

September 10, 2021

Sent by email and mail

Jennifer Peters
Chair, Board of Appeals
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

Re: Appeal of Building Permit No. B21-187

Dear Chair Peters:

Together with my colleague, Michael Traister, I represent Eugene and Heidi Miller; Peter and Rhonda Senger; and Andrea Pizzo and Haoyi Gu.¹ Please allow this letter to serve as a supplement to the accompanying Administrative Appeal form through which they seek to vacate a building permit (No. B21-187) issued on August 13, 2021 to Ed Libby (“Libby”), a purported member of Two Towns LLC (“Two Towns”), which owns real property subject to said permit located at 538 Portland Street and identified on the Town’s Tax Map as Lot 30-14 (“538 Portland”).

The grounds for this appeal are simple: the CEO issued a building permit authorizing Libby to place an “Accessory Structure” on 538 Portland, but the building Libby has proposed to relocate—a 960 square foot house—is categorically not an “Accessory Structure, as a matter of law and fact. Instead, the structure is what Libby accurately represented it to be throughout his efforts to obtain a Contract Zone Agreement (“CZA”) for 538 Portland from late 2020 to spring 2021—a “single-family dwelling,” which is termed a “dwelling, single family detached” (“DSFD”) under the Yarmouth Zoning Ordinance (“YZO”). The Town Council unanimously denied Libby’s request on May 20, 2021, and his attempt to evade the results of that vote by simply reclassifying the proposed “single-family dwelling” as an “Accessory Structure must be repudiated by the Board of Appeals.

I. Background

A. 538 Portland Street

538 Portland is a 23,500 square foot lot within the Medium Density Residential (“MDR”) District.² 538 Portland is a nonconforming lot because it does not satisfy the minimum lot requirement for

¹ Eugene and Heidi Miller own real property located at 59 Astilbe Lane, as recorded in the Cumberland County Registry of Deeds (“Registry”) at Book 22742, Page 197. Peter and Rhonda Senger hold title to 54 Astilbe Lane, as recorded in the Registry at Book 17586, Page 125. Andrea Pizzo and Haoyi Gu own 68 Astilbe Lane, as recorded in the Registry at Book 17488, Page 218. Their respective deeds are attached hereto as Exhibit A.

² “Requests for Contract Zone Agreement – Final Review” dated February 18, 2021 and prepared by Alex Jaegerman, Director of Planning & Development, which is attached hereto as Exhibit B, at 1.

the MDR.³ The property is located at the intersection of Portland Street and Astilbe Lane. A small portion of 538 Portland extends into the Town of Cumberland.



Figure 1: location of 538 Portland Street (outlined in white) at entrance to the Astilbe Lane Subdivision

Currently situated on the property is a 924 square foot single-family dwelling (“House I”).⁴



Figure 2: street view of House I from Portland Street⁵

³ YZO Art. IV, § H (“Medium Density Residential Minimum Dimensional Requirements”).

⁴ Tax Assessor card for 538 Portland, attached hereto as Exhibit C.

⁵ Exhibit C.



Figure 3: view of House I from the southeast on 538 Portland⁶

Libby does not currently live on the property, and it has apparently never served as Libby’s primary residence.⁷ Instead, it has been a source of rental income for Two Towns, and has been occupied since 2018 by Two Town’s tenant, John Russell.⁸

B. The Denial of a Contract Zone Agreement for 538 Portland

On November 12, 2020, Libby submitted a request for a CZA for 538 Portland to Alex Jaegerman, the previous Director of Planning & Development (“Jaegerman”), through which Libby sought to subdivide the lot; relocate, in his words, an “additional home” to the property (“House II”); and offer this second residential structure to the public for sale or rent as workforce housing.⁹ House II, which would be relocated from 136 Old County Road, is shown below in its current location.

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⁶ Planning Department Report for “Minor Site Plan Accessory Dwelling Unit, 538 Portland Street,” attached hereto as Exhibit D, at 3.

⁷ In Libby’s letter to Alex Jaegerman dated November 12, 2020 requesting a CZA, which is attached hereto as Exhibit E, Libby stated that House I “serves as a rental.” Ex. I at 2.

⁸ Public comment by John Russell to Planning Board in support of Libby’s application for a CZA, attached hereto as Exhibit E.

⁹ Ex. I at 1.



Figure 4: House II as currently situated on 136 Old County Road in Yarmouth¹⁰

The Planning Board took up Libby’s CZA request at its December 9, 2020 meeting, during which “[a]ll of Astilbe Lane” expressed its opposition.”¹¹ The Planning Board considered the CZA request again at its January 27, 2021 and February 24, 2021 meetings, deciding ultimately to recommend the proposal to the Town Council for its review.

Prior to the February 24 meeting, Jaegerman prepared a final report for the Planning Board dated February 18, 2021 that described House II as follows:

Ed Libby, owner of a single family home on property at 538 Portland Street, has applied for a Contract Zone Agreement (CZA) to enable the division of his lot in order to build a *new* affordable “workforce” *single family home* for sale or rent on the new lot.¹²

The Town Council held a workshop on May 6, 2021 at which it discussed the proposed CZA. It then voted 7-0 against approving the CZA at its May 20, 2021 meeting.¹³ At no point during the Planning Board’s and Town Council’s consideration of Libby’s CZA request was House II ever classified as anything other than a single-family home.

C. Building Permit No. B21-187

At some point between the Town Council’s denial of Libby’s CZA request on May 6, 2021 and August 13, 2021, Libby applied for a building permit to “construct foundation to accept a 24 x 40 structure being moved from 136 Old County Rd. + connect utilities” (the “Permit”).¹⁴ In other words, Libby applied to place House II—a second single-family home—onto 538 Portland under the guise of a request to add an “Accessory Structure” to the lot. The CEO approved the permit application under “Use Group” “Accessory Structure to Existing SFD,” with House I serving as the existing “single-family dwelling.” The Permit included the following conditions:

¹⁰ Ex. D at 3.

¹¹ Minutes for the Planning Board’s December 9, 2020 meeting, attached hereto as Exhibit F, at 7.

¹² Ex. B at 1 (emphasis added).

¹³ Minutes for Town Council’s May 20, 2021 meeting, attached hereto as Exhibit G, at 4.

¹⁴ Building Permit No. B21-187, attached hereto as Exhibit H.

Subject to MUBEC 2018. Shall provide engineer’s inspection report per 2015 IEBC / 1302.7 after structure is relocated. *Accessory structures shall not constitute additional dwelling unit.* Shall comply with MDR zoning setbacks 15’ front & rear and 10’ side yard. Shall comply with engineered drawing by Aaron Wilson dated 8/4/2021[.] Foundation to be located by qualified professional.¹⁵

D. The Reclassification of House I as an “Accessory Dwelling Unit”

Concurrent with the building permit application, Libby requested that Erin Zwirko (“Zwirko”), the current Director of Planning & Development, issue minor site plan approval through which House I, a “single-family dwelling,” an “accessory dwelling unit” (“ADU”).¹⁶ Zwirko described Libby’s minor site plan application as follows:

In this case, the applicant will move a structure to the site and designa[te] it as the *primary dwelling unit*. The existing structure on the site will be designated the ADU.¹⁷

On August 16, 2021, Zwirko approved Libby’s minor site plan application (the “Approval”). Nowhere in the Approval did Zwirko address the obvious paradox at hand—i.e., that the Permit expressly stated that House II, as an “Accessory Structure, “shall not constitute [an] additional dwelling unit,” but that the Approval was predicated on House II serving the “primarily dwelling unit” for 538 Portland.¹⁸

To recap, the Town’s Planning Department and CEO, in a span of less than a year, has, depending on the context and expediency of the moment, classified the same building (House II) as a “single-family home,”¹⁹ an “accessory structure”²⁰ and a “primary dwelling unit.”²¹ Because these contradictory classifications cannot be reconciled and House II is unquestionably a DSFD under the YZO, the CEO erred in issuing a building permit.

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¹⁵ Ex. H (emphasis added).

¹⁶ Ex. D.

¹⁷ Ex. D at 4 (emphasis added).

¹⁸ This summary of Zwirko’s decision to classify House I as an ADU should not be read as tacit support for that conclusion. House I is not an ADU as that term is defined in the YZO, and an appeal of the Approval will be filed with the Planning Board in the coming days.

¹⁹ Ex. B at 1.

²⁰ Ex. H.

²¹ Ex. D at 4.

II. Analysis

A. House II is a “dwelling, single family detached” under the Yarmouth Zoning Ordinance as a matter of law.

The YZO defines a DSFD as a “[b]uilding designed and/or used exclusively for residential purposes for one (1) family only and containing not more than one (1) dwelling unit.”²² Inclusive in the definition of the word “dwelling” is a “residence.”²³

House II clearly fits the definition of a DSFD. As discussed colloquially by the Planning Department, Planning Board and Town Council, House II is a “single-family home.” It is designed to be used by a single family as a “dwelling unit,” which the YZO defines as “[o]ne or more habitable rooms arranged for the use of one or more individuals living together as a family, with a Kitchen, Bathroom and sleeping facilities”²⁴ Libby has, at various times, proposed to rent or sell House II as a single-family home and has obligated himself, as part of his application for House I to be classified as an ADU, to occupy House II as his primary residence.²⁵

House II is certainly not an “Accessory Structure” because the other building on the lot is an ADU—i.e., a “secondary dwelling unit that has been *added* onto, or *created within* a single family home or an associated Accessory Structure.”²⁶ Whether a structure is correctly classified as “principal” or “accessory” is a question of law.²⁷ Under the YZO, an “Accessory Structure” is a “[s]tructure which is *incidental and subordinate* to the principal . . . [s]tructure,” whereas a “Principal Structure” is a structure “*other than* one which is used for purposes wholly incidental or accessory to the use of another Structure . . . on the same lot.”²⁸

In addition to the criteria for an “Accessory Structure” set forth in the YZO, the Law Court has consistently imposed a legal standard that limits the scope of what can qualify as an “accessory

²² YZO Art. I, § D.

²³ YZO Art. I, § D (“The word . . . ‘[d]welling’ includes the word ‘residence[.]’”)

²⁴ YZO Art. I, § D.

²⁵ A condition of the Approval is that Two Towns record in the Registry the following:

- a. The accessory unit shall not be sold separately.
- b. The unit is restricted to the approved size.
- c. The use permit for the accessory unit shall be in effect only so long as either the main residence, or the accessory unit, *is occupied by the owner of record as the principal residence.*
- d. The above declarations are binding upon any successor in ownership of the property;
- e. The deed restrictions shall lapse upon removal of the accessory unit.

Ex. D at 7 (emphasis added). As will be explained in a separate appeal to the Planning Board of the Approval, because the Permit expressly prohibits House II from serving as a “dwelling unit,” House I cannot be classified as an ADU under the YZO.

²⁶ YZO Art. I, § D.

²⁷ “*Singal v. City of Bangor*, 440 A.2d 1048, 1051 (Me. 1982), *overruled on other grounds by Norris Family Assocs. LLC v. Town of Phippsburg*, 2005 ME 102, 879 A.2d 1007 (Whether a proposed use, principal or accessory, falls within a given categorization contained in zoning regulations is a question of law.”); *see Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 318 (Me. 1967) (“Whether a proposed use falls within a given categorization contained in zoning regulations is a question of law”)

²⁸ YZO Art. I, § D (emphasis added).

structure” and specifies factors that a municipal board must consider in deciding whether a use or structure is “accessory”:

[T]he essence of an accessory use or structure by definition admits to a use or structure which is dependent on or pertains to a principal use or main structure, having a reasonable relationship with the primary use or structure and by custom being commonly, habitually and by long practice established as reasonably associated with the primary use or structure. It is obvious that factors, which will determine whether a use or structure is accessory within the terms of a zoning ordinance, will include the size of the land area involved, the nature of the primary use, the use made of the adjacent lots by neighbors, the economic structure of the area and whether similar uses or structures exist in the neighborhood on an accessory basis.²⁹

If a municipal board fails to follow the Law Court’s legal definition of an accessory use or to consider the factors listed in *Town of Shapleigh*, its decision constitutes an error of law.

Here, Libby has proposed that 538 Portland will have two structures situated on it—an ADU (House I) and an “Accessory Structure” (House II). House I, as an ADU, must be “secondary” to a primary dwelling unit and House II, as an “Accessory Structure, must be “subordinate and incidental” to a “Principal Structure.” But no “Principal Structure” or primary dwelling unit exists on 538 to anchor the “Accessory Structure” or ADU, respectively. It logically follows that if there is no “Principal Structure” or primary dwelling on 538 Portland, then the Town, through its CEO and Planning Department, has erred as a matter of law in classifying House I as an ADU and House II as an “Accessory Structure.”

B. House II is not an “Accessory Structure” as a matter of fact.

Even if the classification of a structure as “accessory” was a question of fact, it is absolutely clear that House II is not “accessory” to House I. House I is a single-family residence. House II is a single-family residence. They are, at a minimum, in equipoise, given that their uses are identical. But, critically, their sizes are not: House II, the supposed “accessory structure,” has a greater square footage than House I, making House I—not House II—the potential “Accessory Structure.” It simply strains credulity for the Town to take the position that the larger residence (House II) is “subordinate and incidental” to the smaller residence (House I).³⁰

III. Conclusion

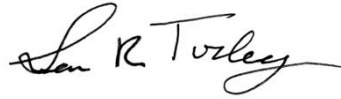
For all of the foregoing reasons, the Board of Appeals should vacate the CEO’s decision to issue a building permit to Ed Libby for an “Accessory Structure” on the property owned by Two Towns,

²⁹ *Town of Shapleigh v. Shikles*, 427 A.2d 460, 465 (Me. 1981); see *Boivin v. Town of Sanford*, 588 A.2d 1197, 1200 (Me. 1991) (“[A]n accessory use may be lawful if it is dependent on a principal use, has a reasonable relationship with that primary use, and is by custom commonly, habitually and by long practice established as reasonably associated with the primary use.” (quotation marks omitted)).

³⁰ The fact that House II is a ranch-styled home and House I is a Cape-Cod-styled home, which Zwirko discussed in the Approval in terms of the degree to which House II fit with its surroundings, is totally irrelevant to the Board’s inquiry into whether House II is subordinate and incidental to House I. Ex. D at 3–4.

LLC at 538 Portland Street. We look forward to discussing this matter with the Board further when it is scheduled for review.

Best Regards,

A handwritten signature in black ink that reads "Sean R. Turley". The signature is fluid and cursive, with the first name "Sean" and last name "Turley" clearly legible.

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