

**Packet of materials for
Bar Harbor Board of Appeals
Meeting of Tuesday, February 11, 2020
4 PM in Council Chambers at Municipal Building**

- **Agenda for this meeting**
- **Minutes from most recent meeting (June 13, 2019)**
- **Decision by Justice Murray (dated Nov. 27, 2019)**
- **Letter from Arthur Greif, RE: representing Ms. Mills**
- **Letter from Arthur Greif RE: 2/4/2020 submission**
- **Greif (Mills) supplemental brief, submitted Feb. 4**
- **Letter from Andy Hamilton RE: 2/4/2020 submission**
- **Hamilton (BHAPTS) supplemental brief, submitted 2/4**
- **Public comment, via email (2/4), from Walter Healey**
- **2/5 staff memo about submission materials from 2019**
- **1/28 letter RE: BHAPTS 2019 submission (fresh copies)**
- **Fresh copy of 2019 submission (binder) from BHAPTS**

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

- I. CALL TO ORDER**
- II. ADOPTION OF THE AGENDA**
- III. EXCUSED ABSENCES**
- IV. APPROVAL OF MINUTES**
 - a. June 13, 2019**
- V. REGULAR BUSINESS**
 - a. Public Hearing: AB-2019-01 — Administrative Appeal**
 - Applicant:** Elizabeth Mills Trustee of the Collier Family Trust
 - Project Location:** The property is located at 25 West Street Extension, Bar Harbor, Tax Map 103, Lots 048-000 and 049-000 within the Village Residential zoning district
 - Application:** The applicant requests that the Board of Appeals hold a public hearing for an administrative appeal of the Bar Harbor Planning Board's February 6, 2019 written decision, pertaining to a Subdivision and Site Plan for a Planned Unit Development application known as PUD-2017-02 pursuant to §125-103 of the Bar Harbor Land Use Ordinance. [Note: this appeal is being reheard by the board pursuant to an order from a Superior Court justice dated November 27, 2019].
- VI. OTHER BUSINESS**
- VII. ADJOURNMENT**

MINUTES

BAR HARBOR BOARD OF APPEALS

JUNE 13, 2019 AT 4:30 PM

BAR HARBOR MUNICIPAL BUILDING – COUNCIL CHAMBERS

93 COTTAGE STREET

Chairperson Ellen Dohmen, Secretary Linda Martin, board members Kay Stevens-Rosa, Robert Webber, and associate member Michael Siklosi were present. Mr. Siklosi was a voting member due to the absence of Vice-chair Roger Samuel.

Town staff present were Code Enforcement Officer Angela Chamberlain and Planning Director Michele Gagnon.

I. CALL TO ORDER

Chairperson Dohmen called the meeting to order at 4:30 PM.

II. EXCUSED ABSENCES

The absence of Vice-chair Samuel was excused by Chairperson Dohmen.

III. ADOPTION OF THE AGENDA

Mr. Siklosi moved to adopt the agenda. Mr. Webber seconded the motion. The motion carried unanimously (5-0).

IV. APPROVAL OF MINUTES

a. April 9, 2019

Chairperson Dohmen explained that in front of the board were two set of minutes. One set of minutes summarized the meeting and captured the motions while the other set only captured the motions while the content of the meeting was presented by reference to the attached transcript prepared by a court reporter working for the appellee (BHAPTS).

Chairperson Dohmen said that this could be perceived as being biased. She notes that a court reporter is expensive to hire and would be an undue burden for some appellants. Ms. Martin asked for an example of when there could be a similar situation. Chairperson Dohmen said that this was a first. However, she still does not like the idea. Ms. Stevens-Rosa noted that she is for adopting the set of minutes that does not reference the transcript and that reading a court transcript would be burdensome as it takes a long time. Mr. Siklosi feels that adopting the set of minutes

referencing the transcript could be seen possibly as being partial, as the court reporter is paid.

Patrick Lyons, Esq., for Eaton Peabody, counsel for the appellee (BHAPTS) who is referenced as a party in said minutes, asked for permission to speak.

Mr. Siklosi moved to not open it to the public. Chairperson Dohmen seconded the motion. The motion failed (2-3) with Ms. Martin, Mr. Webber and Ms. Stevens-Rosa voting against it.

Mr. Lyons was given the permission to speak.

Mr. Lyons referenced a letter between Attorney Grief, counsel for the appellant, and Eaton Peabody, counsel for the appellee, where Mr. Grief noted his support to have the transcript as part of the submittal to the Superior Court. Mr. Lyons argued that if the board approved the minutes referencing the transcript that it would be admissible in court.

The board remarked that its action of excluding the transcript would not preclude BHAPTS from submitting the transcript to the court as Mr. Lyons previously mentioned that the parties had already agreed to accept the transcript in court. Mr. Lyons argued that having the board adopt the transcript by reference would ensure that the transcript would be used as part of the record in court.

Mr. Perry Moore, representative for BHAPTS, asked, from the floor, for a **point of order**. Chairperson Dohmen recognized the request and said that the board would discuss the point of order. Mr. Perry requested a transcript of the ongoing meeting so that the court understands what happened at the meeting. He said that BHAPTS could have a court reporter prepare a transcript from the recording. Chairperson Dohmen responded that staff minutes and not a transcript would be prepared for the ongoing meeting.

Ms. Stevens-Rosa moved not to adopt this precedent of using transcription in lieu of the traditional minutes. Mr. Siklosi seconded the motion. The motion carried unanimously (5-0).

Ms. Martin moved to adopt the minutes. Ms. Stevens-Rosa seconded the motion. The motion carried (4-0-1) with Mr. Siklosi abstaining.

Chairperson Dohmen noted that in the minutes that the board just adopted, there was a discussion on page 4 pertaining to someone in the audience calling for a point of order. It reads, "A person in the audience called for a **point of order** and asked to speak. Upon conferring with Mr. Pileggi, Chairperson Dohmen declined the request." To clarify what is a point of order, Chairperson Dohmen proceeded to read from Robert's Rules of Order.

"Point of Order - purpose: to correct a breach in the rules. No second; not debatable; presiding officer rules on the point; cannot be reconsidered." Chairperson Dohmen mentioned that "cannot be reconsidered" is not true as someone can appeal the chairperson's ruling, which would bring the decision to the board as a whole.

She continued, "The purpose of a point of order is to correct a breach in the rules when the presiding officer does not correct it, or when the presiding officer makes a breach of the rules. Point of order should not be used for minor infractions. It does not need a second, can interrupt a speaker, and is ruled upon by the chair. A point of order is made at the time of the infraction..." Chairperson Dohmen gave examples of when a point of order is applicable. It could be someone leaving the room and there is no longer a quorum for a vote. A motion is made and the board is about to take a vote before there is a second. Chairperson Dohmen gave more examples and stressed that a point of order can only be used for procedural and technical matters.

Chairperson Dohmen indicated that Ms. Martin is retiring and thanked her for years of wonderful service. Ms. Martin is presently the board's secretary.

Ms. Martin nominated Mr. Webber as Secretary. Mr. Siklosi seconded the motion. The motion carried unanimously (5-0).

V. PUBLIC HEARINGS

None

VI. OTHER BUSINESS

- a. **BOA Rules of Procedure** – Chairperson Dohmen referenced the section of the board’s Rules of Procedure titled Receipt of Documents, regarding the number of copies that need to be submitted for an appeal.

Mr. Siklosi moved to change the apparent typographical error from 10 copies to 12 copies consistent with the Land Use Ordinance. Ms. Martin seconded the motion. The motion carried unanimously (5-0).

Chairperson Dohmen explained that on page 2 of the Rules of Procedure, fourth paragraph, there is a hyphen between the words ‘land’ and ‘use’ that needs to be removed.

Mr. Siklosi moved to take the hyphen between ‘land’ and ‘use’ out and leave it as a space. Mr. Webber seconded the motion. The motion carried unanimously (5-0).

Chairperson Dohmen referred to the Land Use Ordinance 125-103 D1g (p. 125:135) where it reads Rules – Said hearing shall be conducted according to rules adopted by the Board of Appeals. Ms. Dohmen proposed that the board’s Rules of Procedure be attached to every appeal application that anybody gets, so that the appellant has them, knows it is required that they follow them, and cannot say that they did not know it, they never saw them, or that they never had them.

Ms. Martin moved that the board’s Rules of Procedure be appended to all applications for appeal. Mr. Webber seconded the motion. The motion carried unanimously (5-0).

The Planner explained that changing the number of copies in the Rules of Procedure would be in conflict with what is required in the Land Use Ordinance.

Ms. Stevens-Rosa would like the town to move toward a paperless/digital system. She said that she would no longer accept paper packets.

Mr. Siklosi moved to rescind the vote on number of copies and have the number of copies conform to the Land Use Ordinance. Mr. Webber second the motion. The motion carried unanimously (5-0).

VII. BOARD MEMBER COMMENTS AND SUGGESTIONS FOR THE NEXT AGENDA

Ms. Martin mentioned that it would be great to get some younger folks on the board.

VIII. ADJOURNMENT

At 5:15 PM, Mr. Webber moved to adjourn the meeting. Ms. Martin seconded the motion. The motion carried unanimously (5-0).

Signed and approved

Robert Webber, Board of Appeals Secretary

Date

STATE OF MAINE
Penobscot, ss

SUPERIOR COURT
Docket No. BANSC AP-19-18

Elizabeth Mills
Plaintiff,

v.

Town of Bar Harbor and BHAPTS, LLC
Defendants.

**ORDER ON PLAINTIFF'S 80B
COMPLAINT and Motion to Stay**

Before the court is plaintiff Elizabeth Mills' Rule 80B complaint requesting review of governmental action. Ms. Mills challenges the Town of Bar Harbor Board of Appeals' (Board) decision dismissing her appeal to the Board, which challenged the Town Planning Board's decision granting a building permit to defendant BHAPTS, LLC. The Town of Bar Harbor has taken no position on the legal issues raised in this 80B action and is participating in this matter only to monitor proceedings.¹ For the following reasons, the Court vacates the Board's decision and remands the case back to the Board for further proceedings consistent with this opinion.

I. Background

BHAPTS applied to the Bar Harbor Planning Board for permission to make alterations to a rental property located at 25 West Street Extension, Bar Harbor. BHAPTS seeks to turn the property into an eighteen-unit housing project for its seasonal workforce. The Town Planning Board held hearings on this application on December 5, 2018 and January 16, 2019. The Planning Board approved the application and then issued a written decision on February 6, 2019. Ms. Mills owns a historic property adjacent to the proposed housing project and opposes the Planning Board's

¹ As stated in an October 11, 2019 letter to the court by the Town's attorney, Edmund J. Bearor, the Town of Bar Harbor "takes no position with regard to this pending appeal" and is "not participating in this appeal except to monitor." According to Attorney Bearor, the Town's position should be understood as identical to the positions of its appointed Boards.

decision to allow the housing project. Ms. Mills appealed the Planning Board's decision to the Bar Harbor Board of Appeals (Board) on March 8, 2019 and submitted copies of her written statement and a portion of the record of the Planning Board proceedings on March 19, 2019. The Board then held a hearing on her appeal on April 9, 2019.

The Town's land use ordinance sets forth procedural rules for the Town's Board of Appeals, including a requirement that appellants provide certain materials to the Board. The procedural rules at issue in this case are found in Bar Harbor, Me. Land Use Ordinance §§ 125-103B², 125-103C(1)³, and § 125-103D(1)(b)(1)-(3)⁴ (June 13, 2019).

² Bar Harbor, Me. Land Use Ordinance § 125-103B (June 13, 2019) provides the following:

Application. An application for an administrative appeal shall include the following and must be filed with the Planning Department within 30 days of the decision or action being appealed:

1. A completed application for appellate or de novo review on a form prescribed by the Planning Department;
2. An administrative fee and a public notice fee, which fees shall, from time to time, be set by the Bar Harbor Town Council.
3. In the case of an appeal to be heard by appellate review, a notice of the applicable parts of the record to be transcribed at the expense of the appellant;

³ Bar Harbor, Me. Land Use Ordinance § 125-103C(1) (June 13, 2019) states:

Appellate review hearings.

- a) At least 20 days prior to the Board of Appeals meeting at which an appellant is to be heard in an appellate review hearing, the appellant shall file with the Planning Department 12 copies of the record on appeal upon which the appellant plans to rely, along with 12 copies of a written statement setting forth the appellant's position as to the basis for the appeal and the relief requested.
- b) No later than seven days prior to the public hearing on the appeal, any other person wishing to present either parts of the record on appeal not submitted by the appellant or a written statement setting forth that person's position on the appeal may file 12 copies of such materials with the Planning Department.

⁴ Bar Harbor, Me. Land Use Ordinance §125-103D(1) (June 13, 2019) states:

Hearing.

1. Appellate review hearings.

a. . . .

- b. Appellate review hearings shall be limited to review of the record on appeal. The appellant and other parties may submit written argument and use illustrative aids that highlight or otherwise help the Board understand the record on appeal but may not introduce any evidence that was not presented to the decision-maker below. The Record on appeal shall consist of:

1. Transcripts of the hearings held below;
2. Exhibits and other documentary evidence submitted to or considered by the decision-maker below; and

The April 9, 2019 hearing mainly concerned whether Ms. Mills' appeal application met the procedural requirements set forth in § 125-103 of the Town's land use ordinance. BHAPTS argued that Ms. Mills' appeal application failed to meet these procedural requirements because: (1) she failed to provide a timely filing fee; (2) she did not provide complete transcripts of the Planning Board proceedings and the transcripts she did provide were incomprehensible; and (3) she did not provide the Board with all the documents relied on by the Planning Board.

After deliberations, the Board unanimously held that Ms. Mills did not submit sufficient documents for the Board to review her appeal and dismissed the appeal application. (Pl.'s Br. Ex. C, at 32-38.) During the Board's deliberation, Board members voiced concerns that the transcripts Ms. Mills submitted had transcription errors and that because Ms. Mills did not submit a complete transcript of the Planning Board's proceedings, her transcripts were difficult to follow and did not provide adequate information about what the Planning Board based its decision upon. (Pl.'s Br. Ex. C, at 32-34.) Board members also indicated that Ms. Mills appeal application was incomplete because it was missing the final site plan approved by the Planning Board as well as other materials from the Planning Board proceedings. (Pl.'s Br. Ex. C, at 34-38). Some Board members were further concerned that Ms. Mills may not have submitted 12 copies of her written statement and the record she intended to rely upon in her appeal; however, the Board never determined explicitly or implicitly whether or not Ms. Mills had submitted the necessary number of copies.⁵

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3. The decision being appealed, factual findings made by the decision-maker below and any other rulings or decisions made by the decision-maker below that are relevant to the issues on appeal.

⁵ The hearing transcript indicates the Board was unsure whether Ms. Mills' attorney had submitted 12 copies of her written statement and the parts of the record she intended to rely upon. When the Board's Chair, Ms. Dohmen, indicated that the Board may not have received 12 copies, Ms. Mills' attorney stated that he had provided 12 copies to the Board, Pl.'s Br. Ex. C, at 15-16. Board Chair Dohmen then asked the Town's Planning Director, Ms. Chamberlain, whether 12 copies were submitted and she stated she was unsure whether there were 10 or 12 copies. (Pl.'s Br. Ex. C, at 16.) ("I'm not sure if there were ten or twelve, but there were, I believe, six bound like copies like this [indicates], and then there was a whole bunch of copies not in binders.") Ms. Mills' attorney then stated again that he had submitted twelve copies. (Pl.'s Br. Ex. C, at 16.) The Board's attorney later advised the Board that they needed to decide how many copies of the record were filed, (Pl.'s Br. Ex. C, at 27, 34). However, the record indicates the Board did not make a finding on whether Ms. Mills' had submitted the required 12 copies. Based on the record provided, the court must

The Board issued a written decision on April 12, 2019 making the following findings:

“Based on the evidence in the administrative record, and after conducting their review, the Board of Appeals finds, on procedural matters:

1. The appellant fee was not paid within 30 days of the decision of the Planning Board on February 6, 2019
2. Appeal application is incomplete.
3. Meaningful portions of the record are missing such as the Planning Board-approved site plan and complete transcripts of the hearings.
4. The transcripts provided are incoherent and deficient.
5. The failure of the appellant to provide a meaningful record would not allow the board to review fairly the actions of the Planning Board.
6. Dismissal of the appeal is appropriate based on 125-103 B, C, and D.”

The Board determined: (1) the plaintiff's failure to pay the filing fee was waived, as the appropriate Town officials apparently did not know the amount to be charged when Ms. Mills' attorney attempted to pay; but that (2) the submitted application was incomplete as it did not meet the requirements of § 125-103 of the Town's land use ordinance. The Board then concluded that “on a procedural matter” the appeal should be dismissed. On May 10, 2019, Ms. Mills filed a complaint pursuant to M. R. Civ. P. 80B, challenging the Board's determination.

Ms. Mills argues: (1) that the Board of Appeals erred by misinterpreting the procedural rules in § 125-103 and applying that misinterpretation of the law to her appeal application; (2) that under the Town's land use ordinance, the Board lacks the power to dismiss an appeal on procedural grounds; (3) that she met the procedural requirements in § 125-103; and (4) the Board should have decided her appeal on the merits.

I. Standard of Review

conclude that the Board did not make a finding regarding the number of copies that Ms. Mills' submitted to the Board. *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169. A3d 396 (when reviewing governmental action pursuant to M. R. Civ. P. 80B, the court will neither embark on an independent and original inquiry, nor review the matter by implying the findings and grounds for the decision from the available record;) *see also Fisser v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797.

When the Superior Court reviews a municipal board of appeals decision pursuant to 80B it directly reviews the record developed before the board of appeals for abuse of discretion, errors of law, and findings not supported by substantial evidence. *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶¶ 9-10, 153 A.3d 113; *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 13, 82 A.3d 148; M. R. Civ. P. 80B. Substantial evidence exists if there is any competent evidence in the record upon which a reasonable mind would rely as sufficient support for a conclusion. *21 Seabran*, 2017 ME 3, ¶ 10, 153 A.3d 113; *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114. The fact that the record before the local agency is inconsistent or could support a different outcome does not render the decision wrong. *Duffy*, 2013 ME 105, ¶ 22, 82 A.3d 148. However, the court will neither embark on an independent and original inquiry, nor review the matter by implying the findings and grounds for the decision from the available record. *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169 A.3d 396; *Fissmer v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797 (court will not imply findings or create an analytical construct to attribute to a municipal agency's decision, because that judicial intervention would prevent the court from properly determining whether the municipal action is supported by the evidence and invite judicial usurpation of administrative functions.)

The interpretation of a local ordinance is a question of law and is reviewed de novo. *Duffy*, 2013 ME 105, ¶ 13, 82 A.3d 148. The party seeking to overturn the municipal agency's decision bears the burden of persuasion to demonstrate error. *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 13, 153 A.3d 768; *Duffy*, 2013 ME 105, ¶ 13, 82 A.3d 148.

II. Analysis

1. Procedural Requirements for Appeal Applications to the Bar Harbor Board of Appeals

Ms. Mills argues that she was only required to meet the requirements of § 125-103B and § 125-103C, i.e. she was required to submit: (1) a completed application for appeal on the Town planning department's form; (2) an administrative fee; (3) a notice of the applicable parts of the record to be transcribed at her expense; (4) 12 copies of the parts of the record on appeal upon which she planned to rely; and (5) 12 copies of a written statement setting forth the basis of her appeal and the relief she requested. Ms. Mills asserts that while § 125-103D(1)(b) establishes the scope of the permissible record on appeal, it does not require applicants to provide all of the documents described in the subsection.

BHAPTS argues that § 125-103D(1)(b) requires appeal applicants to provide all of the documents described in the subsection, meaning: (1) all transcripts of the hearings held below; (2) all exhibits and documentary evidence submitted to or considered by the decision-maker below; and (3) the decision being appealed, and any other rulings or decisions made below that are relevant to the issues on appeal. According to BHAPTS, § 125-103D(1)(b) creates a floor that obligates applicants to provide the Board with a complete record of the proceedings below, not just the portions of the record upon which they intend to rely upon in their argument to the Board. BHAPTS contends that § 125-103B and § 125-103C create additional requirements on top of § 125-103D(1)(b).

Interpretation of a local ordinance is a question of law and is reviewed de novo. *21 Seabran*, 2017 ME 3, ¶ 12, 153 A.3d 113; *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024. The court looks first to the plain meaning of the ordinance's language, and construes its terms reasonably in light of the purposes and objectives of the ordinance and its general structure as a whole. *Fissmer*, 2017 ME 195, ¶ 15, 170 A.3d 797; *Stewart v. Town of Sedgwick*, 2002 ME 81, ¶ 6, 797 A.2d 27. If the meaning of the ordinance is clear, the court will look no further than its plain meaning. *21 Seabran*, 2017 ME 3, ¶ 12, 153 A.3d 113; *Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 684. In reviewing the local agency's application of an ordinance, the court accords substantial deference to the agency's

characterizations and fact-findings as to what meets the ordinance's standards. *Fisser*, 2017 ME 195, ¶ 13, 170 A.3d 797; *Bryant*, 2017 ME 234, ¶ 12, 176 A.3d 176. Ms. Mills bears the burden of persuasion on appeal because she seeks to overturn the Board's decision. *21 Seabran*, 2017 ME 3, ¶ 10, 153 A.3d 113.

Looking to the plain language of § 125-103B, C, and D in light of the general structure of the whole ordinance, the Court concludes that a party appealing a Town of Bar Harbor Planning Board decision to the Bar Harbor Board of Appeals must, subject to the ordinance's timing requirements, submit the following items to the Board of Appeals:

1. A completed application for appeal on the Town planning department's form;
2. An administrative fee;
3. A notice of the applicable parts of the record to be transcribed at the party's expense;
4. 12 copies of a written statement setting forth the basis of her appeal and the relief she requests; and
5. 12 copies of the parts of the record on appeal upon which she plans to rely.

When read as a whole, it is plain that § 125-103 of the ordinance was intended to create a method where the record on appeal is developed by relying on an adversarial process. Under § 125-103, the appellant and all of the interested parties are called on to submit what portions of the record they believe are pertinent to the appeal. This is shown by the parallel language in § 125-103C(1)(a) and (b). § 125-103C(1)(a) is entitled "submissions generally" and mandates the appellant (i.e. the ordinance states, "appellant shall file . . .") to provide 12 copies of the record on appeal upon which the appellant plans to rely along with 12 copies of the appellant's written argument and request for relief. This language is immediately followed by a provision allowing any other interested party to present their own written statement and parts of the record on appeal that were not submitted by the applicant. In this scheme, both the appellant and any interested parties are asked to provide the Board with the parts of the record they intend to rely upon but, contrary to BHAPTS' contention, no party is required to provide a complete record.

§ 125-103D, entitled “hearing,” then provides a series of rules governing the Board of Appeal’s administration of appellate hearings. § 125-103D(1)(b) opens with the sentence, “appellate review hearings shall be limited to review of the record on appeal.” The subsection then lays out what may constitute the record on appeal, i.e. transcripts of the hearings below, etc. Contrary to what BHAPTS suggests, this subsection does not require the appellant or any other party to supply a complete and comprehensive record of the proceedings below. The subsection contains no language actually directing the appellant to provide these items and plainly does not require the appellant to provide a complete record of all transcripts of hearings in the proceedings below.

Unlike § 125-103C(1), § 125-103D(1)(a) does not use language such as the ‘appellant shall’ or ‘appellant must.’ § 125-103D is mainly directed at establishing the range of materials the BOA could consider on appeal rather than what materials the appellant or other party must submit as part of the appeal process. The language and structure of the Town’s ordinance demonstrates § 125-103D(1)(a) was intended to demarcate the limits of the record on appeal that the Board of Appeals could consider, not act as a mandate requiring an appellant to provide certain materials in his or her application for appeal.

§ 125-103B then sets some additional procedural requirements for appellants regarding applications for appeal. The subsection requires appellants to provide a filing fee, a completed application form from the Town’s planning department, and a notice of the applicable parts of the record that the appellant will pay to transcribe. None of this language indicates the Town of Bar Harbor intended to require appellants to provide the complete and exhaustive record as suggested by BHAPTS.

2. Plaintiff’s Request for a Stay

On August 8, 2019 the Bar Harbor Planning Department issued a building permit to BHAPTS to construct three 50 by 32 feet concrete foundations at 25 West Street Extension, the property at issue. In late September, the plaintiff observed circumstances, such as removal of trees

on the BHAPTS property, that suggested construction was commencing on the foundations for the BHAPTS housing project. On October 3, 2019, Ms. Mills filed a motion for a stay pending appeal pursuant to Rule 80B(b), requesting that the Court enjoin any further construction activities by BHAPTS pending resolution of the appeal. Ms. Mills seeks to maintain the status quo until her challenge to the Planning Board's decision is finally resolved. October 24, 2019, BHAPTS, LLC filed an objection. On November 7, 2019, Ms. Mills filed her reply.

M.R. Civ. P. 80B(b) provides that:

Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but *the court may order a stay upon such terms as it deems proper.*

Id. (emphasis added). As interpreted by the Law Court, Rule 80B's purpose is to provide the public with a "mechanism to test a government decision but, by imposing time limits to appeal and not automatically staying the action being reviewed, it recognizes the countervailing policy that the administration of government should not be unnecessarily impeded. A broad reading of the non-stay provision in the rule best reconciles these two policies by not holding government hostage by private parties *unless there is some showing made to the court that a stay is proper.*" *Cobbossee Dev. Grp. v. Winthrop*, 585 A.2d 190, 194 (Me. 1991) (emphasis added).

Both parties framed their arguments in terms that suggest this Court would utilize the *Ingraham* standard for obtaining a preliminary injunction to inform its consideration of Ms. Mills' motion for a stay under Rule 80B(b). *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691 (Me. 1982) Nothing in the body of Rule 80B(b) nor in the Law Court's interpretation of it, suggests that the *Ingraham* standard controls motions for a stay under Rule 80B(b). However, this Court, like the Court in *Pike Indus. v. City of Westbrook*, BCD-WB-Ap-09-31, (Bus. & Consumer Ct. Nov. 17, 2009, Humphrey, C.J.) looks to *Ingraham* for guidance in its consideration of Ms. Mills' motion.

Under *Ingraham*, the Court must find that four criteria have been satisfied before granting a preliminary or permanent injunction:

- 1) the plaintiff will suffer irreparable injury if the injunction is not granted. An “irreparable injury” is an “injury for which there is no adequate remedy at law.” *Bangor Historic Track*, 2003 ME LEXIS 140, ¶ 9, 837 A.2d 137;
- 2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant;
- 3) plaintiff has demonstrated a likelihood of success on the merits (at least a substantial possibility); and
- 4) the public interest will not be adversely affected by granting the injunction.

Ingraham, 441 A.2d at 693; *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 9, 837 A.2d 137. A remedy at law is adequate, when it is “as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.” *Throumoulos v. Bernier*, 61 A.2d 681, 683 (1948).

In connection with her request for a stay, Ms. Mills filed an affidavit which alleges that if BHAPTS begins construction on the housing project as her appeal is pending she would suffer “significant harm” as an abutting property owner. (Mills Aff. ¶ 3.) In September 2019, a narrow tree line on BHAPTS property created a buffer between the back line of Ms. Mills land and BHAPTS’ existing housing structure. Ms. Mills alleges that BHAPTS construction plan would eliminate this tree line and create multiple three-story apartment structures 10 feet from her property line. (Mills Aff. ¶ 4.) She contends that destroying this tree line will forever change the quiet enjoyment of her historic home. (Mills Aff. ¶ 11.) She states that these trees provide a visual, light, and noise barrier between her property and BHAPTS housing units and that once these trees are removed and BHAPTS finishes its new worker housing project, she will suffer harm from increased light and noise disturbances. (Mills Aff. ¶ 9.) In September 2019, BHAPTS removed a significant portion of these trees in preparation for construction on its housing project. (Salvatore Aff. ¶ 24.); (Salvatore Aff. Ex. F); (Pl.’s Mot. to Stay, Ex. A, B, C.)

She further alleges that since BHAPTS took control of the property, noise disturbances, trespassing, and littering have increased. (Mills Aff. ¶ 8.) She states that should BHAPTS complete the housing structure and move in more workers, she would suffer from increased trespassing and littering on her property. (Mills Aff. ¶¶ 9, 11.) However, she is not certain that BHAPTS’ tenants

are the actual source of her current issue with littering and trespassing. (Mills Aff. ¶ 8.) She also contends that if BHAPTS completes the housing project, she “will not be able to change the pattern of noise, trespass, late-night disturbances and light pollution that is already a problem with the worker housing complex.” (Mills Aff. ¶ 11.)

After considering the record and the parties’ arguments on this issue, the Court grants Ms. Mills’ request to stay further construction activities by BHAPTS. The Court finds as follows:

1) The plaintiff will suffer irreparable injury if the injunction is not granted.

Currently there are 4 apartment buildings on BHAPTS property, these buildings contain 16 apartments and are permitted to house 80 people (5 people in each of the 16 “small” apartments). These 4 buildings are located primarily along the North Woodbury Road and West Street Extension. The current 4 buildings have 4 apartments each. Under the new plan, there would be 7 apartment buildings on BHAPTS’ property, and these buildings would contain 18 apartments and would be permitted to house 90 people (5 people in each of the 18 “large” apartments, some of such 18 apartments having 4 separate bedrooms with private bathrooms). Two of the new buildings would sit 10 feet from Ms. Mills’ property line. BHAPTS has already removed a significant portion of the trees on its land that served as a buffer between Mills land and BHAPTS’ existing apartment buildings. The third new building would sit directly in front of one of the new buildings that would sit proximate to Ms. Mills’ property line.

There is no doubt that the construction of 3 new multi-story residential buildings along Ms. Mills’ property line along with the destruction of the trees would increase noise and light coming onto Ms. Mills’ property from the BHAPTS property and would interfere with her quiet enjoyment of her property. Whether the as yet unknown temporary seasonal workers would trespass and litter on Ms. Mills

property is unknown, but there is evidence that noise, trespassing, and littering of liquor bottles and hypodermic needles on Ms. Mills' property increased after BHAPTS acquired the property and converted it into temporary worker housing.

The Court is satisfied that continued construction before the resolution of the appeal will impact Ms. Mills in a way that may not be remedied through an award of money damages. There is no adequate remedy at law. The record indicates that should BHAPTS finish construction of its apartment buildings and house more workers there, the alleged repeated nuisances, trespasses, and littering that Ms. Mills has suffered may increase. If Ms. Mills were to later bring tort actions for trespass and nuisance and succeed, her alleged harms would not be adequately remedied by an award of money damages alone.⁶ Moreover, given the nature of the housing, each tourist season may well bring different tenants to the buildings.

Finally, the Court is not confident that The Town of Bar Harbor would require destruction of the new buildings once constructed, even if it were determined that the LUO was violated. The Planning Board ignored its attorney's advice in approving this matter, and this leads the Court to question whether the Town would order the removal of the buildings.⁷

- 2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant.

⁶ "Irreparable injury can be demonstrated where the plaintiff is subject to repeated trespasses, to a continuing nuisance or where he faces the prospect of a multiplicity of law suits in order to obtain relief." *Plourde v. Valley Sno-Riders*, No. CARSC-CV-02-007, 2002 Me. Super. LEXIS 41, at *6 (March 18, 2002); *Wilson v. Harrisburg et al.* 107 Me. 218, 77 A. 787 (1910).

⁷ The Town's land use ordinance states that if the Board of Appeals finds that the Planning Board's decision is contrary to the land use ordinance "[i]t may reverse the decision, subject to such terms and conditions it considers advisable to protect the public's health, safety, and general welfare", or vacate the decision and remand the matter to the Planning Board. Bar Harbor, Me. Land Use Ordinance §125-103(D)(1)(I) (June 13, 2019). Based on this language, it is unclear whether the Board of Appeals has the authority under the ordinance to order BHAPTS to remove the buildings should Ms. Mills succeed at the Board of Appeals. If this is true, then Ms. Mills would need to bring subsequent proceedings against BHAPTS in the courts for further relief. Given the court's finding that Ms. Mills is likely to succeed in overturning the Planning Board's decision, this outcome seems grossly inefficient.

The project in question will house an additional 10 seasonal workers. While BHAPTS might have to find an alternative location to house these 10 workers for the 2020 tourist season, the Court finds this injury does not outweigh the potential injury to the Plaintiff. BHAPTS will not be in any worse position than it has been in for the preceding tourist seasons.

3) Plaintiff has demonstrated a substantial possibility of success of the merits.

This Court is remanding this matter to the Bar Harbor Board of Appeals for action consistent with the Court's instruction on what materials a party must submit to the Board of Appeals to pursue an appeal of a decision of the Bar Harbor Planning Board (see page 7-8 of this decision). Whether submitted by Ms. Mills or BHAPTS, it appears that the Board of Appeals has the materials necessary to consider the merits of Ms. Mills' arguments. *See* (Pl.'s Br. Ex. C, at 7, 20) (indicating that BHAPTS submitted supplemental records to the Board of Appeals and is confident the Board has a sufficient record to adjudicate the merits); (Def.'s Br. 7, 8) (indicating that BHAPTS provided records to the Board of Appeals to supplement the record provided by Ms. Mills).

There is a substantial possibility that Ms. Mills will succeed on the merits before the Board of Appeals on one or more of the following issues:

- 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;
- b. The Planning Board's decision that the "base development density" was 9 units, not 8;

- c. The Planning Board's decision that the maximum density was 18 units, not 16;
 - 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.
- 4) the public interest will not be adversely affected by granting the stay.

Appropriate enforcement of the LUO is in the public interest. Additional lodging for the 2020 tourist season for 10 workers will not adversely affect the public interest. BHAPTS has indicated that it will find housing for these 10 people elsewhere, as it apparently has done in the past. While these 10 people may be important to BHAPTS business interests, the public interest will not be adversely affected by granting the stay.

The Court is not satisfied that any security should be provided by Ms. Mills in connection with the granting of this stay. First, the court is not convinced that Rule 80B provides this mechanism to the Defendant, and even if it did, that it would be appropriate in this case. Moreover, the Court is not at all persuaded by the Defendant's calculation of the estimated "project delay losses."

The Motion to Stay is granted.

III. Conclusion

Upon consideration of the record and the parties' arguments, the court concludes that the Bar Harbor Board of Appeals misinterpreted and misapplied the procedural rules in Bar Harbor, Me. Land Use Ordinance § 125-103, which govern appellate review applications to the Board. Looking to the plain-meaning, structure, and purpose of § 125-103, the court concludes that the ordinance required Ms. Mills, subject to the ordinance's timing requirements, to submit the

following materials as part of her appeal application: (1) a completed application for appeal on the Town planning department's form; (2) an administrative fee (which has been waived); (3) a notice of the applicable parts of the record to be transcribed at the party's expense; (4) 12 copies of a written statement setting forth the basis of her appeal and the relief she requests; and (5) 12 copies of the parts of the record on appeal upon which she plans to rely. The record demonstrates that the Board did not assess Ms. Mills' application according to these requirements; this mistake constitutes an error of law and therefore, the court vacates the Board's decision and remands the matter back to the Board for further proceedings consistent with this opinion. 5 M.R.S. § 11007.

Ms. Mills' Motion for a Stay is granted.

The entry is as follows:

1. The Town of Bar Harbor Board of Appeals decision is vacated and the matter is remanded to the Board of Appeals for further proceedings consistent with this opinion.
2. Plaintiff's request for a stay is granted.

The Clerk is directed to incorporate this order on the docket by reference.

Dated: 11/27/14



Ann M. Murray, Justice
Maine Superior Court

ORDER/JUDGMENT ENTERED IN THE
COURT DOCKET ON: 12-3-19

STATE OF MAINE
Penobscot, ss

SUPERIOR COURT
Docket No. BANSC AP-19-18

Elizabeth Mills
Plaintiff,

v.

Town of Bar Harbor and BHAPTS, LLC
Defendants.

ORDER

Plaintiff's request to file a reply memorandum in support of her motion for a stay pending appeal of 10 pages is granted.

11/27/19
Date *nunc pro tunc*


Ann M. Murray, Justice
Maine Superior Court

ORDER/JUDGMENT ENTERED IN THE
COURT DOCKET ON: 12-2-19

STATE OF MAINE
Penobscot, ss

SUPERIOR COURT
Docket No. BANSC AP-19-18

Elizabeth Mills
Plaintiff,

v.

ORDER

Town of Bar Harbor and BHAPTS, LLC
Defendants.

Plaintiff's request for a non-testimonial hearing on her motion for a stay pending appeal is denied.

11/27/19
Date


Ann M. Murray, Justice
Maine Superior Court

ORDER/JUDGMENT ENTERED IN THE
COURT DOCKET ON: 12-2-19

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

GILBERT & GREIF, P.A.

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(207) 941-9871

January 14, 2020

Bar Harbor Planning Department
ATTN: Michelle Gagnon
93 Cottage St.
Bar Harbor, ME 04609

Dear Michelle,

Enclosed please find a letter from Elizabeth Mills which authorizes me to represent her in her absence at the hearing scheduled for Tuesday, February 11, 2020, and all hearings thereafter.

Sincerely,



Arthur J. Greif
ajg@yourlawpartner.com

AJG/mek

CC: Andrew Hamilton, Esq. (w/encl.)
Daniel Pileggi, Esq. (w/encl.)

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

Elizabeth Mills

15 Highbrook Rd
Bar Harbor ME 04609

RECEIVED JAN 13 2020

December 29, 2019

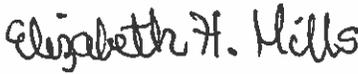
Bar Harbor Planning Board
93 Cottage St I
Bar Harbor, ME 04609

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 Mills

GILBERT & GREIF, P.A.

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YOUR LAW PARTNERSM

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

PEGGY B. GILBERT, OF COUNSEL

February 3, 2020

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FEB 04 2020

TOWN OF BAR HARBOR
PLANNING/CODE ENFORCEMENT

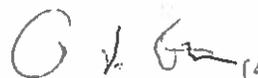
Bar Harbor Planning Department
ATTN: Michelle Gagnon
93 Cottage St.
Bar Harbor, ME 04609

Dear Michelle,

Enclosed please find 12 copies of Appellant's supplemental brief together with Exhibits A and B thereto. I am at the same time copying attorneys Hamilton and Pileggi on this filing and I thank you for taking the necessary steps for making sure the Board of Appeals receives the necessary copies for next Tuesday's hearing.

Thank you in advance for your efforts.

Sincerely,



Arthur J. Greif
aig@yourlawpartner.com

AJG/mek

CC: Andrew Hamilton, Esq. (w/encl.)
Daniel Pileggi, Esq. (w/encl.)
Elizabeth Mills (via e-mail only)

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

TOWN OF BAR HARBOR BOARD OF APPEALS

RECEIVED

FEB 04 2020

TOWN OF BAR HARBOR
PLANNING/CODE ENFORCEMENT

ELIZABETH MILLS,)
)
 Appellant)
)
 v.)
)
 BHAPTS, LLC.,)
)
 Appellee)

Appellant's Supplemental Brief

By agreement of the parties, any supplemental briefing on legal issues must be submitted in 12 copies to the Planning Department on or before Tuesday, February 4, 2020. This is Ms. Mills' supplemental brief.

Introduction

First, attached as Exhibit A is a written authorization by Ms. Mills which has already been filed with the Planning Department which authorizes any attorney at Gilbert and Greif, P.A. to represent her even though she may not be physically present for next week's hearing. Secondly, although Appellee insists that the decision by the Superior Court is not part of the "record," it is clearly the law of the case as attorney Pileggi can explain. It is obviously not something the Planning Board could have reviewed because the Superior Court decision of November 27, 2019 came long after the Planning Board granted site-plan approval much earlier that year. However, to not consider what the Superior Court has already ruled would be akin to a lower court in the late 1950's confronting a challenge to school segregation and declining to even consider what the United State Supreme Court had ruled in Brown v. Board of Education, 337 U.S. 483 (1954). Justice Murray's opinion must necessarily help this Board of Appeals shape its decision-making process.

Justice Murray's decision is attached hereto as Exhibit B. Because Justice Murray ultimately granted a stay of the underlying site-plan approval by the Planning Board for this temporary worker housing expansion, she has analyzed both the decision of the Board of Appeals in dismissing the appeal on procedural grounds (which action she overturned) and the underlying decision by the Planning Board on the substance of the zoning dispute.

While I urge the Board of Appeals to read the entire decision by Justice Murray, I would draw its attention to two separate parts of that decision, the first found at page 12 where the Court stated:

Finally, the Court is not confident that The Town of Bar Harbor would require destruction of the new buildings once constructed, even it were determined that the LUO was violated. The Planning Board ignored its attorney's advice in approving this matter, and this leads the Court to question whether the Town would order the removal of the buildings.

Footnote 7, also found at page 12, provides as follows:

The Town's LUO states that if the Board of Appeals finds that the Planning Board's decision is contrary to the LUO "[i]t may reverse the decision, subject to such terms and conditions it considers advisable to protect the public's health, safety, and general welfare", or vacate the decision and remand the matter to the Planning Board. Bar Harbor, ME. Land Use Ordinance §125-103 (D) (1) (1). Based on this language, it is unclear whether the Board of Appeals has the authority under the ordinance to order BHAPTS to remove the buildings should Ms. Mills succeed in the Board of Appeals. If this is true, then Ms. Mills would need to bring subsequent proceedings against BHAPTS in the courts for further relief. Given the Court's finding that Ms. Mills is likely to succeed in overturning the Planning Board's decision, this outcome seems grossly inefficient.

(emphasis added).

As this footnote makes clear, the Court, in order to grant a stay pending appeal, found that Ms. Mills was likely to succeed in overturning the decision by the Planning Board. This is significant. Justice Murray gave a more detailed explanation of the substantial likelihood that Ms. Mills would succeed in this appeal at pages 13 and 14 of her decision:

There is a substantial possibility that Ms. Mills will succeed on the merits before the Board of Appeals on one or more of the following issues:

- 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;
- B. The Planning Board's decision that the "base development density" was 9 units not 8;
- C. The Planning Board's decision that the maximum density was 18 units, not 16;
- 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.

(emphasis added).

Finally, Ms. Mills will not respond to the *ad feminam* attack on her as having some sort of racial bias toward temporary workers, when she spoke out about how workers needed to be better treated by their employers and not housed in over-crowded conditions. The issues before this Board of Appeals are purely legal: did the Planning Board correctly interpret the LUO or was the Superior Court right that it made 4 or more critical errors? This Board need not get dragged into the unfortunate *ad feminam* attack that Appellee has launched at Ms. Mills.

Argument

There were 11 separate interpretation errors made by the Planning Board, any one of which, standing alone, is sufficient to "reverse the decision." While one or two errors might be grounds for simply vacating the decision and remanding the matter to the Planning Board, under LUO §125-103 (D) (1) (1), the multiplicity of legal errors is such that only a reversal of the decision will suffice. A complete reversal of the decision, setting out the ways in which the Planning Board committed legal error, would allow the Appellee to either start from scratch and submit a completely new application for site-plan approval, or allow the Appellee to seek relief in the Superior Court to test whether this Board of Appeals has made the right decision. This offers a basic procedural fairness to the Appellee and Ms. Mills. The alternative would be a

series of potentially endless remands, appeals, remands, and appeals until there was a final decision, that could, once again, be appealed to the Superior Court. That is not in the interest of administrative efficiency, judicial efficiency, or the need to have land use matters decided in a fashion economical and cost-effective for all parties.

1. Expanding Non-conforming Structures and Use

There were four separate times that the Planning Board ignored its own attorney and ignored the LUO which should have guided its decision. At its December 5, 2018 meeting, it voted 3-2 that the lot was grandfathered. LUO §125-52 (a) recognizes that lots, structures, and uses can all be grandfathered. This lot is clearly large enough for as many as eight dwelling units since it exceeds 85,000 sq. feet and the minimum lot area per dwelling unit for the Village Residential District is now 10,000 sq. feet. The lot is not too small or non-conforming. It is only when 16 dwelling units were placed upon the lot and the LUO was then amended to increase the minimum lot area per dwelling unit that the structures became non-conforming. LUO §125-109 defines “structure, non-conforming” as being a structure which “does not meet the dimensional, height or setback requirements in the district in which it is located.” This refers to the 10 enumerated dimensional standards of the Village Residential District found at LUO §125-20 (b). The 10th of those standards is a minimum area per family of 10,000 sq. feet with sewer. Thus, all four existing buildings, which each have four apartments, are non-conforming: they effectively create slightly over 5,000 sq. feet per family for an area that has a sewer hookup. They do not meet the express dimensional standards of the District and are non-conforming structures as defined by the LUO.

The use, as well, is non-conforming as a Multi-Family II use is now only allowed “by planned unit development,” and the current site is not a planned unit development. LUO §125-

69 (S) was added on June 13, 2006 and established the PUD-V process. Thus, the PUD-V process was never used to permit the Multi-Family II use which currently exists.

Here, the applicant is going to create three completely new buildings and significantly enlarge the actual footprint of the complex. This violates LUO §125-54 (A) which provides “no non-conforming use shall be enlarged or increased, or extended to occupy a greater area of land.” It also violates LUO §125-54 (B) which provides that no existing structure that is devoted in whole or in part to a non-conforming use “shall be extended or enlarged.” It also violates LUO §125-54 (C) which provides that “no non-conforming use shall be extended to occupy any land outside such building.” Finally, LUO §125-55 (A) provides that no “structure shall be enlarged, altered or extended in any way that increases its non-conformity.”

One cannot take four non-conforming structures and apply that non-conformity to three entirely new buildings. The Town Attorney advised the Planning Board of this and the Planning Board, by a 3-2 vote, rejected this considered legal opinion.

Once this Board agrees that both the structures and the use are non-conforming, a completely different analysis applies to the site-plan review approval process. Rather than having but two new dwelling units permitted under the rigorous criteria for PUD-V approval and affordable housing approval, all dwelling units must meet the rigorous requirements for both criteria. Since the use is a non-conforming use, it cannot be converted to a PUD-V Multi-Family II project without meeting every requirement of the PUD-V process.

2. Miscalculating Base Development Density

The process for approval of a PUD-V is found in LUO §125-69 (S). That includes a definition of “base development density” based upon the density allowed with what would be a conventional subdivision application. LUO §125-69 (S) (6) (a) [1]. For the Village Residential

District, the minimum lot size per family is 10,000 sq. feet, as this lot has a sewer hookup. LUO §125-20 (b) (10). This is a minimum area per family and the fact that there are 85,000 sq. feet does not allow the Planning Board to round up and call for 9 dwelling units as the base density allowed. Minimum means minimum. Words have meaning. The remaining 5,000 square feet cannot be used for a ninth dwelling unit. At its January 16, 2019 meeting, the Town Attorney made it clear that the base development density would be 8. Nonetheless, none of the 3 individuals who had agreed on December 5, 2018, that the base development density was 9 moved to reconsider their earlier decision. Transcript of 1-16-19 hearing, p. 76.

3. Maximum Number of Units

Base development density is important because under LUO §125-69 (S) a PUD-V cannot have dwelling units in a number “more than twice the base development density.” LUO §125-69 (S) (6) (a) [3]. Thus, the maximum number of units for a PUD-V would be 16, not the 18 approved, if every other criteria for a PUD-V is met.

4. Number of Affordable Units

The Planning Board ignored its Attorney once again in deciding that only two of the 18 units it allowed needed to be affordable.

First, for the 8 units that are part of the permitted maximum density without taking advantage of the PUD-V process, “the minimum number of affordable units or lots must be 20% of the base development density.” LUO §125-69 (S) (6) (b). 20% of 8 would normally be 1.6, but the affordable housing portion of the LUO allows rounding down of the fractional sum, LUO §125-69 (R) (3) (f). Thereafter, for the 8 additional units potentially allowed, 4 of the additional 8 must be affordable because “for every additional affordable dwelling unit, an additional market-rate unit may be allowed.” LUO §125-69 (S) (6) (a) [2] [a]. By simple mathematical

analysis, one of the first 8 units must be affordable and 4 of the next 8 must be affordable, for a total number of affordable units of 5. In contrast, the Planning Board approved only 2 affordable units in its December 5, 2018 initial decision by a vote of just 3-2.

Changing the number of mandated affordable units from 2 to 5 is critical. As noted below, LUO §125-69 (R) (3) (a) mandates that affordable dwelling units be sold or rented to qualified moderate-income buyers, with preference “given to Town residents and then to employees of the Town or the public School in Bar Harbor.” As noted below, Appellee has made it clear that these units will be rented only to seasonal employees of its allied seasonal businesses and no preference, whatsoever, shall be given to either Town residents, Town employees, or employees of the Town’s public school. Appellee now has 16 units which it claims it can rent to seasonal employees, only. Does it really wish to reduce its available seasonal employee rental units from 16 to 11 and then provide, as a public service, affordable housing preferentially limited to qualified buyers who are Town residents or Town employees? Because this is so fundamental to the project as designed and approved, the appropriate step for the Board of Appeals is to “reverse the decision” rather than remand to the Planning Board. LUO §125-103 (D) (l) (1).

5. This Use is Not Permitted in a Residential District.

Residential is not defined in the LUO so that LUO §125-108 (a) provides that it should have the meaning “as found in the current edition of Webster’s Collegiate Dictionary.” Residential, at that Dictionary, is defined as “restricted to or occupied by residents in a residential neighborhood.” Since residential is defined by Webster in terms of “resident,” the definition of resident is critical:

The place where one actually lives as distinguished from one’s domicile or place of temporary sojourn.

Reside, the root word for resident and residential, is defined at Webster's as "to dwell permanently or continuously: occupy a place as one's place of legal domicile." (emphasis added) The problem for the applicant is that, by its own admission, this development is intended only for seasonal workers who are not residents of Bar Harbor, some of whom who may be here on visas which can only be issued to non-residents.

The LUO defines the purpose of the Village Residential District as encompassing "the well-established residential neighborhoods that surround the traditional downtown area of Bar Harbor" LUO §125-20 (A) (emphasis added). Attempts to permit this as a Multi-Family II runs afoul of the same restriction, that Multi-Family II is only for residential occupancy. Dwellings, Multi-Family II is defined as buildings "used for residential occupancy for five or more families living independently of each other and doing their own cooking in the building in each of the five or more separate and independent dwelling units" LUO §125-109 (emphasis added). Should there be any doubt that PUD-V is intended only for residential, not commercial development, the primary purpose of the PUD-V is defined as being to "provide an opportunity for residential subdivision developments in the villages of Bar Harbor." LUO §125-69 (S) (1) (a). The remaining references for PUD-V stress affordable housing, and following guidelines for the Great American Neighborhood, both of which refer to people who have some permanent connection with Bar Harbor and are not here for 6 months or less.

In the initial application process, the applicant thought that it could meet the affordable housing standards by making some affordable units available only in the 6 months of the off-season when summer workers were not here and the hotel season had ended. The Town Attorney disagreed.

Because the LUO accepts the definition of residential found at Webster's Collegiate Dictionary, and because both the District, the use (Multi-Family II), and the entire purpose of the PUD-V development are all focused on residential use and residential subdivision, this use, which is essentially a boarding house or employee dormitory, is not a permitted use in the District and clearly not a permitted use for the PUD-V residential subdivision process. One cannot have a Great American Neighborhood that lies vacant six or more months out of the year.

Ms. Mills agrees that someone who has a long-standing pattern of spending 6 months or more in Bar Harbor and spending the winters away, qualifies as a resident. They have an intent to reside which Webster's defines as "to dwell permanently or continuously: occupy a place as one's place of legal domicile." The workers assigned to this project may be here for a single summer and never return. They are likely legal residents of other states or other nations. They have no vested interest in the community. Ms. Mills wishes that the corporations allied with Appellee could find year-round employment for these individuals. Then they would be able to set down roots and help build a Great American Neighborhood and become a functioning part of this community. However, these are individuals who are here for 6 months or less and may never return. Swallows return to Capistrano every year. The workers assigned rooms at Acadia Apartments may never return.

6. These Workers do not Constitute a Family

Family is defined at §125-109 as including "not more than 5 persons not so related, occupying a dwelling unit (including a vacation unit) and living as a single housekeeping unit, such a group to be distinguished from a group occupying a boarding house, lodging house, club, fraternity or transient accommodations" (emphasis added). What is being proposed here is essentially a boarding or lodging house. These workers are not coming together as a "single

housekeeping unit” and have not chosen their rooms on their own. They are being assigned to their current lodging by their employer and it is doubtful they are preparing their meals together, buying their meals together, etc.

This Board should ask the Appellee whether each group of five of their allied business employees come together and choose to live at Acadia Apartments, choose to form a family, and collectively sign a single lease, or whether they are each assigned rooms, each required to sign a lease, and may have no idea who is living in the adjacent room. Were five College of the Atlantic students together to collectively rent an apartment in Bar Harbor, they would meet this definition of family. They would have signed and co-signed the same lease, and would likely be purchasing and helping prepare some of their meals together as a single house-keeping unit. That is not what is happening here. This is more akin to a Youth Hostel in which people arrive at different points in time from different places on the globe and only get to know each other, if at all, after they have assumed their tenancy.

The Board of Appeals might ask Appellee to provide the leases which were signed by the residents of all 16 units for the 2019 summer season. That would be telling.

Final proof that this is a commercial, not a residential, use is found in the LUO’s definition of COMMERCIAL USE as including any activity designed for the production of income “exclusive of rental of residential buildings and/or dwelling units.” Once again, residential is set as a different concept than commercial and the Webster’s definitions of residential, reside and resident make it clear that these terms apply only to people who are staying in Bar Harbor with an intent to remain.

These buildings serve an auxiliary commercial purpose to the hotels which employ the employees randomly assigned housing there. The Board may take notice of the fact that the

Planning Department is drafting definitions for “Shared Accommodations (SA)” and “Employee Living Quarters” which will not generally be allowed in residential districts. These terms more accurately reflect what is actually happening here at Acadia Apartments.

Appellee had a burden before the Planning Board to present some evidence that the individuals assigned to this temporary worker housing constituted a family. Because they have failed to meet that burden, none of the dwelling units it proposes meet the core definition of dwelling unit, LUO §125-109, which is defined as a “ group of rooms which is designed, equipped and intended exclusively for use as residential living quarters by only one family” (emphasis added).

This failure to establish that these proposed units meet the definition of dwelling units, which incorporates the definition of family under the LUO, is fatal to the entire project, which is yet another reasons to reverse the decision below and not to remand under LUO §125-103 (D) (1) (1).

7. Buffering

The attempt to more than double the density of this project from the 8 dwelling units otherwise allowable in Village Residential District to 18 (two more than allowable even under the PUD-V process) runs afoul of LUO §125-69 (S) (5) which allows the addition of other Multi-Family dwelling units for a PUD-V when it “will result in the creation and/or retention of larger buffers, open space, and recreation areas that might not be possible otherwise in the development.” There are no recreational areas being created by this development and the 3 new structures will be placed at or near Ms. Mills’ back line. The initial site plan application placed some of these structures on the North Woodbury Road side of the development where they were at least insulated from the other residents of the District by an intervening roadway. Here, by

moving these structures to Ms. Mills' back line, the Defendant is not retaining the wooded buffer that existed between Ms. Mills' property and the existing site but filling that pleasant wooded area with three entirely new buildings. Ms. Mills has been the most vociferous opponent of this development and her opposition has resulted in buildings being moved from their originally planned locations on North Woodbury Road to Ms. Mills' backline. The dwelling units will be just 10 feet from her property line. This expansion drastically diminishes buffering, rather than enhances it.

8. Open Space Requirement

Page 5 of the Planning Board's decision baldly states "that the development meets the Open Space Standard." The open space requirement found at LUO §125-69 (S) (6) (c) for PUD-V must be read in light of one of the purposes and intents of the PUD-V process of "clustering of dwelling units to create public parks and gardens." LUO §125-69 (S) (1) (a) [1]. When asked by Planning Board member Fitzpatrick whether there would be any public parks or gardens as part of this PUD-V process, the applicant admitted there would be none. While this lot is less than 5 acres such that the 20% requirement of open space of LUO §125-69 (S) (6) (c) [1] is not triggered, the applicant never presented to the Planning Board "proposed language for incorporation into deeds, recorded plans and declarations designed to insure the integrity, protection and maintenance of the common open space," as required by LUO §125-69 (S) (6) (c) (5). This is mandatory language and there is nothing in the deed or accompanying declaration which preserves any open space available to the public. The restrictive language required is mandatory and the actual deed language "shall be subject to the approval of the Town Attorney to be sure it will accomplish its intended purposes." LUO §125-69 (S) (6) (c) [5].

Because this open space requirement is mandatory for a PUD-V application, and because no development, whatsoever, is possible in the absence of a PUD-V application, this failure to preserve open space defeats the entire project.

9. Set-Back Requirements

This deals with the distance between buildings standards required by LUO §125-67 (B) (3). That section in general provides that set-backs between buildings should be twice the minimum side set-back or front set-back (as appropriate) for the district in which the buildings are located. The front set-back for structures in the Village Residential District is 20 feet and the side and rear set-backs for structures in that District are 10 feet. LUO §125-20 (b) (3), (4), (6). This means that the front of any structure must be at least forty feet from any other structure and that every other side of every structure must be at least 20 feet from the side of another structure. These buildings are so closely packed on Ms. Mills' backline that this standard cannot be met.

The Planning Board, at page 2, suggests that it is clustering the buildings in violation of §125-67 (b) (3) merely to "allow the buildings to be clustered to create larger buffers and open space on the site." Of course, as noted above, the buildings are being placed on the only real open space remaining on the site, the wooded area between Ms. Mills' backline and the structures currently in existence. The Planning Board, having justified this elimination of buffers as a way of clustering "to create larger buffers," then seeks to justify its modification as being "necessary to protect the public health, safety or welfare or to address particular site characteristics to allow the buildings to be clustered to create larger buffers and open space on the site." (Decision, p. 7)

Modification of set-backs between buildings can only be accomplished in accordance with LUO §125-64 "to protect the public health, safety, or welfare or to address particular site characteristics". At no point during its deliberations did the Planning Board articulate what

interest in public health or safety would be advanced by crowding three buildings on Ms. Mills' backline. Since she has complained about increasing trespass from occupants of the current employee housing at Acadia Apartments, placing these buildings even closer to her back line will not improve her health, safety, or welfare. Nor can this, as the other exception found at §125-64 provides, be necessary because of "particular site characteristics." The initial plan provided for buildings on North Woodbury Road, without any request for a modification of the side set-backs between buildings. There is nothing about this particular site which requires 3 buildings to be crowded on Ms. Mills' back line.

Were this problem with set-back requirements the only flaw in the site-plan as approved, this error would call for a remand to the Planning Board. However, given the multiple flaws above, this remains a case in which the Board should simply reverse the decision below and allow Appellee to either re-submit a completely new application or appeal this Board's decision to the Superior Court.

10. Affordable Housing

The approved plan has only two affordable housing units when a plain reading of the LUO mandates at least 5 affordable housing units (and 6 if somehow Appellee is allowed to place 18 dwelling units on this lot in violation of doubling the base development density of 8).

The declaration of covenants and affirmative marketing plan referenced at page 7 of the Planning Board's decision make it clear that the affordable units can only be rented to employees of Ocean Properties and its affiliates. However, LUO §125-69 (R) (3) (a) provides that the units "shall be sold or rented to qualified moderate-income buyers as defined. Preference shall first be given to Town residents and then to employees of the Town or of the public school in Bar Harbor." (emphasis added) This reference to "Town residents" and "employees of the Town or

public school” makes it clear that resident is intended to refer to someone who actually lives in the Town of Bar Harbor or will move to the Town of Bar Harbor to work on a year-round basis. There is nothing in the marketing plan which allows any employee or resident of the Town, or any employee of the Town’s school system, to apply for this affordable housing. While these preferences apply only when the number of qualified renters exceeds the number available units, there must be a general offering to the public of these moderate-income units and the moment any Town resident or any Town employee applies they should have a preference over any employee of Ocean Properties or its affiliates who is moving to the Town to work only seasonally.

Because, as discussed above, at least 5 dwelling units must be affordable units offered on a preferential basis to Town employees or Town Residents who meet the qualifying income standards, and because the many requirements for affordable housing found at LUO §125-69 (R) are mandatory, this failure to meet the affordable housing requirements defeats the entire process, such that the decision by the Planning Board should simply be reversed without any remand.

11. Affect upon Adjacent Historic Properties

LUO §125-67 (X) is unambiguous:

All site plans will demonstrate that the proposed development will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, rare and irreplaceable natural areas or any other public rights for physical or visual access to the shoreline.

(emphasis added)

Here, there has been no attempt to affirmatively demonstrate that this development will not have “an undue adverse effect” on the “historic site” which is Ms. Mills’ 1810 Farm House and world-famous Beatrix Farrand Garden. This is one of the oldest structures in Bar Harbor,

has been visited by Presidents, and has been used for frequent fundraisers for local charities. It is part of the National Registry of Historic Places and is clearly an historic site, and by Ms. Mills' testimony, has already been unduly affected by temporary workers who currently reside at Acadia Apartments. Placing 3 buildings on her back line is likely to increase the noise, increase the trespassing and increase the degradation of an historic site. The Planning Board never even addressed this particular provision of LUO §125-67 (X) and was completely silent about adjacent historic sites. The Board only, at page 4, found that there are "no historic or archeological resources on the property." It had a far greater duty with an adjacent historic site in such close proximity. It failed in that duty by approving a modification to the initial application which then crowded the three new buildings on the back line of this historic site.

The LUO's use of the word "will demonstrate" at §125-67 (X) is significant, as it places both a burden of proof and a burden of persuasion upon the applicant. Appellee made no attempts to "demonstrate" that the development would not have an undue adverse effect and in the absence of it meeting its own burden of proof, this site-plan approval was improvidently granted and the decision below should be reversed.

Conclusion

All 11 issues before this Board are completely legal in nature. This is not a question of this Board exercising its discretion or deferring to factual findings made below or giving any deference to the legal interpretations in the Planning Board's decision. This Board has been created to give a more balanced interpretation of the many requirements of the LUO. Because this site-plan approval has failed to comply with the LUO in 11 critical ways, the best approach for this Board of Appeals is to simply reverse the decision below and allow Appellee to either begin the process completely anew or take an appeal directly to the Superior Court. This will be

the best use of all of the parties' resources, and, given the 11 separate violations of the LUO, is the only prudent course for this Board to take.

4 Feb 2020

Date

Arthur J. Greif Bar #395

AJ Greif

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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



STATE OF MAINE
Penobscot, ss

SUPERIOR COURT
Docket No. BANSC AP-19-18

Elizabeth Mills
Plaintiff,

v.

Town of Bar Harbor and BHAPTS, LLC
Defendants.

**ORDER ON PLAINTIFF'S 80B
COMPLAINT and Motion to Stay**

Before the court is plaintiff Elizabeth Mills' Rule 80B complaint requesting review of governmental action. Ms. Mills challenges the Town of Bar Harbor Board of Appeals' (Board) decision dismissing her appeal to the Board, which challenged the Town Planning Board's decision granting a building permit to defendant BHAPTS, LLC. The Town of Bar Harbor has taken no position on the legal issues raised in this 80B action and is participating in this matter only to monitor proceedings.¹ For the following reasons, the Court vacates the Board's decision and remands the case back to the Board for further proceedings consistent with this opinion.

I. Background

BHAPTS applied to the Bar Harbor Planning Board for permission to make alterations to a rental property located at 25 West Street Extension, Bar Harbor. BHAPTS seeks to turn the property into an eighteen-unit housing project for its seasonal workforce. The Town Planning Board held hearings on this application on December 5, 2018 and January 16, 2019. The Planning Board approved the application and then issued a written decision on February 6, 2019. Ms. Mills owns a historic property adjacent to the proposed housing project and opposes the Planning Board's

¹ As stated in an October 11, 2019 letter to the court by the Town's attorney, Edmund J. Bearor, the Town of Bar Harbor "takes no position with regard to this pending appeal" and is "not participating in this appeal except to monitor." According to Attorney Bearor, the Town's position should be understood as identical to the positions of its appointed Boards.

decision to allow the housing project. Ms. Mills appealed the Planning Board's decision to the Bar Harbor Board of Appeals (Board) on March 8, 2019 and submitted copies of her written statement and a portion of the record of the Planning Board proceedings on March 19, 2019. The Board then held a hearing on her appeal on April 9, 2019.

The Town's land use ordinance sets forth procedural rules for the Town's Board of Appeals, including a requirement that appellants provide certain materials to the Board. The procedural rules at issue in this case are found in Bar Harbor, Me. Land Use Ordinance §§ 125-103B², 125-103C(1)³, and § 125-103D(1)(b)(1)-(3)⁴ (June 13, 2019).

² Bar Harbor, Me. Land Use Ordinance § 125-103B (June 13, 2019) provides the following:

Application. An application for an administrative appeal shall include the following and must be filed with the Planning Department within 30 days of the decision or action being appealed:

1. A completed application for appellate or de novo review on a form prescribed by the Planning Department;
2. An administrative fee and a public notice fee, which fees shall, from time to time, be set by the Bar Harbor Town Council.
3. In the case of an appeal to be heard by appellate review, a notice of the applicable parts of the record to be transcribed at the expense of the appellant;

³ Bar Harbor, Me. Land Use Ordinance § 125-103C(1) (June 13, 2019) states:

Appellate review hearings.

- a) At least 20 days prior to the Board of Appeals meeting at which an appellant is to be heard in an appellate review hearing, the appellant shall file with the Planning Department 12 copies of the parts of the record on appeal upon which the appellant plans to rely, along with 12 copies of a written statement setting forth the appellant's position as to the basis for the appeal and the relief requested.
- b) No later than seven days prior to the public hearing on the appeal, any other person wishing to present either parts of the record on appeal not submitted by the appellant or a written statement setting forth that person's position on the appeal may file 12 copies of such materials with the Planning Department.

⁴ Bar Harbor, Me. Land Use Ordinance §125-103D(1) (June 13, 2019) states:

Hearing.

1. Appellate review hearings.
 - a. . . .
 - b. Appellate review hearings shall be limited to review of the record on appeal. The appellant and other parties may submit written argument and use illustrative aids that highlight or otherwise help the Board understand the record on appeal but may not introduce any evidence that was not presented to the decision-maker below. The Record on appeal shall consist of:
 1. Transcripts of the hearings held below;
 2. Exhibits and other documentary evidence submitted to or considered by the decision-maker below; and

The April 9, 2019 hearing mainly concerned whether Ms. Mills' appeal application met the procedural requirements set forth in § 125-103 of the Town's land use ordinance. BHAPTS argued that Ms. Mills' appeal application failed to meet these procedural requirements because: (1) she failed to provide a timely filing fee; (2) she did not provide complete transcripts of the Planning Board proceedings and the transcripts she did provide were incomprehensible; and (3) she did not provide the Board with all the documents relied on by the Planning Board.

After deliberations, the Board unanimously held that Ms. Mills did not submit sufficient documents for the Board to review her appeal and dismissed the appeal application. (Pl.'s Br. Ex. C, at 32-38.) During the Board's deliberation, Board members voiced concerns that the transcripts Ms. Mills submitted had transcription errors and that because Ms. Mills did not submit a complete transcript of the Planning Board's proceedings, her transcripts were difficult to follow and did not provide adequate information about what the Planning Board based its decision upon. (Pl.'s Br. Ex. C, at 32-34.) Board members also indicated that Ms. Mills appeal application was incomplete because it was missing the final site plan approved by the Planning Board as well as other materials from the Planning Board proceedings. (Pl.'s Br. Ex. C, at 34-38). Some Board members were further concerned that Ms. Mills may not have submitted 12 copies of her written statement and the record she intended to rely upon in her appeal; however, the Board never determined explicitly or implicitly whether or not Ms. Mills had submitted the necessary number of copies.⁵

-
3. The decision being appealed, factual findings made by the decision-maker below and any other rulings or decisions made by the decision-maker below that are relevant to the issues on appeal.

⁵ The hearing transcript indicates the Board was unsure whether Ms. Mills' attorney had submitted 12 copies of her written statement and the parts of the record she intended to rely upon. When the Board's Chair, Ms. Dohmen, indicated that the Board may not have received 12 copies, Ms. Mills' attorney stated that he had provided 12 copies to the Board, Pl.'s Br. Ex. C, at 15-16. Board Chair Dohmen then asked the Town's Planning Director, Ms. Chamberlain, whether 12 copies were submitted and she stated she was unsure whether there were 10 or 12 copies. (Pl.'s Br. Ex. C, at 16.) ("I'm not sure if there were ten or twelve, but there were, I believe, six bound like copies like this [indicates], and then there was a whole bunch of copies not in binders.") Ms. Mills' attorney then stated again that he had submitted twelve copies. (Pl.'s Br. Ex. C, at 16.) The Board's attorney later advised the Board that they needed to decide how many copies of the record were filed, (Pl.'s Br. Ex. C, at 27, 34). However, the record indicates the Board did not make a finding on whether Ms. Mills' had submitted the required 12 copies. Based on the record provided, the court must

The Board issued a written decision on April 12, 2019 making the following findings:

“Based on the evidence in the administrative record, and after conducting their review, the Board of Appeals finds, on procedural matters:

1. The appellant fee was not paid within 30 days of the decision of the Planning Board on February 6, 2019
2. Appeal application is incomplete.
3. Meaningful portions of the record are missing such as the Planning Board-approved site plan and complete transcripts of the hearings.
4. The transcripts provided are incoherent and deficient.
5. The failure of the appellant to provide a meaningful record would not allow the board to review fairly the actions of the Planning Board.
6. Dismissal of the appeal is appropriate based on 125-103 B, C, and D.”

The Board determined: (1) the plaintiff's failure to pay the filing fee was waived, as the appropriate Town officials apparently did not know the amount to be charged when Ms. Mills' attorney attempted to pay; but that (2) the submitted application was incomplete as it did not meet the requirements of § 125-103 of the Town's land use ordinance. The Board then concluded that “on a procedural matter” the appeal should be dismissed. On May 10, 2019, Ms. Mills filed a complaint pursuant to M. R. Civ. P. 80B, challenging the Board's determination.

Ms. Mills argues: (1) that the Board of Appeals erred by misinterpreting the procedural rules in § 125-103 and applying that misinterpretation of the law to her appeal application; (2) that under the Town's land use ordinance, the Board lacks the power to dismiss an appeal on procedural grounds; (3) that she met the procedural requirements in § 125-103; and (4) the Board should have decided her appeal on the merits.

I. Standard of Review

conclude that the Board did not make a finding regarding the number of copies that Ms. Mills' submitted to the Board. *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169 A.3d 396 (when reviewing governmental action pursuant to M. R. Civ. P. 80B, the court will neither embark on an independent and original inquiry, nor review the matter by implying the findings and grounds for the decision from the available record); *see also Fisser v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797.

When the Superior Court reviews a municipal board of appeals decision pursuant to 80B it directly reviews the record developed before the board of appeals for abuse of discretion, errors of law, and findings not supported by substantial evidence. *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶¶ 9-10, 153 A.3d 113; *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 13, 82 A.3d 148; M. R. Civ. P. 80B. Substantial evidence exists if there is any competent evidence in the record upon which a reasonable mind would rely as sufficient support for a conclusion. *21 Seabran*, 2017 ME 3, ¶ 10, 153 A.3d 113; *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114. The fact that the record before the local agency is inconsistent or could support a different outcome does not render the decision wrong. *Duffy*, 2013 ME 105, ¶ 22, 82 A.3d 148. However, the court will neither embark on an independent and original inquiry, nor review the matter by implying the findings and grounds for the decision from the available record. *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 169 A.3d 396; *Fissmer v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797 (court will not imply findings or create an analytical construct to attribute to a municipal agency's decision, because that judicial intervention would prevent the court from properly determining whether the municipal action is supported by the evidence and invite judicial usurpation of administrative functions.)

The interpretation of a local ordinance is a question of law and is reviewed de novo. *Duffy*, 2013 ME 105, ¶ 13, 82 A.3d 148. The party seeking to overturn the municipal agency's decision bears the burden of persuasion to demonstrate error. *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 13, 153 A.3d 768; *Duffy*, 2013 ME 105, ¶ 13, 82 A.3d 148.

II. Analysis

1. Procedural Requirements for Appeal Applications to the Bar Harbor Board of Appeals

Ms. Mills argues that she was only required to meet the requirements of § 125-103B and § 125-103C, i.e. she was required to submit: (1) a completed application for appeal on the Town planning department's form; (2) an administrative fee; (3) a notice of the applicable parts of the record to be transcribed at her expense; (4) 12 copies of the parts of the record on appeal upon which she planned to rely; and (5) 12 copies of a written statement setting forth the basis of her appeal and the relief she requested. Ms. Mills asserts that while § 125-103D(1)(b) establishes the scope of the permissible record on appeal, it does not require applicants to provide all of the documents described in the subsection.

BHAPTS argues that § 125-103D(1)(b) requires appeal applicants to provide all of the documents described in the subsection, meaning: (1) all transcripts of the hearings held below; (2) all exhibits and documentary evidence submitted to or considered by the decision-maker below; and (3) the decision being appealed, and any other rulings or decisions made below that are relevant to the issues on appeal. According to BHAPTS, § 125-103D(1)(b) creates a floor that obligates applicants to provide the Board with a complete record of the proceedings below, not just the portions of the record upon which they intend to rely upon in their argument to the Board. BHAPTS contends that § 125-103B and § 125-103C create additional requirements on top of § 125-103D(1)(b).

Interpretation of a local ordinance is a question of law and is reviewed de novo. *21 Seabran*, 2017 ME 3, ¶ 12, 153 A.3d 113; *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024. The court looks first to the plain meaning of the ordinance's language, and construes its terms reasonably in light of the purposes and objectives of the ordinance and its general structure as a whole. *Fissmer*, 2017 ME 195, ¶ 15, 170 A.3d 797; *Stewart v. Town of Sedgwick*, 2002 ME 81, ¶ 6, 797 A.2d 27. If the meaning of the ordinance is clear, the court will look no further than its plain meaning. *21 Seabran*, 2017 ME 3, ¶ 12, 153 A.3d 113; *Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 684. In reviewing the local agency's application of an ordinance, the court accords substantial deference to the agency's

characterizations and fact-findings as to what meets the ordinance's standards. *Fissmer*, 2017 ME 195, ¶ 13, 170 A.3d 797; *Bryant*, 2017 ME 234, ¶ 12, 176 A.3d 176. Ms. Mills bears the burden of persuasion on appeal because she seeks to overturn the Board's decision. *21 Seabran*, 2017 ME 3, ¶ 10, 153 A.3d 113.

Looking to the plain language of § 125-103B, C, and D in light of the general structure of the whole ordinance, the Court concludes that a party appealing a Town of Bar Harbor Planning Board decision to the Bar Harbor Board of Appeals must, subject to the ordinance's timing requirements, submit the following items to the Board of Appeals:

1. A completed application for appeal on the Town planning department's form;
2. An administrative fee;
3. A notice of the applicable parts of the record to be transcribed at the party's expense;
4. 12 copies of a written statement setting forth the basis of her appeal and the relief she requests; and
5. 12 copies of the parts of the record on appeal upon which she plans to rely.

When read as a whole, it is plain that § 125-103 of the ordinance was intended to create a method where the record on appeal is developed by relying on an adversarial process. Under § 125-103, the appellant and all of the interested parties are called on to submit what portions of the record they believe are pertinent to the appeal. This is shown by the parallel language in § 125-103C(1)(a) and (b). § 125-103C(1)(a) is entitled "submissions generally" and mandates the appellant (i.e. the ordinance states, "appellant shall file . . .") to provide 12 copies of the record on appeal upon which the appellant plans to rely along with 12 copies of the appellant's written argument and request for relief. This language is immediately followed by a provision allowing any other interested party to present their own written statement and parts of the record on appeal that were not submitted by the applicant. In this scheme, both the appellant and any interested parties are asked to provide the Board with the parts of the record they intend to rely upon but, contrary to BHAPTS' contention, no party is required to provide a complete record.

§ 125-103D, entitled "hearing," then provides a series of rules governing the Board of Appeal's administration of appellate hearings. § 125-103D(1)(b) opens with the sentence, "appellate review hearings shall be limited to review of the record on appeal." The subsection then lays out what may constitute the record on appeal, i.e. transcripts of the hearings below, etc. Contrary to what BHAPTS suggests, this subsection does not require the appellant or any other party to supply a complete and comprehensive record of the proceedings below. The subsection contains no language actually directing the appellant to provide these items and plainly does not require the appellant to provide a complete record of all transcripts of hearings in the proceedings below.

Unlike § 125-103C(1), § 125-103D(1)(a) does not use language such as the 'appellant shall' or 'appellant must.' § 125-103D is mainly directed at establishing the range of materials the BOA could consider on appeal rather than what materials the appellant or other party must submit as part of the appeal process. The language and structure of the Town's ordinance demonstrates § 125-103D(1)(a) was intended to demarcate the limits of the record on appeal that the Board of Appeals could consider, not act as a mandate requiring an appellant to provide certain materials in his or her application for appeal.

§ 125-103B then sets some additional procedural requirements for appellants regarding applications for appeal. The subsection requires appellants to provide a filing fee, a completed application form from the Town's planning department, and a notice of the applicable parts of the record that the appellant will pay to transcribe. None of this language indicates the Town of Bar Harbor intended to require appellants to provide the complete and exhaustive record as suggested by BHAPTS.

2. Plaintiff's Request for a Stay

On August 8, 2019 the Bar Harbor Planning Department issued a building permit to BHAPTS to construct three 50 by 32 feet concrete foundations at 25 West Street Extension, the property at issue. In late September, the plaintiff observed circumstances, such as removal of trees

on the BHAPTS property, that suggested construction was commencing on the foundations for the BHAPTS housing project. On October 3, 2019, Ms. Mills filed a motion for a stay pending appeal pursuant to Rule 80B(b), requesting that the Court enjoin any further construction activities by BHAPTS pending resolution of the appeal. Ms. Mills seeks to maintain the status quo until her challenge to the Planning Board's decision is finally resolved. October 24, 2019, BHAPTS, LLC filed an objection. On November 7, 2019, Ms. Mills filed her reply.

M.R. Civ. P. 80B(b) provides that:

Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but *the court may order a stay upon such terms as it deems proper.*

Id. (emphasis added). As interpreted by the Law Court, Rule 80B's purpose is to provide the public with a "mechanism to test a government decision but, by imposing time limits to appeal and not automatically staying the action being reviewed, it recognizes the countervailing policy that the administration of government should not be unnecessarily impeded. A broad reading of the non-stay provision in the rule best reconciles these two policies by not holding government hostage by private parties *unless there is some showing made to the court that a stay is proper.*" *Cobbossee Dev. Grp. v. Winthrop*, 585 A.2d 190, 194 (Me. 1991) (emphasis added).

Both parties framed their arguments in terms that suggest this Court would utilize the *Ingraham* standard for obtaining a preliminary injunction to inform its consideration of Ms. Mills' motion for a stay under Rule 80B(b). *Ingraham v. Univ. of Maine at Orono*, 441 A.2d 691 (Me. 1982). Nothing in the body of Rule 80B(b) nor in the Law Court's interpretation of it, suggests that the *Ingraham* standard controls motions for a stay under Rule 80B(b). However, this Court, like the Court in *Pike Indus. v. City of Westbrook*, BCD-WB-Ap-09-31, (Bus. & Consumer Ct. Nov. 17, 2009, Humphrey, C.J.) looks to *Ingraham* for guidance in its consideration of Ms. Mills' motion.

Under *Ingraham*, the Court must find that four criteria have been satisfied before granting a preliminary or permanent injunction:

- 1) the plaintiff will suffer irreparable injury if the injunction is not granted. An “irreparable injury” is an “injury for which there is no adequate remedy at law.” *Bangor Historic Tract*, 2003 ME LEXIS 140, ¶ 9, 837 A.2d 137;
- 2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant;
- 3) plaintiff has demonstrated a likelihood of success on the merits (at least a substantial possibility); and
- 4) the public interest will not be adversely affected by granting the injunction.

Ingraham, 441 A.2d at 693; *Bangor Historic Tract, Inc.*, 2003 ME 140, ¶ 9, 837 A.2d 137. A remedy at law is adequate, when it is “as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.” *Throumoulos v. Bernier*, 61 A.2d 681, 683 (1948).

In connection with her request for a stay, Ms. Mills filed an affidavit which alleges that if BHAPTS begins construction on the housing project as her appeal is pending she would suffer “significant harm” as an abutting property owner. (Mills Aff. ¶ 3.) In September 2019, a narrow tree line on BHAPTS property created a buffer between the back line of Ms. Mills land and BHAPTS’ existing housing structure. Ms. Mills alleges that BHAPTS construction plan would eliminate this tree line and create multiple three-story apartment structures 10 feet from her property line. (Mills Aff. ¶ 4.) She contends that destroying this tree line will forever change the quiet enjoyment of her historic home. (Mills Aff. ¶ 11.) She states that these trees provide a visual, light, and noise barrier between her property and BHAPTS housing units and that once these trees are removed and BHAPTS finishes its new worker housing project, she will suffer harm from increased light and noise disturbances. (Mills Aff. ¶ 9.) In September 2019, BHAPTS removed a significant portion of these trees in preparation for construction on its housing project. (Salvatore Aff. ¶ 24.); (Salvatore Aff. Ex. F); (PL’s Mot. to Stay, Ex. A, B, C.)

She further alleges that since BHAPTS took control of the property, noise disturbances, trespassing, and littering have increased. (Mills Aff. ¶ 8.) She states that should BHAPTS complete the housing structure and move in more workers, she would suffer from increased trespassing and littering on her property. (Mills Aff. ¶¶ 9, 11.) However, she is not certain that BHAPTS’ tenants

are the actual source of her current issue with littering and trespassing. (Mills Aff. ¶ 8.) She also contends that if BHAPTS completes the housing project, she “will not be able to change the pattern of noise, trespass, late-night disturbances and light pollution that is already a problem with the worker housing complex.” (Mills Aff. ¶ 11.)

After considering the record and the parties’ arguments on this issue, the Court grants Ms. Mills’ request to stay further construction activities by BHAPTS. The Court finds as follows:

1) The plaintiff will suffer irreparable injury if the injunction is not granted.

Currently there are 4 apartment buildings on BHAPTS property, these buildings contain 16 apartments and are permitted to house 80 people (5 people in each of the 16 “small” apartments). These 4 buildings are located primarily along the North Woodbury Road and West Street Extension. The current 4 buildings have 4 apartments each. Under the new plan, there would be 7 apartment buildings on BHAPTS’ property, and these buildings would contain 18 apartments and would be permitted to house 90 people (5 people in each of the 18 “large” apartments, some of such 18 apartments having 4 separate bedrooms with private bathrooms). Two of the new buildings would sit 10 feet from Ms. Mills’ property line. BHAPTS has already removed a significant portion of the trees on its land that served as a buffer between Mills land and BHAPTS’ existing apartment buildings. The third new building would sit directly in front of one of the new buildings that would sit proximate to Ms. Mills’ property line.

There is no doubt that the construction of 3 new multi-story residential buildings along Ms. Mills’ property line along with the destruction of the trees would increase noise and light coming onto Ms. Mills’ property from the BHAPTS property and would interfere with her quiet enjoyment of her property. Whether the as yet unknown temporary seasonal workers would trespass and litter on Ms. Mills

property is unknown, but there is evidence that noise, trespassing, and littering of liquor bottles and hypodermic needles on Ms. Mills' property increased after BHAPTS acquired the property and converted it into temporary worker housing.

The Court is satisfied that continued construction before the resolution of the appeal will impact Ms. Mills in a way that may not be remedied through an award of money damages. There is no adequate remedy at law. The record indicates that should BHAPTS finish construction of its apartment buildings and house more workers there, the alleged repeated nuisances, trespasses, and littering that Ms. Mills has suffered may increase. If Ms. Mills were to later bring tort actions for trespass and nuisance and succeed, her alleged harms would not be adequately remedied by an award of money damages alone.⁶ Moreover, given the nature of the housing, each tourist season may well bring different tenants to the buildings.

Finally, the Court is not confident that The Town of Bar Harbor would require destruction of the new buildings once constructed, even if it were determined that the LUO was violated. The Planning Board ignored its attorney's advice in approving this matter, and this leads the Court to question whether the Town would order the removal of the buildings.⁷

- 2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant.

⁶ "Irreparable injury can be demonstrated where the plaintiff is subject to repeated trespasses, to a continuing nuisance or where he faces the prospect of a multiplicity of law suits in order to obtain relief." *Plourde v. Valley Sno-Riders*, No. CARSC-CV-02-007, 2002 Me. Super. LEXIS 41, at *6 (March 18, 2002); *Wilson v. Harrisburg et al.* 107 Me. 2017, 218, 77 A. 787 (1910).

⁷ The Town's land use ordinance states that if the Board of Appeals finds that the Planning Board's decision is contrary to the land use ordinance "[i]t may reverse the decision, subject to such terms and conditions it considers advisable to protect the public's health, safety, and general welfare", or vacate the decision and remand the matter to the Planning Board. Bar Harbor, Me. Land Use Ordinance §125-103(D)(1)(i) (June 13, 2019). Based on this language, it is unclear whether the Board of Appeals has the authority under the ordinance to order BHAPTS to remove the buildings should Ms. Mills succeed at the Board of Appeals. If this is true, then Ms. Mills would need to bring subsequent proceedings against BHAPTS in the courts for further relief. Given the court's finding that Ms. Mills is likely to succeed in overturning the Planning Board's decision, this outcome seems grossly inefficient.

The project in question will house an additional 10 seasonal workers. While BHAPTS might have to find an alternative location to house these 10 workers for the 2020 tourist season, the Court finds this injury does not outweigh the potential injury to the Plaintiff. BHAPTS will not be in any worse position than it has been in for the preceding tourist seasons.

3) Plaintiff has demonstrated a substantial possibility of success of the merits.

This Court is remanding this matter to the Bar Harbor Board of Appeals for action consistent with the Court's instruction on what materials a party must submit to the Board of Appeals to pursue an appeal of a decision of the Bar Harbor Planning Board (see page 7-8 of this decision). Whether submitted by Ms. Mills or BHAPTS, it appears that the Board of Appeals has the materials necessary to consider the merits of Ms. Mills' arguments. *See* (Pl.'s Br. Ex. C, at 7, 20) (indicating that BHAPTS submitted supplemental records to the Board of Appeals and is confident the Board has a sufficient record to adjudicate the merits); (Def.'s Br. 7, 8) (indicating that BHAPTS provided records to the Board of Appeals to supplement the record provided by Ms. Mills).

There is a substantial possibility that Ms. Mills will succeed on the merits before the Board of Appeals on one or more of the following issues:

- 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;
- b. The Planning Board's decision that the "base development density" was 9 units, not 8;

- c. The Planning Board's decision that the maximum density was 18 units, not 16;
 - 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.
- 4) the public interest will not be adversely affected by granting the stay.

Appropriate enforcement of the LUO is in the public interest. Additional lodging for the 2020 tourist season for 10 workers will not adversely affect the public interest. BHAPTS has indicated that it will find housing for these 10 people elsewhere, as it apparently has done in the past. While these 10 people may be important to BHAPTS business interests, the public interest will not be adversely affected by granting the stay.

The Court is not satisfied that any security should be provided by Ms. Mills in connection with the granting of this stay. First, the court is not convinced that Rule 80B provides this mechanism to the Defendant, and even if it did, that it would be appropriate in this case. Moreover, the Court is not at all persuaded by the Defendant's calculation of the estimated "project delay losses."

The Motion to Stay is granted.

III. Conclusion

Upon consideration of the record and the parties' arguments, the court concludes that the Bar Harbor Board of Appeals misinterpreted and misapplied the procedural rules in Bar Harbor, Me. Land Use Ordinance § 125-103, which govern appellate review applications to the Board. Looking to the plain-meaning, structure, and purpose of § 125-103, the court concludes that the ordinance required Ms. Mills, subject to the ordinance's timing requirements, to submit the

following materials as part of her appeal application: (1) a completed application for appeal on the Town planning department's form; (2) an administrative fee (which has been waived); (3) a notice of the applicable parts of the record to be transcribed at the party's expense; (4) 12 copies of a written statement setting forth the basis of her appeal and the relief she requests; and (5) 12 copies of the parts of the record on appeal upon which she plans to rely. The record demonstrates that the Board did not assess Ms. Mills' application according to these requirements; this mistake constitutes an error of law and therefore, the court vacates the Board's decision and remands the matter back to the Board for further proceedings consistent with this opinion. 5 M.R.S. § 11007.

Ms. Mills' Motion for a Stay is granted.

The entry is as follows:

1. The Town of Bar Harbor Board of Appeals decision is vacated and the matter is remanded to the Board of Appeals for further proceedings consistent with this opinion.
2. Plaintiff's request for a stay is granted.

The Clerk is directed to incorporate this order on the docket by reference.

Dated: 11/27/19



Ann M. Murray, Justice
Maine Superior Court

ORDER/JUDGMENT ENTERED IN THE
COURT DOCKET ON: 12-2-19

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TOWN OF BAR HARBOR
PLANNING/CODE ENFORCEMENT

February 4, 2020

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

Re: Mills v. BHAPTS, LLC Appeal

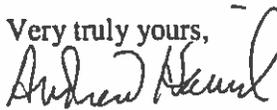
Dear Chair Dohmen and Members of the Board:

In advance of the February 11, 2020 Board of Appeals hearing in the above referenced matter, please find 12 copies of the following:

1. Permittee's Summary of Arguments; and
2. Permittee's Summary Table.

Thank you for your consideration in this matter.

Very truly yours,



P. Andrew Hamilton

PAH/rah
Enclosure

cc: Eben Salvatore
Perry N. Moore
Arthur Greif
Daniel Pileggi

Memorandum

To: Bar Harbor Board of Appeals
From: Andrew Hamilton, Esq. and Patrick Lyons, Esq.
Date: February 4, 2020
Re: Permittee's Summary of Arguments

Considering that it has been almost one year since Ms. Mill's appeal was last reviewed by the Board of Appeals, Permittee BHAPTS, LLC has prepared a summary of its argument opposing the Mills appeal. This summary does not replace the arguments in BHAPTS's April 2, 2019 Written Reply Statement and supporting record materials (hereinafter referred to as *BHAPTS's 4/2/19 Memo.*), but rather provides a succinct summary of each issue on appeal to prime the Board for its review of BHAPTS's April 2, 2019 memo and record materials.

BHAPTS thanks the Board for its careful attention to the issues on appeal.

I. STANDARD OF REVIEW

The burden of persuasion for an appeal always rests with the Appellant. When acting in an appellate capacity, the Board of Appeals reviews the record to determine whether or not the Planning Board's decision was "clearly contrary" to the Bar Harbor Land Use Ordinance ("LUO"), and in doing so, must defer to all findings of facts by the Planning Board that are supported by competent or substantial evidence in the record. *LUO Section 125-103(D)(1)(l)*.

"Competent" or "substantial" evidence exists if a reasonable person would rely on that evidence to support a conclusion. *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 12, 750 A.2d 577 ("Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion; the possibility of drawing two inconsistent conclusions does not render the evidence insubstantial."). The Appellant must demonstrate that "no competent evidence supports the Planning Board's conclusions." *Id.*

As found in the record materials that include the underlying Submittals to the Planning Board (Permittee's Exhibits 1-24) and the Planning Board Transcripts of the December 5, 2018 and January 16, 2019 meetings, there is more than ample competent evidence to support the Planning Board's findings and its Decision is not clearly contrary to the specific provisions of the LUO called out in the Mills Appeal.

II. BHAPTS, LLC'S PUD-V PROJECT IS BOTH RESIDENTIAL AND FOR FAMILIES AS DEFINED UNDER THE BAR HARBOR LUO

The Appellant argues that Planned Unit Development – Village (“PUD-V”) requires that a project be “residential” in nature. In doing so, Ms. Mills creates a new definition of “residential” not in the LUO while asserting the Permittee’s project is not residential but instead for “temporary worker housing.”

The plain language of the LUO directly contradict the Appellant’s arguments. Reading the definitions of “dwelling unit,” “dwelling, multifamily II,” “family,” and “transient” together, the LUO makes clear that unless you are living in transient accommodations – somewhere for less than 30 days – you are living in a residential dwelling unit. *See BHAPTS’s 4/2/19 Memo* at 8-10. Whether the occupants are there only for the summer or for the entire year makes no difference. Moreover, the plain language of the LUO states that a family includes “not more than five persons not so related, occupying a dwelling unit” and “living as a single housekeeping unit.” The occupants do not have to be related to constitute a “family” for Multifamily II housing in the PUD-V zoning. (Please also see notes in *Summary Table*; term “transient” defined).

Moreover, the Appellant’s argument would mean any summer home in Bar Harbor would not be considered “residential” since their pattern of residing is not permanent or continuous. This unreasonable interpretation creates an absurd result and could exclude development or occupancy of any summer residence in all residential neighborhoods in Bar Harbor.

Most troubling is that the Appellant is arguing for an interpretation of the LUO that is prejudicial to employees of a seasonal business, as in their own words “some of whom who may be here on visas which can only be issued to non-residents.” This interpretation is tantamount to exclusionary zoning, especially considering the race and national origin of many of BHAPTS’s tenants. *See BHAPTS’s 4/2/19 Memo* at 10-11.

III. THE PLANNING BOARD CALCULATED THE CORRECT BASE DEVELOPMENT DENSITY AND TOTAL NUMBER OF ALLOWABLE DWELLING UNITS

A. Base Development Density

In determining the base development density for PUD-V, the Planning Board properly started with the 85,324 square foot parcel (as if vacant) and divided it by 10,000 square feet (the minimum area per lot or area per family requirements in the LUO), getting an 8.5324 base development density. § 125-69(S)(6)(a)(1). The Planning Board then rounded up to 9. The Appellant’s argument that the Planning

Board should have rounded down, not up, is not supported by the plain language of the Ordinance.

First, there is a significant precedent for the Planning Board rounding up in determining base development density, such as was originally done for the Property in 1986. *See BHAPTS's 4/2/19 Memo* at 12-13.

Additionally, the LUO rounds up for area calculations in other sections, such as for determining the required number of parking spaces. *See* § 125-67(D)(5). This approach follows the general rule for rounding numbers, where if the number you are rounding is followed by 5, 6, 7, 8, or 9, you round the number up, while if the number you are rounding is followed by 0, 1, 2, 3, or 4, you round the number down.

Finally, there is no language in § 125-69(S) indicating that partial sums are rounded down – any ambiguities in an ordinance must be resolved in favor of the property owner's proposed use. *See BHAPTS's 4/2/19 Memo* at 13. (Please also see notes in Table for the precedent of the 1986 approval).

B. Intensity of Development and Allowable Dwelling Units

In the PUD-V, an increase in the number of dwelling units above the base development density is permitted if the development provides affordable housing units or other benefits set out in LUO. *See* § 125-69(S)(6)(a)(2)(a – h). But this benefit is limited, as a PUD-V may never exceed the maximum allowable number of dwelling units by more than twice the base development density. § 125-69(S)(6)(a)(3). Here, two times the base development density of 9 is a total of 18. Again, the calculation of 18 is derived from the base development density of 9 for a vacant parcel. Because the property already has 16 existing units on the lot, 9 is not the starting point for this built property. Rather, it simply provides the maximum density.

The Appellant argues that base development density can only be doubled by following the specific provisions of § 125-69(S)(6)(a)(2)(a – h). But in every instance for the provisions in subsections (a) through (h), satisfying their requirements does not guarantee an increase in the number of dwelling units, only that the Planning Board may allow additional dwelling units. The only requirement is that a PUD-V cannot exceed the maximum allowable number of dwelling units by more than twice the base development density. § 125-69(S)(6)(a)(3).

As the Planning Board is the permitting authority for PUD-V, it is entirely in its discretion to determine the appropriate area per family and number of dwelling units, so long as it is not more than twice the base development density. As the base development density is nine (9), the Planning Board was well within its discretion to allow for twice that – 18 dwelling units.

IV. BHAPTS' PROPERTY IS GRANDFATHERED AS A NONCONFORMING LOT; NONCONFORMING USES AND STRUCTURES ARE NOT AT ISSUE.

A. Nonconforming Lots

BHAPTS, LLC's property is a single, nonconforming lot. Under the LUO, a nonconforming lot includes "minimum area per family" for a lot that lawfully existed before the enactment of an ordinance amendment that increased the minimum area per family requirement. § 125-56; see *BHAPTS's 4/2/19 Memo* at 15.

Acadia Apartments was developed circa 1986 when the minimum area per family under the LUO was 5000 square feet. On June 8, 2010, the LUO was amended to include Planned Unit Development ("PUD") provisions and doubled the area per family requirement across all districts in Bar Harbor. The change in area per family requirement made the built lot nonconforming, as the area per family no longer met the district minimum of 10,000 square feet per family.

On June 8, 2012, Acadia Housing Associates transferred the two parcels to BHAPTS, LLC. Under the LUO, any legally existing nonconformity may be transferred and the new owner may continue such nonconformity. See § 125-53(D). The two parcels were, by operation and application of the LUO, merged into a single, 85,324 square foot nonconforming lot permitted for sixteen (16) units. § 125-56(E).

The construction of two (2) additional affordable housing units, in addition to the sixteen (16) units that still exist today as grandfathered nonconforming units, are authorized by and wholly consistent with the maximum density under § 125-69(S). See *BHAPTS's 4/2/19 Memo* at 16.

B. Principles of Nonconformity

The Appellant also contends that by permitting the construction of buildings on nonconforming lots, the Planning Board somehow permitted the construction of a nonconforming structure or is somehow expanding a nonconforming use. This argument is misleading and improperly conflates three distinct concepts of nonconformity that are separately detailed in the LUO. Article IV of the LUO addresses: (1) nonconforming uses of lands or structures in § 125-54; (2) nonconforming structures in § 125-55; and (3) nonconforming lots in § 125-56.

The only nonconformity here is the lot, which as discussed above, is lawful. Even if one were to falsely accept the Appellant's position that the project is a nonconforming use, all uses have become conforming with PUD-V approval, as the

Property will, once built, be subject to the requirements in § 125-69(S). BHAPTS continues to hold property rights to the 16 units that have existed since 1986 and they exist today.

Moreover, despite the Appellant's arguments, there is no provision indicating legally grandfathered property features (such as nonconforming lots) are to be set aside as part of PUD review. Indeed, § 125-56(A) states a nonconforming lot may be built on without a need for a variance, so long as, "in all other respects, [it complies] with the provisions of this chapter [125]." See *BHAPTS's 4/2/19 Memo* at 17-18.

PUD-V is an overlay option for the Village Residential District that an applicant may elect to use. See § 125-20(E); § 125-69(2)(b). Nowhere in the ordinance does it state that application of the PUD-V overlay requires an abandonment by an applicant of its property right to continue to enjoy the property given the legally existing nonconformities in place at the time of transfer.

Even if we accept the Appellant's argument that nonconforming lot protections are set aside with PUD-V approval, those protections would exist until the PUD-V approval is granted, final building permits are issued, and substantial construction has commenced (i.e., vested rights to construct the 18 units). Anything less would conflict with the LUO and deprive BHAPTS of its property rights.

V. BHAPTS, LLC, SATISFIES THE AFFORDABLE HOUSING REQUIREMENTS OF THE LUO

A. Calculation of Required Affordable Housing Units

The Appellant asserts that under the PUD-V, for every unit permitted in excess of the base development density under § 125-69(S)(6)(a), an additional affordable housing unit must also be constructed. This interpretation conflicts with the plain language of the LUO.

Specifically, § 125-69(S)(6)(b) of the PUD-V requires that, for affordable units and lots, "in the final plan the minimum number of affordable units or lots must be 20% of the base development density. These units and lots must be in compliance with § 125-69R." As established, the base unit density here is nine (9); 20% of nine (9) is 1.8. Rounding 1.8 up, BHAPTS, LLC is required to provide two (2) affordable housing units.

It is important to note that the requirement is not to provide two (2) affordable housing units for every 9 units that are developed – the plain language of the LUO states that "the minimum number of affordable units or lots must be 20% of the base development density." This is just what the Planning Board permitted,

requiring two (2) affordable housing units (20% of the base development density of 9).

B. Satisfaction of § 125-69(R)

The Appellant also makes various arguments that BHAPTS, LLC failed to satisfy provisions of § 125-69(R) as they relate to the long-term affordability of the units. These arguments fail as the affordable housing agreement speaks for itself by requiring compliance with all applicable provisions of § 125-69(R). *See BHAPTS's 4/2/19 Memo* at 19-20. The Appellant also argues that if dwelling units are not occupied year round, they cannot constitute affordable housing units. However, no part of § 125-69(R) stipulates a minimum period of residency for a dwelling unit to be considered affordable.

VI. BHAPTS, LLC, SATISFIED ALL OTHER APPLICABLE PUD-V REQUIREMENTS

A. Purpose and Intent of PUD-V

The Appellant contends that the Planning Board failed to uphold the purpose and intent of PUD-V development, arguing that BHAPTS should have been required to create public parks and gardens, reduce negative impacts to the environment, and encourage pedestrian access. These arguments are misleading and misguided, as the purpose and intent section of the PUD-V – § 125-69(S)(1) – creates no mandatory standards for an applicant, but serves instead to list purposes as aspirational language for PUD-V developments; the PUD-V does not require public parks, gardens, or pedestrian access. *BHAPTS's 4/2/19 Memo* at 20-21.

The Planning Board reviewed all applicable standards of PUD-V under § 125-69(S) and found that BHAPTS complied with all applicable standards. Moreover, the application also complied with the purpose and intent of PUD-V, as it clusters dwelling units to create open space and reduce negative impacts on the environment, it includes affordable housing, and is infill development that allows for growth where Town services, roads, and pedestrian access already exist.

B. Setback Modification and Buffering

The Appellant also argues the Planning Board should not have granted a modification of setbacks between buildings, asserting the modifications violate the intent and spirit of the LUO and the Town's Comprehensive Plan.

The LUO allows for modification of review standards "when necessary to protect the public health, safety, or welfare or to address particular site characteristics." § 125-64 (emphasis added). In issuing its approval to BHAPTS,

LLC, the Planning Board determined a modification to the setback requirements of §125-67(B) was necessary to “protect the public health, safety or welfare or to address particular site characteristics to allow the buildings to be clustered to create larger buffers and open space on the site.” It is also important to note that the setback modification is not necessary to make the project comply. The same number of units could exist in a lower number of structures as originally designed. The reduction of building mass (clustering) creates a better project and provides more buffer to the greatest number of neighbors.

Not only does the setback modification satisfy § 125-64, it also supports the purpose and intent of PUD-V to: (1) create open space; (2) reduce negative impacts on the environment (e.g., creating larger buffers); (3) infill development that allows for growth where Town services, roads, and pedestrian access already exist; (4) complement the visual character of the district; (5) allowing greater freedom of design; and (6) provide the opportunity for flexibility and creativity in the land development process. See § 125-69(S)(1)(a – c). (Please also see notes in Summary Table).

C. Historic Properties

The Appellant’s final argument asserts that the Planning Board failed to properly apply § 125-67(X) and its requirement of demonstrating a proposed development will not have an undue adverse effect on historic sites. In doing this, the Appellant notes that the Planning Board did in fact consider this standard, finding that there are no historic or archaeological resources on the Property, but argues the Planning Board should have applied this standard to the impacts on her property. (Please also see notes in Summary Table).

For a number of reasons, the Appellant’s arguments must fail and are instead used as pretext to argue against additional neighbors she finds undesirable. See *BHAPTS’s 4/2/19 Memo* at 22-23. Further, the project was evaluated by the State Historic Preservation Office who noted no concerns for the project but supported the offer of the Permittee to work with Appellant to find an agreeable way to minimize visual impacts of the project to the listed property, which the Permittee did. (Please also see notes in Summary Table).

VII. CONCLUSION

The Appellant fails to meet her burden to establish that the Planning Board’s fact findings are not supported by any competent evidence and fails to demonstrate the Planning Board decision is clearly contrary to the terms of the LUO.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
<p>PB misinterpreted whether project is "residential". Proposed development is not residential – it is temporary worker housing – so project is not permissible in Village Residential District</p>	<p>LUO § 125-69(S)(1)(a)* <i>LUO § 125-20 E*</i></p>	<p>Appellant seeks to create a LUO standard. Bar Harbor's LUO addresses residency in two classes, "Transient" (less than 30 days) with all others being those living in a dwelling unit for more than 30 days (e.g. "resident"). Planning Board properly dismissed this attempt to insert legislation where none is needed.</p> <p>1/16/19 Decision clearly indicates that application is PUD-2017-02 Planned Unit Development – Village. Permitted Use: PUD-V.</p>	<p>BHAPTS's 4/2/19 Memo at pp. 8-12; PB Decision 2/6/19 at p. 2, 2(a)</p>
<p>PB misinterpreted definition of "families" and whether project serves families as required to be a permissible Multi Family II Dwelling in the VR District.</p>	<p>LUO § 125-120 LUO § 125-109</p>	<p>Board found the use to be Multifamily II as allowed by Planned Use Development in the Village Residential district per section 125-20E. The definition of Multifamily II as set out under section 125-109 is as follows: A building or portion thereof, or multiple buildings, located on a lot or on a contiguous parcel or area of land, used for residential occupancy for five or more families living independently of each other and doing their own cooking in the building in each of five or more separate and independent dwelling units.</p>	<p>BHAPTS's 4/2/19 Memo at pp. 8-12; PB Decision 2/6/19 p. 2, 2(a)</p>

*The LUO references that appear in bold print are taken from the Mills' appeal. The LUO references that appear in italic print have been added by BHAPTS, LLC.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
<p>PB misinterpreted requirements of LUO 125-69(R) in calculating number of affordable units required</p>	<p>LUO § 125-69(R) <i>LUO § 125-69(S)(6)(b)</i></p>	<p>§ 125-69(S)(6)(b) of the PUD-V requires that, for affordable units and lots, "in the final plan the minimum number of affordable units or lots must be 20% of the base development density. These units and lots must be in compliance with § 125-69R." As established, the base unit density here is nine (9); 20% of nine (9) is 1.8. Rounding 1.8 up, BHAPTS, LLC is required to provide two (2) affordable housing units. The requirement is not to provide two (2) affordable housing units for every 9 units that are developed – the plain language of the LUO states that "the minimum number of affordable units or lots must be 20% of the base development density." This is just what the Planning Board permitted, requiring two (2) affordable housing units (20% of the base development density of 9).</p>	<p>BHAPTS's 4/2/19 Memo at pp. 12-14, 18-20; PB Decision 2/6/19 at pp. 5, § 4(c); 5-6, ¶ 5 (a)-(k)</p>
<p>PB misinterpreted requirements of LUO 125-69(R) in allowing seasonal dwellings to be understood as affordable housing</p>	<p>LUO § 125-69(R)</p>	<p>No part of § 125-69(R) stipulates a minimum period of residency for a dwelling unit to be considered affordable. Currently there is a husband and wife with 2 children occupying the property year round.</p>	<p>BHAPTS's 4/2/19 Memo at pp. 19-20. PB Decision 2/6/19 at pp. 5-6, ¶ 5 (a)-(k)</p>

*The LUO references that appear in bold print are taken from the Mills' appeal. The LUO references that appear in italic print have been added by BHAPTS, LLC.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
PB misinterpreted requirements of LUO 125-69(R) preservation of the long-term affordability of the units	LUO § 125-69(R)(3)(c), 125-69(R)(d) and 125-69-(R)(3)(h)	The affordable housing agreement sets forth compliance with all applicable provisions of § 125-69(R).	BHAPTS's 4/2/19 Memo at pp. 19-20; PB Decision 2/6/19 at pp. 5-6, ¶ 5 (a)-(k);

*The LUO references that appear in bold print are taken from the Mills' appeal. The LUO references that appear in italic print have been added by BHAPTS, LLC.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
<p>PB misinterpreted ordinance in waiving building setback requirements of PUD-V development. Such modifications are only allowable "when necessary to protect the public health, safety, or welfare or to address specific site characteristics.</p>	<p>LUO § 125-64 <i>LUO § 125-69(S) and (S)(1)</i></p>	<p>These arguments are misleading and misguided, as the purpose and intent section of the PUD-V – § 125-69(S)(1) – creates no mandatory standards for an applicant, but serves instead to list purposes as aspirational language for PUD-V developments; the PUD-V does not require public parks, gardens, or pedestrian access.</p> <p>The Planning Board reviewed all applicable standards of PUD-V under § 125-69(S) and found that BHAPTS complied with all applicable standards. Moreover, the application also complied with the purpose and intent of PUD-V, as it clusters dwelling units to create open space and reduce negative impacts on the environment, it includes affordable housing, and is infill development that allows for growth where Town services, roads, and pedestrian access already exist.</p> <p>Final placement of buildings by BHAPTS was made at the request of the Appellant to diminish the number of buildings along her property line. This building arrangement relies upon the provisions of §125-69(S). It is disingenuous for the Appellant to request a certain and specific placement of buildings and then argue that it does not meet the LUO and seek to overturn the approval.</p>	<p>BHAPTS's 4/2/19 Memo at pp. 20-22. PB Decision 2/6/19 at p. 5 ¶ 4; p. 7 Modifications of Standards ¶ 1</p>

*The LUO references that appear in bold print are taken from the Mills' appeal. The LUO references that appear in italic print have been added by BHAPTS, LLC.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
<p>Current structures are non-conforming structures, As such, structures and use are grandfathered, but non-conforming to the existing legal regime.</p>	<p>LUO § 54(A) LUO § 125-56 LUO § 125-53(D) LUO § 125-56(E).</p>	<p>The BHAPTS' property is a single, nonconforming lot. There are no other nonconformities. Under the LUO, a nonconforming lot includes "minimum area per family" for a lot that lawfully existed before the enactment of an ordinance amendment that increases the minimum area per family requirement. § 125-56. All structures on the property meet all dimensional standards of Article III, and are thus not non-conforming <u>structures</u>. Further, the <u>use</u> is legal. Planning Board approval of the project as a PUD makes the project wholly conforming as to current LUO standards. Acadia Apartments was developed circa 1986 when the minimum area per family under the LUO was 5000 square feet. On June 8, 2010, the LUO was amended to include Planned Unit Development ("PUD") provisions and doubled the "area per family" across all districts. The change in area per family requirement made the lot nonconforming, as the area per family no longer met the district minimum of 10,000 square feet per family. On June 8, 2012, Acadia Housing Associates transferred the property to BHAPTS. Any legally existing nonconformity may be transferred and the new owner may continue such nonconformity. See § 125-53(D). Together, the two parcels original comprise a single 85,324 square foot lot permitted for sixteen (16) units.</p>	<p>BHAPTS's 4/2/19 Memo at pp. 15-18; PB Decision 2/6/19 at p. 5 ¶ 4</p>

*The LUO references that appear in bold print are taken from the Mills' appeal. The LUO references that appear in italic print have been added by BHAPTS, LLC.

PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
No public parks and gardens as required	LUO § 125-69(S)(1)(a)(1)	<p>The section of the LUO cited to by Appellant is an optional incentive and <i>not a requirement</i> for BHAPTS's application. See LUO § 125-69(S)(1)(a)(1): Purpose and intent.</p> <p>(a) The purpose of the Planned Unit Development - Village is to provide an opportunity for residential subdivision developments in the villages of Bar Harbor to embody the principles of:</p> <p>[] Clustering of dwelling units to create public parks and gardens;</p> <p>The Applicant, within discretion allowed by the LUO, opted to not use this incentive, but others (e.g. underground utilities, affordable units).</p>	BHAPTS's 4/2/19 Memo at pp. 20-22; PB Decision 2/6/19 at p. 5 ¶ 4
Project does not result in creation and/or retention of large buffers, open spaces and recreation areas, as required	LUO § 125-69(S)(5) <i>LUO § 25-69 S(6)(d)(1)</i>	<p>The PB found that the development will meet the minimum lot standards for the Village Residential District and as allowed under section 25-69(S)(6)(d)(1), the Board voted to reduce the distance between buildings as required in section 125-67(B)(3) to the distances as shown on the final site plan to allow the buildings to be clustered to create larger buffers and open space on the site. Further, the Board found development will meet buffering and screening requirements as shown on Exhibit 11.0b dated 1/8/19.</p>	BHAPTS's 4/2/19 Memo at pp. 20-22; PB Decision 2/6/19 at p. 3 ¶ 2(p); p. 5, ¶ 4

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PERMITTEE'S SUMMARY TABLE

		<p>The project <i>does</i> create open space and a buffer between the several residences on Woodbury Road as designated in relevant neighborhood meetings. The initial plan placed units at the intersection of Woodbury Road and West Street Extension, but these were moved and clustered specifically to address this concern. Building clustering also creates open space at the northwest corner of the site as specifically requested by the Appellant. The assertion that open space and buffers are not created is false, it is the <i>quantity</i> provided the Appellant finds lacking. Discretion to determine adequate open space and buffers is specifically designated to the Planning Board, and the location and amount provided was determined adequate by the 1/16/2019 decision. While the Appellant would prefer more, or argue that what the Board required to be provided is inadequate, this simply is an attempt to contravene or change the Planning Board's discretionary authority.</p>	
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PERMITTEE'S SUMMARY TABLE

MILLS ASSERTION	APPLICABLE ORDINANCE §	BHAPTS' RESPONSE	CITATIONS
Project adversely affects existing historic properties	LUO § 125-67(X)	<p>There are no historic or archaeological resources on the property. The LUO standard cited stipulates "...undue adverse affect..." The project was reviewed by the Maine State Historic Preservation Commission and they did not find any objectionable aspects of the project on the abutting historic property. Note that the historic designation is not for buildings but the gardens on the Appellant's property, which are attributed to Beatrix Farrand. The Appellant has argued that impacts from dwellings about ten feet from her property line would have adverse impacts on the gardens, but has not provided any evidence to support her allegations. The Applicant provided evidence during the review process that the project as proposed would mitigate existing adverse affects by: removing invasive plant species; addressing erosion caused by existing stormwater run-off from Woodbury Road; and providing fencing and plantings to screen buildings. The Planning Board weighed all of the Appellant's arguments, reviewed the Applicant's submittals, and determined there was no undue adverse affect caused by the proposed project. Again, while the Appellant may disagree with the decision, they provide nothing to demonstrate that there was a lack of <u>any</u> evidence to support the Planning Board decision or establish the Planning Board decision was clearly contrary to the plain language of the LUO.</p>	BHAPTS's 4/2/19 Memo at pp. 22-23; PB Decision 2/6/19 at p. 4 ¶ 2(II)

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Steve Fuller

From: Walter Healey/ <4falmouthrd@gmail.com>
Sent: Tuesday, February 4, 2020 1:04 PM
To: sfuller@barharbormaine.gov
Subject: Administrative Appeal of the Planning Board, February 11, 2020, 4 PM

Dear Mr. Fuller,

I recommend that the town lawyer be invited to review his recommendations that he made (early) during the deliberations/ meetings concerning this matter. His legal opinions were not accepted (by, I believe, a split vote) by the Planning Board. My question to the Board of Appeals is: "Why reject the town's attorney's legal opinion about the appropriateness of the (early) proceeding. "

I wrote a number of letters to the editor (THE ISLANDER) about this and other concerns that I had during this process. I went to the APPEAL BOARD MEETING on February 6, 2019 and , at a public meeting, was not provided the adequate time to express my thoughts, concerns, and questions.

If the town's attorney is not able to attend the February 11th meeting, I respectfully suggest that the meeting be adjourned until he can be available to provide his opinions and answer any questions that the Board, the attorneys, and "the public" may have.

As I followed this entire process in THE ISLANDER (and in attendance), I was made aware that many of the decisions were made by a "split vote". These votes made changes in the definitions of many words, and concepts, as well a important changes in the LUO related to this topic. Specifically, there were changes in the original intend of the use of this land for RESIDENTIAL USE (of Residential Zoning) and LOW INCOME HOUSING. The original intent of the LUO (PRIOR TO THESE CHANGES) should be considered again.

Bar Harbor needs year round residents and low income housing for year round workers. The change to CORPORATE USE seems inconsistent with the long term best interest of the Village and current and future land use. I know of one family that lost their low income housing during a previous " BUY OUT" of another complex and replacement my seasonal workers. I think a line should be drawn in the sand about this use of land and buildings in a RESIDENTIAL ZONE.

Prior to the most recent APPEAL BOARD meeting, I had read the APPEAL summary of Elizabeth Mill's representatives and the counter statement by OCEAN PROPERTIES. The reasons and facts presented by Mill's APPEAL were the more persuasive of the two presentations. It was amazing to me that the APPEAL was "DISMISSED" on procedural grounds. I was more than pleased that Justice Anne Murray of the MAINE SUPERIOR COURT remanded the appeal back to the Board because (per THE ISLANDER) "they had dismissed the case improperly."

As I stated previously I was at the APPEAL BOARD. The process was not neutral. The "CHAIR" was overtly bias to

the OCEAN PROPERTIES attorney calling him by his first name. The "Chair" also made a rather unneutral "clarification" of one of the concepts to be voted upon; in my opinion to the increased confusion of a board member and myself.

THE ISLANDER article by BECKY PRITCHARD ended with a quote " There is a substantial possibility that Ms. Mills will succeed on the merits before the Board of Appeals". I not sure to whom that quote refers, but I hope that it means that some form of impartial justice will be the result.

Ocean Properties has other option: they bought the nursing home, they have plans for OCEAN DRIVE in HULL'S COVE, they can transport. etc. Bar Harbor has only so much RESIDENTIAL HOUSING ZONING. This is not merely a disagreement about "litter, noise, and alleged drug use".

Thank you for taking the time to review my concerns,

Respectfully,
Walter J. Healey
BAR HARBOR

Sent on Tuesday afternoon, by e-mail, February 4, 2020



Town of Bar Harbor Planning & Code Department

Michele Gagnon, *Planning Director* Angela Chamberlain, *Code Enforcement Officer*
Steve Fuller, *Assistant Planner* Patrick Lessard, *Deputy Code Enforcement Officer*
Tammy DesJardin, *Administrative Assistant*

To: Appeals Board members

CC: Planning/Code staff, Arthur Greif, Andy Hamilton, Dan Pileggi

From: Assistant Planner Steve Fuller

Date: February 5, 2020

Subject: Appellant's and appellee's 2019 submissions in AB-2019-01

Appeals Board members,

This is a reminder that you all have been provided with the original submission materials — in either digital or paper form (large binders) — from the parties in this case (AB-201901) that were originally submitted when it first came before you last year.

Attorney Arthur Greif, representing Ms. Mills, reviewed the master copy of the submission materials in the Planning Office and did not report finding any errors or omissions. As such, this master copy was used to produce the paper copies for those members who needed them (and was scanned to provide the digital copy).

The appellee, BHAPTS LLC, elected after discussing with town staff to provide new copies of their submission materials from last year (same materials, fresh copies). There is a letter from Attorney Andy Hamilton taped to the front of the large binder, noting this. For those of you who retained your binder from last year or got a copy from staff, this binder matches what you retained/received. The appellee wanted to ensure you have complete and intact copies, however, and as such provided the binder included here.

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

Eaton Peabody

Attorneys at Law

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January 28, 2020

RECEIVED

HAND DELIVERED

JAN 28 2020

Michele Gagnon, Planning Director
Town of Bar Harbor
93 Cottage Street
Bar Harbor, ME 04609

TOWN OF BAR HARBOR
PLANNING/CODE ENFORCEMENT

Re: Board of Appeals – Mills v. BHAPTS, LLC, et al.

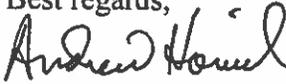
Dear Ms. Gagnon:

In advance of the February 11, 2020 Board of Appeals hearing in the above referenced matter, we are filing 12 notebooks containing the record material previously filed on behalf of BHAPTS, LLC.

In addition, we are enclosing one copy of the record material previously filed on behalf of Ms. Mills: (1) the March 8, 2019 appeal package, and (2) the notebook of materials under cover of March 18, 2019.

We look forward to being before the Board of Appeals at the February 11, 2020 meeting.

Please contact me if you have any questions regarding our request.

Best regards,

P. Andrew Hamilton

Enclosure

Cc: Dan Pileggi, Attorney for Board of Appeals
Jon Steed, Esq.
Arthur Greif, Esq.
Eben Salvatore