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June 26, 2020

Bar Harbor Board of Appeals (Hand-Delivered)
c/o Bar Harbor Planning Department
93 Cottage Street
Bar Harbor, Me, 04609

RECEIVED JUN 26 2020

Re: *Elizabeth Mills v. BHAPTS, LLC*

Dear Chair Dohmen and Members of the Board of Appeals:

First, I thank each of you for your willingness to serve in such an important role. Twelve identical copies of this letter, with exhibits A through F, are being delivered in conformance with LUO Section 125-103C(1)(a). I am also serving Steve Fuller an electronic copy of both this letter and the same six exhibits so that he might forward them to Board Members who prefer electronic copies only. These exhibits together form the parts of the record upon which Ms. Mills is relying. These exhibits are as follows:

Exhibit A – The Planning Board decision of May 8, 2020 that is being appealed.

Exhibit B – Mr. Moore's March 12, 2020 submission to the Planning Board.

Exhibit C – Ms. Mills's April 24, 2020 submission to the Planning Board.

Exhibit D – The transcript of the Planning Board's meeting of April 29, 2020.

Exhibit E – Pages 28, 74, 75, 86-88, 93 and 94, together with the index page for "pedestrian" from the December 5, 2018 Planning Board hearing, the complete transcript of which was Exhibit C-1 to BHAPTS, LLC's submission when this matter came before the Board of Appeals for its first hearing on April 9, 2019.

Exhibit F – Pages 5, 94, 117, 134 and 143, together with the index pages for "path" and "stairs" from the January 16, 2019 Planning Board hearing, the complete transcript of which was Exhibit C-2 to BHAPTS, LLC's submission when this matter came before the Board of Appeals for its first hearing on April 9, 2019.

PROCEDURAL ISSUES

This matter is an appellate review hearing under LUO Section 125-103C(1), not an evidentiary hearing under LUO Section 125-103C(2). As such, the only individuals who should be speaking on behalf of the parties are Attorney Hamilton and myself. Both attorneys will

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already have made their legal arguments as to the number of affordable units required under LUO Sections 125-69S and 125-69R. Both attorneys will also have made their arguments as to whether the evidence before the Planning Board was sufficient to support BHAPTS, LLC's claim that a stairway to a dirt road constitutes "new pedestrian amenities to connect the proposed development to other areas, amenities or goods and services" under LUO Section 125-69R(6)(a)[2][e].

Were this an evidentiary hearing, Mr. Salvatore and Mr. Moore would be free to testify and be cross-examined. For a purely legal appeal such as this, the danger of having either speak is that they may offer facts outside of the record and/or make legal arguments that are best left in the hands of Attorney Hamilton. I would object to either speaking during the substantive part of the hearing. They are free to privately consult with Attorney Hamilton if they feel his presentation missed an important point and are free to speak at the public comment portion of the hearing. Once a party has engaged counsel for a purely legal argument, only counsel should be allowed to speak. This would be the case in the Maine Courts for appellate review and should be the case for an appellate review before the Board of Appeals.

NUMBER OF AFFORDABLE UNITS

The Planning Board, in the first sentence of its fourth conclusion of law, interpreted the LUO correctly, holding that the number of affordable units should be five. Exhibit A, p.2. LUO Section 125-69S(6)(b) requires the minimum number of affordable units to be 20% of the base development density or 1.6. Per LUO Section 125-69R(3)(f), this number is rounded down to 1. To obtain eight more units to reach the maximum allowable units of 16, the developer would normally add one affordable unit and then be able to add one market rate unit. Using "A" to mean affordable and "M" to mean market, the 9th through 16th units would be:

9-A; 10-M; 11-A. 12-M; 13-A; 14-M; 15-A; 16-M.

This is in conformance with LUO Section 125-69S(6)(a)[2][a] which provides that "[f]or every additional affordable dwelling unit, an additional market-rate dwelling unit may be allowed."

Thus, the first eight units must include one affordable unit and the next eight must include four affordable units, for a total of five. Building a single affordable unit is a "two-for"; it allows the developer to gain two more dwelling units total for each affordable unit built.

This is not so for underground utility placement, which is a "one-for." LUO Section 125-69S(6)(a)[2][h] provides that for placement of underground utilities "an additional market rate dwelling unit may be allowed." This would not change the overall number of affordable units required, as adding another market rate unit is different from reducing the total number of affordable units required. Ms. Mills does not contest the evidence behind the claim that underground utilities will be provided because it makes no difference in the total number of affordable units required. To get to 16, the maximum allowable units allowed, and remembering that an affordable unit must be built before a market rate can be built, the allocation of units 9 through 16 would be as follows:

9-M(underground utilities); 10-A; 11-M; 12-A; 13-M; 14-A; 15-M; 16-A

Thus, the addition of a single market-rate unit leaves the developer with five affordable units, one for the first eight, and four for the second eight, for a total of five. The only effect of requiring underground utilities is to shift the required affordable units from odd-numbered units to even-numbered units.

However, the Planning Board clearly misread the LUO in the second sentence of its fourth conclusion of law, Exhibit A, p.2:

However, it was determined that the applicant only needs to provide three affordable rents units as the applicant received credit for two affordable rent units as follows: Per 125-69S(6)(a)[2][e] – one unit for being pedestrian friendly and per 125-69S(6)[2][h] (sic – it should read 125-69S(6)(a)[2][h]) one unit for provision of underground utilities.

However, each of those subsections allows an additional market rate dwelling unit, not a reduction in required affordable units. The Planning Board has confused an apple (affordable unit) with a mango (market-rate unit). Each of the two subsections it relies upon increase total allowable units by one, unlike the building of an affordable unit, which increases the total number of allowable units by two.

Even if the wooden stairway to a dirt road were considered “new pedestrian amenities to connect the proposed development to other areas, amenities or goods and services,” LUO Section 125-69S(6)(a)[2][e], these two additional market rate allowances still leave the total number of affordable units as four. The ninth through sixteenth units would be as follows:

9-M(buried utilities); 10-M(pedestrian amenities); 11-A; 12-M; 13-A; 14-M; 15-A; 16-M

This leaves the developer with a minimum number of affordable units of four, one for the first set of eight and three for the second set of eight. No reading of the LUO can justify the fifth conclusion of law that the developer “shall have a total of 13 market rate units and three affordable rent units.” Exhibit A, p.2.

By confusing an addition of a market rate unit with the reduction of affordable units, the Planning Board has made a clear error of law “contrary to the provisions of this chapter” and the Board of Appeals should “reverse the decision, subject to such terms and conditions it deems advisable.” Under LUO Section 125-103(D)(1)(l)[1]

The best case scenario for the developer here is that it must build four affordable units, not five. But, as described below, the minimum number of affordable units must be five.

A STAIRWAY TO A DIRT ROAD DOES NOT CONSTITUTE PEDESTRIAN AMENITIES

This is both a legal challenge to the Planning Board’s conclusion as to what “new pedestrian amenities” means and an evidentiary challenge that the finding that such a stairway was supported by any evidence, let alone the required “substantial evidence” that would allow this Board to defer to the Planning Board’s finding. LUO Section 125-103(D)(1)(l).

Legally, the phrase “[f]or projects that propose to construct new pedestrian amenities to connect the proposed development to other areas, amenities of goods and services,” LUO Section 125-69(6)(a)[2][e], must have meaning. The LUO does not define “pedestrian”: or

“amenities,” so the default provision is Webster’s New Collegiate Dictionary. LUO Section 125-108A. Amenity is defined by Webster as “something that helps to provide comfort, convenience, or enjoyment.” Pedestrian as an adjective in Webster’s is defined as “relating to or designed for walking” and the examples given are “pedestrian mall” or “pedestrian bridge.”

Moreover, LUO Section 125-108A requires that words “shall have the meaning implied by their context in the chapter.” Here, the new pedestrian amenities must “connect the proposed development to other areas, amenities or goods and services.” LUO Section 125-69S(6)(a)[2][e]. A pedestrian bridge to nowhere is not “pedestrian amenities” within the meaning of the LUO. Finally, the use of the plural form of amenity has meaning: it connotes something larger than a rickety wooden stairway.

If a stairway constitutes “pedestrian amenities” would not every new driveway or walkway constitute “pedestrian amenities”? Words have meaning. All the other choices for market rate unit bonuses have substantial investments required of the developer under LUO Section 125-69S(6)(a)[2]. They involve a required 10% open space dedication, deeded active recreation space, meeting LEEDS energy standards for all units, formal access to public transportation, preservation of an historic resource existing on the property, or underground placement of all utilities. Once again, this reference to “pedestrian amenities” that connect the development to “other areas, amenities or goods and services” must “have the meaning implied by their context in the chapter.” LUO Section 125-108A.

A wooden stairway to the dirt portion of Woodbury Road running behind Ms. Mills’s property cannot, as a matter of law, be “pedestrian amenities” as that term is construed under Bar Harbor’s LUO under the rules of construction found at LUO Section 125-108. There must be a minimum standard set and this small stairway to nowhere fails to meet that standard. Indeed, the only language that even addresses “pedestrian amenities” in the decision is found at the fourth conclusion law, which uses the phrase “pedestrian friendly” with no further delineation. Exhibit A, p.2.

BHAPTS, LLC’s March 12, 2020 submission , Exhibit B, was totally silent as to providing “pedestrian amenities” and incorrectly stated that the Planning Board could “modify Article III” as to the Village Residential District dimensional standard for these non-conforming structures. I wrote that Planning Board on on April 24, 2020, Exhibit C, p. 2, that the Planning Board had no authority to modify any dimensional standard of the Village Residential District other than setback standards under LUO Section 125-69S (6)(d)(1)..

At the hearing itself, Exhibit D, page 20, Mr. Fitzpatrick noted that the required affordable units should be six and stated:

I’m also assuming that there’s no other provision of the PUD that are taken advantage of, whether it’s putting in a bus stop, whether it’s putting in a sidewalk down to Eden Street.

At Exhibit D, page 50, Mr. Fitzpatrick established with Attorney Bearor that the applicant was limited to the claims it made for affordable units in its original application. At Exhibit D, page 51, he stressed that the original application had to show a sidewalk or biking lane to Bar Harbor that was “better funded, turned over amenity to the Town.”

At Exhibit D, page 54, Mr. Moore conceded:

What happened with this is that we had proposed, if you'll recall, a sidewalk along West Street. It was supposed to come off of here and a bus stop. Chip and I talked about it. Chip presented numbers to the council. The council elected not to participate.

Mr. Moore then claimed that there had been an earlier decision by the Planning Board to accept side stairs to Woodbury as "pedestrian amenities." Exhibit D, p. 54.

However, nowhere in the Planning Board's 8 page decision of February 6, 2019 do the words "pedestrian amenities" appear. At page four, paragraph 5, of that decision, the Planning Board merely held that the project was grandfathered for 16 legally grandfathered dwelling units and required that of the 18 units it approved, two must be affordable.

A review of the relevant pages of the transcripts of the December 5, 2018 and January 16, 2019 hearings before the Planning Board and the index pages for those hearings for any relevant mention of paths, pathways, pedestrian, and stairs is attached as Exhibits E and F, respectively. I have not burdened the Board of Appeals with the entire transcripts, as these pages show the only mention of those potentially critical words. At Exhibit E, page 28, I stressed that there was now not going to be a sidewalk along West Street that would enhance pedestrian access. At Exhibit E, pages 74-75, Mr. Salvatore made a bare mention of "pedestrian amenities" without specifying what they would be. At Exhibit E, pages 86, Mr. Moore mentions that he was working with Town staff "to provide a sidewalk along West Street Extension." I have included page 87-88 of that same Exhibit to make it clear that no further mention was made of actual "pedestrian amenities" other than the sidewalk along West Street Extension which Mr. Moore conceded at the April 29, 2020 Planning Board hearing was no longer planned. At Exhibit E, pages 93-94, Mr. Fitzpatrick referenced "discussions with the Town regarding a sidewalk."

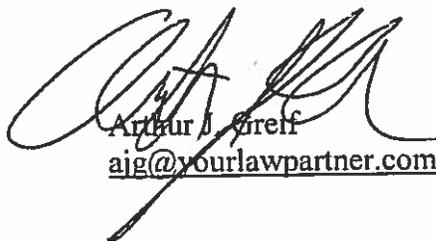
There is no mention of pedestrian at the final Planning Board hearing on January 16, 2019. Exhibit F, index pages. A sidewalk along West Street Extension is discussed again at Exhibit F, page 5. The only mention of "stairs" deals with internal stairways within buildings. Exhibit F, page 94. Mr. Moore again referenced his ongoing communications with the Town about a West Street Extension sidewalk. Exhibit F, page 117. A path was discussed at Exhibit F, page 134, but only in relation to a sewer easement. Finally, at Exhibit F, page 143, Mr. Salvatore talks about staying on the path in procedural terms.

In short, the Planning Board had no evidence, let alone substantial evidence, of any stairway to Woodbury Road as "pedestrian amenities." The decision itself, Exhibit A, page 2, merely uses the irrelevant term "pedestrian friendly."

Given this absence of evidence, the Board of Appeals should find that there is no evidence of "pedestrian amenities" so as to affect the number of affordable units and that there is no legal basis to allow a stairway to be considered "pedestrian amenities." Once BHAPTS, LLC conceded that the West Street Extension sidewalk was no longer part of the plan, no credit should have been given for an extra market rate unit.

This Board should simply reverse the Planning Board's decision and, on the record before it, direct that the developer must build five affordable units. There is no need for a remand to the Planning Board.

Sincerely,



Arthur J. Greif
ajg@yourlawpartner.com

AJG/mek

CC: Andrew Hamilton, Esq. (w/encl.)
Elizabeth Mills (w/encl.)



Town of Bar Harbor Planning & Code Department

DECISION

Remand of PUD-2017-02 from the Board of Appeals

Date: April 29, 2020
Subdivision: PUD-2017-02
Project Location: 25 West Street Extension (Tax Map 103, Lots 48 and 49, encompassing a total of 1.54 acres of land in the Village Residential District).
Applicant/Owner: BHAPTS, LLC
Application: The remand to the Planning Board was from a decision on appeal from the Board of Appeals (identified as AB-2019-01), at a meeting on February 11, 2020 and in a written decision dated February 13, 2020.
Permitted Use: Multi-family I (MF I)
Notice to Abutters: April 15, 2020
Comment Period: Ended April 27, 2020
Public Comments:

1. On April 24, 2020, the Planning Department received a letter from Mr Arthur J. Greif on behalf of Elizabeth Mills which was distributed to the Planning Board
2. On April 29, 2020, Mr. Greif participated in the meeting held via the Zoom online meeting platform due to the emergency pandemic known as Covid-19. Mr. Greif spoke on behalf of Ms. Mills and on his own behalf as a resident affected by the development.

The approval is based upon the following submitted plans:

1. Subdivision Plat Plan dated 03.12.2020 prepared The Moore Companies in association with Pltsga and Day.
2. Site Plan and Subdivision Review PUD-2017-02, Applicants' exhibit 20.A.2 Building D Proposed Floorplans dated 03.12.2020 prepared by The Moore Companies in association with TMS Architects.

To the Code Enforcement Officer: Under the authority and requirements of the Land Use Ordinance §125-61 F, at the properly noticed public hearing on April 29, 2020, by a motion duly made and seconded, it was voted to approve the noted application.

This approval is based upon the Planning Board's following FINDINGS AND CONCLUSIONS OF LAW:

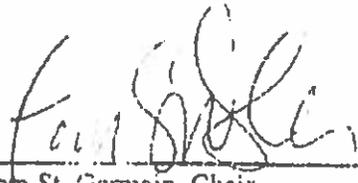
1. The remand to the Planning Board from a decision on appeal from the Board of Appeals (identified as AB-2019-01), at a meeting on February 11, 2020 and in a written decision dated February 13, 2020.
2. Per 125-69 S. (6)(a)[1], the based development density number shall be eight units.
3. Per 125-69 S. (6)(a)[3], the maximum allowable units under the Planned Unit Development - Village (PUD-V) shall be 16 units.
4. Per 125-69 S. (6)(b), the number of base affordable rent units is five. However, it was determined that the applicant only needs to provide three affordable rents units as the applicant received credit for two affordable rent units as follows: per 125-69 S. (6)(a)[2] [e] – one unit for being pedestrian friendly and per 125-69 S. (6)[2][h] one unit for the provision of underground utilities.
5. The applicant shall have a total of 13 market rent units and three affordable rent units.
6. All previous approvals and conditions not superseded by the above finding apply – see Decision dated January 16, 2019 and signed by the Planning Board Chair on February 6, 2019.

Suspension of recording deadlines due to the emergency pandemic known as COVID-19: Per Section 125-75, the plat plan shall be signed by the Planning Board within 45 days of this signed decision and recorded at the Hancock County Registry of Deeds within 90 days of the plan being signed by the Planning Board. Due to the emergency pandemic known as COVID-19, these deadlines are suspended until the re-opening of both the Bar Harbor Town Office and the Hancock County Registry of Deeds. From whichever of those dates is later, the Planning Board will have 45 days to sign the Subdivision Plat Plan dated 03.12.2020 prepared by the Moore Companies in association with Plisga and Day. Proof of recording at the registry of deeds within 90 days of the plan being signed is required and shall be submitted to the Code Enforcement Officer.

The applicant is advised of the following:

1. No modifications shall be made to this approval, including changes to the plans, accompanying documents, and/or conditions, without a review for a modification under the requirements in Section 125-88 of the Land Use Ordinance.
2. This permit does not relieve the applicant from any other local, state or federal permits that may be required for this proposed development.
3. Please refer to Article VIII for standards/conditions that will be applied to the construction of this project. No performance bonds are required.
4. Building permits are required for this project.
5. There is an appeal period for any interested party of 30 days to appeal this decision. It is the risk of the applicant to commence construction during this period.
6. Violations of any conditions placed upon this approval are subject to enforcement per Article IX, Section 125-100 B of the Land Use Ordinance.

No modifications to this approval shall be made without an application to the Planning Department.

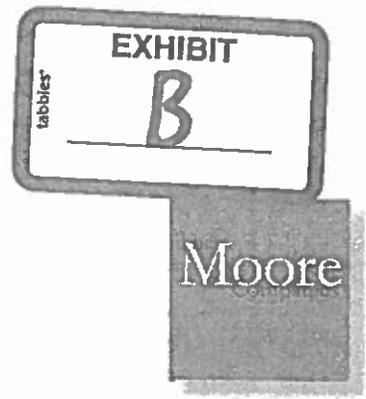


Tom St. Germain, Chair
Planning Board, Town of Bar Harbor

May 8 2020

Date

Appeals of this decision may be made to the Board of Appeals pursuant to Section 125-103 of the Bar Harbor Land Use Ordinance within 30 days of this date of this decision.



03.12.2020

Bar Harbor Planning Board
c/o Planning Department
Bar Harbor Town Offices
93 Cottage Street
Bar Harbor ME 04609

RE: BHAPTS, LLC PUD-V Application PUD-2017-02

Members of the Board,

Attached is a revised subdivision plat indicating a total of sixteen units and a new exhibit depicting floorplans for converting Building D from four units to two. These address findings 8 and 9 of the Board of Appeals decision signed February 13, 2020.

The Applicant observes that the "dimension" noted as creating a non-conforming condition is area-per-family and the Planning Board has authority under § 125.69.S. to modify Article III as to that standard. Once the Planning Board affirms that development density, the project complies, there is no non-conformity and finding 2 of the Appeals decision is moot.

Respectfully, on behalf of the Applicant,

A handwritten signature in black ink, appearing to read "Perry N. Moore".

Perry N. Moore, ASLA
Maine Licensed Landscape Architect 2699
Pennsylvania Professional Landscape Architect 3255
Principal
The Moore Companies

PLANNING BOARD CONDITIONS AND DISCRETIONARY

1. APPLICANT SHALL SET ASIDE TWO UNITS TO BE USED AS OFFICE SPACE FOR THE TOWN OF BAR HARBOR GOVERNED BY AGREEMENT WITH THE TOWN OF BAR HARBOR

2. UNDER DISCRETION AND AUTHORITY PROVIDED IN 119.03(9)(B)(2)(I) AND 119.03(10)(A), THE TOWN OF BAR HARBOR RELATES TO RETRACES BETWEEN STRUCTURES ON THE PROPERTY. ALL OTHER RETRACES REMAIN UNCHANGED

3. THIS PLAN SUPERSEDES THE DOCUMENT FILED AS PLAN 111182 ON 04/11/2019

BHART'S LLC
25 West Street
Bar Harbor, ME 04719
Subdivision
Plan
03-13-2020

Owner:
BHART'S LLC
1000 Highway 11 West (Box 1)
Sumner, ME 04853
Purchase No. 03131

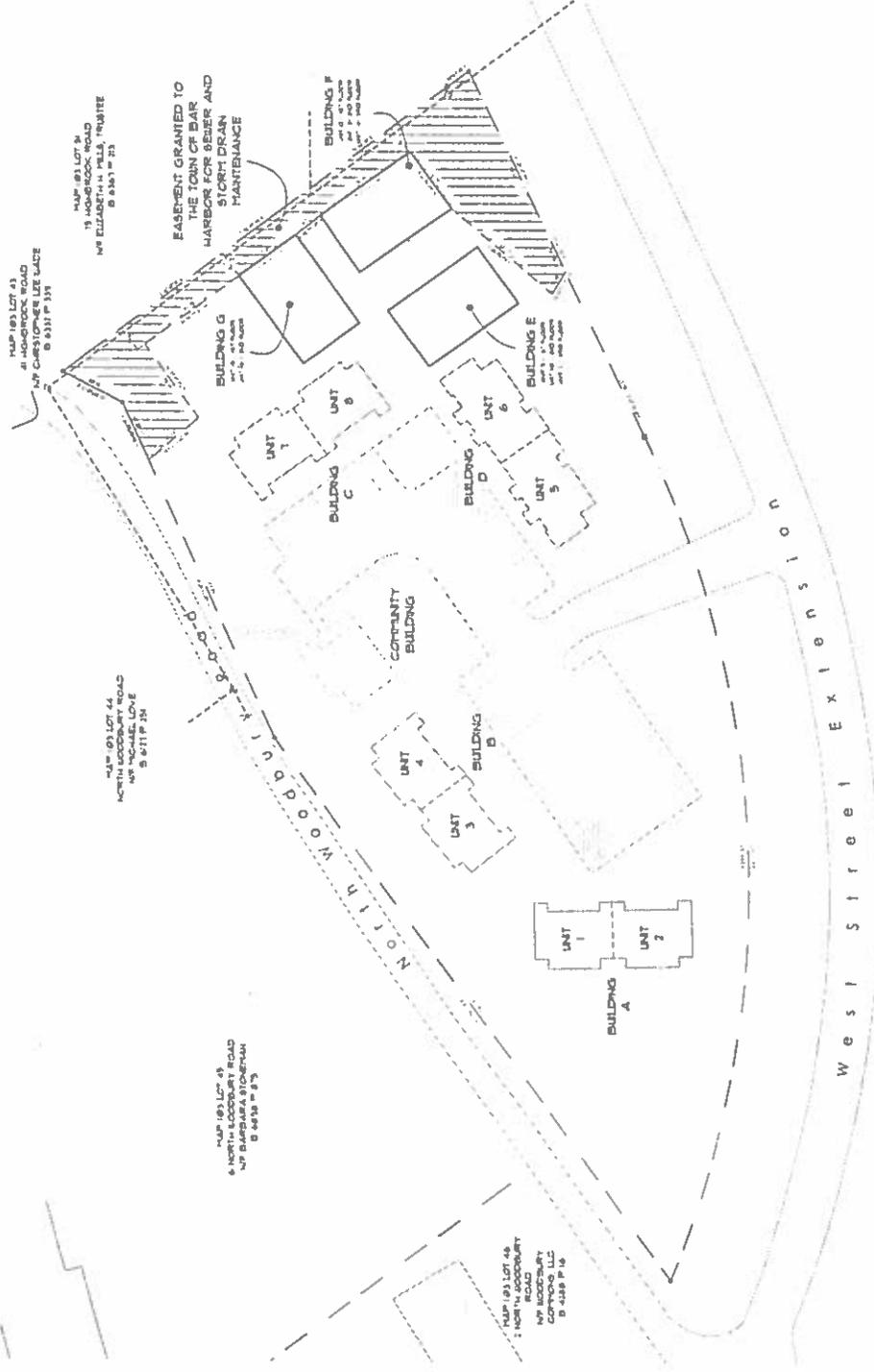
Map 1, LOT 43
15 HADLOCK ROAD
BAR HARBOR, ME 04719



THIS PLAN, MAP, AND SPECIFICATIONS SHALL BE CONSIDERED AS A PART OF THE SUBDIVISION MAP AS REQUIRED BY THE PLANNING BOARD.

PISCIA & DAY
LAND SURVEYORS
77 HANCOCK STREET
BAR HARBOR, ME 04719
P.L.L.C.

STATE OF MAINE	RECORDED
HANDICAPED BY REVISION OF DEEDS	DATE
FILE NO.	RECORDED INSTRUMENT
ATTORNEY	FILE NO.
RECORD YEAR OF DEEDS	



ALL THE UNDEVELOPED AREAS OF THIS PLAN ARE RESERVED TO THE APPLICANT FOR THE DEVELOPMENT OF OFFICE SPACE AND SHALL BE CONSIDERED AS A PART OF THE SUBDIVISION MAP AS REQUIRED BY THE PLANNING BOARD.

DATE: 03/13/2020

FILE NO.:

RECORDED INSTRUMENT:

FILE NO.:

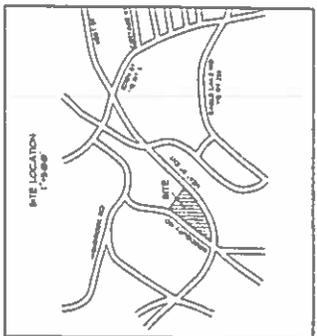
RECORD YEAR OF DEEDS:

LEGEND

- 1. 20' PLANNING BOARD EASEMENT
- 2. 10' PLANNING BOARD EASEMENT
- 3. 5' PLANNING BOARD EASEMENT
- 4. 10' PLANNING BOARD EASEMENT
- 5. 5' PLANNING BOARD EASEMENT
- 6. 10' PLANNING BOARD EASEMENT
- 7. 5' PLANNING BOARD EASEMENT
- 8. 10' PLANNING BOARD EASEMENT
- 9. 5' PLANNING BOARD EASEMENT
- 10. 10' PLANNING BOARD EASEMENT

SURVEY NOTES

1. EXISTING UTILITIES WERE LOCATED AND DEPICTED AS SHOWN ON THE RECORD DRAWING OF THIS SITE.
2. THE PLANNING BOARD HAS REVIEWED THIS PLAN AND HAS DETERMINED THAT THE PROPOSED DEVELOPMENT IS IN ACCORDANCE WITH THE ZONING REGULATIONS OF THE TOWN OF BAR HARBOR.
3. THE PLANNING BOARD HAS REVIEWED THIS PLAN AND HAS DETERMINED THAT THE PROPOSED DEVELOPMENT IS IN ACCORDANCE WITH THE ZONING REGULATIONS OF THE TOWN OF BAR HARBOR.
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9. THE PLANNING BOARD HAS REVIEWED THIS PLAN AND HAS DETERMINED THAT THE PROPOSED DEVELOPMENT IS IN ACCORDANCE WITH THE ZONING REGULATIONS OF THE TOWN OF BAR HARBOR.
10. THE PLANNING BOARD HAS REVIEWED THIS PLAN AND HAS DETERMINED THAT THE PROPOSED DEVELOPMENT IS IN ACCORDANCE WITH THE ZONING REGULATIONS OF THE TOWN OF BAR HARBOR.



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April 24, 2020

Bar Harbor Planning Department
93 Cottage St.
Bar Harbor, ME 04609

Re: *BHAPTS, LLC and Elizabeth Mills*

Dear Chairman St. Germain and Members of the Planning Board:

On behalf of Elizabeth Mills, and pursuant to LUO Section 125-61(B)(2), I submit ten copies of this letter of opposition. I attach to each copy Exhibit A, which is Ms. Mills written authorization to represent her. This was previously submitted to the Planning Department as part of Ms. Mills successful appeal to the Board of Appeals.

I have reviewed the notice of the Zoom-assisted hearing to be held on April 29, 2020 at 4 p.m. That notice is silent as to how I, as a representative of a party, can participate. While there is a public comment period call-in phone number provided, Ms. Mills has a status in this proceeding beyond that of a member of the public and I trust that I will, via Zoom or telephone, be able to respond to the presentation made by the applicant and be able to remain on line should I need to raise a point of order.

The current application complies with only two of the four findings by the Planning Board, those as to base development density (finding 7) and maximum allowable units (finding 8). It completely fails to deal with finding 2, that the current structures on the lot are non-conforming, and finding 9, which set aside the Planning Board's decision that only two units needed to be affordable. There is nothing in the current application that commits the applicant to construct five affordable units.

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Mtre Gloriane Blais, Lawyer
PO Box 260, 4473A, Laval
Lac-Mégantic, Québec
CANADA G6H 2S6
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I note that Justice Murray, in her November 27, 2019 decision staying all construction on this project, held that Ms. Mills was likely to prevail on at least four legal errors made by the Planning Board, two of which remain unresolved by the current application:

A. The Planning Board's decision that the four non-conforming structures and non-conforming use could be expanded and enlarged for temporary worker housing in seven buildings, including construction of three new buildings and reconfiguration of the existing four structures;

....

D. The Planning Board's decision that only 2 of the 18 units needed to be "affordable housing" as defined by the LUO; and potentially other issues.

(Superior Court opinion, pp. 13-14)

The Board of Appeals found that the four structures containing 16 dwelling units were non-conforming as they did not meet the dimensional standards for the Village Residential District, LUO Section 125-20(B)(10), of having at least 10,000 square feet for each family dwelling unit. This finding is critical. Non-conforming structures cannot be extended or enlarged, LUO Section 125-54(B). They cannot be altered so as to extend beyond existing walls, LUO Section 125-55(A). If a non-conforming structure is razed, it can only be rebuilt to its precise prior dimensions, LUO Section 125-55(B). A non-conforming structure may be relocated on the same lot only with the approval of the Board of Appeals, subject to very specific conditions, LUO Section 125-55(C).

The applicant proposes to take the current status of non-conforming structures and apply it to three entirely new structures. This is a clear violation of the LUO. All nonconformities are encouraged to "convert to conformity," LUO Section 125-53(A). The applicant, by converting each of the four existing structures with four dwelling units each to four structures with two dwelling units each, will have finally met the dimensional standards of the Village Residential District. It will have 10,000 square feet of area for each family dwelling unit. Once converted to conformity, no structure can revert to nonconformity, LUO Section 125-53(E).

The applicant claims that this Board has authority to modify the dimensional standards that make each of these four current buildings nonconforming. It cites no provision of the LUO for this claim. Modification of non-conformities is generally left to the Board of Appeals, as noted above. Per LUO Section 125-69-S(6)(d), the only power granted the Planning Board in the PUD-V process is that of modifying setbacks or the general requirements of LUO Section 125-67. The PUD-V process grants no authority to the Planning Board to modify the other

Page 3

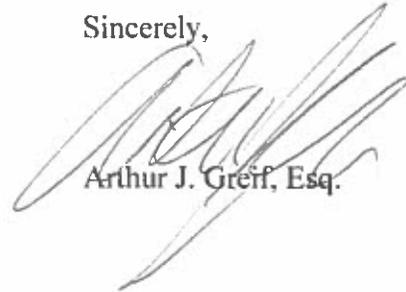
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93 Cottage St.
Bar Harbor, ME 04609

dimensional standards for this or any other District.

The only way the applicant can add eight new dwelling units in three new buildings is to comply with the PUD-V process as to affordable housing. Those requirements make it clear that at least five of the total of sixteen dwelling units must be affordable. The minimum number of affordable units must be 20% of the base development density of 8, LUO Section 125-69(S)(6)(b). This minimum of 1.6 affordable units is rounded down to 1. For each additional affordable unit, a market rate unit may be built, LUO Section 125-69(S)(6)(a)[2][a]. To add eight more units under the PUD-V process, four more units must be affordable, bringing the total number of affordable units to five.

The application should be rejected as it seeks to misuse the nonconforming structure status of the four existing buildings for three new buildings and it fails to provide the required five affordable units.

Sincerely,



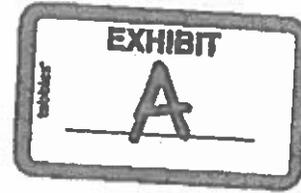
Arthur J. Greif, Esq.

cc: Andrew Hamilton, Esq.

Affiliate Office

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PO Box 260, 4473A, Laval
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Elizabeth Mills
15 Highbrook Rd
Bar Harbor ME 04609



RECEIVED JAN 13 2020

December 29, 2019

Bar Harbor Planning Board
93 Cottage St I
Bar Harbor, ME 04609

Bar Harbor Board of Appeals
93 Cottage St I
Bar Harbor, ME 04609

Dear Members of the Planning Board and Board of Appeals,

By this letter I expressly authorize Arthur J. Greif, Esq., and any attorney at his firm to represent me for any proceedings before the Planning Board and/or Board of Appeals and in particular, for the hearing scheduled before the Board of Appeals on Tuesday, February 11, 2020.

Sincerely,

Elizabeth H. Mills

Elizabeth Mills



Town of Bar Harbor, Maine
Planning Board Meeting
April 29, 2020
(Excerpt of Meeting)

Maine Court Reporting Services

2

1 (Excerpt of April 29, 2020 Planning Board Meeting.)

2 * * * * *

3 CHAIR ST. GERMAIN: Moving on to our -- Item 6(e).
4 We have a public hearing for remand of PUD-2017-02 from
10 51 33 5 the board of appeals. The location is 25 West Street
6 Extension. Applicant/owner is Bar Harbor Apartments,
7 LLC.

8 Are we -- go ahead, Steve.

9 MR. FULLER: Sorry, could I -- if I could just take
10 10 52 03 10 a minute at the beginning, rather than wait until the
11 public hearing starts, and I realize we're not there
12 yet, but just if I could say to the listening audience,
13 if there is anyone interested in speaking during the
14 public hearing when that takes place, which is not --
10 52 29 15 the public hearing is not taking place right now as I
16 understand it -- but just if you wish to speak, I just
17 want to read that number now and give folks a chance to
18 prepare.

19 It's 288-1710. Again, 288-1710, and the pass code
10 53 01 20 is 0107522, pound sign. Again, 0107522 followed by the
21 pound sign.

22 I would just add, if anyone does call into that
23 number, if you can please, you know, the chairman will
24 state when the public hearing has been opened, so please
10 53 31 25 wait to make any comments until that time. I just

3

1 wanted to put that out there at the beginning so that
2 we're prepared when it does come to that point.

3 CHAIR ST. GERMAIN: Okay. Thanks.

4 MR. MOORE: Tom, this is Perry. Can I jump in real
10 53 57 5 quick? I've asked for permission to record the meeting.
6 It needs to be approved by Steve. We'd like to record
7 the meeting.

8 MR. Fuller: Does anyone -- I'm trying to see if
9 I -- Michele, do you want to weigh in? I'm not even
10 54 22 10 sure where I see that on my --

11 MS. GAGNON: There's a record button on the right.

12 MR. MOORE: Yes. But he's requesting for recording
13 permission from the meeting host. So the host needs to
14 approve that.

10 54 51 15 MR. FULLER: I'm looking, Perry, to see where
16 that's coming through on my -- my end here. I don't --
17 I see where I can record it. I'm trying to see -- I
18 don't see a request of any kind. Sorry, that's a first
19 for --

10 55 18 20 MR. MOORE: Can you record it for us, please?

21 MR. FULLER: Yeah, I would note that it is being
22 recorded on the Town Hall Streams, so it will be like
23 any other planning board meeting, it is being stored
24 there, and anybody could go back in.

10 55 42 25 Is that sufficient to know that it's being recorded

4

1 and stored on Town --

2 MR. MOORE: Yes.

3 MR. FULLER: Okay. Just for confirmation, that is
4 taking place. So it will be available on -- it's
10 55 58 5 available live now, and it will be available for
6 watching in the future at that location.

7 CHAIR ST. GERMAIN: Okay. I will jump in here.
8 Today what we're dealing with is a remand from the
9 appeals board on an application that was previously
10 56 25 10 approved by this planning board I believe last year.

11 It was appealed and the appeals board found
12 certain -- made certain findings, and it's being given
13 back to us, and the application has been modified.

14 So the applicant is here this evening. I know,
10 57 12 15 Perry is here as a representative, and so is Attorney
16 Andrew Hamilton.

17 The appellate, I believe, is represented here, but
18 it is -- by and large this is a remand that the planning
19 board will hear from the applicant.

10 57 45 20 We have, I think, a lot of ground to cover, and so
21 I think what -- what I'd like to do is propose some form
22 to this meeting that might include, you know, opening
23 statements and a presentation by the applicant. Perhaps
24 at some point in time we'll get to a public hearing, and
10 58 18 25 then the planning board, I think, has a lot of ground to

1 cover today, and if we get to it, there may be a chance
 2 during deliberations that we would converse with the
 3 applicant, and then if we, again, these are conditional
 4 things, I'm not -- depending on whether we get that far,
 10 58 51 5 we will consider some sort of closing statements from
 6 the applicant, and it's possible that members of the
 7 public may be able to weigh in at that point in time.

8 However, the normal rules of the public hearing
 9 will apply. You can call in through that line that's
 10 59 16 10 been provided by Steve, but we don't want to have repeat
 11 callers, so in other words, if you have something to
 12 say, please make sure that you get it out in the time
 13 that you're allotted.

14 I hope that sounds fair to everybody, and I guess
 11 00 34 15 at this point in time, has this application, the number
 16 of this application, been read into the record for the
 17 site plan review, or the PUD?

18 Yes, John.

19 MR. FITZPATRICK: So, Tom, just to be clear, I'm
 11 01 14 20 reading the document that came back from the appeals
 21 board, and unless I'm mistaken, we are asked to do three
 22 things.

23 We are asked to consider -- if I read the
 24 decision -- based on the findings and conclusions above,
 11 01 39 25 the board of appeals voted to vacate the planning board

1 decision and remand the matter to the planning board in
 2 accordance with LUO Section 125-103D(1), Limited to
 3 consideration of base development density, maximum
 4 allowable units, and required affordable housing units
 11 02 21 5 only consistent with the board's finding above.

6 Is that the case? Those three things are what
 7 we're here to decide, nothing else?

8 CHAIR ST. GERMAIN: As I understand it, that's
 9 correct.

10 MR. BEAROR: That's correct.

11 MR. FITZPATRICK: Okay, good. Thank you, Ed.

12 MR. HAMILTON: I'll defer until you're ready,
 13 Mr. Chairman.

14 CHAIR ST. GERMAIN: Yes, I'm just -- thank you.
 11 03 19 15 I'm just writing down what John said as a guidance for
 16 myself. I'm not the one leading up the [inaudible], I
 17 hope.

18 But why don't we -- Mr. Hamilton, why don't we have
 19 you go right ahead, although, again, I'm not sure that
 11 03 56 20 this particular application has been read into the
 21 record.

22 Did you read it into the record, Basil?

23 MR. FULLER: Hold on, Basil is --

24 MR. ELEFTHERIOU: Would you like me to read the
 11 04 25 25 entire decision or --?

1 CHAIR ST. GERMAIN: Well, I'm having trouble
 2 remembering whether you actually read this in as an item
 3 for the agenda.

4 Did you already do that this afternoon just a few
 11 04 47 5 minutes ago?

6 MR. ELEFTHERIOU: For the agenda, yes.

7 CHAIR ST. GERMAIN: Okay. So you have -- you have
 8 introduced the item on the agenda. I just wanted to
 9 make sure. Sorry.

10 If that's been done, then I'll turn it over to
 11 Mr. Hamilton, unless Mr. Moore is going to be doing the
 12 presentation. But the applicant will have -- I'll give
 13 you some time to make your presentation to us, please.

14 MR. HAMILTON: Sure. So I'm going to view this
 11 05 45 15 with Mr. Moore. We are going to have a few PowerPoint
 16 slides just to keep the flow of this crisp and keep it
 17 short and sweet and focused on the three findings,
 18 Findings No. 7, 8, and 9 that are reflected in the
 19 decision component of the board of appeals' decision are
 11 06 21 20 the limited considerations that the board of appeals
 21 sent this back to the planning board.

22 On all other findings the board of appeals denied
 23 the grounds for appeal, and so we're only thinking of 7,
 24 8, and 9, and I think the question from Member
 11 07 00 25 Fitzpatrick echoed by your attorney, Edmond Bearor, and

1 as reflected by the chairman are accurate.

2 So I would say good evening to everyone. I know
 3 that we're already starting at 5:39, and these
 4 discussions usually aren't brief, but I'm going to do my
 11 07 43 5 best to keep ours brief.

6 Steve, with your technology assistance, I think I
 7 can mirror my iPad which has the PowerPoint on it, and
 8 let me see if this works.

9 MR. FULLER: Okay.

10 (Audio interference.)

11 MR. HAMILTON: So obviously this project is at 25
 12 West Street Extension. It is Acadia Apartments. There
 13 are 16 existing units, a Multifamily II project. I'm
 14 going to say that again. It is a Multifamily II
 11 09 11 15 project, and that means that under the land use
 16 ordinance as we're before you here on April 29, 2020,
 17 it's very important to make sure that we understand that
 18 we're required by 125-20E to be before you as a PUD-V.
 19 That's how we come to you both before and after.

20 So I think it's already been covered, but based
 21 upon the findings and conclusions above, this is in the
 22 decision section of the board of appeals' decision.

23 The board of appeals remanded -- remands the matter
 24 to the planning board limited to consideration of base
 11 10 17 25 development density, that's Finding 7, Maximum allowable

1 units, Finding 8, and requires affordable housing and
2 only those items.

3 The board of appeals denied the appeal to all of
4 the issues raised.

11 10 55 5 So in our opinion, Finding No. 2 is moot. We're
6 going to hear some conversation about Finding 2, relates
7 to nonconforming structures. There is a clear and plain
8 set of provisions in the PUD-V provisions, 125-69S that
9 I'll detail in a moment.

11 11 50 10 But the planning board can decide if the project
11 both requires [inaudible].

12 MR. FULLER: Sorry, I think someone is on the
13 public hearing line, and I think they're listening to
14 the -- to the meeting and it's creating some feedback.

11 12 35 15 MR. HAMILTON: So maybe what we could say is if
16 folks could mute their devices until they're speaking,
17 that would be great. And thanks, Steve.

18 MR. FULLER: Yes.

11 12 57 19 MR. HAMILTON: So if the planning board proceeds as
20 it already has, and I think largely most every one of
21 your findings from the last decision, it's ditto as to
22 your findings this time around except as to those three
23 items that the board of appeals addressed.

11 13 40 24 So if we're under PUD-V, which we believe we have
25 to be under 125-20E in your ordinance, then that's going

1 to moot the whole issue as to Finding No. 2 and
2 nonconformities, and I'll detail that in just a moment.

11 14 22 3 So the narrow scope of the review again is base
4 development density, maximum allowable units, and
5 affordable housing units.

6 You have a limited application amendment before
7 you. It's a revised subdivision plat for 16 units.

8 Previously it was 18 units. So the only difference
9 between this one and the one that you previously
11 14 51 10 approved is we're down to 16 units, and for those who
11 either view the nearest whole number that you can get to
12 as the test, we're rounding down of the test, that's
13 what the board of appeals found.

14 So Building D on Perry's plan has been converted
11 15 07 15 from 4 units to 2 units.

16 So the board of appeals' Finding No. 7 is that, as
17 we all know, this lot has 85,324 square feet. You
18 divide that parcel size by 10,000 square foot, which is
19 the minimum area per family, a lot standard, and you
11 16 11 20 come to a base development density of 8.5324.

21 The board of appeals said two similar things in
22 finding it was 8. They said, you can't get to the whole
23 number of 9 based on 8.5. They also said -- a few of
24 them -- you would round down to 8.

11 16 54 25 So this revised application accepts the finding of

1 the board of appeals on base development density, and as
2 you saw from the letter of Attorney Greif, he agreed
3 that the base development density is 8. So we're not in
4 any disagreement there.

11 17 25 5 The next is the maximum allowable units, the board
6 of appeals' Finding No. 8. They found that instead of
7 18, the maximum allowable units is 16, and as you know,
8 125-69S contains a provision that says you may have up
9 to two times the base development density. 8 times two
11 18 14 10 is 16.

11 We note that we also have 16 units that were built
12 by planning board approval back in the '80s. Those
13 units became grandfathered by virtue of the change to
14 the village residential district that changed the area
11 18 50 15 per family and the minimum lot size in that district.

16 And so the lot became nonconforming but we have --
17 in terms of units -- not the buildings, not the
18 structures -- the units, we have 16 grandfathered units.

19 What is the area per family? It says, For every
11 19 30 20 family unit, you have to have given area. And so we've
21 got 16 grandfathered units.

22 The board of appeals' Finding No. 9, in the final
23 plan, The minimum number of affordable units or lots
24 must be 20 percent of the base development density.

11 20 07 25 That's cited in 125-69S(6)(b). 20 percent of 8 is 1.6.

1 Again, the board of appeals' logic was and is you
2 need to get to the nearest whole number. You can't get
3 to 2. You round down to 1 or you choose the full whole
4 number that you can accommodate within 1.6.

11 20 52 5 For either of those reasons for consistency, a
6 rounding down or nearest low or whole number is the
7 finding of the board of appeals.

8 So why do we need to proceed before you this
9 evening to come before the planning board? There are at
11 21 26 10 least three reasons. First of all, 125-20E provides
11 that Multifamily II is a use allowed by plan unit
12 development approved by the planning board. The code
13 officer, the board of appeals, neither have the
14 authority to grant a PUD-V. That strictly resides with
11 22 09 15 the planning board.

16 The whole concept of a PUD, why do you proceed?
17 Because you've got dimensional standards that can't
18 always be met for a given development. So 125-69S(1)
19 provides for a greater freedom of design and improving
11 23 53 20 the opportunity for flexibility and creativity in the
21 land development process.

22 That means that wholly coherent with 125-64, which
23 is invoked by the ordinance in the context of both PUDs
24 and particularly to this one subdivision, you have the
11 23 25 25 ability to modify standards. And so the PUD is the

1 vehicle that the ordinance requires that we use.
 2 Then what is the board's authority? There's
 3 conflict here. The appellate, Mills, argues through her
 4 counsel that the planning board doesn't have any
 5 authority to vary requirements in the ordinance
 6 including for so-called nonconforming structures. We
 7 disagree.
 8 125-69S(2)(c) does indeed vest the planning board
 9 with authority to approve changes to dimensional
 10 standards since the planning board is the permitting
 11 authority for PUD-V.
 12 If the Town was to designate a review authority for
 13 a given style of development -- in this case the
 14 PUD-V -- it would be strange not to give them permitting
 15 authority.
 16 So you also know that under 125-64 you're the one
 17 entity, the land use entity, that has authority to
 18 modify standards. If you look to the plain language of
 19 125-64, it's only the planning board that can modify
 20 standards.
 21 So you put two concepts together -- three concepts
 22 together -- 125-20E says, if you're going to do a
 23 PUD-V-style project, which this one is styled as, and
 24 thus interior setbacks can be modified, as you did with
 25 the original approval, that's a Multifamily II. That's

1 structure question, we think it's erroneous, but we're
 2 not asking the planning board to find that the board of
 3 appeals committed error. We're just saying, once we
 4 vest our rights after you provide for amended PUD-V
 5 approval as you did last time, that will then remove the
 6 nonconformities. It's all conforming under 125-69S.
 7 So we don't have to decide if there's nonconforming
 8 structures on this property, there aren't, but we don't
 9 have to decide that because this provision, 125-69S,
 10 says it doesn't matter how you came to us, if you're
 11 under a PUD-V, we give you authority to proceed as a
 12 PUD-V.
 13 So we would ask for two planning board findings to
 14 be very clear. First is that the dimensional standard
 15 noted by the appeals board as creating a nonconforming
 16 condition is the minimum area for family standard, and
 17 you find that in Article III, Section 125-20B of the
 18 land use ordinance.
 19 Two, the planning board has authority under 125-69S
 20 to modify that Article III standard. There is no reason
 21 that these PUD-V projects come before you unless they
 22 can't meet dimensional standards under Article III.
 23 They're coming to you because they want to proceed as a
 24 better-designed project, one that can advance the Town's
 25 objectives as articulated in 125-69.

1 a planned use development. 125-20(E) says go to the
 2 planning board and only to the planning board. Nobody
 3 else has got authority to do this.
 4 You then take the authority to provide greater
 5 freedom of design and improve for flexible and creative
 6 land development process and use your authority under
 7 125-69S(2)(c). That means you are the permitting
 8 authority. You have the authority to invoke this.
 9 And then finally, 125-64 says you're uniquely the
 10 board that can modify standards.
 11 There's no way to approve this project except
 12 through the planning board, and I think it's hopeful
 13 that the board of appeals only remanded for three
 14 issues.
 15 So given that the planning board has authority
 16 under 125-69S to modify the area per family standard
 17 through PUD-V and apply the PUD-V standards to approve a
 18 16-unit project at two times the base development
 19 density of 8, rounded down or containing the whole
 20 number of 8 per the board of appeals' finding, so legal
 21 nonconformities, whether it be a nonconforming lot or
 22 any theory that we know we're going to be taking up
 23 before the board of appeals, it's likely that no matter
 24 which way you decide this one again, it's going to the
 25 board of appeals. We can resolve the nonconforming

1 The third finding, once the planning board affirms
 2 the board of appeals' finding of development density of
 3 8, then the project complies with the land use ordinance
 4 and there is no nonconformity, and therefore Finding
 5 No. 2 of the findings in the appeals' decision is moot.
 6 We don't have to talk about it, it's mooted.
 7 And then the next finding is 4, All legal
 8 nonconformities are eliminated once the planning board
 9 grants amended PUD-V approval, and 2, BHAPTS vests that
 10 approval by commencing construction of the project after
 11 amended PUD-V approval of the project by the planning
 12 board.
 13 There can be all kinds of exotic theories, but what
 14 I've provided as thoughts really is all that you need to
 15 review. Everything else is coloring outside the lines
 16 and getting way too creative, particularly for this hour
 17 of a very fine day outside.
 18 So I'm happy to be brief but to answer any more
 19 data points that you need by answering any questions
 20 that you have.
 21 MR. FULLER: Do you mind, Andy, if I -- are we all
 22 set with the screen sharing for now?
 23 MR. HAMILTON: Yes.
 24 MR. FULLER: Okay. I just want to go back so
 25 everyone viewing at home can see who's -- see who's

1 speaking.

2 MS. GAGNON: Before we start, can I say something,

3 Tom?

4 CHAIR ST. GERMAIN: Yes, please. Go ahead,

11 35 47 5 Michele.

6 MS. GAGNON: Andy, this was not part of the mailed

7 package. Now that you've presented that, that becomes

8 part of the record, so I would like to get a copy

9 immediately after this meeting. I'd like you to email

11 38 20 10 this to myself and to the planning board so we can make

11 sure that's part of the record.

12 MR. HAMILTON: You should know, Michele, that I had

13 committed to share it with the planning staff, and so

14 Steve Fuller has it.

11 39 43 15 MR. FULLER: I did -- I received it. That's

16 correct. Andy sent it to me this afternoon just

17 before -- shortly before the meeting. I can forward

18 that on, too.

19 MR. HAMILTON: I did not share it as a submittal.

11 37 34 20 I shared it as an illustrative presentation, and as

21 Attorney Bearor knows, it's okay to do a presentation,

22 and that's all I was doing.

23 It's all in the letters and materials. I could

24 have -- I could have, you know, buried the planning

11 38 32 25 board in paper. We decided not to do that just to keep

1 presentation to address that with Attorney Hamilton

2 regarding the presentation that he gave and see if there

3 is a thought that we can develop for the course of

4 action that we might take this afternoon.

11 41 31 5 Go ahead, John. Do you have a question?

6 MR. FITZPATRICK: Part a question, part a

7 statement. Again, I go back to my initial question that

8 Ed answered earlier.

9 I think we're here to provide simply three numbers:

11 42 08 10 Base development density, maximum number of units, and

11 the number of affordable units.

12 I appreciate what Andy's asking for, findings about

13 the planning board's ability to vacate area per family

14 requirements and dimensional standards, but that's --

11 42 44 15 that's not really what we're here to do.

16 If we approve the PUD, we were asked to provide

17 three numbers. I think that's an argument between

18 Andy's team and Ed's team and Art's team and everything

19 else, whether it creates -- Item 2 is a moot point.

11 43 17 20 That's not what we were asked to do.

21 So I would suggest that the planning board focuses

22 on providing those three numbers. I can certainly lay

23 down the three numbers that I think you guys have to

24 comply with, and we can use that as a starting point,

11 43 45 25 and those numbers would be 8, 16, and 6.

1 it brief.

2 But thank you, Michele.

3 MR. MOORE: Tom, can I jump in real quick?

4 CHAIR ST. GERMAIN: Sure.

11 35 54 5 MR. MOORE: The things that we would like to ask

6 for as we conduct the meeting tonight is that there may

7 be times when our team needs to compare notes or there

8 may be times when we ask you for a side bar. I just

9 wanted to alert you to that and ask for the privilege to

11 39 38 10 do that.

11 As you know when we're live and sitting next to

12 each other at the planning board meeting, we pass notes,

13 we lean over. That's part of the dynamic that we need

14 to have to make sure we're all on the same page.

11 40 04 15 So at the board's pleasure, I would like to have

16 that opportunity.

17 CHAIR ST. GERMAIN: Okay. I think that's fair.

18 How is that going to -- are you suggesting that we --

19 you guys just mute and you have some way of

11 40 27 20 communicating amongst yourselves?

21 MR. MOORE: Yes.

22 CHAIR ST. GERMAIN: Okay. Then we'll keep the

23 meeting going while we wait for that to occur.

24 I guess at this point in time what I'd like to do

11 40 49 25 is ask board members if they have questions about that

1 CHAIR ST. GERMAIN: 8, 16, and 6, okay. 6 is

2 20 percent -- could you tell me, 6, because in order to

3 get from 8 to 16, there's a set of directions provided

4 by 125-69S.

11 44 29 5 MR. FITZPATRICK: Yeah, and so I'm also assuming

6 that there's no other provisions of the PUD that are

7 taken advantage of, whether it's putting in a bus stop,

8 whether it's putting in a sidewalk down to Eden Street.

9 But if the way to get to the maximum number is

11 44 59 10 through providing affordable units, then I think we're

11 at 8, 16 and 6, and how I got 6 is 20 percent of 8 is

12 1.6. When it says minimum of, you round up, you don't

13 round down. And the rounding down provision in an

14 earlier part of the ordinance deals with proportionality

11 45 45 15 of the phased construction. I don't think it applies

16 going further.

17 So if a minimum of 20 percent is 1.6, then you have

18 to provide 2. We're up to 8 units, and if we want to

19 bring 8 more on at a 1:1 ratio, then 2 plus 4 is 6.

11 46 25 20 MR. HAMILTON: So can I respond to that at some

21 point, Mr. Chairman?

22 CHAIR ST. GERMAIN: Yeah, I think what I'd like to

23 do is poll other members and maybe we could have that as

24 a question that you could respond to, because I have a

11 46 45 25 similar question, but it's not exactly the same. So I

1 think that what I'd like to do is maybe go to other
2 members if they have a question -- questions for you and
3 do it that way.

4 MR. HAMILTON: Very good.

11:47:14 5 CHAIR ST. GERMAIN: John, is that a summary of
6 everything that you believe we need to determine this
7 afternoon?

8 MR. FITZPATRICK: Yeah, yeah, I think it's pretty
9 short and sweet.

11:47:27 10 CHAIR ST. GERMAIN: Okay. Joe, go right ahead,
11 please.

12 MR. COUGH: I'm trying to understand the 8/16 John
13 suggested as a starting point. I'm a little perplexed
14 by the 1.6 rounding up to 2 given the planning board

12:25:57 15 decided to round down from the 1.5, which we are all
16 taught in math rounds up. So I'm not sure that
17 that's -- and I don't know, I haven't looked at the
18 ordinance to compute that -- but my sense is that
19 because we're not a whole number, it would be back down

12:26:32 20 to 1, at least starting from there. That's it for now.

21 CHAIR ST. GERMAIN: Okay. Basil, do you have any
22 thoughts to share on these numbers?

23 MR. ELEFTHERIOU: Yeah, I agree with John on, you
24 know, the base and 16.

12:27:03 25 John, I guess I just ask on the 6, if you have 8

1 base units, you're saying the 9th is affordable, the
2 10th is market, 11th is affordable, and so on? Is that
3 how -- is that how you're calculating?

4 MR. FITZPATRICK: Correct.

12:28:28 5 MR. ELEFTHERIOU: So by your argument, are you
6 saying 9 and 10 -- you're saying 9 and 10, affordable,
7 11 is market, 12/13 affordable, then market, then
8 affordable?

12:28:57 9 MR. FITZPATRICK: Yeah, so basically 2 out of the
10 first 8 are affordable, and then a 1:1 ratio, 4 out of
11 the next 8 would be affordable, again, unless the
12 applicant's taking advantage of another way to get a
13 market unit apartment in there through a bus stop or a
14 sidewalk or some other public infrastructure
12:29:33 15 improvements.

16 MR. ELEFTHERIOU: You know, at this moment I agree.
17 I understand we had likely discussions the last time on
18 the base development number 8, and I think, you know,
19 obviously the nonconformity of the lot, does come to 8,
12:31:03 20 and I think in reviewing some of the stuff, you know, I
21 think Ed had said it in some correspondence.

22 You can't have it both ways when you forfeit the
23 nonconformity protection. If you forfeit that
24 nonconformity protection, it's referred to a PUD-V. You
12:31:59 25 just can't have it both ways and I think that's --

1 that's where some of this argument is going to come into
2 play.

3 So at the moment I would agree with John unless --
4 unless someone can provide something else.

12:32:16 5 MR. HAMILTON: Again, we'll defer, but I'd like the
6 opportunity.

7 CHAIR ST. GERMAIN: You'll be given the
8 opportunity. I think that perhaps we could get
9 questions from each of us, and you could deal with them
10 in the aggregate in the event that some of them overlap.

11 I believe that my questions may overlap with some of the
12 comments from other members.

13 Erica, do you have questions?

14 MS. BROOKS: I actually -- I don't right at this
12:33:27 15 moment. I'm still doing some more math.

16 CHAIR ST. GERMAIN: Okay. If you don't mind, then
17 I'll jump in, and I'll -- in addition to the questions
18 that have been put out there by -- or suggestions by
19 other members, I would like to add to that list for
12:34:09 20 Mr. Hamilton to tell us how we're going to get from 8 to
21 16.

22 If the base -- if we accept that the base
23 development density is 8, is there -- are you saying
24 that the -- I guess I'd like you to separate between
12:34:35 25 nonconforming, grandfathered nonconforming number of

1 units at 16, or if you're going to use 125-69S(6), some
2 of the other ways to get 2 additional units and thereby
3 reduce the number of affordable units. That's one
4 question.

12:35:10 5 I guess that really both of my questions are rolled
6 into that one, and this is a question I think for the
7 planning board to kind of consider as well.

8 This property right now has a grandfathered number
9 of dwelling units of 16. It was legal when it was
12:35:41 10 built. The land use ordinance changed. The base
11 development density is much less than that.

12 Are we going to resolve that tonight or is that --
13 are we just going to go with the base development
14 density if we agreed that it's 8 and figure out how we
12:36:15 15 get to the 16 that exists now and permit it as a PUD-V
16 as suggested by the applicant tonight?

17 It's actually done -- I think we can deliberate
18 that as a board later, but I think unless Erica would
19 like to add to the list, then maybe we can turn it back
12:36:55 20 over to Attorney Hamilton and he can deal with some of
21 these questions.

22 Erica, do you have anything to add right now?

23 MS. BROOKS: No. I'd like to hear what
24 Attorney Hamilton has to say.

12:37:20 25 CHAIR ST. GERMAIN: Okay.

1 MR. HAMILTON: So thank you all members of the
 2 board. I'm going to lean in on Mr. Moore who's got vast
 3 experience with the Bar Harbor land use ordinance and
 4 ask for his thoughts, and I'm going to supplement what
 12 37 44 5 Perry has to say.
 6 MR. MOORE: Thanks, Andy. Okay. We agree with
 7 16 -- or 8 as the base and 16 is the maximum. There's
 8 no quibble with that.
 9 As to the affordable, I think there's two -- two
 12 35 08 10 paths you can take there. I agree with the chair that
 11 we're grandfathered for 16. My reading of the ordinance
 12 is that you're entitled to 16 units, 16 market units,
 13 but because there's a requirement that 20 percent of the
 14 units be affordable, our calculation is 1.6 of the total
 12 38 43 15 must be affordable, so that's 2. We're willing to do 2.
 16 That's the base of the application.
 17 The second way that you can get to the affordable
 18 units is to endorse the idea that we were required to
 19 walk away from the nonconformity because we applied from
 12 39 21 20 the PUD. That is not stated anywhere in the ordinance.
 21 Any attempt to say that we have to do that is
 22 legislating outside the ordinance; however, if we want
 23 to go there, the way 125-69S is set up is that
 24 there's -- -69S(6)(2) is an al carte menu by which we
 12 40 25 25 can ask for additional units over the base development

1 required by 125-69 to treat 25 West Street Extension as
 2 though it's a vacant lot. It's not. It has 16 existing
 3 units on it.
 4 So your ordinance provisions in the 125-50 series,
 12 44 09 5 including 125-56, provide the requirement that we must
 6 treat nonconformity as transferrable when BHAPTS -- for
 7 some reason Art's face is moving from side-to-side,
 8 thanks Art.
 9 So when BHAPTS acquired this property, they
 12 44 55 10 acquired a property that had been approved by the
 11 planning board, they acquired a property that had
 12 already been built out in 16 units, they had acquired a
 13 property that was configured into four buildings, so 4
 14 units per building, and for more than 30 years that
 12 45 28 15 existed at the site.
 16 They then wanted to do a PUD-V project because the
 17 layout, the configuration of those buildings, was not
 18 optimal, and so they applied under PUD-V.
 19 I think it's a difficult conclusion both legally
 12 45 56 20 and as a matter of land use policy to say somebody who
 21 has an existing house on their property and wants to
 22 [inaudible] -- for somebody that wants to have the
 23 opportunity to redevelop their property, they have every
 24 opportunity to use those nonconformities. You're going
 12 47 02 25 to hear nonconformity argued two polar opposite ways.

1 density of 8.
 2 There is no requirement that we have to provide
 3 affordable housing except for the total must be -- it
 4 must be 20 percent of the total at the end of the day.
 12 40 47 5 So if we were to agree to throw away a
 6 grandfathered nonconformity and go with the base of 8,
 7 we've got 8. We've got underground utilities. We get 1
 8 for that. That's 9. We also did pedestrian amenities
 9 in the form of a sidewalk and bike rack on Woodbury
 12 41 37 10 Road, which I recall from the previous application was
 11 considered to be good enough for that part, which is
 12 129-69S(e). So that's 10.
 13 Then we do 1 affordable and 1 market rate, another
 14 affordable and 1 market rate, another affordable and 1
 12 42 20 15 market rate for 6 more units. That's 16. I think --
 16 and in that interpretation it's the only way that you
 17 can get there. I don't see that we're required to give
 18 20 percent of the base as -- upfront before we start
 19 adding those from 129-69S(3).
 12 43 02 20 Andy?
 21 MR. HAMILTON: Perry, that's helpful because it
 22 gives the two branches that Chairman St. Germain was
 23 looking for. So I'm going to supplement in a couple of
 24 different ways but some of it may be redundant.
 12 43 27 25 So I fundamentally do agree that we are not

1 We argue that grandfathering gives you rights.
 2 You'll hear Mill's argument that it's a straightjacket.
 3 It limits what you can do in terms of footprint for
 4 those structures.
 12 47 40 5 So we don't agree that you give up nonconformities.
 6 We think you start with a base of 8. Either way, either
 7 under PUD or nonconformities, you start with a base of
 8 8. We do not agree that you start with a base of zero,
 9 and I think the difficulty is, if we think about
 12 48 16 10 starting at zero, you are wiping the slate clean.
 11 You're taking away rights, you're taking away property
 12 rights specifically, and I don't think this applicant
 13 will ever tolerate the idea that it loses property
 14 rights.
 12 48 46 15 Now let's go to the second branch that Mr. Moore
 16 spoke of. If we start at 8 market units, because that's
 17 the development density, we have a base of 8, then there
 18 is 1 for underground utilities, that's a credit, 1 for
 19 pedestrian amenities. We're now from 8 market units to
 12 49 25 20 10 market units. Now we start using the cadence that is
 21 provided in one provision of the ordinance where you
 22 start counting one-by-one.
 23 So if we start at 10, the next that would be an
 24 affordable is number 11. The next market would be 12.
 12 50 00 25 The next affordable would be 13. The next market would

1 be 14. The next affordable would be 15. The next
 2 market would be 16.
 3 That cadence takes you to 3 at most. I cannot find
 4 a way that is both somewhat respectful of the property
 5 rights of all Bar Harbor residents as well as the
 6 understanding that there's nothing in 125-69 that
 7 eradicates rights under Article V, the nonconformities'
 8 provision, and so you use the two together, and I think
 9 they merge somewhere between 1 and 3. I can't get to 4
 10 or 5 or 6.

11 Now, to answer specifically Member Fitzpatrick's
 12 good question, he's starting with the premise that if
 13 you want 8 to begin with, you've got to give up 2
 14 affordable units. I can't agree with that. That would
 15 be to not only deprive property rights but it would be
 16 to stand 125-69 on its head and we don't agree.

17 To answer Basil's good question, Member
 18 Eleftheriou, I do agree, Basil, that I think you have to
 19 look at the nonconformity, but I choose to understand
 20 that the lexicon of lawful nonconformity means that
 21 something exists. If this was a vacant lot, we start at
 22 zero. We're not starting at zero. We've got 16
 23 existing units on that property.

24 And so I do agree with the view that you can't
 25 leverage to the Heavens without using affordable units,

1 but you hear this applicant saying, we agree, it's 8,
 2 base development density, it's 16 for total number of
 3 allowable units, and therefore, start at 8, give the
 4 credit for 2 that's authorized by 125-69S clearly, and
 5 now you're at 10, and you go in a rule of cadence to go
 6 from 11 through 16, and that requires 3 units.

7 I can't get above 3, and I think it's responsive
 8 to -- to Member Fitzpatrick's comment, but I also think
 9 it is responsive to those who understand there's nothing
 10 in 125-69 that negates Article V.

11 I have seen provisions that are varied by 125-69,
 12 but those are the articles, three-dimensional standards.

13 And so as I said in the PowerPoint, we're looking
 14 at Article III dimensional standards that are changed by
 15 125-69. I find nothing in the plain language of the
 16 land use ordinance that says we negate the Article V
 17 lawful nonconforming rights.

18 I hope that robustly is helpful but I want to
 19 emphasize something. I think we can get there tonight
 20 because the only way we don't resolve is we have a
 21 disagreement over affordable units. That's going to
 22 send us to the board of appeals, and we can resolve with
 23 them at a further time if we need to.

24 I think the planning board can finish up tonight
 25 even after hearing argument that, gee, maybe there needs

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1 to be 8 affordable units. Who knows?
 2 So I think we're somewhere between 1 and 3, and I
 3 think this applicant could live at between 1 and 3. We
 4 can't live at 6 or 8. It doesn't make sense to us. So
 5 I'll leave it there.

6 CHAIR ST. GERMAIN: John, go ahead. Thank you,
 7 Mr. Hamilton.

8 MR. FITZPATRICK: Yeah, thank you, Andy.
 9 Appreciate that.

10 So I'm embarrassed to say my math has been
 11 corrected. The minimum -- I still feel that 8 is base
 12 development density, 16 is max. The 20 percent rounding
 13 up is where we need to end up at 2 or greater.

14 And if we do look at starting with the first data
 15 as market, the underground utilities, if we're going to
 16 take advantage of that provision, it gives you an
 17 additional market unit for 9.

18 If we do put in a permanent amenity from the site
 19 to the intersection of Eden Street or whatever it is
 20 that the board agrees to, there's another market for 10.
 21 And then if you follow your cadence, then I see that we
 22 do get to 3, 3 affordable, 3 market, we're at 3
 23 affordable, 3, 13 market overall. That exceeds the
 24 20 percent minimum. So my sixth number is now 8, 16,
 25 and 3 is where mine ends up.

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1 MR. ELEFThERIOU: I was just going to reinforce a
 2 little bit of what John had said, so I'm looking at a
 3 letter from Ed Bearor from August 14th, 2018, and this
 4 was a discussion where we were talking about the base
 5 units and also the affordable units. I was trying to
 6 think if this discussion was going on, how we ever
 7 arrived at the affordable unit 1.

8 But Ed's letter -- and I'll read a portion of it, I
 9 don't know if anyone has it in front of them -- but it
 10 cites -- I'll just start in the middle paragraph.

11 It says, In this instance the affordable unit
 12 dedication formula in Section -69(R)(3)(f) requires that
 13 we round down. So only 1 affordable unit is required
 14 under base development density.

15 And then, of course, he just goes on to reiterate
 16 some of the things that we can use like the utilities
 17 and the pedestrians to increase that.

18 So I guess that kind of reinforces what
 19 Mr. Hamilton said about, you know, to being just 1
 20 instead of 2, which John had initially said, and I would
 21 agree with John and Andy Hamilton that, you know,
 22 provided for the utilities and the pedestrians and
 23 leaves you with the base, it leaves you with 10. Doing
 24 the math gives you 3 affordable. So I would agree with
 25 that number.

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1 CHAIR ST. GERMAIN: Thank you, Basil.
 2 Just as food for thought in looking at 125-69S(6),
 3 if you go through all the menu as it was described by
 4 Perry for the way to get to additional market rates
 01 03 15 5 versus affordable units, if you go past that, and it's
 6 125-69S(6)(b), it says -- and this is, I think -- it
 7 duplicates the support of the math as performed by both
 8 Member Fitzpatrick and what Basil suggest that in that
 9 provision it says, Affordable units and lots. In the
 01 04 01 10 final plan, the minimum number of affordable units or
 11 lots must be -- must be -- 20 percent of the base
 12 development density.
 13 So I'm not sure if that leads us astray or not, but
 14 20 percent, that is a minimum number of the base
 01 04 24 15 development density, but it strikes me that it must be
 16 20 percent of the base development density, and I don't
 17 know if that causes any other consideration among the
 18 members as we read it, but I am interested in what you
 19 have to say about that.
 01 04 51 20 Does anybody see any --
 21 MR. FITZPATRICK: [Inaudible]
 22 MR. ELEFThERIOU: Pardon me, John?
 23 MR. FITZPATRICK: Are you asking board members?
 24 MR. ELEFThERIOU: Yes, I am.
 01 05 20 25 MR. FITZPATRICK: Yeah, I'll throw my 2 cents in.

1 It says minimum of 20 percent of base development
 2 density as long as -- in my reading -- there's two or
 3 more that we've met it.
 4 PARTICIPANT: I would agree.
 01 05 51 5 CHAIR ST. GERMAIN: And you're saying the base
 6 development density is 8, and as long as there's 2 or
 7 more, we've met that even with what Basil just said
 8 about 125-69 or in the provision that says that
 9 fractional sums should be rounded down?
 01 09 25 10 MR. FITZPATRICK: Well, it does say fractional
 11 sums, but I read that as directly related to
 12 proportionality for phased construction, not carrying
 13 through the entire ordinance.
 14 CHAIR ST. GERMAIN: Okay. Joe, do you have
 01 08 48 15 something that you wanted to say?
 16 MR. COUGH: No, I was going to say, I mean, no
 17 matter how you look at it, it doesn't say it has to
 18 carry through the entire development on every aspect of
 19 it. It's simply says minimum base development.
 01 07 19 20 And if we identify the minimum base development as
 21 8, 20 percent, 1.6, so you could argue whether it's, you
 22 know, 2 or 1 or whatever. If they're -- if they're
 23 choosing 3, then we've exceeded that level.
 24 So either way we're -- we're satisfying the
 01 07 54 25 ordinance, and maybe that's how we deal with it. We

1 identify, you know, under this and under that they're in
 2 compliance if that's the way we choose to go.
 3 CHAIR ST. GERMAIN: Okay. Thank you. All right.
 4 Tonight is a -- there is going to be a public hearing
 01 03 27 5 aspect of this.
 6 At this point in time, Steve, I know Attorney Greif
 7 is here as an interested party, and I don't know if he
 8 would like to go first or if you have members of the
 9 public that are waiting in line right now. Steve, I'll
 01 08 51 10 leave that up to you.
 11 MR. FULLER: Yeah, I'm just checking. Sorry. I've
 12 got -- yeah, I know, as you said, Tom, I know that
 13 Attorney Greif is here.
 14 Maybe if I could just read the number one more
 01 03 13 15 time, and then we could -- since we know that
 16 Attorney Greif is here, go to him first, and then that
 17 would give anyone who's dialing in a chance to -- does
 18 that make sense? I'll just read the number, then we
 19 could go to Art because we know that he's here.
 01 09 41 20 PARTICIPANT: [Inaudible]
 21 MR. FULLER: Okay. I'll read the number real
 22 quick, and then we can see if we can get Art connected
 23 if that makes sense.
 24 CHAIR ST. GERMAIN: Great.
 01 51 23 25 MR. FULLER: If anyone's watching and wishes to

1 participate in the hearing, I know we've got at least --
 2 it sounds like at least one person on the line -- but
 3 for anyone watching who wishes to participate, again,
 4 the number is 288-1710. Again, 288-1710 with a pass
 01 52 10 5 code when prompted of 0107522 followed by the pound
 6 sign. Again, 0107522 followed by the pound sign.
 7 I think we may have Attorney Greif both on the
 8 phone line and in the Zoom meeting. Can you hear us,
 9 Art?
 01 52 48 10 BY MR. GREIF: Yes, and I will appear via the Zoom
 11 meeting.
 12 MR. FULLER: Okay. Can everyone else hear him? I
 13 can hear him. Can everyone else hear him? Okay, yep,
 14 go ahead.
 01 53 13 15 MR. GREIF: Can you hear me?
 16 MR. FULLER: Yes.
 17 MR. GREIF: First and foremost, the reason the
 18 board of appeals remanded on the issue of number of
 19 affordable units is that the grandfathered structure,
 01 53 34 20 the nonconforming structure, didn't matter if you put in
 21 6 affordable units.
 22 And so if you've got the affordable units
 23 correct -- and we suggest it's either 5 or 6 -- then the
 24 fact that it's a nonconforming structure doesn't matter.
 01 53 58 25 Now, I keep puzzling at the fact that

1 Attorney Hamilton says that these are grandfathered
 2 units. A unit is nothing more than a structure itself
 3 or part of a structure, and when this planning board
 4 reached its first decision, it found that the 16 units
 01 54 33 5 were grandfathered, so it only had to deal with
 6 affordability for the remaining 2 units.
 7 But once we realized that these are nonconforming
 8 structures, which now with the conversion of Building D
 9 to contain only 2 units will finally have been converted
 01 55 16 10 to nonconformity, you can only add more than the 8 units
 11 that the district requires as the absolute maximum by
 12 complying strictly with PUD-V process.
 13 And there's never been a finding or any
 14 presentation for this hearing about the possibility of
 01 55 52 15 underground power lines or pedestrian amenities. The
 16 entire application -- and the only matter that is
 17 properly before this board -- is they want to stay with
 18 the same 2 affordable units that were required when you
 19 last heard this matter, and they don't want to deal with
 01 56 19 20 the hard, cold fact that once they have the 8 units that
 21 are allowed, 20 percent of which -- and I think
 22 Mr. Fitzpatrick is right -- 2 have to be affordable,
 23 that for every additional -- to get to 16 units, you
 24 have to apply -- comply with the affordable housing
 01 56 55 25 requirement, and that means a one-for-one match so that

1 to get from 8 units to 16 units, which are really
 2 nothing more than parts of a structure, you have to add
 3 4 affordable units.
 4 And so you have a total requirement of 6 affordable
 01 57 21 5 units. If you have 6 affordable units, the fact that
 6 these are nonconforming structures doesn't matter.
 7 But the planning board got to its initial decision
 8 that we took an appeal from and prevailed by saying,
 9 we're going to take this grandfathered status and apply
 01 58 00 10 it to three completely new buildings.
 11 I heard Mr. Hamilton say you can transfer a
 12 nonconforming status. Yes, that refers to a transfer
 13 from one owner to the other; but you cannot transfer a
 14 nonconforming status to an entirely new building, in
 01 58 32 15 fact, even move a nonconforming structure within the
 16 confines of the lot, you must go to the board of
 17 appeals.
 18 Finally, the notion that there could be some waiver
 19 through Section 125-64 flies in the face of that
 01 58 55 20 language, because 125-64 talks about health or safety
 21 reasons, not the convenience of the applicant, and I
 22 looked again at the citation that Mr. Hamilton made to,
 23 we can waive it -- and bear with me because I don't have
 24 my LUO in front of me. If you give me 2 seconds I will
 01 59 49 25 pull it.

1 He said we can waive it under the provisions of
 2 125-69S(2)(c).
 3 Let me read that section to you. The planning
 4 board is a permitting authority for a PUD-V; however,
 02 00 28 5 any other permits and approvals required must be sought
 6 and received by the applicant.
 7 There's nothing in that section that allows the
 8 planning board to waive the dimensional requirements for
 9 village residential district, which makes each one of
 02 00 59 10 these current 4 structures nonconforming until they're
 11 reduced to 2 dwelling units each.
 12 The only provision for waiver deals with setbacks.
 13 That's later in the 125-69S. And so you have to have 5
 14 or 6 affordable units, and there's no basis -- there's
 02 01 28 15 nothing in this application -- that seeks to take
 16 advantage of underground utilities or pedestrian
 17 amenities or hooking up pedestrian amenities, and so
 18 they cannot surprise us with that application with that
 19 change at the hearing.
 02 01 59 20 The application was long ago final. They never
 21 justified why they were going to get to anything more
 22 than the original 2 affordable units that were part of
 23 the application. The Superior Court said that that was
 24 an incorrect interpretation of the LUO. The planning
 02 02 24 25 board said that's an incorrect interpretation of the

1 LUO, and the affordable units have to be 5 or 6, not the
 2 1 to 3 that Attorney Hamilton suggests.
 3 Thank you. I'm happy to take questions.
 4 CHAIR ST. GERMAIN: Thank you. Steve, did you say
 02 02 54 5 you have somebody on the phone?
 6 MR. FULLER: I believe so. I'll check right now.
 7 Is there anyone on the conference call line that wishes
 8 to make a comment during the public hearing portion of
 9 this application? Is there anyone there? Could you
 02 03 12 10 please identify yourself?
 11 MS. KARLSON: Donna Karlson.
 12 [Inaudible]
 13 CHAIR ST. GERMAIN: While you're speaking, Donna,
 14 if you could mute the Zoom.
 03 12 01 15 MS. KARLSON: Thank you for being patient.
 16 [Inaudible]
 17 The first thing I want to say, I've been listening
 18 to the two points on the property rights that
 19 Mr. Hamilton brought up.
 03 12 36 20 I live in a lot where a house was constructed
 21 approximately the same time frame that the old Acadia
 22 Apartments was. So this is -- I have a single-family
 23 residence here. The lot is approximately 16,000 square
 24 feet, which I'm sure if I went to apply for a building
 03 13 38 25 permit and asked, please let me build a second dwelling

1 unit on this lot, I would be denied automatically
2 because the standard now is 10,000 square feet, and I
3 don't have 20,000 square feet, I have only 16,000 square
4 feet.

03 14 04 5 So I would like the planning board to think
6 carefully about Mr. Hamilton's argument about
7 grandfathering, which, if the planning board agrees with
8 Mr. Hamilton about this sort of transferring of
9 grandfathered rights in a very broad fashion, it means
03 14 43 10 either my lot, where really, I am allowed only 1
11 dwelling unit for 16,000 square feet because I don't --
12 I only have 10,000 feet available, I don't have 20,000
13 for the second dwelling unit.

14 But if this planning board agrees with Mr. Hamilton
03 15 23 15 on this, that means I and many other people in
16 Bar Harbor could then, through his argument about
17 grandfathering, all of a sudden start building lots of
18 additional dwelling units on their very small property,
19 which I can tell you, my neighborhood, I know my
03 15 57 20 neighbors, it would be highly undesirable for reasons
21 the public speaker, from another matter, a site plan
22 review, said.

23 The density is not what we really should be looking
24 at now in these times of pandemic and future pandemics.
03 16 37 25 We should be very careful about crowding. And I think

1 this is a problem.

2 If the planning board agrees with Mr. Hamilton,
3 that means every time someone like me with a lot that's
4 too tiny for 2 dwelling units, they have to say, well,
03 17 06 5 the planning board, they got away with it up at Acadia
6 Apartments. I should enjoy the same legal right.

7 I am very concerned about this sort of very broad,
8 broad, unusual and one that I have to remind the
9 planning board. I've read the Superior Court decision
03 17 41 10 on this.

11 The Superior Court justice was clear that they do
12 not agree with this theory of grandfathering of
13 Mr. Hamilton's, and I think the planning board and
14 everyone should really pay close attention to that.

03 18 06 15 I'm not a lawyer. I can't argue the legal points.
16 But all of a sudden I realize, if the planning board
17 approves this, then I shouldn't enjoy what we have,
18 Ocean Properties gets, and every other citizen who owns
19 property in Bar Harbor should enjoy this wonderfully
03 18 42 20 loose huge expansion of grandfathering rights.

21 It would be chaos, I believe, in Bar Harbor, but I
22 would like you to think very carefully about that.

23 Again, I thank the planning board and the planning
24 department for your time and work under very difficult
03 19 15 25 conditions. Thank you.

1 CHAIR ST. GERMAIN: Thank you. Anybody else?

2 MR. FULLER: I'll check. Is there anybody -- we've
3 heard from Donna. Is anybody else on the public comment
4 line to speak during the public hearing?

03 19 49 5 Again, if you could mute -- okay, if you could just
6 mute the meeting in the background while you're speaking
7 so there's no --

8 MR. COLLIER: Yes, I have.

9 MR. FULLER: Okay. Can you identify yourself,
03 20 08 10 please?

11 MR. COLLIER: Sure. My name is Sargent Collier,
12 and my family's lived on the property next door at
13 15 Highbrook Road. It's a family property. We've lived
14 there for over 100 years, and as you know -- I have two
03 20 54 15 areas in which I want to express my concern.

16 No. 1 is the visual effect. Our garden is very
17 important. As you know, they're very historic. The
18 house was built in 1810. It's one of the oldest on the
19 island and it survived the fire of 1947. It's the only
03 21 35 20 house on -- one of two houses on our side of the street,
21 of Eden Street.

22 The gardens we open up to the public very often,
23 and we enjoy doing that and sharing with the community.

24 One of the biggest concerns I have is you can see
03 22 01 25 the development that they propose, you can see it from

1 the house and from the garden. The property sits down
2 the hill from the Acadia Apartments, and I'm very
3 concerned that this will adversely affect the property
4 value, and I invite the planning board to come over and
03 22 32 5 see this.

6 My second concern is grandfathering. If these
7 grandfathered rights continue through our family, our
8 property should be a farm that's housed here with horses
9 and all sorts of animals, so why can't we just go ahead
03 23 04 10 and start a farm here in the middle of town?

11 And then my last concern is the affordable housing.
12 It's my understanding that only -- the only way to add 8
13 new units in three new buildings is to comply with the
14 PUD process as to affordable housing, at least 5 of the
03 23 33 15 total of 16 units be affordable, must be 20 percent.

16 So I spoke to representatives at Ocean Properties.
17 They told me twice they didn't want to discuss math. I
18 said nothing has really changed other than the
19 elimination of the 2 units. They didn't want to discuss
03 24 10 20 math.

21 And so as we know, affordable housing is a very big
22 issue on the island. I think -- I believe the Conners
23 Emerson School, the population of students is declining
24 because families who live here cannot afford to live
03 24 52 25 here, and that -- those structures were year-round

1 structures, year-round residential structures when they
2 were built, and those people were kicked out of the
3 property when Ocean Properties purchased it.

03 25 27 4 It was a big deal and it wasn't really well covered
5 but it is known to the residents who have lived there.

6 So my [inaudible] is if they want to build
7 affordable housing, then that, I believe, they are
8 allowed to do that.

9 So why don't they work with a group like the Island
03 25 59 10 Housing Trust who I am told they're not considered
11 year-round rentals as a change from traditional housing
12 construction?

13 I just don't think that Ocean Properties is in the
14 business of affordable housing or should be, and they're
03 29 24 15 very vague on their numbers. They don't even want to
16 discuss it.

17 That's all I have to say. I thank you for your
18 time. I appreciate it.

19 MR. FULLER: Thank you. I'll check and see, Tom,
03 26 41 20 if there's anybody. I can't tell. Is there anybody
21 else -- we've heard from two speakers now.

22 Is there anyone else on the public comment line who
23 wishes to speak during this public hearing portion of
24 this agenda item for Acadia Apartments to remand?

03 27 10 25 MR. GREIF: This is Art Greif.

1 MR. FULLER: Hi, Art.

2 BY MR. GREIF: My concern is that Ms. Mills is a
3 party, and I represent her as a party, and when I tried
4 to object to the chairman's suggestion that they would
03 27 42 5 hear only from the applicant, and apparently they will
6 hear only from Ms. Mills in public comment, that is
7 inconsistent with due process.

8 I note that the rules of procedure for the planning
9 board don't even address the issue except the LUO does
03 28 17 10 say that any opponent may submit, as I did, ten copies
11 of their opposition, which I did. But I hope that I am
12 not limited to my Zoom participation by simply making my
13 objections -- speaking in public comment and public
14 comment only. I want to have that clarified for the
03 28 54 15 record.

16 Thank you.

17 CHAIR ST. GERMAIN: Okay. All right. I've got
18 Mr. Bearor waiting at this point in time. Typically we
19 limit participation to, you know, several minutes. 3
03 29 23 20 minutes is the norm.

21 Mr. Bearor, can you weigh in on this one, please?

22 MR. BEAROR: Sure. My impression of the procedure
23 thus far is that Mr. Greif, as representative of
24 Ms. Mills, was given an opportunity -- and certainly not
03 30 05 25 limited to 3 minutes -- to make his argument as to what

1 the board of appeals' decision on remand requires of
2 this planning board. He had a chance to do that, he had
3 a chance to respond to anything that Mr. Hamilton had
4 presented and Mr. Moore had presented on behalf of the
03 30 40 5 applicant.

6 So I'm troubled to really understand what more he
7 thinks he is entitled to, and I'll emphasize the word
8 entitled because it's a public hearing, it's nothing
9 more than that. We don't have parties at the planning
03 31 09 10 board level.

11 He's been given a status that I think we recognized
12 the need to hear Mr. Greif's arguments on behalf of his
13 client, and we have done that, and if he wants to now on
14 his own behalf as an individual, as a member of the
03 31 37 15 public, speak, he certainly can. He'll be subject to
16 the same requirements of any other member of the public.

17 I don't think that we -- due process in an
18 administrative proceeding like this is notice of the
19 hearing and an opportunity to be heard, and I think that
03 32 05 20 we have done more than that.

21 MR. HAMILTON: I agree.

22 CHAIR ST. GERMAIN: Thank you. And I'd add that as
23 the chair I allowed you to speak, and you concluded your
24 remarks without any prompt from me. You just said that
03 32 30 25 you, yourself, concluded them, Mr. Greif. You were

1 given just under 6 minutes.

2 If you'd like to speak as a member of the public
3 rather than as a representative of Mrs. Mills, then as
4 Mr. Bearor said, then feel free. You've got 3 minutes.

03 33 04 5 MR. GREIF: The point I wish to make is that
6 this -- the number of affordable units is critical to
7 the decision this board must make.

8 Justice Murray, when she stayed all construction,
9 expressly found that we were likely to prevail in our
03 34 15 10 argument that this board didn't allow enough affordable
11 units, and the only way this board got to the 2
12 affordable units it did was through its acceptance of
13 the novel theory that nonconforming structure status can
14 be 5 completely new structures.

03 35 04 15 And so although Mr. Hamilton began by saying we're
16 not here to talk about nonconformity, the only way he
17 can talk about 1, 2, or 3 affordable units when it
18 should really be 5 or 6 is by insisting that there is
19 some special grandfathered status to the dwelling units
03 35 41 20 that he has.

21 The board of appeals was quite clear. These are
22 nonconforming structures. The Superior Court was quite
23 clear. These are nonconforming structures.

24 Thanks.

03 36 38 25 CHAIR ST. GERMAIN: All right, thank you.

1 MR. FULLERS: If I may, Tom, can I make one last
 2 check? I haven't heard any other chimes on the phone
 3 but just to make sure that in all the back and forth
 4 that I haven't missed anyone one last time on the public
 03 37 16 5 hearing line, if I could.

6 CHAIR ST. GERMAIN: Sure.

7 MR. FULLER: I'll just make one last check. Is
 8 there anyone on the public comment line who wishes to
 9 speak during the public hearing portion of this agenda
 03 37 44 10 item?

11 I'm not hearing anybody.

12 CHAIR ST. GERMAIN: All right. Great. In that
 13 case I think I'll close the public hearing. And I'll go
 14 back to the planning board to see if you have any
 03 38 06 15 thoughts on things that we've heard and the way that
 16 we're going to approach this, if it has changed or if
 17 any of you are prepared to try to delve into the meat
 18 right now.

19 Go ahead, John.

03 38 31 20 MR. FITZPATRICK: I'm multi-tasking. A question
 21 for Ed. And I apologize, when I left the office
 22 yesterday, I didn't bring the old application package to
 23 be able to reference.

24 I would assume -- I would assume where we're
 03 39 06 25 remanded to go back and look at the three items that I

1 mentioned earlier, we cannot look at anything de novo,
 2 so whatever is in the original application is the frame
 3 of reference that we're limited to.

4 Is that a fair statement, Ed?

03 39 34 5 MR. BEAROR: Yes.

6 MR. FITZPATRICK: Okay. I don't recall whether the
 7 underground utilities provision was shown and noted in
 8 the plans. I don't recall if the permitted amenity,
 9 bringing people into the heart of downtown, was in
 03 40 15 10 there.

11 If they were, then I'll continue to fall on the
 12 last set of members that I came up with. I think we all
 13 agree that base development density is 8.

14 Is there any debate amongst the parties that that
 03 40 38 15 number is valid?

16 CHAIR ST. GERMAIN: John, that's a good point, so
 17 why don't we go member-by-member [inaudible].

18 Do you agree, Joe? I think you said that earlier
 19 that you felt that the base development density was 8.

03 41 09 20 I think you're muted right now, Joe.

21 MR. COUGH: He was right for moving things along.
 22 The 16 number was right in the next round.

23 CHAIR ST. GERMAIN: Basil, do you agree with that?

24 MR. ELEFTHERIOU: Yeah, I agree both with the base
 03 42 05 25 of 8 and maximum of 16.

1 CHAIR ST. GERMAIN: Erica, do you concur?

2 MS. BROOKS: I concur.

3 CHAIR ST. GERMAIN: Okay. I do, too. So John,
 4 would you like to --

03 42 29 5 MR. FITZPATRICK: So we're two-thirds of the way
 6 there.

7 So for the last number, for affordability, again, I
 8 mentioned earlier, if the underground utility provision
 9 was in the original application, then I would -- I would
 03 42 52 10 promote and support that there's an additional market
 11 unit that's available bringing that number up to 9.

12 If the permitted amenity or -- to Bar Harbor is
 13 referenced, you know, the sidewalk or the biking lane,
 14 some sort of amenity is better funded, turned over
 03 43 25 15 amenity to the Town is brought in, then there's another
 16 market unit that's available. That brings it up to 10.

17 Again, if there's a bus stop that's proposed -- I
 18 don't recall seeing that one -- but if there is, that
 19 would bring it up to 11.

03 43 57 20 And then you started to do the trade-off between
 21 affordable units and market units.

22 If none of those were proposed, then I think you
 23 are doing the trade-off the minute you start with Unit
 24 No. 9, and the number of affordable units would be 4.

03 44 31 25 I still read the ordinance that at the final

1 development a minimum of 20 percent of the base
 2 development density needs to be provided. Again, to
 3 minimize the sake of argument, if we're at 4, that's
 4 over 1 and it's over 2, so it doesn't really matter
 03 45 01 5 whether we round up or round down at that point.

6 If we're at 2, we land there. It doesn't matter
 7 whether we round up or round down. But I would say if
 8 none of those things were included in the original
 9 development application, then we're at 12 market and 4
 03 45 37 10 affordable. If they were, then we back down from there.
 11 I just don't have that information in front of me at
 12 this time.

13 MR. HAMILTON: Can we provide that for the board,
 14 what the final plans showed previously? I think
 03 45 54 15 Mr. Moore can do that.

16 CHAIR ST. GERMAIN: Mr. Hamilton, are you
 17 suggesting that he can do that right now?

18 MR. MOORE: Yes. If you can let me to show my
 19 screen?

03 46 10 20 MR. GREIF: I object that this is not actually
 21 before the board in the submission made. It's either in
 22 the record from the prior proceeding or it's not.

23 MR. MOORE: Mr. Chairman -- Mr. Chairman, if I can
 24 jump in. Your final decision, the first item listed is
 03 46 53 25 this approval is based upon the following submitted

1 plans, Exhibit 9.12, proposed site plan in 1.06, 2-19
2 prepared by the Moore Companies. That's the plan I'm
3 prepared to show.

4 CHAIR ST. GERMAIN: Ed, is that permitted?

03 47 30 5 MR. BEAROR: Yeah, that represents -- that
6 representation I would accept. I have no reason not to
7 accept the plan that Perry is going to show us as what
8 was previously filed.

9 MR. MOORE: And made part of the record.

03 47 53 10 CHAIR ST. GERMAIN: Okay. Steve, are we ready?

11 MR. FULLER: Yeah, I think you should be able to go
12 ahead. There should be an option down at the bottom of
13 your screen, Perry, where you -- there you go.

14 MR. HAMILTON: It's up, Perry.

03 48 30 15 MR. MOORE: I can't see it. Hold on. All right.

16 So this is the final plan. I'll zoom in just to
17 make sure that the record is clear on where we're at.
18 This is the plan referenced.

19 The history, as I recall it -- you'll have to
03 49 09 20 forgive me because it has been a while -- but the
21 underground utilities are -- this is an existing
22 underground utility, if you can follow my cursor -- and
23 what we proposed on the plan -- I'm not seeing it
24 here -- but all of the other utilities from West Street
03 49 49 25 and up through here -- hang on just a second. I can get

1 those plans.

2 But I think that the underground utility question
3 is not -- not really an issue because the record shows
4 that this part is the pedestrian amenities.

03 50 12 5 What happened with this is that we had proposed, if
6 you'll recall, a sidewalk along West Street. It was
7 supposed to come off of here and a bus stop. Chip and I
8 talked about it. Chip presented numbers to the council.
9 The council elected not to participate.

03 50 57 10 It's my best recollection that this was accepted as
11 pedestrian [inaudible]. It was side stairs and this
12 patio which gave these people pedestrian access from
13 Woodbury Road, so they didn't have to walk up and down
14 West Street.

03 51 27 15 I don't recall that we were ever talking about
16 making a connection to the downtown. If that's going to
17 be the sword we have to fall on, I don't want to go
18 there.

19 I think we -- the underground utilities are clearly
03 51 51 20 provided. There were several utility plans shown, and
21 that's where we were at; but I think at the end of the
22 day we're talking about 8 units, underground utilities,
23 it's 9. If we want to go 4 and 4 to get to there, I
24 don't see that that's it.

03 52 20 25 I think in the interest of making this easier for

1 you guys -- and I want to express my appreciation for
2 your time and consideration -- that we -- we're not
3 going to get hung up on the number of affordable units
4 moving forward.

03 53 07 5 We gave you guys underground utilities.
6 [Inaudible] what you determine.

7 Andy?

8 MR. HAMILTON: So I'm just going to wrap up quickly
9 because your time is valuable, and I want to make sure
03 53 28 10 we're efficient.

11 So again, we started with 8 market units, 1 for
12 underground utilities, 1 for pedestrian amenities, and
13 we're at 10, so affordable is 11, 12th is market,
14 affordable, 13. 14th is market, 15 is affordable, 16th
03 54 05 15 is market.

16 That's the 3 that Member Fitzpatrick said, it
17 depends upon what you had in your original submission.
18 Mr. Moore has pointed out by actually showing you the
19 plan again what you had used as the basis for your
03 54 40 20 original approval. It's in the record to respond to
21 Mr. Greif's good question.

22 And so we're -- we're willing to go 3. We started
23 tonight on the basis of 1.6 rounding up. If you have
24 to, to 2. We think the more appropriate is to round
03 55 00 25 down to 1, take the whole number that's contained

1 within, but we can do this with 3. We conferred, we
2 caucused privately, and we can live with 3 affordable
3 units.

4 We actually want to move on and be able to do this
03 55 49 5 project. As the Town knows, having housing for workers
6 is very important. So we're willing to move on.

7 CHAIR ST. GERMAIN: Thank you. So we've heard from
8 the applicant.

9 John, I know that you went through and you kind of
03 56 19 10 gave a description of the way the map would go. If you
11 were inclined to make a motion, I definitely believe
12 that we should cite the provisions of 125-69S that
13 you're referring to and have them reflect the
14 conditional nature of, you know, what you had suggested
03 56 49 15 if you were inclined to make a motion.

16 MR. FITZPATRICK: Let me formulate it here. Keep
17 talking amongst yourselves.

18 CHAIR ST. GERMAIN: I don't have anything left to
19 say.

04 34 18 20 MR. FITZPATRICK: Talk about the weather, how nice
21 it is outside.

22 CHAIR ST. GERMAIN: They're eating pizza downstairs
23 and I'm hungry.

24 Yes, it's an awfully nice day. It's a nice day
04 34 45 25 here, late April. There were peepers by the ocean the

1 other night. I didn't know the peepers were in the
 2 ocean. How's that for small talk?
 3 So any motion that is made -- and I'm sure you're
 4 going to cover this, John -- would reflect the
 04 40 08 5 directions given to us by the appeals court to come up
 6 with a required base development density to determine
 7 the maximum allowable units, and then in determining the
 8 maximum allowable units, cite where in the land use
 9 ordinance the PUD provision allow us to -- or how they
 04 40 50 10 get allocated I believe would be the right way to go
 11 about it; but I do think that citing, you know, the
 12 provisions in 125-69S(6) are important.

13 MR. ELEFTHERIOU: Tom, could I ask Ed just a quick
 14 question?

04 41 20 15 We have the appeal decision, and we have findings,
 16 of course, and then, of course, the decision. So within
 17 the decision text, in that body, they cite the three
 18 things we're discussing.

19 MR. BEAROR: Yes.

04 41 57 20 MR. ELEFTHERIOU: But in the findings, Finding
 21 No. 2, they talk about the nonconforming structure.

22 Do we need to address that at all since [inaudible]
 23 decision?

24 MR. BEAROR: I think we did and I think the
 04 42 20 25 board --

1 CHAIR ST. GERMAIN: Ed, you just went to mute.

2 MR. BEAROR: I don't think you need anything other
 3 than what is in the order of remand itself.

4 That finding is puzzling. I think you can make
 04 43 08 5 your decision without addressing that finding. I think
 6 THAT Mr. Hamilton had encouraged you to have a four-part
 7 decision which would have included addressing that
 8 finding, but I don't think it's for the planning board
 9 to tell the board of appeals that they got something
 04 43 33 10 wrong. That's just not for us to do.

11 And if we can comply with their remand order by not
 12 having to get into the merits of their underlying
 13 decision, I think that the motion that I -- that John
 14 previewed when we started the deliberations a while ago,

04 44 04 15 the three-part motion, is sufficient to address, I
 16 think, the board of appeals' decision in its entirety.

17 MR. ELEFTHERIOU: Thanks.

18 MR. BEAROR: While I have the -- am I still
 19 talking?

04 44 29 20 CHAIR ST. GERMAIN: Yes, go ahead, Ed.

21 MR. BEAROR: I don't think that our decision
 22 tonight is based upon a grandfathering argument that was
 23 presented earlier. I want to make that point. And I
 24 don't think that Justice Murray's earlier decision,
 04 44 55 25 although she certainly -- she certainly addressed what

1 she thought was some infirmities in your earlier
 2 decision, that was by no means a ruling of that court.
 3 She was indicating that Mr. Greif was entitled to his --
 4 the granting of his TRO because there were credible
 04 45 32 5 arguments that he could make based upon what she had
 6 seen in the record and what arguments he had put forth
 7 that he might indeed prevail.

8 But I don't want the board to be left with the
 9 impression that the Superior Court had ruled that your
 04 46 03 10 earlier decision was right or wrong. It simply alluded
 11 to the fact that it certainly appeared to the Court
 12 based on the papers that were filed that there could
 13 have been an error in your calculations. That's it.

14 CHAIR ST. GERMAIN: Thanks, Ed.

04 46 34 15 MR. GREIF: I would point out that that is simply
 16 not what was required to obtain the stay pending appeal.

17 We had to show a likelihood of success on appeal
 18 and we showed that. That's not a final decision, but it
 19 should be a persuasive decision.

04 47 07 20 MR. BEAROR: Right. I agree, and I didn't mean to
 21 suggest otherwise. I thought I was actually paying
 22 quite a compliment.

23 I think that this decision tonight is based on
 24 different rationale than the decision that was made back
 04 47 33 25 in 2019. So I think the presentation made to the Court

1 on your decision.

2 MR. FITZPATRICK: All right. Ready for me to give
 3 it a crack?

4 CHAIR ST. GERMAIN: Let's have it, John.

04 48 08 5 MR. FITZPATRICK: Let's see, okay. So in response
 6 to the Bar Harbor appeals board decision, specifically
 7 related to AB-2019-01 dated February 13th, 2020, I would
 8 move to approve the subdivision site plan PUD-2017-02,
 9 BHAPTS with the condition the subdivision plan be
 04 48 32 10 recorded in the registry of deeds, stamped by a public
 11 land surveyor prior to being signed by the planning
 12 board as it complies to LUO specifically as follows:

13 The planning board finds that the base development
 14 density number based on LUO Section 125-69S(6)(a)(1) to
 04 49 56 15 allow 8 units. The planning board also finds based on
 16 LUO Section 125-69S(6)(a)(3) that the maximum allowable
 17 units under the PUD shall be 16. And the planning board
 18 also finds based on LUO Section 125-69S(6)(b) that the
 19 number of base affordable units shall be 3, and finds
 04 51 05 20 that with the applicant providing 1 additional unit for
 21 the provision of underground utilities -- that's a
 22 market unit -- 1 additional market unit for the
 23 provision of amenities as outlined in
 24 125-69S(6)(a)(2)(e) for a total of 13 market units and 3
 04 51 54 25 affordable units.

1 MR. COUGH: I'll second that. Make a motion, John.
 2 CHAIR ST. GERMAIN: Okay. So moved and seconded.
 3 Do members have any further discussion or points to
 4 make?
 04 52 29 5 MR. ELEFThERIOU: I don't know if it's important to
 6 note, John -- I don't know if you want to add something
 7 to your motion -- just the fact of how we got to the
 8 number 1, affordable unit. We had a discussion earlier
 9 between 1 and 2.
 04 52 58 10 And 125-69R(3)(f) specifically states that we round
 11 down to 1. I just didn't know if that was worthwhile
 12 adding. Just as a point of clarity.
 13 MR. FITZPATRICK: I would -- I guess I would
 14 suggest that we go outside of that and just say that it
 04 53 38 15 meets 125-69S(6)(3)(b).
 16 MR. ELEFThERIOU: Okay. That's fine. I second.
 17 MR. COUGH: I would like to ask Ed if he sees any
 18 omissions in the motion?
 19 MR. BEAROR: The only omission, if it might be
 04 54 22 20 there, maybe I just didn't hear it, I heard John
 21 describe 1 unit for underground utilities. I didn't
 22 hear mention of whether there was a second unit. I
 23 didn't know if we were agreeing -- it seems like we were
 24 because you only came up with 3 affordable units that
 04 54 43 25 you must have also found that they were pedestrian

1 that -- so you're basing your motion on the presentation
 2 that we just saw, which was the plans from 2017?
 3 MR. FITZPATRICK: Yeah, and I just looked it up
 4 electronically in the package I received in January of
 04 57 12 5 2019 as well.
 6 CHAIR ST. GERMAIN: So it's been moved and
 7 seconded. Do any other members have anything to add to
 8 this at this point?
 9 All right. I'll call a vote. Joe?
 04 57 43 10 MR. COUGH: Aye.
 11 CHAIR ST. GERMAIN: I think you're muted, Basil.
 12 Thank you.
 13 MR. ELEFThERIOU: Aye.
 14 CHAIR ST. GERMAIN: Erica.
 04 58 01 15 MS. BROOKS: Aye.
 16 CHAIR ST. GERMAIN: Thank you.
 17 MR. HAMILTON: Thank you very much.
 18 CHAIR ST. GERMAIN: Thank you.
 19 MR. MOORE: So, John, just a little bit of
 04 58 21 20 housekeeping here. So what we will do is revise the
 21 plat to reflect there are 3 affordable units required?
 22 MR. FITZPATRICK: Correct.
 23 (This portion of the planning board meeting was
 24 concluded.)
 25

1 amenities?
 2 MR. FITZPATRICK: Yeah, we did, I think I referred
 3 to that.
 4 MR. BEAROR: If the board members think you
 04 55 06 5 referred to it, then that's fine. I didn't -- I didn't
 6 pick up on it. If the board members heard you say or
 7 reference the right section, amenities --
 8 MR. MOORE: So forgive me for jumping in, but he
 9 did say 16. That is pedestrian amenities.
 04 55 36 10 MR. COUGH: As far as the second one is concerned,
 11 whether I mentioned it or not in detail, I certainly
 12 referenced it by discussion so --.
 13 MR. BEAROR: I don't see any [inaudible].
 14 MR. COUGH: I'm fine with the way it was. If
 04 56 05 15 there's nothing else, then that's good.
 16 CHAIR ST. GERMAIN: Just to be clear, John, was
 17 your motion a conditional one, if the pedestrian
 18 amenities are to be shown on the plan from 2017 or is it
 19 based on the --
 04 59 32 20 MR. FITZPATRICK: It was accepting of what Perry
 21 shared. That date matches the record.
 22 CHAIR ST. GERMAIN: Okay.
 23 MR. FITZPATRICK: The date on the drawing matches
 24 the record.
 04 56 45 25 CHAIR ST. GERMAIN: Okay. And you're saying

CERTIFICATE

I, Lisa Fitzgerald, a Notary Public in and for the State of Maine, hereby certify that a prerecorded Zoom meeting was transcribed by me and later reduced to typewritten form with the aid of computer-aided transcription; and the foregoing is a full and true record of the testimony given.
 I further certify that I am a disinterested person in the event or outcome of the above-named cause of action.
 IN WITNESS WHEREOF, I subscribe my hand and affix my seal this June 17, 2020.

Lisa Fitzgerald

LISA FITZGERALD, NOTARY PUBLIC
Court Reporter

My commission expires: May 10, 2024

1 low-income housing to worker housing.

2 We were all in college and we know how wild and
3 crazy college kids or college-age kids can be. When
4 you're under 30, you want to party late, you want to
5 party hardy. Let that happen downtown within earshot of
6 the bars where it won't be a disruption to neighbors who
7 told you they have to turn on their air conditioning or
8 have requested and then have been rejected that there be
9 some 6 p.m. to 6 a.m. overnight security.

10 This development will not benefit the town as a
11 whole. I see no benefit running to the town. This does
12 not enhance pedestrian access. There is no sidewalk on
13 West Street. There is no easy way for these workers to
14 walk to their employment. This -- and this is
15 important -- 125-69(S)(3)(b) requires a site analysis
16 which places this development in context with the
17 surrounding neighborhood. That's never been done.

18 This -- a multi-family II is not allowed in village
19 residential other than as a PUD-V, and because of that,
20 you are then left with the very narrow requirements of
21 125-69(S)(5) which says you "may consider the allowance
22 of multi-family dwellings not otherwise allowed in the
23 underlying district when the construction of
24 multi-family dwelling structures will result in the
25 creation and/or retention of large buffers."

1 the nearest whole unit. So we only needed to do one
2 affordable unit.

3 MR. MOORE: One quick final thought to add onto
4 that. Here's where I think the affordable -- I mean,
5 the 16 units being grandfathered would not apply.

6 Let's say we came in and said we're going to have
7 16 grandfathered units and then we're going to go one
8 affordable, one market, one affordable, one market, one
9 affordable, one market because one affordable/one
10 markets are allowed only within 129-69(S) where we
11 comply, and when we're over 16, the limitation on twice
12 the development density comes into play.

13 So I think the way we get there and what we've been
14 saying over and over again is 18 is as many as we can
15 have, I think that's where we come into restriction
16 here. The only [inaudible] to answer Ed's question
17 exactly, are we really talking about two units? Yes.

18 MR. SALVATORE: Now, just so I'm clear, 18, you
19 accept 18 as the max?

20 MR. FITZPATRICK: Times the base density. What I'm
21 struggling with was the number of affordable units.
22 What I was looking at is the nine -- you come up with
23 one out of the nine, give a credit for underground
24 utilities --

25 MR. SALVATORE: Pedestrian amenities --

1 MR. FITZPATRICK: Bonus unit, and then one
2 affordable, one bonus, one affordable, one bonus, and
3 come up with four affordable, 14 market for a total of
4 18.

5 And, again, I'm -- and, again, I'm not a lawyer by
6 any stretch. I understand 125-53(B), the legal existing
7 nonconformity can be transferred -- to continue such
8 nonconformity. I don't read that you can convert that
9 nonconformity into other things.

10 It allows you to use the property in a
11 nonconforming use, you can transfer the deed, you know,
12 in perpetuity.

13 MR. SALVATORE: We're not converting to other
14 things. We still have 16 nonaffordable units.

15 MR. FITZPATRICK: We may have to move on to see if
16 there's any other questions. I've got pages full of
17 them, but I'm still not there yet.

18 I think when you go PUD, you start at baseline
19 because you're getting something, and to get something,
20 you can't cherry pick what you carry over --

21 CHAIRMAN ST. GERMAIN: The only other thing it
22 could be is the number of units would be multi-family I,
23 which is actually limited to four units, so it has to be
24 multi-family II at this point.

25 MR. FITZPATRICK: Well, actually, I was going to

1 Under (1)(b), Including Affordable Housing, we've
2 already agreed to do that. Follow guidelines for the
3 Great American Neighborhood. Those are guidelines,
4 they're subjective. I will submit to you that we have.

5 We have talked to Town staff on several occasions
6 about working with them to provide a sidewalk along West
7 Street Extension, and we're willing to continue that
8 discussion. That's part of that.

9 Another one of the guidelines for the Great
10 American Neighborhood has to do with what is called
11 infill development: Reducing the footprint of the
12 impact, clustering the buildings together, and making
13 neighborhood spaces.

14 I argue that, again, that's in your discretion, but
15 if you look at what we've talked about in the sketch
16 plan and what we came up with after working with the
17 neighbors over the course of the year, that's what we
18 did with this layout with four buildings. Instead of
19 having one large building and a couple of others
20 scattered around the site, we've got four there
21 compacted and closely related to each other so that
22 people can interact in a communal situation, so I would
23 submit that we meet that.

24 Compliment the Visual Character of the District.

25 Again, that's at your discretion, but if you'll recall

1 at our first public meeting we had a lot of people that
2 were here and were concerned, and they're not here
3 tonight, and the reason they're not here tonight is
4 because we met their concerns.

5 They didn't want us to have a building on the
6 corner of West Street Extension and Woodbury Road
7 because it was in front of their bedroom or their units.
8 So we moved that building.

9 And if you look again at the two plans that are up
10 on the wall, the footprint of what we have proposed now
11 fits in the footprint of only the three buildings we had
12 originally prepared. So we have essentially given up
13 the footprint of one building, compacted it, and made it
14 fit. Again, that's at your discretion but I argue that
15 we did meet that.

16 And then (4), Infill Development. It's
17 specifically allowing for growth for town services so
18 pedestrian can access already exists. It's pretty clear
19 but, again, that's your -- one thing I'll point to that
20 is that there is existing sewer along the east property
21 line that the Town put in place without an easement as
22 part of this project. We're going to memorialize that
23 easement.

24 And then it goes on to the intent as being, To
25 encourage development where -- by offering financial

1 incentives, and the PUD-V seeks to provide for enhanced
2 plan building by allowing greater freedom of design.

3 I think that gets to what we're talking about.
4 Instead of having something that looks like a suburban
5 cookie cutter development from someplace in the midwest,
6 we've got something that mimics development, Bar Harbor.

7 Those of you that are familiar with Westcott Street
8 and what used to be called Bar Harlem, we have a
9 tradition in this town of having close dwelling units
10 that relate to each other. That's not an unknown
11 building type. It's infill and it's consistent with our
12 community. But it's not the kind of thing that we
13 normally think of when we look at new development. We
14 think of the cookie cutter stuff we see when we fly
15 across the country. That also applies to (2).

16 And (3), Undertaking Techniques which Foster
17 Community and Pedestrian Access. Again, we got rid of
18 the parking lot. This is -- these buildings are
19 intended to be used by residents that use bikes or walk,
20 so it's not just a passing thing. We're doing an active
21 step to encourage the kind of stuff that Mr. Friedmann
22 talked about earlier.

23 CHAIR ST. GERMAIN: All right. Do members of the
24 board have questions about applicability of the purpose
25 and intent with this project? Did anybody take the time

1 rights to apply this to where they're at, but I don't
2 necessarily think that that's what needs to be put in
3 the ordinance.

4 CHAIR ST. GERMAIN: I think a counterpoint to that
5 is that there are two different PUD standards, PUD-O,
6 which allows density of up to like 1.5 times the base
7 density, and PUD-V, which I think was actually -- they
8 were cognizant that the lots that are covered in the
9 village district generally are quite small, and as a
10 result, the Great American Neighborhood standards become
11 less applicable, and infill seems to be the
12 applicable operation.

13 MR. FITZPATRICK: Which are a little bit different
14 than --.

15 If we want to run down through there, I had the
16 same concerns as Alf did with the clustering of parks
17 and gardens and everything else. I didn't see much
18 there for that.

19 Compatible design is subjective, but if you look
20 at, you know, the condo across the street, Woodbury, the
21 multi-family units further up West Street, this is not
22 incompatible with the design in the application, the
23 size and the density. That's already starting to grow
24 in and around the neighborhood.

25 Access to local goods, services, and employments --

1 employment. We are close to the heart of downtown. I'm
2 glad to hear that there's discussions with the Town
3 regarding a sidewalk. I think that would improve
4 immensely people's safe access to and from town.

5 Having driven for about a year on the detour at
6 night coming home from work, it's amazing how many sharp
7 lefts I've to take to avoid hitting people walking in
8 the street. I'm glad we don't have to go that way
9 anymore.

10 How far along in those discussions with Chip are
11 you?

12 MR. SALVATORE: He and I spoke several times. He
13 went and looked at the site. I know he's talked to
14 Angie. We've pledged -- I say pledge -- I've offered to
15 incorporate the concept in the future in the
16 construction of this, as well as contribute to the
17 portion in front of our property.

18 In other words, I'm not going put it in and then
19 wait for the Town to connect the dots, but we're not
20 going to put a basin or something in the way of what
21 hopefully is a wider road with better -- much better
22 pedestrian access.

23 For every one of our people that walk down there,
24 there's 15 bike renters that are trying to walk up.
25 It's a highway for pedestrians, for sure.

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1 could address and amend, so we eliminated that building
2 footprint and added it over here to these buildings.

3 The depth, this was the downhill side. This
4 wasn't as nearly a concern to her as this area here, so
5 we're proposing we just eliminate the building entirely
6 for her, and leaving that undeveloped.

7 We all agreed on the stormwater issue coming
8 through here. That's a major problem, and Perry's more
9 than capable of addressing that, which he has in his
10 plan, and how it affects, unrelated to this project, but
11 the bigger issue of West Street Extension, the possible
12 sidewalk, the path, and how that would tie in as a
13 neighborhood.

14 It was a very productive meeting. Nothing else,
15 really. None of the other aspects of the parts have
16 changed. I know Mr. Bearor and Mr. Hamilton have, I
17 think, hammered out the documents that we had talked
18 about. Perry's got the visual things here, the
19 footprint remains as it was, and actually the layout got
20 even better. This is still walled off, this entrance.
21 This entrance is walled off.

22 The comings and goings to all the buildings and all
23 the people, it's one very small area sheltered,
24 protected, safe, lit, screened, and noise doesn't
25 transfer.

1 another 8 or 9 feet -- two of the buildings being
2 higher. In my mind, it at least warrants a discussion
3 on that internal area.

4 BOARD MEMBER: I just had a quick question, a
5 clarifying question on that.

6 They're clearly labeled E and F, so I assume
7 they're two separate buildings; is that correct?

8 MR. MOORE: Yeah, the same -- actually, let me get
9 to this. I didn't walk you guys through this.

10 This is Building G. This is the front of it.
11 This is a covered entryway for bikes, the and the like.
12 That's facing the west.

13 This is the elevation of Building E on the right
14 and F on the left.

15 The way this works is there's a set of stairs that
16 comes up to a landing that goes to -- the entryway that
17 goes with a set of stairs up to the third floor and a
18 doorway that goes into the second floor.

19 Under building code, this would be treated as one
20 building because they're connected by a roofed area, but
21 in terms of what we've provided, it's two separate
22 buildings with a breeze-like connector.

23 BOARD MEMBER: So I guess my question to Basil's
24 point is, does that -- is there setback? That's one
25 building. There's no setback between, because there's

1 MR. HAMILTON: Exactly.

2 MS. CHAMBERLAIN: It didn't get approved --

3 MR. HAMILTON: Right.

4 MS. CHAMBERLAIN: -- because you didn't meet the
5 conditions.

6 MR. HAMILTON: Right.

7 MR. MOORE: I'm curious, if I could jump in here,
8 normally the public works deals with traffic. I don't
9 know -- traffic changes.

10 Stormwater, the ordinance handles the standards for
11 that, so the one thing that would be useful is him
12 affirming that 10 feet or 12 feet is wide enough.

13 The other thing that -- solid waste -- is that a
14 separate? Is that separate or not?

15 So solid waste is there. We've got a submittal to
16 that effect.

17 So I think worst-case in this, you know, public
18 access stuff like the sidewalk or bike path is there, so
19 I think worst-case in this, based on my experience and
20 my discussions with Chip, is that he could come back and
21 say, we need to talk about the sidewalk or give some
22 direction on the maintenance. And I don't see those as
23 being things that couldn't be made a condition.

24 We've already been in dialogue about how we can
25 make a bike path work along West Street Extension.

1 from your motion was dealing with the issue of the
2 internal setbacks, the modification of that.

3 I thought you were going for the whole thing.

4 MR. COUGH: So are you fine with the building
5 permit the way it's stated there?

6 CHAIR ST. GERMAIN: Would you mind repeating --

7 MR. COUGH: The sewer and the sewer easement and
8 capacity statement? I mean, to me they're both going to
9 come in short hand.

10 CHAIR ST. GERMAIN: Well, if they're going to come
11 quickly, if Mr. Bearor believes that that's something
12 that's fairly quick, then -- then we'll put it in there
13 as such.

14 MR. FITZPATRICK: Surveyors, a critical path item
15 for an easement?

16 MR. SALVATORE: No, I think it's probably the bank
17 and the language. Either one's fine. I was happy with
18 the permit, but if you want to make it part of the
19 approval, it's --

20 MR. FITZPATRICK: I was just asking what -- you
21 said this could pan out for a while. What's an
22 empirical path, for getting an easement recorded?

23 MR. SALVATORE: Getting an easement recorded is
24 easy. Drafting and agreeing on it, sending it to the
25 bank and they in turn -- days go by before you blink,

1 I'll go back to the 11-by-17 drawings with the
2 light gray print on white paper. The first I had a
3 chance to look at it, because I've got business
4 obligations, was on Saturday.

5 But, you say there's one drawing that's getting
6 revised. There's at least ten in here that are
7 different from the last package that we got in December,
8 and which ones from December are going to carry through,
9 Perry, and which ones from now are being overwritten?

10 I don't know. I would like to see a nice package.
11 If I were sitting on that side of the table, I would
12 have handed in a conformed set to the entire board, not
13 a mish-mash of updated drawings and other ones that are
14 revised.

15 MR. SALVATORE: Well, okay, 90 percent of what we
16 submitted were requests by you and the board. They
17 weren't missing submittals that require the ordinance.
18 The ordinance requires 11 by 17. If it's really just a
19 few paragraphs, what we've done in the last hour, let's
20 stay on that path.

21 You want a combined packet, we gave it to you a
22 week ago. It's not going to change. This -- the only
23 thing that's going to change is what Ed and Andy work on
24 in the easement.

25 MR. FITZPATRICK: So these are all -- there's no

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