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Sent by email and mail
Judy Colby-George
Chair, Planning Board
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

Re: Appeal of Minor Site Plan Approval for 538 Portland Street

Dear Chair Colby-George:

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 Minor Site Plan Appeal Form through which our clients seek to vacate the minor site plan approval (the "Approval") issued to Ed Libby ("Libby") by the current Director of Planning & Development, Erin Zwirko ("Zwirko"), on August 16, 2021 reclassifying, under the Yarmouth Zoning Ordinance ("YZO") and Yarmouth Site Plan Review Ordinance ("YSPRO"), an existing single-family home located at 538 Portland Street that is owned by Two Towns LLC ("Two Towns") and identified on the Town's Tax Map as Lot 30-14 ("538 Portland") as an "Accessory Dwelling Unit" ("ADU").

There are three grounds for this appeal.

1. A clear prerequisite in the YSPRO for the issuance of minor site plan approval is a finding that "[a] single-family dwelling exists on the lot or will be constructed *in conjunction with the accessory unit*."[2] Here, however, the only other structure on 538 Portland has been permitted as an "Accessory Structure" that Town Towns and Libby are expressly precluded from using the structure as a dwelling of any kind.[3]

2. An ADU, as defined in the YZO, is a dwelling that is secondary to another, primary dwelling,[4] yet no such primary dwelling will exist on the lot if the current single-family residence is reclassified as an ADU.

[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] YSPRO § J.13 (emphasis added).
[3] The building permit issued to Libby (No. B21-187), attached hereto as Exhibit B, includes the following prohibition: "Accessory structures shall not constitute additional dwelling unit."
[4] YZO Art. I, § D ("Accessory Dwelling Unit").

3. The reclassification of a current single-family residence as an ADU contravenes the clear intent of the technical standards for an ADU in the YSPRO, particularly the restriction on positioning the ADU on a lot in such a way as to require a variance to a setback. Here, the supposed ADU *does* violate the setbacks for the Moderate Density Residential ("MDR") Zone and *would* require a variance if it were a new structure being built on or relocated to 538 Portland.

Fundamentally, Libby's most recent attempts to relocate a new building to 538 Portland and convert—as a matter of semantics—the existing single-family residence to an ADU is a blatant effort to evade the unanimous vote by the Town Council on May 20, 2021 denying Libby's request for a Contract Zone Agreement ("CZA") through which he sought an almost identical result.[5]

I. Background

A. 538 Portland Street

538 Portland is a 23,500 square foot lot within the MDR District.[6] 538 Portland is a nonconforming lot because it does not satisfy the minimum lot requirement for the MDR.[7] 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

[5] As summarized in further detail herein, Libby applied for a CZA to subdivide 538 Portland; relocate a single-family residence from another property in Yarmouth; and rent or sell *both* residences on the property.
[6] "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 C, at 1.
[7] YZO Art. IV, § H ("Medium Density Residential Minimum Dimensional Requirements").

Currently situated on the property is a 924 square feet single-family dwelling ("House I").[8] House I is a nonconforming structure because it violates the setbacks applicable to a single-family residence in the MDR District.[9]

Figure 2: view of House I from Portland Street[10]

Libby does not currently lived at 538 Portland and the property has apparently never served as Libby's primary residence.[11] 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.[12]

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.[13] House II, which would be relocated from 136 Old County Road, is shown below in its current location.

[8] Tax Assessor card for 538 Portland, attached hereto as Exhibit D.
[9] Planning Department Report for "Minor Site Plan Accessory Dwelling Unit, 538 Portland Street," attached hereto as Exhibit E, at 7; *see* YZO Art. IV, § H.
[10] Exhibit D.
[11] In Libby's letter to Alex Jaegerman dated November 12, 2020 requesting a CZA, which is attached hereto as Exhibit F, Libby stated that House I "serves as a rental." Ex. F at 2.
[12] Public comment by John Russell to Planning Board in support of Libby's application for a CZA, attached hereto as Exhibit G.
[13] Ex. F at 1.

Figure 3: House II as currently situated on 136 Old County Road in Yarmouth[14]

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."[15] 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.[16]

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.[17] 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 20, 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").[18] 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:

[14] Ex. E at 3.
[15] Minutes for the Planning Board's December 9, 2020 meeting, attached hereto as Exhibit H, at 7.
[16] Ex. C at 1.
[17] Minutes for Town Council's May 20, 2021 meeting, attached hereto as Exhibit I, at 4.
[18] Ex. B.

> 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.[19]

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

Concurrent with the decision of the CEO to grant the Permit to relocate House II to 538 Portland, Zwirko, on August 16, 2021, issued the Approval for House I.[20] Zwirko described Libby's minor site plan application as follows:

> In this case, the applicant will move a structure to the site and designat[e] it as the primary dwelling unit. The existing structure on the site will be designated the ADU.[21]

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. Instead, the Approval contains the following "Town Comment" concerning the requirement that a single-family dwelling *other than the ADU* exist on-site:

> Only one accessory dwelling unit will be located on the property. A structure will be moved to the property and placed on a foundation. The structure to be moved will be designated as the primary dwelling unit, and the existing structure will be designated as the accessory dwelling unit. Although this standard references "construction," the act of moving the structure to the property, placing it on a foundation, and connecting it to utilities is understood to be construction.[22]

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,"[23] an "accessory structure"[24] *and* a "primary dwelling unit,"[25] and has reclassified a "single-family home"[26] (House I) as an ADU that is, irreconcilably, "accessory" to another "Accessory Structure" (House II).

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[19] Ex. B (emphasis added).
[20] Ex. E at 1 ("The building permit is being considered concurrently with this request for minor site plan approval of the ADU.")
[21] Ex. E at 4 (emphasis added).
[22] Ex. E at 6.
[23] Ex. G at 1.
[24] Ex. B.
[25] Ex. E at 4.
[26] Ex. G at 1.

II. Analysis

A. Zwirko erred in issuing the Approval because a "single-family dwelling" does not—and will not—exist on the lot with the "Accessory Dwelling Unit" as a matter of fact.

In order for either the Director of Planning & Development or CEO to issue minor site plan approval for an ADU, there must be a finding of fact, among others, that "[a] single-family dwelling exists on the lot or will be constructed in conjunction with the accessory unit."[27] This requirement tracts the definition of an ADU in the YZO, which classifies an ADU as "[a] *secondary* dwelling unit that has been *added onto,* or *created within* a single family home or an associated Accessory Structure."[28] The use of the word "secondary" in this definition necessarily implies that there is a "primary" dwelling unit to which to anchor or tether the ADU on the property and to which the ADU is subordinate.[29] A "dwelling unit," then, is defined as "[o]ne or more habitable room arranged for the use of one or more individuals living together as a family with a Kitchen, Bathroom, and sleeping facilities."[30] Inclusive in the definition of the word "dwelling" is a "residence."[31] In other words, an ADU is defined in relation to a separate, primary dwelling unit on the same lot as the ADU to which the ADU is "secondary" and the Director of Planning & Development and CEO are precluded from issuing minor site plan approval for an ADU if no such primary dwelling exists on that lot.

Needless to say, if a building permit is issued that expressly prohibits the proposed structure from serving as an "additional dwelling unit," then that structure cannot—through any reasonable interpretation of the YZO and YSPRO or basic common sense—be a "single-family dwelling" for purposes of issuing minor site plan approval for an ADU.

Here, the fact that the Permit was issued with the express condition that Two Towns and Libby were prohibited from using House II as a dwelling unit precluded Zwirko from finding that House II would be the requisite 'single-family dwelling" on 538 Portland for her to then issue the Approval.[32] As a result, the Approval is fatally defective and must be vacated on the grounds that

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[27] YSPRO § J.13.

[28] YZO Art. I, § D (emphasis added).

[29] This reading of the YZO that the existence of a "primary" dwelling unit is a necessary component for the definition of an ADU is reinforced by the language used in the criteria for approval of an ADU in the YSPRO, which makes several references to a "primary residence" on the same lot as the ADU. YSPRO § J.13 (requiring that "the design of the *primary residence* . . . shall not visually dominate [the ADU] or the surrounding properties" (emphasis added)).

[30] YZO Art. I, § D.

[31] YZO Art. I, § D ("The word . . . '[d]welling' includes the word 'residence[.]'")

[32] It is important to note that an condition attached to the Approval is that Libby, as the applicant, is obligated to record in the Registry the following five "declaration of restrictions" on the use of 538 Portland:

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.

Two Towns and Libby did not satisfy all of the criteria for a minor site plan approval for an ADU to be issued.

B. Zwirko erred in classifying House I as an ADU because there is no "dwelling unit" on 538 Portland to which House I is "accessory" as a matter of law.

Beyond this critical mistake of fact, Zwirko erred in classifying House I as an ADU as a matter of law; House I is not "accessory" to House II because both structures are closely equivalent single-family homes.[33]

While the definition of an "Accessory Dwelling Unit" in the YZO does not separately define the word "Accessory," the ordinance *does* indicate that the ADU must be "secondary" to another, primary dwelling on the property.[34] Providing further guidance and context for interpreting the "Accessory" nature of an ADU is that the YZO defines an "Accessory Structure" to be a "Structure which is *incidental* or *subordinate* to the principal . . . Structure."[35]

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 "accessory" and specifies factors that a municipal board must consider in making that determination:

> [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

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Ex. E at 7. Libby is also required to "provide documentation that one of the units will be owner occupied prior to the occupancy of either dwelling unit." Ex. E at 7. It is our understanding that no such documentation has been filed with the Town to date and that it is highly unlikely that Libby will live on site given (a) his past use of 538 Portland to generate rental revenue for Two Towns and (b) his intention to rent out or sell both units, which he disclosed to the Planning Board and Town Council when Libby applied or the CZA. Ex. C at 1; Ex. G. Given the very real possibility that Libby will not reside on the property as required as a condition of the Approval, the Planning Board should, at a minimum, instruct Libby to provide some documentation of his current occupancy of House I or an affirmation that he will, in fact, reside in House I in the future.

[33] The interpretation of what an ordinance means is a question of law. *E.g., Portland Reg'l Chamber of Com. v. City of Portland,* 2021 ME 34, ¶ 23, 253 A.3d 586. So is whether a particular use fits within an ordinance definition. *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 . . . .")

[34] YZO Art. I, § D.

[35] YZO Art. I, § D (emphasis added).

> 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.[36]

If a municipal board fails to follow the Law Court's legal definition of an accessory use or structure or to consider the factors listed above, the town's decision constitutes an error of law.

Given these guideposts, it is abundantly clear that House I is not a "secondary" or "incidental or subordinate" structure to any other structure on 538 Portland, even after House II is relocated to the property. House I is, as of now, an "Accessory Dwelling Unit." House II, under the terms of the Permit, is an "Accessory Structure." Neither is subordinate or incidental to the other, nor can either structure reasonably classified as a "primary" dwelling or structure to which the other could be "accessory."

Zwirko noted the apparent equivalence of the two structures in the Approval when discussing the YSPRO criterion that "[t]he design of the accessory unit shall related to the design of the primary residence and shall not visually dominate it or the surrounding properties":

> When viewing the property from Portland Street, the existing structure to be designated as the ADU appears as the primary structure. When viewing the property from Astilbe Lane, the structure to be moved to the site appears as the primary structure.[37]

Zwirko's comment makes complete sense given the size and use of each structure. House I is a 924 square-foot single-family residence.[38] House II is a 980 square-foot single-family residence.[39] This differential of roughly 60 square feet between the two structures—or about 6%--is miniscule and likely imperceivable; it certainly does not render House I "secondary" or "subordinate or incidental" to House II.

Beyond this visual equivalence, the two structure are identical in uses. The Law Court has instructed that for a structure qualify as "accessory," it must have "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."[40] But here the uses of the two structures are the same—single-family residences. Therefore, Zwirko erred in reclassifying House I as an ADU

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[36] *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)).

[37] YSPRO § J.13.

[38] Ex. D. The factual determination by Zwirko that the livable space in House I measures closer to the number provided by Two Towns and Libby (717 square feet) is irrelevant when comparing the structures and their visual relationship to each other. *See* Ex. E at 7.

[39] Tax Assessor card for 136 Old Country Road, attached hereto as Exhibit I. The 980-square-feet figure is derived from the dimensions of the structure itself, exclusive of the basement, which will not be relocated to 538 Portland from 136 Old County Road. (Nor has Libby been permitted to construct a basement for House II. *See* Ex. B.)

[40] *Shikles*, 427 A.2d at 465.

given the coequal relationship it will have with House II if the Permit stands and House II is relocated to 538 Portland.[41]

C. The clear intent of the YSPRO is to forbid minor site plan approval for an ADU, such House I, that violates setback requirements.

A requirement for issuing minor site plan review that Zwirko failed to recognize is that "[a]ccessory dwelling units are not eligible for variances to setbacks."[42] As Zwirko recognized in the Approval, "the structure to be designated as the accessory dwelling unit is pre-existing *nonconforming* in terms of setbacks." But, Zwirko concludes, it is exempt from this criterion for minor site plan review because it is not a newly-constructed structure.[43]

This interpretation of the prohibition on violating setbacks also contravenes the clear intent of this requirement—i.e., to prevent the Director of Planning & Development and CEO from approving ADUs that create or perpetuate a nonconformity. It is a "hallmark of land use law" that the purpose of zoning is to "eliminat[e] nonconforming uses over time."[44] To accomplish that end, any language providing for the continuation of a nonconformity must be strictly construed.[45]

In this case, the most liberal reading of this setback requirement in the YSPRO is that it is ambiguous as to whether an ADU can violate a setback requirement when it preexists its classification as an ADU.[46] The express language discusses an ADU as a *new* structure on a property and does not affirmatively state that all structures—new and preexisting—need to comply with the applicable setback. As a matter of law, such ambiguity must be construed against the continuation of the nonconformity, and Zwirko should have denied minor site plan approval for 538 Portland on these grounds. But Zwirko has adopted an even more permissive interpretation and opened wide a

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[41] Our clients are simultaneously pursuing an appeal to the General Board of Appeals challenging the CEO's decision to grant the Permit.

[42] Ex. E at 7; YSPRO § J.13.

[43] It is arguable that the YSPRO even contemplates that an ADU can be anything other than new construction—either the conversion of an existing building or an entirely new structure. For example, The YZO defines an ADU as an "[s]econdary dwelling unit that *has been added onto*, or *created within* a single family home or an associated Accessory Structure." YZO Art. 1, § D (emphasis added). This language clearly presumes that the ADU is *new*. Furthermore, the YSPRO requires that a single-family residence "exists" (present tense) when the primary residence is constructed "or will be constructed *in conjunction with* the accessory unit." YSPRO § J.13 (emphasis added). Even the language regarding the locating an ADU "within an existing garage or other outbuilding" references "modifications" to those structures to convert them into an ADU. YSPRO § J.13 ("For an ADU located within an existing garage or outbuildings . . . any exterior modifications should be consistent with the architectural style of that structure . . . ."). It is reasonable, then, for the Planning Board to vacate the Approval on the grounds that the YSPRO does not authorize the Director of Planning & Development or CEO to issue an ADU for a preexisting structure that will not be modified in any way.

[44] *Merrill v. Town of Durham*, 2007 ME 50, ¶ 16, 918 A.2d 1203; *Lewis v. Maine Coast Artists*, 2001 ME 75, ¶ 26, 770 A.2d 644 ("The underlying policy of zoning is to gradually eliminate nonconforming structures and uses.").

[45] *Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579, 581 (Me. 1971).

[46] It is arguable that the YSPRO authorizes the Director of Planning & Development or CEO to reclassify an existing structure as an ADU. The technical standards in section J.13

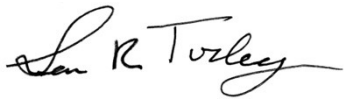
loophole for applicants to evade this prohibition on the placement of an ADU in violation of a setback by simply reclassifying an extant structure as an ADU.

Because of the directive to strictly construe any language perpetuating a nonconformity, this setback requirement for an ADU *must* be interpreted *against* allowing for the nonconformity caused by House I to exist, and the Board should vacate the Approval on this basis.

III. Conclusion

For all of the foregoing reasons, the Planning Board should vacate the Planning Director's decision to issue minor site plan approval to Ed Libby for an "Accessory Dwelling Unit" on the property owned by Two Towns, LLC at 538 Portland Street. We look forward to discussing this matter with the Board further when it is scheduled for review.

Best Regards,



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Enclosures
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Peter and Rhonda Senger
Andrea Pizzo and Haoyi Gu