

November 4, 2021

Sent by email

Judy Colby-George
Chair, Planning Board
Town of Yarmouth
200 Main Street
Yarmouth, Maine 04096

**Re: Motion for Reconsideration of Planning Board Decision on Appeal of
Minor Site Plan Approval for 538 Portland Street**

Dear Chair Colby-George:

Please accept this letter as a Motion for Reconsideration (the “Motion”)¹ regarding the Planning Board’s decision that my clients, Eugene and Heidi Miller; Peter and Rhonda Senger; and Andrew Pizzo and Haoyi Gu, lack standing to appeal the minor site plan approval issued by Erin Zwirko, the Director of Planning and Development, to Ed Libby for an “Accessory Dwelling Unit” on 538 Portland Street (“538 Portland”).

As a result of the Board’s decision, my clients are at a crossroads.

One path leads to an appeal to the Superior Court, through which my clients would challenge the Board’s determination that they lack standing. Given that the Board clearly erred as a matter of law in reaching its decision, we believe the Court will, in all likelihood, grant the appeal, vacate the Board’s decision, and remand this matter back to the Board for it to reach the merits of my clients’ argument against the minor site plan approval issued to Mr. Libby. Taking this path will result in unnecessary expense to all involved—my clients, the Town, and Mr. Libby—only to arrive back before the Board.

¹ On November 1, 2021, my colleague, Michael Traister, and I contacted counsel for the Town of Yarmouth, Phil Saucier, to notify him of our intent to file this motion and to discuss with him the appropriate procedure for us to follow. He agreed with our position that my clients have the right to pursue this remedy even though the ordinances for the Town of Yarmouth do not expressly discuss the filing of a motion for reconsideration to the Planning Board because appellants can file such a motion to challenge a decision of the General Board of Appeals and Robert’s Rules of Order recognize a motion to reconsider as the proper means to bring an apparent error to the Board’s attention. *See* Yarmouth Board of Appeals Ordinance § G.2 (“The Board of Appeals may reconsider any decision reached under this section pursuant to the provisions in 30-A M.R.S.A. section 2691”); Robert’s Rules of Order § 36; *see Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579, 583 (Me. 1971) (“Administrative determinations are subject to reconsideration and change where they have not passed beyond the control of the administrative authorities.”).

The alternative way forward is this Motion, which provides the Board an opportunity to rectify its error so it can make a final determination of the substance of the matter before it. This latter course of action is the most efficacious for all the parties to a potential appeal to the Superior Court.

To that end, the Board should reconsider its decision to deny my clients' appeal for lack of standing for the following two reasons:

1. The Board erred by misinterpreting the "abutter notification" provision in the Yarmouth Site Plan Review Ordinance ("YSPRO"), which includes within the scope of persons who qualify as abutters residents who live within 500 feet of the property subject to the minor site plan approval—i.e., my clients.
2. The Board erred by refusing to apply the definition of "abutter" established by the Supreme Judicial Court, which is binding on all tribunals tasked with interpreting ordinances, including this board, notwithstanding the provision in the Yarmouth Zoning Ordinance ("YZO") that terms not defined elsewhere should be interpreted in accordance with their dictionary definition.²

I. Abutter Notification under the YSPRO

A. The YSPRO defines "abutter" in reference to the notice it provides when the Town considers a site plan application.

Any person who qualifies as an "abutter" has standing to appeal a minor site plan approval.³ The term "abutter" is not expressly defined in either the YSPRO or the YZO, but the YSPRO does outline the process by which the Town must provide "abutter notification," thereby clarifying who the Town considers to be an "abutter" as that term is used in the YSPRO.

Specifically, section E sets forth the notice requirements the Town must satisfy when a resident submits a site plan application for minor site plan approval:

For minor site plan applications, the Department will mail such notice **as detailed above** within 7 days of determination of completeness of a complete application, as determined by the Director. The Director of Planning and Development shall not make a decision on the proposal for a period of ten (10) days after the mailing of **abutter notification** to provide an opportunity for public comment.⁴

The "notice as detailed above" that section E.1.b incorporates by reference in order to explain what the ordinance means by "abutter notification" is as follows:

For major site plan applications and for any minor site plan that is referred by the Planning and Development Director to the Planning Board, the Department shall

² The instruction to define terms according to their dictionary definition does not absolve the Board of its responsibility to apply the law when it has been brought to their attention, as it has in this circumstance.

³ YSPRO § D.4 ("Appeals of final action of minor site plans, submitted by the applicant or an abutter, shall be heard by the Planning Board.")

⁴ YSPRO § E.1.b (emphasis added).

[m]ail the notice by first class postage to all **owners of property** as of the latest Assessor's address record on file **within a minimum of 500 feet of the property under consideration**, and, if the proposed development is located within 1,000 feet of any public or private school, to the superintendent or head of such school. If it is determined by the Director of Planning and Development that the impact of the site plan has the potential of significant impacts to properties beyond 500 feet, the Department may send notices to a distance of up to 1,000 feet of the proposed development. The notice will be mailed at least 10 days before the meeting (workshop or public hearing) at which the application first appears on the Planning Board agenda.⁵

This section, which unambiguously defines "abutter notification," mandates that the Town *at a minimum* notify property owners within 500 feet of the subject property and specifies the other abutters who must be notified, depending on the significance of the proposed site plan and whether an abutting property is a school.⁶ Importantly, nothing in the "abutter notification" provision limits the class of persons who qualify as abutters to owners of property directly adjacent to the subject property, which is the narrow definition proposed by Mr. Libby.⁷

The reason the YSPRO ties the definition of "abutter" to who the Town must notify when a minor site plan application is submitted is to ensure that anyone who may be harmed by the Town's approval of that application has an opportunity to express their concerns to the Town and, if necessary, appeal its decision. If the Town did not notify nearby property owners who could potentially suffer injury as a result of the Town's actions, then it would deprive its residents of their basic due process rights under the law. "It is essential to a party's right to procedural due process

⁵ YSPRO § E.1.a.

⁶ Mr. Libby argued at the hearing on October 27, 2021 that because a superintendent or head of school is not necessarily a nearby property owner, section E.1.a can be ignored in its entirety by the Board in determining the meaning of the word "abutter." This position is without merit. The notice provision applies to the "owners of property" within a certain distance from the subject property. A school is likely to be owned by the Town itself. Because there may be confusion as to who is authorized to provide feedback to the Director of Planning and Development and the Planning Board on the site plan application on behalf of the school, the ordinance specifies who should be contacted when such an application is submitted for a nearby property. That person then appears on behalf of the abutting property—the school. The fact that the YSPRO *clarifies* who receives notice when a school is in close proximity to an applicant's property does not change the meaning of the entire provision on "abutter notification" or invalidate the portion of that provision that states that *at a minimum* each and every property owner within 500 is due notice as an "abutter." If anything, it *expands* the definition of who qualifies as an abutter rather than restricts it.

⁷ In his presentation to the Board, Mr. Libby suggested that because other sections of the Town's ordinances discuss the notice requirements for other types of applications, such when someone applies for a contract zone amendment, without referring to "abutters," the specific notice provision in the YSPRO that *does* refer to "abutter notification" cannot be relied on by the Board to interpret what the word "abutter" means. In making this argument, Mr. Libby misrepresented our position to the Board. We have never suggested that *everyone* the Town is obligated to notify under *any* provision of its ordinances is an "abutter," such that "abutter" universally means "anyone who receives notice." The reason the Board should interpret section E.1 of the YSPRO to define the word "abutter" is because, unlike those other provisions, this particular notice provision, which is the only one relevant to the matter now before the Board, expressly uses the term "abutter" in reference to who receives notice. This critical distinction—the use of the word "abutter" in the YSPRO's notice provision—means that the other notice provisions in the Town's ordinances are not germane to deciding whether my clients qualify as abutters under the YSPRO.

that he be given notice of and an opportunity to be heard at proceedings in which his property rights are at stake.”⁸ The requirement that property owners within 500 of the subject property receive notice is a recognition that harm may flow to persons beyond the owners of directly-adjacent property and that their constitutional rights would be violated if not provided within an opportunity to have their voices heard and to exercise their appeal rights.

It is simply incorrect and nonsensical to read the YSPRO as requiring the Town to provide “abutter notification” to property owners within 500 feet of the applicant’s property but then find that those same people do not qualify as “abutters.” “An ordinance must be construed reasonably in consideration of its purposes and structure and to avoid absurd or illogical results.”⁹ The idea that the Town provides “abutter notification” to nearby property owners but then adopts a definition of “abutter” that denies the recipients of that notice any right to appeal would result in such an absurdity.

In this situation, the Town provided “abutter notification” to all of my clients because they own property within 500 feet of 538 Portland.¹⁰ Therefore, they qualify as abutters under the YSPRO, and, as abutters, possess standing to appeal by operation of section D.4 of the ordinance.

B. The Town already found my clients to be abutters prior to the October 27, 2021 Planning Board hearing.

Beyond the fact that my clients qualify as abutters under the YSPRO, the Town itself expressly identified them as abutters in the Planning Department Report issued by Director Zwirko on August 16, 2021:

Notices of this public hearing were sent to 15 property owners in the vicinity (within 500 feet) of the proposed development. **Six abutters** on Astilbe Lane expressed concern with the proposal. The **abutters** were concerned that this proposal is too similar to the contract zoning that was denied by the Town Council in May 2021 and that the proposal is not consistent with the ADU standards.¹¹

Furthermore, the Board has classified my clients as “abutters” in the past. Specifically, Board Member Holden, at the Board’s December 9, 2021 meeting, made the following remark during the Board’s discussion of Mr. Libby’s applicant for a contract zone amendment:

I do agree that this, you know, being in the village is one thing and subdividing and the density down here, down in the village, but in this area I have a little bit more

⁸ *City of Biddeford v. Adams*, 1999 ME 49, ¶ 9, 727 A.2d 346; *Senty v. Bd. of Osteopathic Examination & Registration*, 594 A.2d 1068, 1072 (Me. 1991).

⁹ *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920; *Fryeburg Trust v. Town of Fryeburg*, 2016 ME 174, ¶ 5, 151 A.3d 933.

¹⁰ The Millers’ property, 59 Astilbe Lane, is located roughly 415 feet from 538 Portland Street. The distance between the Sengers’ property, 54 Astilbe Lane, and 538 Portland Street is roughly 215 feet. Andrea Pizzo and Haoyi Gu reside at 68 Astilbe Lane, which is roughly 340 feet from 538 Portland.

¹¹ Planning Department Report for “Minor Site Plan Accessory Dwelling Unit, 538 Portland Street,” attached hereto as Exhibit A, at 4 (emphasis added).

concern and I also have concern that **all of the abutters of Astilbe Lane** were completely against this.¹²

The decision, then, by the Board to suddenly find that my clients are not abutters contradicts not only the fact that the Town provided my clients with “abutter notification” and Director Zwirko’s determination, on behalf of the Planning Department, that my clients qualify as abutters, but also the way in which the Board has discussed my clients concerns with Mr. Libby’s proposed uses of 538 Portland in the past. As a result, its decision to deny my clients standing is a clear error the Board should reconsider.

II. The Legal Definition of “Abutter”

Beyond my clients’ status as abutters—both under the terms of the YSPRO and as a matter of fact in terms of how the Town has applied and interpreted its ordinances—there can be no question that my clients, who reside in close proximity to 538 Portland, qualify as “abutters” as a matter of law.

The interpretation of what a term in an ordinance means is a question of law—not fact.¹³ Indeed, the “[c]onstruction of zoning ordinances is a legal determination,”¹⁴ and the Supreme Judicial Court, as the highest court in the state, “finally determines questions of law.”¹⁵

The decisions reached by our highest court as to matters of law bind all of us—including the Town of Yarmouth Planning Board. Although it may disagree with a decision reached by the Supreme Judicial Court, the Board is obligated to follow its instructions, particularly when it comes to interpreting the meaning of a term in a municipal ordinance.¹⁶

Here, the Court has declared that the term “abutter” in an ordinance must **not** be interpreted so narrowly as to only provide standing to the owners of properties directly adjacent to the subject

¹² Ms. Holden is clearly referring to my clients as they all submitted comments to the Board opposing the contract zone amendment. The recording of the Board’s December 9, 2021 meeting is available on the Town’s website. Ms. Holden made her comment at timestamp 3:55:35. At the following meeting on the proposed contract zone on January 27, 2021, Mr. Libby also referred a pair of my clients, the Millers, as an “abutter,” commenting that “one abutter had written in, with some questions, **the Millers**, from Astilbe Lane The timestamp for Mr. Libby’s reference to the Millers as an “abutter” is 20:50. The Board should not condone Mr. Libby changing his tune because it is expedient for him to do so to opposing this appeal.

¹³ *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, ¶ 12, 153 A.3d 113; *Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, ¶ 6, 61 A.3d 698; *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024; *Logan v. City of Biddeford*, 2006 ME 102, ¶ 8, 905 A.2d 293; *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 16, 868 A.2d 161.

¹⁴ *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 21 (Me. 1981).

¹⁵ *Mailman v. Record Foundry & Mach. Co.*, 118 Me. 172, 106 A. 606, 607 (1919).

¹⁶ Mr. Libby suggested to the Board that it is not bound by the decision of the Supreme Judicial Court as to abutter standing because the Court can only decide who has standing before it but not a municipal board. That is simply wrong. Cases reach the Court because there is an underlying appeal to a municipal board that is being challenged by a party to that appeal who cannot make an argument in court unless he or she already did so to the municipal board. “[N]o principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue.” *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722. Therefore, when the Court decided, under the close proximity test, that the appellants in *Sabl* had standing, it did so to determine whether they could file an appeal *to a municipal board*—not to the Court itself.

property. Instead, the standing held by abutters depends on whether the appellants own property within a “close proximity.”¹⁷

As a result, the definition of abutters is sufficiently broad to include neighbors across the street,¹⁸ and neighbors who live down the street.¹⁹ In the decades that it has interpreted municipal ordinances, the Supreme Judicial Court has *never* announced that the term “abutter” *only* means the owner of an adjacent property.²⁰

The rationale provided by the Court for interpreting the term “abutter” to include more than the people who own property directly adjacent is that owners of property within close proximity are presumed to suffer a “level of particularized injury sufficient to confer standing.”²¹

When ordinances like the YSPRO provides standing to all abutters, then, it does so on the same presumption—i.e., that owners of property within close proximity to the property subject to the site plan are likely enough to suffer particularized injury for all abutters to be afforded the opportunity to file an appeal.

This presumption aligns with the standard that applies in situations where the ordinance only provides the right to appeal to someone “aggrieved” by municipal action.²² In circumstances where the critical issue is whether someone is sufficiently “aggrieved” to possess standing—but not in situations, such as here, where the ordinance grants standing to all abutters—an abutter must set forth “a reasonable allegation of a potential for a particularized injury.”²³ As compared to non-abutters, “the threshold for demonstrating a particularized injury is minimal,”²⁴ such that “a minor adverse consequence affecting the party’s property, pecuniary or personal rights is all that is required.”²⁵ Indeed, an abutter need only show that there is a “conceivable injury” to possess standing.²⁶

¹⁷ *Sabl v. Town of York*, 2000 ME 180, ¶ 9, 760 A.2d 266; see *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 15, 2 A.3d 284 (applying the “close proximity” test to determine if the appellants had standing as abutters before a municipal board).

¹⁸ *Brooks v. Cumberland Farms, Inc.*, 1997 ME 203, ¶ 11, 703 A.2d 844.

¹⁹ *Harrington v. City of Biddeford*, 583 A.2d 695, 696 (Me. 1990).

²⁰ Contrary to Mr. Libby’s representations to the Board that other cases define what it means to be an abutter, *Sabl v. Town of York* is the *only* case in which the Supreme Judicial Court has provided a definition for that term. The Court has on several occasions reviewed a municipal board’s determination as to whether someone is or is not an abutter under differing sets of facts; that is quite different than what the Court did in *Sabl*, which was to adopt a test for municipal boards to use in deciding whether someone has standing as an abutter.

²¹ *Sabl*, 2000 ME 180, ¶ 9, 760 A.2d 266.

²² The Board of Appeals Ordinance adopts this “person aggrieved” test for standing, as does the YZO. Board of Appeals Ordinance § C; YZO Art. VI, § C. The following review of the “person aggrieved” standard for establishing standing is included in this letter to provide context to assist the Board in understanding why the YSPRO provides standing to abutters as a class and does not require each abutter to show a conceivable injury.

²³ *Christy’s Realty Ltd. P’ship v. Town of Kittery*, 663 A.2d 59, 62 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d 535, 537 (Me. 1991).

²⁴ *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735.

²⁵ *Roop v. City of Belfast*, 2007 ME 32, ¶ 8, 915 A.2d 966.

²⁶ *Lewis v. Town of Rockport*, 2005 ME 44, ¶ 8, 870 A.2d 107.

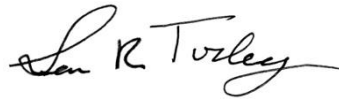
Because standing before the Board is dependent on my clients' status as abutters, it was not—and is not—necessary for the Board to take into account the conceivable injury my clients will suffer should the Board not overturn the minor site plan approval granted to Mr. Libby when reconsidering its decision.²⁷ That said, even if my clients needed to have demonstrate a conceivable injury, I did so on their behalf at the October 27, 2021 hearing by pointing to, among other harms, the potential increase in traffic and density along Astilbe Lane that would result should Mr. Libby be allowed to develop two residences on 538 Portland, which is a nonconforming lot because it does not satisfy the minimum lot requirement for the Medium Density Residential Zone.²⁸

In this matter, my clients unquestionably qualify as abutters because they reside within “close proximity” to 538 Portland. Mr. Libby's property sits at the entrance to Astilbe Lane, a small residential street measuring roughly 850 feet from end-to-end. All of my clients live within 500 feet of the property, which means they will suffer a harm separate and distinct from the public at large should Mr. Libby be allowed to proceed under his minor site plan approval. Because the Supreme Judicial Court has defined an abutter to be an owner of property within close proximity and my clients satisfy that test, the Board erred in denying them standing to pursue this appeal.

III. Conclusion

For all of the foregoing reasons, the Planning Board should grant this Motion for Reconsideration so it can hold a public hearing on the merits of my clients' appeal.

Best Regards,



Sean R. Turley, Bar No. 6351

²⁷ During the October 27, 2021 hearing, Board Member King suggested that there were two paths to establish standing—either as an abutter or as a person aggrieved. Because the YSPRO expressly provides standing to all abutters, my clients did not even need to meet the “minimal” threshold for demonstrating that they are sufficiently aggrieved to pursue their appeal. As a result, the Board did not receive any testimony to establish such harm—nor, for that matter, any testimony at all from them. The fact that they did not hear from my clients about the conceivable injury they will suffer, particularly when the Board did not seek any input from the public prior to its vote, cannot be interpreted as a concession that my clients have not suffered such an injury to confer standing as persons “aggrieved.”

²⁸ It is important to keep in my mind that the Town, particularly its General Board of Appeals, has already found that my clients qualify as “persons aggrieved.” The GBA voted unanimously to find that my clients had standing to challenge the issuance of the building permit and expressly found as follows:

The Appellants **do** have Standing. The General Board of Appeals found that the appellants being located on a small cul-de-sac road, Astilbe Lane, which is the site of the new driveway entrance and is only accessible via Portland Street where the subject property is located do suffer an injury different than the general public.

“Administrative Appeal Standards, Findings & Decision” dated October 22, 2021, attached hereto as Exhibit B, at 1 (emphasis in original).

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**PLANNING DEPARTMENT REPORT
YARMOUTH, MAINE**

Minor Site Plan

Accessory Dwelling Unit, 538 Portland Street

Edward Libby, Applicant

Map 30, Lot 14

Prepared by: Erin Zwirko, Director of Planning & Development,
and Nicholas Ciarimboli, CEO/Planning Assistant

Date: August 16, 2021

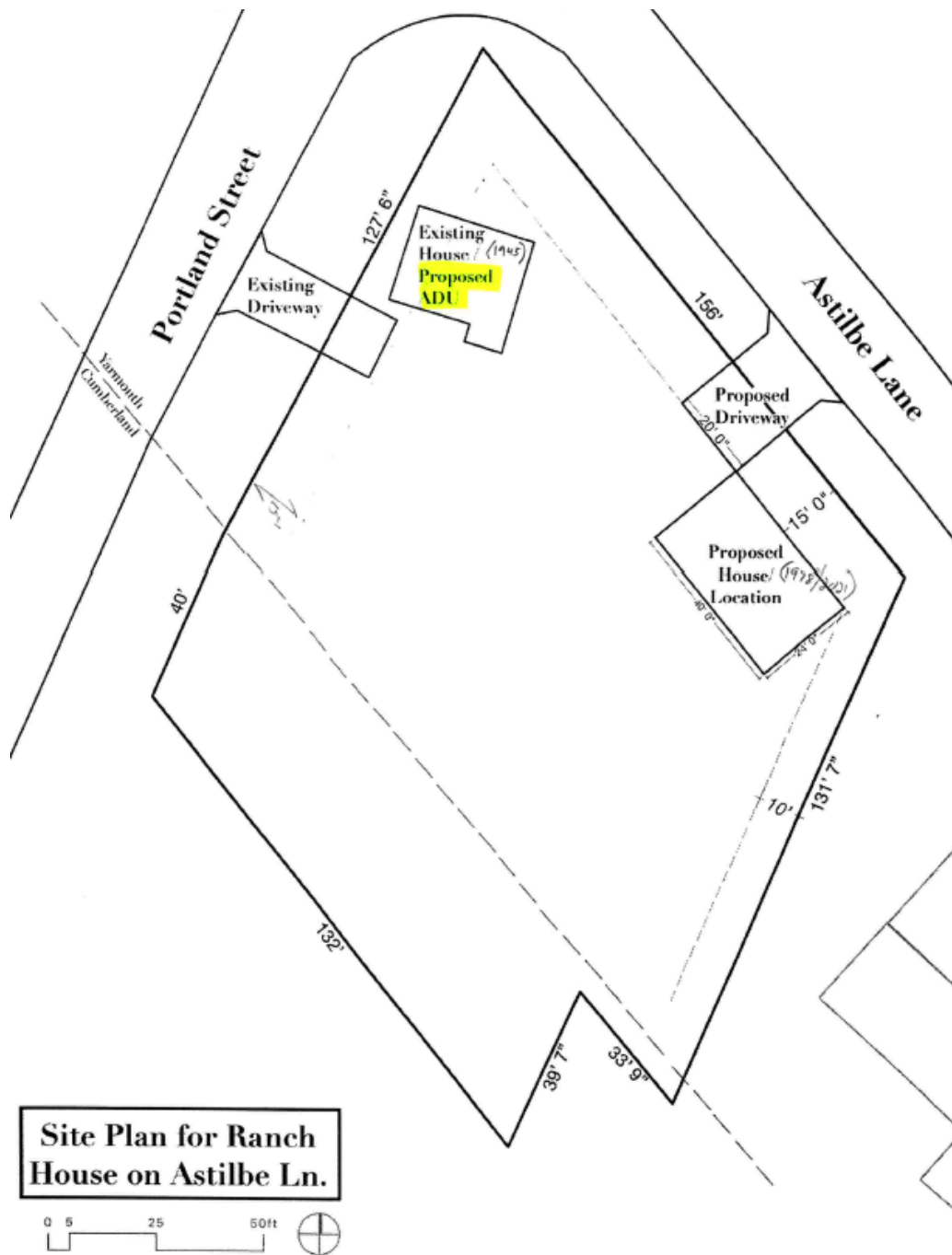
I. INTRODUCTION AND PROJECT DESCRIPTION

Ed Libby proposes to establish an accessory dwelling unit (ADU) on the property at 538 Portland Street per Chapter 702, Site Plan Ordinance. The applicant proposes to designate the existing structure on the site as an ADU and move an existing building located on Old County Road to a new foundation on Portland Street.



View of property and existing structure from Astilbe Lane

The applicant has also requested a building permit to move the structure from Old County Road to the subject property and set it on a foundation. The building permit is being considered concurrently with this request for minor site plan approval of the ADU. In the photo above, the primary dwelling unit will be located to the left of the existing structure.



Site Plan for 538 Portland Street

The existing structure on the site is a Cape Cod style home and the structure to be moved to the site is a ranch style home. The existing lot is approximately 0.50 acres. The dashed line in the image above represents the municipal boundary between Yarmouth and Cumberland. Access for the ADU will remain from Portland Street. The primary dwelling unit will have access from Astilbe Lane. The property is located at the corner of Portland Street and Astilbe Lane.



Structure to be Moved to 538 Portland Street



Existing Structure at 538 Portland Street

The ADU is reviewed as a Minor Site Plan Review per Chapter 702 Article 1.J.13 which outlines the requirements for ADUs.

II. PROJECT DATA

<i>SUBJECT</i>	<i>DATA</i>
Existing Zoning	Medium Density Residential
Existing Use	Single-family home
Proposed Use	Single-family home with detached ADU
Parcel Size	0.54 acres

Uses in Vicinity: The surrounding neighborhood consists primarily of single-family homes, but also includes a municipal sewer pump station, a CMP corridor, a MaineDOT Transportation Maintenance lot, and Main Line Fence located just over the town line in Cumberland on Middle Rd. The Cumberland/Yarmouth municipal boundary bisects the subject parcel.

III. PUBLIC COMMENT

Notices of this public hearing were sent to 15 property owners in the vicinity (within 500 feet) of the proposed development. Six abutters on Astilbe Lane expressed concern with the proposal. The abutters were concerned that this proposal is too similar to the contract zoning that was denied by the Town Council in May 2021 and that the proposal is not consistent with the ADU standards.

IV. DEVELOPMENT REVIEW

A. SITE PLAN STANDARDS (Chapter 702, Article 1.J.13, Accessory Dwelling Unit)

13. Accessory Dwelling Unit: any request shall include a plot/site plan showing the following:

- a. Lot boundaries and dimensions at scale.*
- b. Zoning district.*
- c. Date of plan.*
- d. Property owner with deed reference.*
- e. Lot area.*
- f. Location and setback of all buildings.*
- g. Date of construction of single-family dwelling.*
- h. Separate floor layout of all finished levels.*
- i. All plumbing facilities, kind and location.*
- j. Use of all rooms.*
- k. All entrances/exits.*
- l. All partitions, temporary or permanent.*
- m. Location and type of all appliances.*
- n. Rights of way, public and private*
- o. All easements*
- p. Street names*
- q. Sewerage facilities*
- r. Off-street parking spaces*

Town Comments: The applicant has provided a plan that illustrates these items.

In permitting an ADU, the Planning Director and/or CEO shall find that:

- a. Exterior design of the accessory unit is compatible with the existing residence on the lot through architectural use of building forms, height, construction materials, colors, landscaping, and other methods that conform to acceptable construction practices.*

Town Comments: In this case, the applicant will be moving a structure to the site and designating it as the primary dwelling unit. The existing structure on the site will be designated as the ADU.

Although the two structures are of differing architectural styles and were built at different times, the two structures are not out of scale with each other, both of a modest mass and height, and both representative of traditional American vernacular styles. The two structures are compatible with each other and neither structure overpowers the site. The position of each structure on the property provides the required parking and open space, and begins to establish the 'rambling' development pattern commonly found throughout New England often referred to as 'big house, little house, back house, barn' style.

- b. The exterior design is in harmony with, and maintains the scale of the neighborhood.*

Town Comments: The Astilbe Lane subdivision was developed between 2001 and 2003 with typical two-story suburban style houses approximately 2,400+ SF with attached two-car garages. These homes are larger and are more modern than the majority of homes built on Portland Street and on West Elm Street within the vicinity. The lot sizes on Astilbe Road are larger as well averaging approximately 1.2 acres. Other lots within the vicinity range from .32 acres to almost 2 acres, but average around .77 acres. The existing structure on the subject property and the structure to be moved to the property are more modest in size and relate to the homes located between Portland Street and West Elm Street. The larger area near this intersection include homes that were built at many different times and on different size lots. Therefore, the proposal is in harmony with and maintains the scale of the neighborhood.

- c. The accessory unit does not result in excessive noise, traffic or parking congestion.*

Town Comments: The proposed ADU will not create excessive noise, traffic or parking congestion. The ADU will have dedicated parking off of the larger roadway, avoiding the Astilbe Lane cul-de-sac.

- d. The property fronts on a public water main and public sewer line each with the capacity to serve the additional accessory unit.*

Town Comments: The Yarmouth Water District Superintendent and the Town Engineer confirmed that the public water and public sewer, respectively, have capacity to serve the additional unit.

- e. Major access stairs, deck entry doors, and major windows will generally be limited to the walls facing the primary residence. Windows that impact the privacy of the neighboring side or rear yard have been minimized. The design of the accessory unit shall relate to the design of the primary residence and shall not visually dominate it or the surrounding properties.*

Town Comments: The ADU is an existing structure on the site, and the primary dwelling unit will be moved to the site. Although the two structures are of different style, the ADU is screened by existing vegetation on the site. The location of the ADU at the corner of Portland Street and Astilbe Lane ensures that the ADU does not visually dominate the surrounding properties and does not impact the privacy of the neighboring side or rear yard. 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. Additionally, while the homes on Astilbe Lane are newer and larger, the primary dwelling unit and the ADU are in keeping with the scale of the existing homes on Portland Street and West Elm Street.

- f. The orientation and location of the buildings, structures, open spaces and other features of the site plan are such that they maintain natural resources including heritage or significant trees and shrubs to the extent feasible and minimize alteration of natural land forms.*

Town Comments: Although a number of trees were removed from the eastern property line, the ADU is screened by significant vegetation at the corner of Astilbe Lane and Portland Street. Maintaining this existing vegetation minimizes the amount of alteration that occurs on the site and also provides screening of the ADU from the corner. As a condition of approval, the applicant shall maintain this vegetative buffer.

- g. Building profiles, location and orientation relate to natural land forms.*

Town Comments: The property is flat and does not require the alteration of any natural land forms.

- h. One parking space shall be provided on-site for each a studio and or one bedroom accessory unit. Two parking spaces shall be provided on site for each a two bedroom accessory unit. Parking of the accessory unit is in addition to the required parking for the primary residence. Required parking spaces for the primary residence and the accessory dwelling unit may be provided in tandem on a driveway. A tandem arrangement consists of one car behind the other. No more than two cars in tandem may be counted towards meeting the parking requirement.*

Town Comments: The existing property has informal parking located off of Portland Street adjacent to the structure. In the application materials, the applicant indicates that parking for the ADU will be in the same general location off of Portland Street. Parking for the primary dwelling unit will be located off of Astilbe Lane via a new curb cut. As a two-bedroom ADU, two parking spaces are required. The site plan shows the parking area as 12 feet by 15 feet. Although this area appears to accomodate two parking spaces, the ordinance requires parking spaces to be 9 feet by 18 feet.

As a condition of approval, the ADU parking area shall be designed to be 18 feet by 18 feet or other acceptable configuration of two 9 feet by 18 feet spaces and be constructed so that the driveway entrance and parking area are formalized.

- i. A single-family dwelling exists on the lot or will be constructed in conjunction with the accessory unit. Only one ADU is permitted per lot.*

Town Comments: 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.

- j. *Accessory dwelling units are not eligible for variances to setbacks.*

Town Comments: The structure to be designated as the accessory dwelling unit is pre-existing nonconforming in terms of setbacks and is not required to obtain any variances for the location. The standard is applicable to new structures which would require a variance for the proposed placement. Additionally, the structure to be moved to the site to be designated as the primary dwelling unit will conform to the required setbacks of the zoning district.

- k. *Before obtaining a building permit for an ADU the property owner shall file with the registry of deeds a declaration of restrictions containing a reference to the deed under which the property was acquired by the present owner and stating that:*
- 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.*

Town Comments: These requirements will be a condition of approval. The applicant shall produce the recorded restriction prior to the issuance of a building permit.

In addition, the applicant shall provide documentation that one of the units will be owner occupied prior to occupancy of either dwelling unit. The fact that the property is owned by an LLC is not a concern as many properties are owned through different ownership arrangements. However, the owner shall produce information indicating they are a member of the LLC, state or federal identification in the owner's name showing the property address, and a utility bill in the owner's name for service at the property address.

- l. *Units within an Accessory Structure shall not exceed 900 square feet. If an ADU occupies an entire single floor, the Planning Department may allow for an increase in the allowed size of the ADU in order to efficiently use all of the floor area, so long as all other standards of this section are met.*

Town Comments: The applicant has indicated the floor area of the unit to be 717 SF. This appears to be based on the interior livable area which the Planning Department has deemed to be an acceptable approach. Livable area does not include closets, stairwells, shafts, or other non-habitable spaces. In spaces with sloped ceilings, habitable space should only be calculated for the area having a ceiling height of five feet or greater in accordance with industry standards including 2015 International Residential Code (IRC)/ R304.3 *Height effect on room area*. The assessor's information indicates the Living Area as 924 SF, which is based on the exterior dimensions of the house and accounts for the discrepancy in the two numbers.

- m. *An ADU may have no more than two (2) bedrooms.*

Town Comments: The structure proposed to be designated as an accessory dwelling unit has two bedrooms.

- n. The water and sewage facilities shall meet all existing laws and codes.*

Town Comments: The existing house on site is currently served by Town Water and Sewer. The proposed new structure will be served separately by Town Water and Sewer and has been deemed by both the Yarmouth Water District and the Sewer Department to be acceptable to connect. These connections will be inspected by their respective departments. There are currently no known violations of this nature or any on the property.

The Town Engineer has reviewed the proposal and notes that the property is located along a low pressure sewer system and will require a small private sewer pump station. The system must meet Chapter 304 Sewerage Ordinance requirements as well as the Town's technical standards for sewer infrastructure. In addition, a minimum of five feet separation is required from other underground utilities.

These requirements will be conditions of approval.

- o. Approval of an accessory apartment shall be conditional on obtaining applicable building, plumbing, electrical and any other necessary municipal permits.*

Town Comments: The Town Engineer also requires the installation of erosion and sedimentation control measures. During construction erosion and sedimentation control, Best Management Practices (BMP's) shall be installed prior to construction activities and shall be maintained by the contractor until the permanent vegetation is in place. It is also critical that the contractor performing construction inspect, maintain, and repair all ESC BMP's prior to and following rainstorms to ensure the effectiveness of the BMP's. All inspection work must be documented. Maintaining the erosion and sedimentation control measures is a condition of approval. Obtaining all other permits is also a condition of approval.

- p. The Fire Chief must review and sign off on the application.*

Town Comments: The Fire Chief reviewed the application and has approved the unit with the following conditions:

- Interconnected smoke alarms and carbon monoxide alarms shall be required throughout the ADU in accordance with NFPA 101, NFPA 72 and State Statute, and
- The installation of a fire extinguisher is required, which is to be placed in proximity to the ADU's kitchen.

These requirements will be conditions of approval.

- q. Unless part of the design of an existing single family dwelling the dwelling(s) shall have only one (1) front entrance and all other entrances shall be on the side or in the rear of the dwelling. A front entrance leading to a foyer with entrances leading from the foyer to the two (2) dwelling units is permitted. Outside stairways (either open or enclosed), that service an Accessory Dwelling Units on upper stories are not permitted.*

Town Comments: The proposed ADU is a detached structure from the primary dwelling unit and as such no foyer is proposed. The detached ADU has one front entrance, and the secondary entrance is on the side of the dwelling.

- r. For an ADU located within an existing garage or other outbuilding, the structure is not required to approximate the exterior features of the existing single family dwelling, but any exterior modifications should be consistent with the architectural style of that structure unless the building is upgraded per the requirement of new structures or unless the new structure is designed in a traditional New England form such as a barn.*

Town Comments: The structure to be designated as the accessory dwelling unit is a Cape Code style structure. Although not an existing garage or other outbuilding, the proposal does not modify any of its existing exterior and thus will remain consistent in its architectural style.

- s. An existing single family dwelling that is nonconforming solely due to lot size, lot width, lot frontage, lot coverage, height or setback requirements may be expanded to incorporate an Accessory Apartment subject to the requirements of Chapter 701 of the Yarmouth Code Article III for the expansion of other non-conforming single family dwellings.*

Town Comments: The accessory dwelling unit is proposed to be located within a detached structure. This standard is not applicable.

- t. ADU's may be permitted on back lots.*

Town Comments: The property is not a back lot. This standard is not applicable.

- u. ADU's are not permitted on a lot with a non-conforming use.*

Town Comments: The existing single-family use is a conforming use for a lot within the medium density residential (MDR) district.

- v. ADU's are not permitted on a lot with mixed uses.*

Town Comments: The lot does not have mixed uses. This standard is not applicable.

- w. When an owner wishes to eliminate the accessory apartment proof of the removal of the second kitchen and the restoration of the apartment to its status before the conversion shall be submitted to the satisfaction of the Planning Department. The owner shall record a Release of the Declaration of Restrictions on the Land after inspection and confirmation by the Code Enforcement Officer.*

Town Comments: This standard will be included as a condition of approval.

V. ADMINISTRATIVE APPROVAL

Based on the record, the Planning and Development staff believe that the Minor Site Plan Approval for an ADU

at 538 Portland Street is consistent with the standards of approval subject to the following conditions:

1. Due to the property's location along a low pressure sewer system, the applicant shall install a small private sewer pump station. The system must meet Chapter 304 Sewerage Ordinance requirements as well as the Town's technical standards for sewer infrastructure. In addition, a minimum of five feet separation is required from other underground utilities and a sewer connection permit will be required before building permits are issued.
2. Interconnected smoke alarms and carbon monoxide alarms shall be required throughout the ADU in accordance with NFPA 101, NFPA 72 and State Statute.
3. The installation of a fire extinguisher shall be required, which is to be placed in proximity to the ADU's kitchen.
4. During construction erosion and sedimentation control, Best Management Practices (BMP's) shall be installed prior to construction activities and shall be maintained by the contractor until the permanent vegetation is in place. It is also critical that the contractor performing construction inspect, maintain, and repair all ESC BMP's prior to and following rainstorms to ensure the effectiveness of the BMP's. All inspection work must be documented. Maintaining the erosion and sedimentation control measures is a condition of approval.
5. Prior to the issuance of a building permit, the property owner shall file with the registry of deeds a declaration of restrictions containing a reference to the deed under which the property was acquired by the present owner and stating that:
 - 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.
6. Prior to the issuance of an occupancy permit, the property owner shall provide suitable documentation that indicates that either the primary dwelling unit or the accessory dwelling unit is owner occupied.
7. Prior to the issuance of an occupancy permit, the accessory dwelling unit parking area shall be designed to accommodate two 9 feet by 18 feet parking spaces and be constructed so that the parking area and driveway entrance is formalized.
8. The applicant shall maintain the vegetated buffer at the corner of Portland Street and Astilbe Lane such that the accessory dwelling unit is screened.

Attachments

1. Staff Comment – Eric Gagnon, Yarmouth Water District – email 8/2/2021
2. Staff Comment – Steve Johnson, Town Engineer – memo 8/4/2021
3. Staff Comment – Michael Robitaille – memo 8/2/2021
4. Public Comment – Andrea Pizzo and Howie Gu, 68 Astilbe Ln. – email 7/27/2021
5. Public Comment – Gene and Heidi Miller, 59 Astilbe Ln. – email 7/27/2021
6. Public Comment – Jayshree Patel, 47 Astilbe Ln. – email 7/27/2021
7. Public Comment – Jefferson Oranellas, 71 Astilbe Ln. – email 7/27/2021
8. Public Comment – Peter Senger, 54 Astilbe Ln. – email 7/26/2021

YARMOUTH GENERAL BOARD of APPEALS

Administrative Appeal Standards, Findings, & Decision General Board of Appeals Meeting of October 6, 2021

Applicant/Project Description

Administrative Appeal of Code Enforcement Officer Zoning Determination under Chapter 701, Article VII.B.2.a; Eugene Miller, et al. Appellants, Re: Approval of Building Permit #B21-187 for Accessory Structure at 538 Portland St., MDR Zone, Ed Libby, Owner; Map 30 -Lot 14.

Reference: Chapter 701, Article VII, Section B.2.a. (General Board of Appeals, Powers and Duties) of the Town's Zoning Ordinance, and Chapter 203, Article C & F of the Town's General Board of Appeals Ordinance.

Chapter 203, General Board of Appeals, Article C. Appeals to the GBA (Standing)

1. The Board of Appeals may exercise jurisdiction only upon receipt of a written appeal from a person aggrieved, filed within 30 days of the decision complained of, stating the relief sought and the grounds thereof. The appeal shall be filed with the Town Clerk on forms to be approved by the Board of Appeals.

Findings of Fact and Conclusion of Law:

The Appellants **do** have Standing. The General Board of Appeals found that the appellants being located on a small cul-de-sac road, Astilbe Lane, which is the site of the new driveway entrance and is only accessible via Portland Street where the subject property is located do suffer an injury different than the general public.

Findings and conclusion moved by Phil Ahrens, seconded by Sam Carter, and voted 4 in favor, 0 opposed, Tom Marjerison, recused.

Voted by the Town of Yarmouth General Board of Appeals on October 6, 2021.

Chapter 203, General Board of Appeals, Article C. Appeals to the GBA (Timeliness)

1. The Board of Appeals may exercise jurisdiction only upon receipt of a written appeal from a person aggrieved, filed within 30 days of the decision complained of, stating the relief sought and the grounds thereof. The appeal shall be filed with the Town Clerk on forms to be approved by the Board of Appeals.

Findings of Fact and Conclusion of Law:

The appeal **was** timely filed within 30 days of the issuance of the Building Permit.

Findings and conclusion moved by Phil Ahrens, seconded by Sam Carter, and voted 4 in favor, 0 opposed, Tom Marjerison, recused.

Voted by the Town of Yarmouth General Board of Appeals on October 6, 2021.

Chapter 203, General Board of Appeals, Article F. Jurisdiction, Power and Duties

The Board of Appeals is authorized to hear variances and decide appeals from decisions, actions, or failure to act by the following officials and in the following matters:

1. By permitting authority in the administration or issuance of permits and approvals, or establishment of conditions thereon (if any), subject to paragraph 3 below:
 - a. Chapter 301 – Building Code
 - b. Chapter 304 – Sewerage Ordinance
 - c. Chapter 311 – Electrical Code
 - ...
 - m. Chapter 701 – Zoning Ordinance

Chapter 701, Zoning, Article VII.B. Power and Duties **B. POWERS AND DUTIES**

1. Appeals
Appeals shall lie from the decision of the Planning Director or his/her duly authorized agent to the General Board of Appeals and from the General Board of Appeals to the Superior Court according to the provisions of Maine Revised Statutes.
2. The General Board of Appeals shall have the following powers and duties under this Ordinance:
 - a. Administrative Appeals
To hear and decide where it is alleged there is an error in any order, requirement, decision, or determination made by any officer in the interpretation of this Ordinance. The action of the officer may be modified or reversed by the General Board of Appeals. Any order, requirement, decision or determination made, or failure to act, in the enforcement of this Ordinance is not appealable to the General Board of Appeals but may be appealed directly to Superior Court.

Findings of Fact and Conclusions of Law:

The General Board of Appeals **does** have jurisdiction under Chapter 203, Article F and Chapter 701 Article VII.B.

Findings and conclusion moved by Craig Wolff, seconded by Sam Carter, and voted 4 in favor, 0 opposed, Tom Marjerison, recused.

Voted by the Town of Yarmouth General Board of Appeals on October 6, 2021.

On the Merits of the Appeal:

Findings of Fact and Conclusions of Law:

The General Board of Appeals found that the structure is not an accessory structure and is not incidental and subordinate to the existing Single Family Detached Structure at 538 Portland Street for the following reasons:

1. The size of the structure does not determine whether an Accessory Structure is incidental and subordinate, but the grouping of spaces proposed for the specific structure at 538 Portland Street exceed what could be reasonably considered incidental and subordinate;
2. The attributes of the structure, and the many different uses that it can serve, demonstrate that it is not dependent on the existing Single Family Detached Structure;
3. The distance of the structure from the existing Single Family Detached Structure is further than what could reasonably considered supporting the primary dwelling unit; and
4. The addition of the second driveway on Astilbe Lane to serve the structure suggests that the use of the structure is not incidental and subordinate to the existing Single Family Detached Structure but rather is positioned on the property to function as a primary residence.

A motion was made by Craig Wolff and seconded by Sam Carter to find that there **is** error in the Zoning Determination made by the Code Enforcement Officer that as an Accessory Structure the proposed structure meets the intent of the ordinance and is in fact incidental and subordinate to the existing Single Family Detached Dwelling at 538 Portland Street and therefore **grant** the appeal.

Based on the above findings and conclusions, the Code Enforcement Officer's decision was in error and the appeal is granted as moved by Craig Wolff, seconded by Sam Carter, and voted 4 in favor, 0 opposed, Tom Marjerison, recused.

Voted by the Town of Yarmouth General Board of Appeals on October 6, 2021.

Signed by:



Jennifer Peters, Chair, General Board of Appeals

10/22/21

Date