the nonconformities, including a very involved and detailed history of the property development and all relevant LUO provisions, as detailed specifically on all of four pages from pages 15 to 18 of the BHAPTS April 2, 2019 Brief, within a short span of only seven (7) minutes of argument. Then, BHAPTS counsel had no opportunity to respond to new but incorrect arguments raised during rebuttal by Ms. Mills' counsel and had no chance to respond to the Board's truncated reasoning during deliberations after argument was closed.

2. In response to a direct question to the Bar Harbor Code Enforcement Officer ("CEO"), she plainly advised that "area per family" is a "lot" related standard and not a "structure" related dimensional standard and, in the ensuing deliberations, the Board unfortunately did not have the time to take its cue from the opposing direction given in the respectful responses to requests for advice from the CEO and the Board's legal counsel; and

3. Notwithstanding repeated and appropriate procedural requests by BHAPTS counsel for the Board to reconsider what has become Finding 2 on February 11, the Board would not entertain the request of BHAPTS counsel. No further opportunity for the Board to reconsider its decision was available until after the Board proceeded to render its decision on February 11 and memorialize its written decision on February 13 and so BHAPTS must pursue this Request for Reconsideration under LUO § 125-106 as to Finding # 2.

REASONS AND SUPPORTING LEGAL ARGUMENT FOR RECONSIDERATION

I. This " Structure Nonconformity" issue was not properly before the BOA for its consideration.

The Board did address several facets of the "nonconformities" provisions in Article IV of the LUO that were before the Planning Board. The BOA appeared ready to address fully its reasoning that the lot is a "nonconforming lot" under the LUO (and that was a finding at Section 4(a) of the Planning Board's January 16, 2019 decision) and that the development on the nonconforming lot was not a

"nonconforming use" (since the residential uses were permitted and conforming in 1986 and are now today under § 125-20). But the Board seemed both surprised and treated the argument by counsel for Mills as one of first impression at the February 11, 2020 hearing when Attorney Gilbert argued that the structures were "nonconforming structures." In the logic and plain text of the LUO, it is only the "lot" that is a "nonconforming lot"; not one of the "structures" at 25 West Street Extension is a "nonconforming structure."

In combing the January 16, 2019 decision of the Planning Board and the transcripts of the December 2018 and January 2019 meetings, it is clear that the Planning Board did NOT view Ms. Mills' argument as to "nonconforming structures" as credible and did NOT make a determination contrary to LUO in Section 4(a) of its January 16, 2019 Decision. As this Board was neither conducting an original Variance Appeal proceeding nor an Administrative Appeal of a CEO Decision, in its review of an Administrative Appeal of the written January 16, 2019 Planning Board decision, the Board lacks jurisdiction under § 125-102 and §125-103 to determine that the Planning Board made a finding as to the nonconformity of structures that it could treat as a finding specifically subject to the "clearly contrary" appellate review standard. As such, the Board should withdraw its determination under § 125-20(B)(10) that all structures on the lot are "nonconforming" and that the Planning Board made a "contrary finding."

Notwithstanding the fact that this question was not properly before the Board, if the Board wants to conduct a careful review of whether the structures are

conforming permitted structures or "nonconforming structures," then the Board should review and address in a revised determination ALL relevant LUO provisions, and not just those that were raised late by counsel for Ms. Mills and briefly considered in a truncated review of this important matter under § 125-20(B)(10) using only the limited definitions that the Board considered ("nonconforming structures" and "dimensional requirements"). It is not possible to reach a logical interpretation of 125-20(B)(10) if the Board were to align the LUO direction in both 125-56 and in the definition of "nonconforming structure" in § 125-109 with the term "area per family" in 125-20(B)(10).

The Board should have also required that Ms. Mills meet the burden of proof and persuasion by specifically pointing to those provisions of the LUO that clearly demonstrate that the Planning Board incorrectly addressed the "nonconforming structure" question. Attorney Gilbert improperly turned the burden on BHAPTS to show that something in the Ordinance or the law compelled a legal determination that the structures were not "nonconforming." Although BHAPTS would have taken the time and opportunity to show why the structures cannot be treated as "nonconforming," that was not its burden and, even worse, BHAPTS was not afforded the time or opportunity to do so as it would have been entitled to do if BHAPTS indeed had the burden on this issue. Instead, the Board did not give BHAPTS as Appellee the opportunity to respond fully and completely to Ms. Mills' claims and did not require that Ms. Mills' counsel cite to a specific LUO provision or a Maine Law Court decision that compelled that result. This process has thus

worked an unnecessary injustice to BHAPTS that can only be corrected by allowing a hearing on the this Request for Reconsideration

II. All structures at 25 West Street Extension conform with the LUO.

With more time at the February 11, 2020 hearing, the Board would have allowed time for a holistic and comprehensive review of the "area per family" standard in the LUO. In doing so, BHAPTS asserts the Board would have concluded that the "area per family" standard is strictly a dimensional standard for a "lot" under the LUO and not applicable to a "structure." As the Maine Law Court has frequently ruled, ordinances must be construed to give every section of the ordinance a proper role and meaning and not construed in an isolated and inconsistent manner that fails to give meaning to all relevant provisions. *See Oliver v. City of Rockland*, 1998 ME 88, ¶ 8, 710 A.2d 905; *Town of Union v. Strong*, 681 A.2d 14, 18 (Me. 1996) ("The contested language must be construed reasonably and with regard to both the ordinance's specific object and its general structure.").

Dimensional standards refer to both lots and structures (see definition of "Dimensional Requirements" in § 125-10: "Numerical standards relating to spatial relationships, including but not limited to setback, lot area, shore frontage and height."). When taken as a whole, a proper interpretation of the "area per family" dimensional standard in § 125-20(10) will conclude that it is applicable only to a "lot" under the LUO; it just takes some care and time to reach this proper conclusion.

a. **The terms "structure" and "lot" are defined in the LUO.**

The term "structure" has a broad definition in § 125-109 and covers "anything constructed or erected, the use of which requires location on, above or below the surface of the land . . . ."

By contrast, the terms "lot" and "lot area" relate to land areas. "Lot" is defined in § 125-109 as "a contiguous land area . . . with ascertainable boundaries established by deed or some other instrument of record." The term "lot area" includes "the area contained within the boundary lines of a lot" excluding: (a) land below water or in a wetland; (b) land on sustained slopes greater than 20%; (c) land in a conservation easement for activities no more intensive than passive recreation; and (d) areas under roads serving more than two lots. *Id.*

Generally, "structures" include all human improvements to land whereas "lots" are land areas.

b. Dimensional standards in § 125-20 apply to "structures" <u>and</u> "lots."

The dimensional standards for the Village Residential District are found at §125-20(B).[1] From the text of usage of the requirements in § 125-20(B), it is clear

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[1]

B. Dimensional standards.
(1) Minimum lot size: 10,000 square feet with sewers; 40,000 square feet without sewers.
(2) Minimum road frontage and lot width: 100 feet.
(3) Minimum front setback for structures: 20 feet.
(4) Minimum side setback for principal structures: 10 feet.
(5) Minimum side setback for accessory, nonresidential structures: five feet.
(6) Minimum rear setback for principal structures: 10 feet.
(7) Minimum rear setback for accessory, nonresidential structures: five feet.
(8) Maximum lot coverage: 50% with sewers; 25% without sewers.

that the dimensional standards at § 125-20(B)(1) (Minimum lot size), § 125-20(B)(2) (Minimum road frontage and lot width), § 125-20(B)(8) (Maximum lot coverage), and § 125-B(10) (Minimum area per family) are all related to a "lot." This specific set of lot-related standards is applicable in all Districts as detailed below.

By contrast, all other provisions in § 125-20(B) are all structure-related dimensional standards, including setbacks and height. Again, this specific set of structure-related standards (for height and setbacks) is distinct and applies in all Districts to structures, and not to lots – dimensional standards refer to both lots and structures.

There is a further cue for interpretation of the "area per family" standard in § 125-20(B)(10) as related to a "lot," since the requirement is that there be "10,000 square feet with sewers; or 20,000 square feet without sewers." That is not a requirement for a structure. Another provision in § 125-20(B) tells us why—in § 125-20(B)(1), the requirement for the "Minimum lot size" is that there be "10,000 square feet with sewers; 40,000 square feet without sewers." Both the parallel text, usage and lot area requirements between § 125-20(B)(1) and § 125-20(B)(10) show that both are dimensional requirements related to the "lot" area.

It is vital to distinguish between dimensional requirements related to lot area and dimensional requirements related to structure dimensions, as only a failure to conform to the latter (a structure-related dimensional standard) can be a basis for

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(9) Maximum height: 40 feet.
(10) Minimum area per family: 10,000 square feet with sewers; or 20,000 square feet without sewers.

§ 125-20(B).

concluding that a structure is a "nonconforming structure." BHAPTS requests the BOA confirm this against the plain text requirements of § 125-55 (Nonconforming structures) and § 125-56 (Nonconforming lots), as well as a careful review at a hearing on the Request for Reconsideration with the Bar Harbor Code Enforcement Officer and/or the Board's attorney.

c. An "area per family" dimensional standard applies to lots in almost all zoning districts.

Similar cues are present for "Minimum area per family" being a dimensional requirement related only to lot area are present in virtually of the zoning Districts in the LUO. With few exceptions,[2] virtually all of the zoning Districts from § 125-17 to and including § 125-51.1, establish, in sub-section B, the dimensional standard for "Minimum area per family" that are applicable to lots in those Districts. Several Districts apply a "Minimum area per family" requirement at 40,000 square feet, including § 125-18, § 125-23, § 125-27, § 125-28, § 125-29, and § 125-39, or at or above 80,000 square feet, including § 125-33 and § 125-34, with one District at § 125-41 establishing both the Minimum lot size and the Minimum area per family at 5 acres. Notably, the "Minimum area per family" requirement often matches or, at the very least, mirrors the "Minimum lot size" requirement.

Moreover, two of the Districts specifically refer to this standard as the "Minimum Lot Area per Family" standard. *See § 125-21 and § 125-21.1.* That is

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[2] These Districts do not apply a minimum area per family standard: § 125-21.2 (Downtown Village Transitional), § 125-36 (Resource Protection), § 125-42 (Scientific Research), and § 125-49.3 (Shoreland Maritimes Activities District).

simply what the LUO intends for all "minimum area for family" standards, whether the word "lot" is added or not.

The plain language of the LUO and common sense establishes that a "Minimum lot size" in the Town's zoning districts of 1 acre, 2 acres or even 5 acres, for example, is not a structure-related dimensional standard but is only a land or lot area standard. The same plain language of the LUO and common sense dictates that "Minimum area per family" is a lot area standard.

d. "Nonconforming lot" definitions in § 125-109 and § 125-56 make clear it is not a structure related standard.

The two specific provisions in the LUO that remove any doubt that the "area per family" requirement in § 125-20(B) is strictly and solely a lot-related dimensional requirement are § 125-56 and the definition of "Lot, Nonconforming" in § 125-109.

Under § 125-56, nonconforming lots are:

> A single parcel of land, the legal description or dimensions of which are recorded on a document or map on file at the Hancock County Registry of Deeds, which lawfully existed immediately prior to the enactment of this chapter or any subsequent amendment and which, as a result of the enactment of this chapter or any amendment, does not meet the lot size, minimum area per family, road frontage, floor area ratio, lot coverage, shore frontage, or lot width requirements, or all seven, in the district in which it is located . . . .

In § 125-56, the LUO specifically details seven (7) dimensional standards as relevant standards for determining that a "lot" is either conforming or nonconforming:

1. lot size,
2. *minimum area per family*,

3. road frontage,
4. floor area ratio,
5. lot coverage,
6. shore frontage, or
7. lot width.

In § 125-109, the LUO definition of the term "LOT, NONCONFORMING" is:

> A single lot of record which, at the effective date of adoption or amendment of this chapter does not comply with the minimum lot size, *minimum area per family*, minimum road frontage, minimum shore frontage, minimum lot width or maximum lot coverage requirements of the district in which it is located.

As to "minimum area per family," there is no inconsistency in the treatment of that dimensional standard in either § 125-56 or § 125-109 – "minimum area per family" is a "lot" dimensional standard.

Again, when the LUO specifically defines a term, the BOA cannot redefine the term or ignore it. *B & K Realty, LLC. v. Town of Ogunquit*, No. AP-04-58, 2005 WL 375489, at *1 (Me. Super. Jan. 13, 2005); *Malonson v. Town of Berwick*, 2004 ME 96, ¶ 9, 853 A.2d 224 ("We will not redefine the term simply because the Town now finds its definition inconvenient."). The BOA mistakenly adopted its own interpretation of "area per family" as a structure-related dimensional standard where the definition of "nonconforming lot" in the LUO specifically says it is only a lot-related standard.

Finally, please note that nothing in the definition of "STRUCTURE, NONCONFORMING" in § 125-109 or, more specifically, in § 125-55 (Nonconforming structures) treats "area per family" as a structure-related standard. There is no support in the LUO or Maine case law that would support an

interpretation that pursuant to § 125-20(B)(10), the structures on the Property at 25 West Street Extension are "nonconforming structures." This limited Finding # 2 aspect of the decision that the BOA rendered on February 11, 2020 should be reconsidered and either (1) withdrawn or eliminated from its decision, or (2) modified to state that the Planning Board decision at Section 4(a) is not clearly contrary to LUO § 125-20(B)(10).

CONCLUSION

For these and all other reasons set forth in this Request for Reconsideration, we respectfully ask that the Board of Appeals reconsider the aspect of the Decision that it rendered on February 11, 2020 that determined that each and all of the individual structures at 25 West Street Extension are now "nonconforming structures." Appellee BHAPTS respectfully requests that the Board of Appeals correct its Finding # 2 through a motion to reverse its Finding # 2 and find that there are no nonconforming structures present on the nonconforming lot at 25 West Street Extension.

EXHIBIT A

TOWN OF BAR HARBOR
Appeals Board
93 Cottage Street, Suite I
Bar Harbor, Maine 04603-1400
Tel. 207-288-3329 Fax 207-288-3032

Decision

Public Hearing: AB-2019-01 - Administrative Appeal

Applicant: Elizabeth Mills, Trustee of the Collier Family Trust

Project Location: The property is located at 25 West Street Extension, Bar Harbor, Tax Map 103, Lots 048-000 and 049-000, within the Bar Harbor Village Residential zoning district.

Application: The applicant requests that the Board of Appeals hold a public hearing for an administrative appeal of the Planning Board's February 6, 2019 written decision, pertaining to a Subdivision and Site Plan for a Planned Unit Development application known as PUD-2017-02 pursuant to section 125-103 of the Bar Harbor Land Use Ordinance.

Under authority of section 125-103 of the Bar Harbor Land Use Ordinance (LUO), the Board of Appeals, at its February 11, 2020 meeting, by a motion duly made and seconded, vacated a portion of the Planning Board decision, and remanded the application to the Planning Board, based upon the below noted findings:

Findings

1. The record supports the Planning Board's finding that the project is a lawful nonconforming lot, pursuant to LUO section 125-56.

2. The proposed project contains at least one nonconforming structure, as the structures do not meet the dimensional standards set forth in LUO section 125-20(B)(10), and the Planning Board's contrary finding is clearly contrary to that section.

3. The record supports the Planning Board's finding, per LUO section 125-69(S)(1)(a), that the project is residential, does not include transient accommodations, and is a permitted use per LUO section 125-69(S)(2)(a).

4. The record supports the Planning Board's finding, per LUO section 125-109, that the project residents meet the section's definition of "family".

5. The record supports the Planning Board's finding that the project meets applicable PUD-V standards for open space and buffering, in accord with LUO sections 125-69(S)(1)(a)(1) and 125-69(S)(5).

6. Based upon evidence before the Planning Board that the project will mitigate adverse conditions affecting historic gardens on an adjacent property, the record supports its finding that LUO section 125-67(X) standards have been met.

7. Based upon the project's 85,523+/- square-foot lot size, the Planning Board record does not support its finding that the base development density provisions of LUO section 125-69(S)(6)(a)(1) allow 9 units, and that finding is clearly contrary to that section.

8. Based upon the Planning Board's incorrect calculation of base development density, the Planning Board's determination of maximum allowable units is clearly contrary to LUO section 125-69(S)(6)(a)(3).

9. Based upon the Planning Board's incorrect calculation of base development density, the Planning Board's determination of the number of required affordable housing units is clearly contrary to LUO section 125-69(S)(6)(b).

10. The record supports the Planning Board's determination of appropriate rear setback, and distance between buildings, and its decision is not clearly contrary to LUO sections 125-64 and 125-67(B)(3).

11. The record supports the Planning Board's determination that the affordable housing proposal, aside from the number of required affordable housing units, meets the requirements of LUO section 125-69(R)(3)(a).

Decision

Based upon the findings and conclusions above, the Board of Appeals voted to vacate the Planning Board decision, and remand the matter to the Planning Board in accord with LUO section 125-103(D)(1)(I), limited to consideration of base development density, maximum allowable units, and required affordable housing units only, consistent with the Board's findings above. The Board of Appeals denied the appeal as to all other issues raised.

Any interested party is entitled to request a reconsideration of this decision by the Board of Appeals within 10 days from the hearing date when the decision was made, and/or appeal to the Maine Superior Court within 45 days of the same hearing date.

Signed as witness to the proceedings:

Ellen L. Dohmen, Chair

Date: February 13, 2020

EXHIBIT B

§ 125-20 Village Residential.

A. Purpose. The Village Residential District encompasses the well-established residential neighborhoods that surround the traditional downtown area of Bar Harbor. It consists mostly of single-family homes, but also includes condominium, multifamily, and nonintensive commercial uses. New development, redevelopment, and infill development shall respect and reflect standards to assure the uses are compatible with any nearby properties.

B. Dimensional standards.

(1) Minimum lot size: 10,000 square feet with sewers, 40,000 square feet without sewers.

(2) Minimum road frontage and lot width: 100 feet.

(3) Minimum front setback for structures: 20 feet.

(4) Minimum side setback for principal structures: 10 feet.

(5) Minimum side setback for accessory, nonresidential structures: five feet.

(6) Minimum rear setback for principal structures: 10 feet.

(7) Minimum rear setback for accessory, nonresidential structures: five feet.

(8) Maximum lot coverage: 50% with sewers, 25% without sewers.

(9) Maximum height: 40 feet.

(10) Minimum area per family: 10,000 square feet with sewers; or 20,000 square feet without sewers.

§ 125-55 Nonconforming structures.

§ 125-56 Nonconforming lots.

[Amended 11-5-1991, 5-4-1992, 5-2-1994; 6-13-2006; 11-7-2006; 11-3-2009]

A single parcel of land, the legal description or dimensions of which are recorded on a document or map on file at the Hancock County Registry of Deeds, which lawfully existed immediately prior to the enactment of this chapter or any subsequent amendment and which, as a result of the enactment of this chapter or any amendment, does not meet the lot size, minimum area per family, road frontage, floor area ratio, lot coverage, shore frontage, or lot width requirements, or all seven, in the district in which it is located, and which does not adjoin another vacant parcel in common ownership, may be built upon without the need for a variance, but only subject to the following:

GILBERT & GREIF, P.A.
ATTORNEYS AT LAW
YOUR LAW PARTNER℠
www.yourlawpartner.com
e-mail: info@yourlawpartner.com

CHARLES E. GILBERT, III
ARTHUR J. GREIF
ERIK M. P. BLACK

PEGGY B. GILBERT, OF COUNSEL

82 COLUMBIA STREET
P.O. BOX 2339
BANGOR, ME 04402-2339

MAINE TOLL FREE
1-800-427-2293
(207) 947-2223

TELECOPIER/FAX
(207) 941-9871

February 26, 2020

Bar Harbor Board of Appeals
ATTN: Ellen Dohmen, Chair
Town of Bar Harbor
93 Cottage Street
Bar Harbor, ME 04609-1400

RE: Mills v. BHAPTS, LLC - Specific Request for Reconsideration as to BOA Finding #2/ Application No. AB-2019-01

Dear Chair Dohmen and Members of the Board,

Both the LUO and your procedural rules are silent as to whether an Appellant may respond to a request for re-consideration filed by an Appellee. However, I note that your procedural rules allow reconsideration only on the basis of newly discovered evidence or recent changes in the law. Those rules expressly prohibit "restating arguments" that had already been "rejected by the Board." BHAPTS, LLC's 32 page submission is an elaborate restatement of an argument that has already been rejected, not a reference to newly discovered evidence or recent changes in the law.

Sincerely,

Arthur J. Greif
ajg@yourlawpartner.com

AJG/mek
CC: Andrew Hamilton, Esq.

Affiliate Office
Mtre Gloriane Blais, Lawyer
PO Box 260, 4473A, Laval
Lac-Mégantic, Québec
CANADA G6B 2S6
(819) 583-2776

P. Andrew Hamilton
Direct Dial 207-992-4332
ahamilton@eatonpeabody.com

Eaton Peabody
Attorneys at Law

80 Exchange Street, P.O. Box 1210
Bangor, Maine 04402-1210
Phone 207-947-0111 Fax 207-942-3040
www.eatonpeabody.com

February 28, 2020

Ellen Dohmen, Chair
Bar Harbor Board of Appeals
Town of Bar Harbor
93 Cottage Street
Bar Harbor, ME 04609-1400

RE: Specific Request for Reconsideration as to BOA Finding #2/Application No. AB-2019-01

Dear Chair Dohmen and Members of the Board,

This letter is in response to Attorney Greif's letter dated February 26, 2020.

While the Board's Rules of Procedure establish certain grounds for reconsideration, the Board has authority to entertain requests for reconsideration for reasons beyond those listed in the Rules of Procedure. Indeed, the plain language of 30-A M.R.S. § 2691(3)(F) affords the Board broad discretion to reconsider a prior decision, including initiating reconsideration on the Board's own volition. *Toomey v. Town of Frye Island*, 2008 ME 44, ¶¶ 9-10, 943 A.2d 563.

BHAPTS's narrow request for reconsideration (limited to one finding by the Board as to nonconforming structures) is not simply a restatement of arguments or positions raised before the Board, in part since BHAPTS had an insufficient and incomplete opportunity to address this significant "new twist" on the issue. Rather, BHAPTS extraordinary and intentionally narrow request seeks to reconsider a surprising finding by the Board and address new factual evidentiary issues presented in the Request for Reconsideration (including how the nonconformity standards of the LUO apply to structures on this Property and several other locations in Bar Harbor). If the finding to treat the area per family standard as a structure-related standard stands – which is clearly contrary to the plain language of the LUO – it will do harm to the uniform administration and enforcement of the LUO and cause blight and substantial hardship for many property owners in Bar Harbor if misapplied to permitted and conforming structures.

It is the Board's discretion to entertain the limited Request for Reconsideration. BHAPTS respectfully requests the Chair and the Board exercise its discretion to take up this Request.

Very truly yours,

P. Andrew Hamilton

cc: Arthur J. Greif
Daniel Pileggi