Minutes
Bar Harbor Board of Appeals
Tuesday, February 11, 2020 — 4:00 PM
Council Chambers, Bar Harbor Municipal Building — 93 Cottage Street

Chairperson Ellen Dohmen, Vice-chair Roger Samuel, Secretary Robert Webber, Member Kay Stevens-Rosa and Associate Member Michael Siklosi were all present. Board attorney Daniel Pileggi was present and sat with the board during the meeting. The fifth regular member seat on the board is presently vacant, and as such Associate Member Siklosi served as a voting member.

Town staff present were Planning Director Michele Gagnon, Code Enforcement Officer (CEO) Angela Chamberlain, Deputy CEO Patrick Lessard and Assistant Planner Steven Fuller.

Attorney Charles Gilbert, law partner of Attorney Arthur Greif, was present to represent the applicant. Present on behalf of the appellee, BHAPTS, LLC, were Attorney Andrew Hamilton, Perry Moore, Eben Salvatore. Attorney Patrick Lyons was also present in the audience for the BHAPTS, LLC team.

I. CALL TO ORDER

Chairperson Ellen Dohmen called the meeting to order at 4:01 PM.

II. ADOPTION OF THE AGENDA

Vice-chair Roger Samuel moved to adopt the agenda. Member Siklosi seconded the motion. The motion passed unanimously (5-0).

III. EXCUSED ABSENCES

None.

IV. APPROVAL OF THE MINUTES

a. June 13, 2019

Vice-chair Samuel moved to adopt the minutes of June 13, 2019. Member Stevens-Rosa seconded the motion. The motion passed unanimously (5-0).

V. REGULAR BUSINESS

a. **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 Village Residential zoning district

Application: The applicant requests that the Board of Appeals hold a public hearing for an administrative appeal of the Bar Harbor 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 (a PUD-V) pursuant to §125-103 of the Bar Harbor Land Use Ordinance. [*Note: this appeal is being reheard by the board pursuant to an order from a Superior Court justice dated November 27, 2019*].

Member Steven-Rosa disclosed that she had done work for the applicant, Ms. Mills, years ago. Recently, Ms. Mills group brought to her office's attention that Ms. Mills had an outstanding account balance. Member Stevens-Rosa said that until then she had been unaware of this. She is now aware of it. She said that she wanted to make it known to the board. She said she did not feel that this would impact her ability to review the matter. The work Member Stevens-Rosa had done was around 2011, she said.

Member Siklosi moved that Member Steven-Rosa did not have a conflict of interest given when the work was done and the billing was so many years ago. Vice-chair Samuel seconded the motion. The motion passed unanimously (5-0).

Chairperson Dohmen asked if any of the board members felt that having read the judges' ruling would make them biased toward the case.

Attorney Daniel Pileggi, representing the Board of Appeals, advised the Board that LUO §125-103 D. (1) (B) tells the Board what is the record that they are allowed to review in determining this appeal, which he said is limited to transcripts, exhibits that were presented to the Planning Board, and the Planning Board's decision and findings. Everything else that gets presented by the parties are arguments or illustrative aids, said Attorney Pileggi. "Notice that the Superior Court Judgement is not part of the record that you're allowed to use," he said.

Chairperson Dohmen suggested that the board go through Attorney Charles Gilbert's points one at a time.

Attorney Gilbert explained that he was there on behalf of his colleague, Attorney Arthur Greif. He distributed copies of an outline of what was submitted in text format to the board; Chairperson Dohmen thanked him for the summary.

Attorney Pileggi explained that the appellant has the burden of proof and that the board might want to consider letting them present their case as they see fit. "It's his burden," he said.

Attorney Gilbert began with "general observations" about the process. In the municipal permitting zoning arena there are potentially four levels of review that can occur; five if you include the code enforcement officer, he said.

Cases often start at the Planning Board level, he explained. Some make it to the Board of Appeals, and then there are two additional levels in the judicial system: Superior Court and the Maine Supreme Judicial Court.

This case made it through three of these levels, said Attorney Gilbert, but did not make it to the Supreme Court. The Superior Court made a decision to send it back to the board, he said. The

Superior Court's judgement is not final, he explained, but it is something that the appellant asks the board to consider, because it is a legal ruling.

This is not a de-novo review, said Attorney Gilbert. That means that the board is reviewing the decisions for errors of law. "We've identified … eleven or so issues of law that we think were part of the Planning Board decision," he said.

Attorney Gilbert said that it is "important to understand" that the original applicant, Bar Harbor Apartments, had the original burden to prove that the application complied with all applicable standards. If for any of the 11 issues, he said, the Board of Appeals is convinced that the Planning Board made an error of law in interpreting the ordinance, it means that the application must fail because it will have not met its burden at that level.

The appellant bears the burden of convincing the Board of Appeals that an error was made, said Attorney Gilbert. Those errors are errors of law, he continued, which related to the question that Attorney Hamilton (on behalf of BHAPTS, LLC) raised in his initial brief regarding how the board looks at and interprets the ordinance.

Attorney Hamilton suggested that the board apply a deferential standard to give the Planning Board's interpretation some deference so that you cannot easily overturn it, said Attorney Gilbert.

In some respects, Attorney Gilbert said, Attorney Hamilton's statement is accurate, especially when the board is reviewing facts that are found by the Planning Board. But in this case, Attorney Gilbert continued, the Board of Appeals is reviewing questions of law.

Attorney Gilbert said that if the Board of Appeals gives deference, it assumes that they interpreted the ordinance in a certain way. "One of the rules of interpretation of ordinance is that you have to follow the plain language of the ordinance," he said. "You do not have a right to twist what is plain language when it is used."

Another rule that would apply, said Attorney Gilbert, relates to non-conformity. "The policy of the law is to eliminate non-conformity, not to allow it to continue or allow it to grow, something that we say is what happened in this case."

"That's important," he continued, "Because that puts Mr. Hamilton's view of how you interpret the ordinance at odds with us." The Board has said it must interpret the ordinance to eliminate nonconformities, because this is the policy of the law from the State of Maine.

This is a non-conformity issue, said Attorney Gilbert. He said that he differed, respectfully, from Attorney Pileggi and contended that the Board could and should consider legal rulings of the judge because this was not the factual record but the law and the Board of Appeals cannot ignore that even though that ruling is not final (as the case was remanded to the Board of Appeals). Had the matter gone a step further, the Board would be bound to consider the state's ruling, said Attorney Gilbert.

Attorney Gilbert said that he did not contend that the court ruling was binding but that the Board of Appeals must consider what the Superior Court said and, if the Board finds it persuasive, to follow it.

Attorney Pileggi explained that the role of the Board is constrained by the Land Use Ordinance and noted that Section 125-103 D. (1) (L) says "very clearly" that the only burden the Board has to determine is "Whether the record on appeal shows that the decision appealed is clearly contrary to the specific provisions of this chapter."

Attorney Pileggi explained that the Board of Appeals has to defer to the Planning Board on factual finding and must determine whether they have legal findings regarding the way the ordinance is applied and whether it was applied clearly contrary to its language. This is an appellate hearing, he noted.

Attorney Hamilton introduced his team (Mr. Salvatore, Mr. Moore, and his colleague Attorney Lyons). He said that while it is true that Justice Ann M. Murray had the record, "She never reached the merits and she should not have" since the only two issues before her were the procedural dismissal by the Board of Appeals and the question of whether a motion for stay should be granted.

In that sense, any law of the case principles of the type that Attorney Greif had previously raised, said Attorney Hamilton, cannot be applied to a decision that has never fully reached the merits and then never resulted in a final decision on the question to be decided. So, he said, the court decision is not in a final state where the decision is to be accorded deference.

Attorney Hamilton said his team also disagreed that the court's decision could be treated as persuasive or that it could be treated as the law of the case, since the Board of Appeals applies different standards. Those standards, said Attorney Hamilton, are whether the Planning Board's decision, in any of its respects, was clearly contrary to specific terms of the ordinance being called into question. There were two issues that Attorney Greif presented before the Planning Board, said Attorney Hamilton; he noted that Attorney Greif (through Attorney Gilbert) was now presenting 11. Attorney Hamilton said his team did not find any of the 11 reasons persuasive.

Attorney Hamilton said that there were 16 market-rate dwelling units on the property permitted by right in 1986 for Acadia Housing Associates by the Planning Board with no appeals by the neighbors. For 33 years those units existed immediately adjacent to Ms. Mills' property, said Attorney Hamilton.

The Planning Board recognized this in page 5 of its decision, where it found that the project meets the parcel size and eligibility standards. The Planning Board found that this is a legally non-conforming lot. In this case there is no non-conforming use, said Attorney Hamilton.

There is no non-conforming structure, said Attorney Hamilton. "There's strictly a non-conforming lot," he said. In 1986 when the permit was granted for 16 market-rate units the property was subject to a 5,000 square-feet per-family area requirement and in 2010 this requirement was increased to 10,000 square-feet per-family area.

"The ordinance made the lot lawfully legally non-conforming," said Attorney Hamilton. "Acadia Housing Associates didn't change anything." When the property was sold, he said, to Bar Harbor Apartments, the new owner continued to use it for 16 units. Those units stand on the property today.

Attorney Hamilton referred to Permittee Exhibit C and read the exchange between the Planning Board and Attorney Edmond Bearor. There are 16 units on the lot now; the discussion is about the two additional units, which would be affordable housing and subject to the affordable housing requirements.

Attorney Hamilton then referred to Exhibit 15, the final plan dated January 6, 2019 that was developed by Mr. Salvatore in conversation with Ms. Mills. Attorney Hamilton noted that influence by Ms. Mills is shown in the final plan and discussed the configuration, elevation, setbacks and requirements for the buildings.

Attorney Hamilton then directed the Board of Appeals to footnote 4 on page 11 of the Appellee's brief at the front of the permittee's notebook and noted Ms. Mills language and how she objected to the nature of the people who are workforce employees and who would be housed in those units. Attorney Hamilton then referenced a response by Kendra Rand at a later Planning Board meeting, where she said (in part), "I don't think we should prioritize any one demographic over another."

Attorney Hamilton then closed by saying that he would ask the board to take the same care that the Planning Board did and not engage in exclusionary zoning, adding that he believed it was inappropriate under the Bar Harbor Land Use Ordinance to do that.

Chairperson Dohmen suggested the Board go through the 11 points submitted to the board by attorneys Greif and Gilbert, in the Supplemental Brief dated January 4, 2020.

Attorney Gilbert began by addressing the issues of non-grandfathered or non-conformity, and said he believed the Planning Board and Attorney Hamilton were fundamentally wrong in their contention that the lot is non-conforming.

Attorney Gilbert argued that this was a case of a non-conforming structure because the lot is 85,000 square feet. It is not a non-buildable lot, he said, but one that would "support a lot of different activities under a lot of different uses within your [Land Use] Ordinance."

What makes it non-conforming, Attorney Gilbert continued, is that when it was built, there were 16 units in structures broken down into 5,000 square-feet-per-family units which, at the time, was perfectly legal. What makes it non-conforming is that today's standard is 10,000 square-feet per unit, said Attorney Gilbert, because the ordinance was changed.

That configuration of units could not be built under today's ordinance, Attorney Gilbert acknowledged, but it already existed. "And that's the classic grandfathering."

The structures are non-conforming because the 5,000 square-foot units are too small for today's standards, Attorney Gilbert said. The policy of the ordinance in Article 4 and the policy of the law of the State of Maine is to eliminate non-conforming uses over time to the maximum extent possible, he said.

The Planning Board made a "fundamental error," said Attorney Gilbert. "We are starting with 16 units, grandfathered, non-conforming, and we want to go to 18. That is the wrong direction. The direction is to go down. That is what the law requires, that's what the policy requires."

Attorney Gilbert noted that the 10,000 square-feet standard is a dimensional standard in the ordinance. "You don't get anywhere by tearing down the buildings that are there and building new buildings," he said. "You still can't increase the non-conformity." Essentially, said Attorney Gilbert, the other side stood the concept of non-conformity on its head and that was a fundamental legal error that's fatal to the application right out of the gate.

Chairperson Dohmen explained that the debate the Board would consider was whether the lot or the structures were non-conforming and whether there were non-conforming uses. The number would be one of the separate, though "seminal" issues, said Chairperson Dohmen, but the Board would determine whether they were non-conforming structures, it was a non-conforming lot, or there were non-conforming uses.

Attorney Hamilton asked the board to look in the permittee's notebook under Exhibit A, where he said all the issues relating to non-conformities were presented. He pointed out that use can only be non-confirming if it has never been permitted or never been an allowed use in the zoning district where the property appears.

Attorney Hamilton said that that has never been the case since 1986, when it has always been authorized to have multi-family on this location. "It has never been a non-conforming use," he said.

Attorney Hamilton then read the definition in the ordinance of non-conforming use, Bar Harbor Land Use Ordinance 125-109. Since 1986, this type of housing has always been permitted in this zoning district, said Attorney Hamilton. "It has never been non-permitted."

The law court has said that if there is a defined term in the ordinance the town must apply it, said Attorney Hamilton, adding that Attorney Gilbert was wrong in his conclusion that this was a non-conforming structure. Per the definition of non-conforming structure in the ordinance, said Attorney Hamilton, there is no non-conformity as to the dimensional requirements of the structure.

The only relevant change, said Attorney Hamilton, came in 2010, when the town went from 5,000 square-feet for area per family to 10,000 square-feet for area per family; Section 125-56 answers the entire question as to non-conformity, said Attorney Hamilton. "This is strictly an area-per-family issue," he added.

Code Enforcement Officer Angela Chamberlain was asked her opinion about non-conforming lots regarding the minimum area per family. In response, she read the definition from the ordinance of a non-conforming lot: "A lot which does not comply with the minimum lot size, minimum area per family, so that would be the number of dwellings on the property, minimum road frontage, shore frontage, lot width, or maximum lot coverage."

If the lot does not meet any of the aforementioned standards, it would be non-conforming. She added that it does not mean there can't be other non-conformities as well.

Chairperson Dohmen asked CEO Chamberlain "When you look at a structure, in terms of its non-conformity, the parameters that you are guided by — are they strictly dimensional?" Yes, said CEO Chamberlain.

Attorney Gilbert was afforded time for rebuttal and asked the board to look at the definition of non-conforming structures in the Bar Harbor Land Use Ordinance, Section 125-109. The definition of structure, he noted, is the structure at the effective date of the adoption of the amendment does not meet the "dimensional" height or setback requirement of the district.

Attorney Gilbert then directed the Board's attention to Bar Harbor Land Use Ordinance Section 125-20 B. (10), which discusses minimum area per family. Attorney Gilbert said that, contrary to what Attorney Hamilton said, he didn't say that the structure was a non-conforming use but rather that it was a non-conforming structure.

Looking at the definition in Section 125-20 B. (10), said Gilbert, that's the dimensional standard that is not met, which makes it a non-conforming structure. "This is fundamental to this whole appeal," said Attorney Gilbert. "Once you come to the conclusion that this is a non-conforming structure, that everything flips because it is absolutely premised on an incorrect view of the ordinance."

Chairperson Dohmen proceeded to re-read the definition of non-conforming structure. She noted that it did not include mention of the area per family, which is under definition of lot size, and said she believed that the Board of Appeals was not dealing with a non-conforming structure.

The non-conformity at issue, said Chairperson Dohmen, was the non-conforming lot as it dealt with the area per family. The non-conformity issue was about how many units were on the lot presently. "This is a non-conforming lot with a non-conforming structure," said Chairperson Dohmen, and therefore the grandfathering was of both non-conformities. Attorney Pileggi offered comment.

The contention was on dimensions, said Member Siklosi. The minimum area per family, 10,000 square feet, "is clearly not met," he said. It's a non-conforming structure, he said, although that did not eliminate the possibility of a non-conforming lot, which is a separate issue.

The ordinance is mindful to honor grandfathering but the desire is to move toward conformity; therefore, said Chairperson Dohmen, it does not allow an increase in non-conformity. It does, however, allow maintenance and honoring of the non-conformity.

Attorney Hamilton attempted to interject but the Board decided to hear him later.

Chairperson Dohmen said there was also an issue of a multi-family II, which she said she believed was not non-conforming as it was allowed under PUD. She referred to page 5 of the brief and she pointed out that the use is residential and therefore conforming.

Attorney Hamilton tried to interject again; Attorney Pileggi said that both parties had been heard and whether to hear more was the Board's choice. The Board decided not to hear Attorney Hamilton at that time.

Member Siklosi moved to find that the structure is a legally non-conforming structure per the Bar Harbor Land Use Ordinance Section 125-20 B. (10); Vice-chair Samuel seconded. The motion passed unanimously, 5-0.

Attorney Gilbert said that, using the Webster's Collegiate Dictionary definition, what is planned for the site is not a residential development. Residence, said Attorney Gilbert, "Doesn't always have to be people that are related by blood, marriage." In this case, he said, this will be assigned employee housing, which is not a residence.

The key consideration here, he continued, was that this was not a residential use. It is a commercial venture, he said, not residential.

Attorney Hamilton replied that there are several terms defined in LUO sections 125-20 and 125-109. If a term is defined in the ordinance, said Attorney Hamilton, the Board is required to use that definition. Dwelling, multi-family and family are all defined; going elsewhere for definitions, he said, "is a spooky and crazy argument." He added, "It's all defined in 125-20."

Attorney Hamilton pointed the board toward lot size and minimum area per family. "I think you're heading down the wrong road with non-conforming structure," he said, and advised against using terms as defined in the dictionary, rather than in the ordinance. Area per family is a lot standard, not a structure standard, said Attorney Hamilton.

Attorney Gilbert pointed the Board to LUO §125-108 A., which is where the Board is instructed to use the dictionary definition if a term is not defined; residential is not a defined term, he said.

Chairperson Dohmen asked the Board to look at definitions of dwelling and family as defined in LUO §125-109, and read the definitions aloud; she also read the definition of transient accommodation.

"I would submit," she said, that the proposed units are residential, a conforming use. "They meet our definition of family," she added.

Member Siklosi said, "Everything is residential except when it's not," which is when it's transient or commercial. If it's not either of those, it's residential. If it were less than 30 days, he said, that would be transient. Longer than that — whether it be 6 months, 6 years or 60 years — "that's a residence."

Member Siklosi moved that the Board find that this use is permitted, because it's a group of residences in a residential district and is conforming with the findings of the Planning Board. Member Robert Webber seconded the motion; it passed unanimously, 5-0.

The Board moved on to another point, that the workers do not constitute a family. Attorney Gilbert spoke and said that he did not disagree fundamentally with the comments by Board members but said he did make the distinction between those who live together voluntarily and those who are assigned. The plan for this property, he said, is that those workers who come to work for Ocean Properties will be assigned to a room. "It is a fine distinction," he said, but they are not a family.

Attorney Hamilton said he did not recall from the record or application that the employer designates who is going to stay together. "Once again … Mr. Gilbert … is taking liberty with the facts," he said. Attorney Gilbert replied, "Realistically, it's the employer that controls."

Member Stevens-Rosa said that the ordinance definition is "blind to the nuance of relationships and really looks at the way the space is occupied." She gave the example of her son, who went to a college where the school placed students together. They were perceived as a dwelling unit under the law, she said.

Chairperson Dohmen moved to find that the units constitute a family as defined in the Bar Harbor Land Use Ordinance and as was upheld by the Planning Board. Member Siklosi seconded; the motion passed unanimously, 5-0.

On the issue of buffering, Attorney Gilbert said that the proposal was to increase the density on the lot by reducing buffering and open space requirements. The application proposes to "chew up" most of the open space left on the lot, he said. Planning Board has discretion to do some of that, he said, but what articulated rationale did they give?

"There's a disconnect between the ordinance and what actually happened in this case," Attorney Gilbert continued. The standard for family dwelling units allows the addition when it will result in the creation of larger buffers, open space and recreation. The PUD concept, he said, allows for more flexibility under some circumstances to concentrate and crowd buildings when it will serve other purposes on the lot.

The appellant contended that the Planning Board "gave lip service to that," said Mr. Gilbert, but did not show how it advanced open space or buffering on the lot.

Attorney Hamilton replied that the Planning Board made ample findings as to how the clustering of buildings would provide more open space, adding that Betsy Mills (the applicant in this matter) is a direct beneficiary of that clustering. Attorney Hamilton deferred to Mr. Moore, the landscape architect.

Mr. Moore said that the assertion that they did not leave open space was false; the initial plan had buildings scattered around the site in about the same distribution they are now, with a larger

building about the same size of those that are there now at the corner of West Street Extension and Woodbury Road.

At a neighborhood meeting of neighbors that live in the building across Woodbury Road, said Mr. Moore, residents said they wanted that area of open space to remain open. The applicant (BHAPTS, LLC) moved the buildings to the other side of the property line, clustering them along a property line to leave the area open as advised by residents and the Planning Board.

At a meeting with Ms. Mills, Mr. Moore said, she asked the applicant to move the one building closest to Woodbury Road. It did, said Mr. Moore, maximizing the ability to keep open space.

Regarding buffering, he said, BHAPTS, LLC provided a planting plan with details on the type of plants and where and when they would be planted, as well as a plan for grading and drainage, which included a berm and a fence.

The applicant also provided, said Mr. Moore, photo simulations of what the project would look like after the building and plantings were installed. Mr. Moore said the question on open space and buffering should be left to the Planning Board, which found the applicant met the standards of the ordinance.

Attorney Gilbert said that buffering is being diminished in this case, which Ms. Mills did not consider to be adequate. Per LUO §125-69 S., said Attorney Gilbert, no deed restrictions were presented to the Planning Board to preserve open space.

Chairperson Dohmen said that, relating to purpose and intent of PUD, while those were suggested things, "They are not absolute in looking at a PUD and they never were meant to." They are ideas, she continued, toward looking at a whole. It isn't a hard and fast standard that there must be a certain number of bump outs of trees.

Chairperson Dohmen said that she believed buffering and screening were adequately addressed before the Planning Board in accordance with the Bar Harbor Land Use Ordinance.

Member Stevens-Rosa moved that the Planning Board record supported the finding that the project met applicable standards for open space and buffering; Vice-chair Samuel seconded the motion, which then passed 4-1 with Member Stevens-Rosa opposed.

There was then a question of whether a board member who makes a motion is allowed to vote against it. Unsure of the answer, the Board decided to go back. **Vice-chair Samuel moved to reconsider the motion, and that new motion was seconded by Member Siklosi. The vote to reconsider passed without opposition, 5-0.**

Attorney Pileggi then read the language he'd originally proposed, which **Member Webber then moved: to find that the Planning Board record supported the finding that the project met applicable standards for open space and buffering. Vice-chair Samuel seconded the motion, which then passed 4-1 with Member Stevens-Rosa opposed.**

The setback reduction is to allow for protecting the public health, safety or welfare or to address particular site characteristics, said Attorney Gilbert. The Planning Board did not articulate how what they decided would affect health, safety or welfare or address particular site characteristics, he said.

Minimum distance between buildings in this district is 20 feet, said Attorney Gilbert. The way this has been set up, his client's property and the applicant's property would be separated by 10 feet or less, which would allow for larger buffers and open spaces elsewhere, but "there was no discussion" or finding of how that would advance health, safety and welfare. "Why would you reduce the standard that's there in the ordinance unless there was a reason you could articulate?"

Attorney Hamilton replied that in the middle of page 5 of the Planning Board decision that was addressed. Attorney Gilbert was arguing at cross-purposes, said Attorney Hamilton, by saying on the one hand who cares about buffers, on the other arguing against setback reduction. "You can't on the one hand ask for more buffer and open space and on the other hand ask for no reduction in setbacks; that's the whole purpose of the PUD," said Attorney Hamilton. He said the Planning Board has ample discretion under Section 125-64 to modify standards.

Mr. Moore offered some background on the discussion. He said the 20' setback between buildings is not from the zoning district but rather from §125-67 B. (3), which he said requires that the setback between buildings be doubled in a subdivision. He explained why that was. Regarding §125-64, he said he has heard the Planning Board talk of modifying §125-67 B. (3) because it is within the board's purview. He said the argument about distance between the buildings was both moot and specious because the applicant could simply have connected the buildings with a breezeway and a porch and have it considered as one building. Mr. Moore said drawings were done at the Planning Board's request to show the relationship between the new buildings and the existing buildings. He said the buildings were moved further apart in the final plan.

Chairperson Dohmen asked if former Public Works Director Chip Reeves signed off on the distance between buildings. She said she remembered it being a condition of approval. Mr. Moore said a sign-off was received.

Mr. Moore reiterated that the buildings were moved further apart in the final plan than they were initially. Member Siklosi asked what the actual separation between the new buildings is. Mr. Moore said he recalled it being just under 10 feet, up from 7 feet 9 inches previously.

Attorney Hamilton referred to §125-69 S. (6) (d) regarding the Planning Board's authority with regard to setbacks. He said he believed the Planning Board's finding with regard to setbacks was more than adequate and was supported by the record.

Attorney Gilbert said the applicant did not create more open space elsewhere on the property, and that that was the problem. He said the buildings were just squeezed in. He acknowledged the Planning Board had both discussion and discretion, but said Attorney Hamilton's argument was not supported.

Chairperson Dohmen said she found the setback between buildings matter to have been well documented in the transcript. She said the most relevant piece of the Land Use Ordinance was §125-64, regarding modification of standard. She said she could not see that the Planning Board had acted clearly contrary to LUO in allowing the buildings to be closer than normally allowed. She said there was adequate discussion.

Member Stevens-Rosa said it was difficult to deal with this issue in isolation, given the larger context of Planned Unit Development. She called PUD the ultimate quid pro quo.

Chairperson Dohmen said she was saving the issue of base density, and related things like affordable housing, for the board's seminal discussion.

Member Siklosi said there is a dynamic tension between developers and abutters. He said clustering increases open space. He talked about the difficulty in balancing the interests of different abutters on different sides of a property. He said he thought there was a diligent effort by the Planning Board to treat the matter fairly. He said if the buildings had been too close there would be a safety issue, and that if the fire department was OK with the distances between the buildings, he was, too. He said he thought the Planning Board came to a reasonable conclusion.

Member Siklosi said he would support a motion that the Planning Board did find that the setback requirements were met in due consideration for health, welfare, and safety. At the suggestion of Chairperson Dohmen, he added "and particular site characteristics" to his motion. Vice-chair Samuel seconded the motion. The vote was called and the motion carried 4-1 (Member Stevens-Rosa opposed).

Discussion then turned to appellant's Item #11, affect upon adjacent historic properties. Attorney Gilbert said he saw this issue as severable from the larger PUD issue. He noted the Planning Board, in its decision, found that there were no historic sites or considerations present on the project site. He said that is insufficient as a matter of law. He referred to §125-67 X. (on page 125:77). He talked about his earlier comment about looking at the ordinance as a whole, and noted the ordinance contains several references to conservation and preservation of historic assets. He said it was an important part of the ordinance as a matter of policy.

Attorney Gilbert read §125-67 X. He said there was ample evidence in the record that Ms. Mills' property is a historic site, and he noted it is listed on the National Register of Historic Places. He said the Planning Board found there were no historic sites on the project site, but he called that an insufficient finding with regard to meeting §125-67 X. because it said nothing about the historic property. He said he knew the Planning Board was aware of the adjacent historic property, but said that was not adequate. He said the Planning Board needed to make a finding that adequate steps were taken to ensure no adverse impact on the historic site next door.

Attorney Hamilton said he saw this as a straightforward issue. He said this project was evaluated by the State Historic Preservation Office, which noted no concerns about the project. He said the office was very well aware of sites on the National Historic Register. He referred to Permittee's Exhibit #22, a letter from the State Historic Preservation Office. He said that office supported the

permittee's offer to work with the appellant to find an agreeable way to minimize visual impacts to the listed property. He elaborated on this, and said the permittee modified its site plan in part due to a request from the appellant. He spoke about the work done by Mr. Moore, a landscape architect, and the effort to remove invasive species and manage stormwater (both to protect the gardens on the appellant's property).

Mr. Moore said that although the appellant has alleged there are adverse impacts that he had not heard them or seen an exhibit that described them. Mr. Moore said that he had some conversation with Ms. Mills, and consultants Dennis Bracale and Jeff Kraft, over time when things needed to be handled.

Mr. Moore explained that the house is not on the National Register of Historic Properties but that the site is and the gardens are. The gardens are 500 feet from the property line. There are issues on the property line of erosion that is caused by water coming from Woodbury Road, continued Mr. Moore.

The appellee's plan would resolve this issue, as shown on the grading and drainage plan, Exhibit 25 of the book, said Mr. Moore. In Exhibit 21, there is an explanation of the findings of botanist Jill Webber.

Ms. Webber, in her work, found that this area was full of invasive species that are a threat to the gardens and the site next door. The appellee plans to remove these invasive plants and replant with native species, said Mr. Moore.

The issue of visual impact was addressed under buffering, said Mr. Moore. The Planning Board considered the applicant's proposed mitigation and the Planning Board found that it was appropriate.

Attorney Gilbert said that the problem with what Mr. Moore said is that this was not what the record reflects. The record was that the Planning Board said that there were no historic considerations on this site; the appropriate step would be to remand it back to the Planning Board and let it make the finding, said Attorney Gilbert.

Member Siklosi said that he watched the Planning Board meetings of December 5, 2018 and January 16, 2019. He said that there was significant discussion about what Mr. Moore touched on. There was also a discussion regarding whether then-Bar Harbor Public Works Director Chip Reeves had signed off on some other related things.

There was adequate discussion of the things that were averse to the Mills property and are being mitigated with these changes, said Member Siklosi, adding that he had a hard time seeing how the project would have undue adverse effect with these particular changes. Stormwater in particular would be an improvement, he noted.

Chairperson Dohmen noted that there was a letter from the Maine Historic Preservation Commission noting that there were no findings. Furthermore, in addition to a discussion of water and invasive species, there was a discussion that some of the trees were to be maintained.

Chairperson Dohmen said she felt that the Planning Board met the standard of no adverse effect on adjacent historic properties.

Member Siklosi moved to find that based on the mitigation of adverse conditions upon the adjacent historic gardens, the record supports the Planning Board's finding that section 125-67 X. standard was met. The motion was seconded by Member Webber. Member Stevens-Rosa said that she thinks that the Planning Board acted correctly, but that the Maine Historic Preservation Commission's finding (the office of Kirk Mahoney), was incorrect. **The motion passed unanimously (5-0).**

Attorney Gilbert said the applicant was able to convince the Planning Board of a base development density of nine based on the lot size of 85,000 square-feet by rounding up. Rounding up is not a rule of law, said Mr. Gilbert. The applicable base development density is 8, he said; double that is 16.

Attorney Hamilton said that the Planning Board looked at PUD-V as an overlay. He said Article 4, which relates to non-conformities, has no reference to whether an applicant gains or loses anything under another article of the ordinance.

Article 5 says an applicant gains or loses nothing under Article 4, said Attorney Hamilton. Typically with a PUD-V one would calculate the base development density as if the lot were vacant, which this lot is not.

There is nothing in the PUD-V or in the case law that says property rights are taken away under Article 4 in order to exercise overlay rights under PUD-V, said Attorney Hamilton.

The Planning Board decision combined Article 4 and Article 5. The Planning Board said that it was a non-conforming lot and that there were 16 units lawfully grandfathered. Attorney Hamilton said he thought that this is a non-conforming lot with 16 permitted units in 1986 and that he did not think that they are non-conforming structures.

Under Section 125-69 S. (6) (a) [1], said Attorney Hamilton, the applicant (BHAPTS, LLC) was entitled to take base development density and calculate that. He read the definition, which states in part that "applications shall allow the density allowed for a conventional subdivision application."

The minimum area per lot and the minimum area per family in that district are equivalent, said Attorney Hamilton. They are both 10,000 square-feet. Starting with the lot size of 85,234 square-feet and dividing it by 10,000 equals 8.523. The calculation must be done as though it were a conventional subdivision.

Property rights cannot be taken away based on an ordinance that is either ambiguous or vague, said Attorney Hamilton. It would be inappropriate if it were above 0.5 to round it down, he added. It would be taking units away from the applicants, and therefore the approach must be to round up.

Attorney Pileggi asked Attorney Hamilton what property right he was contending was being taken away; Attorney Hamilton answered that there is a property right to the base development density if one meets the terms of the PUD-V. Attorney Pileggi asked Attorney Hamilton where the property right was being taken away. Attorney Hamilton responded that by rounding down, that essentially takes away 0.523 of a unit.

It would have been easy to an exceed a cap on this property, he said, but the Planning Board said that if the applicant wanted any more units they must add affordable units.

Mr. Moore said that the implied purpose of the PUD-V is to provide more housing, not less. Asking the applicant to round down would be "particularly mean-spirited," he said.

Attorney Gilbert said that the rights being taken away were "phantom rights" that did not exist. Addressing the issue of overlay, Attorney Gilbert said the PUD provisions are not an overlay district. The PUD-V may never exceed the allowable number of dwelling units by more than twice the base development density, which in this case is 8, said Mr. Gilbert. The Board must read the ordinance as a whole or risk being in conflict with the non-conformity provisions of the ordinance, he said, which say a non-conformity may never be increased.

Reading it the way that Attorney Hamilton suggested, said Attorney Gilbert, would mean that the Board would be increasing the non-conformity by at least two units, which is prohibited in Article 4.

Member Webber said that he had repeatedly read transcripts of the Planning Board meetings addressing this issue and that he understood both sides, to a point. Board members posed hypothetical questions to CEO Angela Chamberlain to help them understand.

Vice-chair Samuel said he did not personally see how the code allowed treating the PUD as an overlay. In his reading, said Vice-chair Samuel, it's clear there is a choice of doing a conventional subdivision or a PUD-V, and following the applicable rules.

The way the mathematics work, said Vice-chair Samuel, you do not meet the minimum lot size requirement. Nothing is being taken away, he said. A base density would allow 16 buildings and there are 16; the applicant is prevented from getting more but nothing is being taken away.

There is no provision of de-minimis in the Bar Harbor Land Use Ordinance, said Member Siklosi. He said his reading was that the base unit is 8, the doubling allowed makes it 16; in a sense, he said, he felt badly about not being able to do a PUD in the way the appellee had proposed. He noted there has been a lot of work to get affordable housing, but said the mathematics fail to meet the minimum standard of, in essence, 5,000 square-feet required. No rounding is allowed, he said, meaning the applicant is allowed 16, not 18.

Chairperson Dohmen said she believes that under a legal non-conformity there are 16 units. Non-conformity cannot be increased, she said. "I absolutely cannot get to 18," she said.

At 6:33 PM the Board decided to take a break; members reconvened at 6:39 PM.

Member Webber made a motion that the record does not support the Planning Board determination that base unit density allows 9 units as outlined in Bar Harbor Land Use Ordinance Section 125-69 S. (6) (A) [1]; the motion was seconded by Vice-chair Samuel and it passed unanimously, 5-0.

Vice-chair Samuel made a motion that because the base density was not correctly calculated that 18 [as a number of maximum units] is also not allowed and the Planning Board was contrary to the Bar Harbor Land Use Ordinance. The motion was seconded by Member Siklosi, and it passed unanimously (5-0).

Chairperson Dohmen made a motion that because the affordable housing was based on an incorrect base density it was also clearly contrary to the Bar Harbor Land Use Ordinance. The motion was seconded by Vice-chair Samuel and passed unanimously (5-0).

At 6:41 PM Chairperson Dohmen opened a public hearing. Dessa Dancy, a resident of Bar Harbor, said she was perplexed by one major thing. The use for the development, she said, is employee housing. But if one goes to the section of permitted uses for Village Residential, employee housing is clearly not a permitted use. Employee housing [*note: the actual term is "Employee Living Quarters"*] is slated to be voted on in June, she added. If that's the agreed-upon use for the project and it's not yet a permitted use in the district, she said, it seemed the use could be non-conforming.

Jake Jagel then stood up and read a letter by Donna Karlson, who lives in the area of the proposed project. With her words read aloud by Mr. Jagel, Ms. Karlson said that many concerns had been raised about the project. Neighbors were concerned with the late-night noise, crowding, degradation and the destruction of the peaceful, quiet character of one of Bar Harbor's oldest year-round neighborhoods, as well as whether it met the "bare legal requirements" of the Bar Harbor Land Use Ordinance criteria for site plan review.

A "mass of 70 to 80" young adults will mean they will "inevitably party, get loud and sometimes out of control." The residents do not blame the young, hard-working people, Ms. Karlson (voiced by Mr. Jagel) claimed, but rather blamed Ocean Properties for putting its workers in a quiet, year-round neighborhood.

Mr. Jagel read that Ms. Karlson said that Ms. Mills is concerned with the "noise, partying, trespassing and littering" that will occur on her (Ms. Mills') property, "with trash, liquor bottles and drug paraphernalia." Ms. Karlson said that the proposed dormitories are too close to one another and to the Mills property line and that she saw the Planning Board's interpretation of Bar Harbor Land Use Ordinance Section 125-64 (Modification of Standards) as a "clear legal error."

Ms. Mills' house reflects the historical character of the town, said Ms. Karlson (via Mr. Jagel). The Planning Board ignored LUO § 125-67.X, Ms. Karlson asserted in her letter. That section requires that the Planning Board find the development not have an undue adverse effect on an adjacent site. Ms. Karlson suggested that Ocean Properties provide staff housing on the hotel campus itself.

Mr. Jagel said he had copies of the letter; Chairperson Dohmen said that while the letter had been read into the record it could not be entered because it was not sent to the Board in advance, as is required by the Land Use Ordinance. Mr. Jagel gave a copy of the letter to Attorney Hamilton, who said he found the statements therein "highly objectionable." Chairperson Dohmen said she did not want to discuss the letter.

Chairperson Dohmen said there was nothing in the transcript about police reports or needles and that the Board of Appeals only deals with what was before the Planning Board. Therefore, she said, the Board of Appeals could not and would not address it.

Anne Murray Quinn spoke next an said she has been coming to Bar Harbor for 80 years. She read a letter that said, in part, "Such a property deserves to be conserved as a treasure," referring to the gardens on the Mills property. The development will "seriously impact" garden vistas, said Ms. Quinn. "Please protect this historical treasure from further encroachment," said Ms. Quinn.

Planning Board Chairman Thomas St. Germain spoke next and asked the Board of Appeals to elaborate on the base unit density; if the number is to be 16, how does that relate to the PUD standards, he wondered. If 9 isn't the answer, he said, how to correctly assess base unit density?

Member Siklosi said the Board of Appeals was simply saying 18 is wrong but was not instructing the Planning Board which number is correct. The Board of Appeals was also asking the Planning Board to debate whether grandfathering and PUD can both work on the same property or if it's either/or. Planning Board Chairman St. Germain said that was the clarity he was seeking.

The board turned to a discussion on seasonal occupancy. Attorney Gilbert said the Land Use Ordinance talks about encouraging people of moderate means to make their lives in Bar Harbor. Seasonal industry is different, he said, and doesn't encourage people to live in the community.

Attorney Hamilton said the ordinance focuses on occupancy, not on the individuals who occupy the building. LUO §125-69 R., he said, contains no test to say there can't be seasonal employees.

Attorney Hamilton said BHAPTS, LLC had addressed this through the affirmative marketing plan in Exhibit 24. There is a tenant that resides at 25 West Street Extension on a year-round basis, said Attorney Hamilton, with his wife and two children, who attend the Conners-Emerson school. There is nothing to say there can't be seasonal employees in those units, he said.

Attorney Gilbert said that he and Attorney Hamilton agreed on one thing: occupancy. Teachers won't be able to occupy those units year-round, said Attorney Gilbert. This is not aspirational but how the ordinance is interpreted.

Chairperson Dohmen said that the island's summer residents who own their homes are not year-round residents but that they are residents. She added that the proposed affordable units were going to be open to people living in Bar Harbor year-round.

Chairperson Dohmen made a motion affirming that the Planning Board's finding that the applicant's affordable housing proposal was in accordance with the LUO §125-69 R. (3) (a). The motion was seconded by Member Webber and passed unanimously, 5-0.

At 7:09 PM Chairperson Dohmen closed the public hearing.

Chairperson Dohmen summarized by saying that the Board of Appeals did not uphold articles 1, 5, 6, 7, 8, 9, 10 and 11 of the appellant's supplemental brief. The Board of Appeals disagreed with the Planning Board, said Chairperson Dohmen, with regards to base density (from which the ultimate number of units, and therefore the number of affordable unit); it also found the structures are legally non-conforming per LUO §125-20 B. (10).

Chairperson Dohmen moved that the Board find that the calculation for base density is clearly contrary to the Bar Harbor Land Use ordinance and therefore the number of permitted units is also clearly contrary to the ordinance. The number of affordable housing units, as a result, needs recalculation if PUD is used.

The Board of Appeals upholds the Planning Board's findings and the rest of the application, she continued, as it is clearly in compliance with the Bar Harbor Land Use Ordinance.

The Board of Appeals, she concluded, remands the application back to the Planning Board for the sake of calculating base development density, maximum units and the subset of required affordable housing units, which are dependent upon base development density. The motion was seconded by Member Webber and passed unanimously, 5-0.

VI. OTHER BUSINESS

Member Webber asked town staff who verifies whether there are five people per apartment. "It's a very hard regulation" to enforce, said CEO Chamberlain, because people are always moving around. "We do rely on other people reporting things, and we rely on the property owner doing the right thing." Housing units are not individually inspected by the Fire Department, she said (in response to another question by Member Webber). "You really have to have some kind of proof they're exceeding the standard" to enforce it, she said.

VII. ADJOURNMENT

At 7:19 PM, Member Siklosi moved that the board adjourn the meeting. The motion was seconded by Member Stevens-Rosa and passed unanimously, 5-0.

Signed and approved:

7-23-2020

Robert Webber, Board of Appeals secretary **Date**