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VIA EMAIL

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Town of Northwood Planning Board
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**RE: Michael Sullivan; Case #19-12
8 Bow Lake Road; Tax Map/Lot No.: 222/61**

Dear Chairman and Members of the Board:

As you are aware, this office represents Michael Sullivan, site plan review applicant relative to the above-referenced case and property. This memorandum is intended to serve as a comprehensive response to the March 12, 2020 letter submitted to this Board by counsel for Marcia and Brian Severance (the "Abutters"). Please consider this memorandum part of the certified record in this matter.

The Abutters' March 12, 2020 letter contains a number of inaccuracies, omissions, and conclusory legal assertions that are not supported in fact nor law. By way of this memorandum, the Mr. Sullivan will address each issue in turn. In sum, this Board has more than enough information upon which to grant site plan approval. Mr. Sullivan has unquestionably satisfied the Town's Site Plan Review Regulations over the past year or more of public hearings, and his application should be granted.

1. The proposed site plan does not trigger the need for any variances from the ZBA.

The Abutters' argument that a setback variance is required because Mr. Sullivan is proposing additional pavement on Bow Lake Road closer to the existing dwelling on his property is based upon their conclusion that setbacks are measured from the edge of the pavement of Bow Lake Road. This conclusion, however, is incorrect and is not supported by the terms of the Zoning Ordinance nor common sense. Perhaps most notably, in their analysis, the Abutters' omit the definition of setbacks contained in the

Zoning Ordinance. The definition of setbacks contained in Section III of the Zoning Ordinance defines them as “[t]he horizontal distance *between a structure and the lot boundaries*, measured at right angles or radial to the lot boundaries.” (Emphasis added). Clearly, setbacks are measured as the distance between structures and the boundaries of the lot upon which the structure is situated. They are not measured as the distance between structures and the edge of a road situated on land that abuts the subject property. As such, the proposed widening of Bow Lake Road does not trigger the need for Mr. Sullivan to obtain any variances from the ZBA.

While most Zoning Ordinances refer to setbacks as side, rear, and front, in one instance (Table IV-1), the Northwood Zoning Ordinance refers to setbacks as side, rear, and road. That does not mean, however, that a front setback is measured from the edge of pavement of a road on an abutting parcel. Rather, the Zoning Ordinance appears to use the words “road” and “front” in this context interchangeably. Regardless, the controlling definition of “setback” is that prescribed to it by Section III of the Zoning Ordinance set forth above – the distance between a structure and the subject property’s lot boundaries. To the extent the Zoning Ordinance’s use of the term “road” in Table IV-1 creates any ambiguity, the express definition of setbacks as being the distance between a structure and the subject parcel’s lot boundaries still controls. See Batchelder v. Town of Plymouth Zoning Bd. of Adjustment, 160 N.H. 253, 257 (2010) (where the ordinance defines the term in issue, that definition will govern).

Moreover, the Zoning Ordinance’s definition of setbacks as running between a structure and the boundaries of the lot upon which the structure is situated makes sense as a practical matter. For example, Town or State right of ways are almost always wider than the travel lanes constructed therein – often significantly wider. By the Abutters’ logic, the Town or State could relocate travel lanes within a public right of way closer to a structure on a privately-owned abutting parcel and, if the edge of the relocated pavement encroaches within the “setback” of the structure, that landowner would be required to obtain a variance from the ZBA, even though he or she had no control over the Town or State’s decision to relocate a road within a public right of way. This makes no sense because it would never happen – the Zoning Ordinance measures setbacks as the distance between a structure and the lot boundaries on the landowner’s property. The Zoning Ordinance does not measure setbacks from a structure – across a lot boundary – and to the edge of pavement of a road on an abutting parcel.

Finally, even assuming for the sake of argument that a variance was required (it is not), it would be an insufficient basis upon which to deny the site plan application. While ZBA relief is usually sought before site plan approval as a practical matter, obtaining a variance from the ZBA could simply be made a condition of site plan approval.

2. There is nothing about Mr. Sullivan’s existing well that can or should serve as a basis for this Board to deny his site plan application.

The Abutters suggest that this Board should deny Mr. Sullivan’s site plan application because the 100-foot SPA well radius set forth in NHDES regulations encroaches into their property. This claim is without merit. While the radius does reach a small portion of the Abutters’ property, it is not a basis to deny Mr. Sullivan’s site plan application. In making its decision, this Board is bound by the Town’s Site Plan Review Regulations. Notably, the Abutters do not discuss the Town’s regulations in making this argument. Instead, they focus upon a perceived lack of compliance with NHDES regulations. It is not this Board’s job – and this Board lacks jurisdiction – to interpret state administrative rules and then grant or deny a site plan application based upon perceived compliance (or lack thereof) with same.

Section IX(E) of the Town’s Site Plan Review Regulations provides that “[a]ll developments shall make adequate provision for a water supply of potable water for domestic consumption . . . [and] the location of private wells shall comply with all standards of the . . . applicable New Hampshire regulatory agency” – i.e., NHDES. On February 27, 2020, Mr. Sullivan obtained from NHDES a registration approval for a transient, non-community water system for the existing well on his property. By issuing the registration, NHDES necessarily determined that Mr. Sullivan satisfied all of the State’s administrative rules relating to same. To the extent the Abutters believe the decision of NHDES was in error (it was not), their remedy is or was an administrative appeal of that decision to the applicable appellate body within NHDES. Their remedy is not to try to convince this Board that NHDES was wrong as a basis for denying Mr. Sullivan’s site plan application.

Contrary to the Abutters’ representations, this Board does not have authority to take a different interpretation of the State’s administrative rules and then deny a site plan application on the basis that it believes NHDES erred when it issued its approval. As far as this Board is concerned, Mr. Sullivan has obtained the necessary approval from the State for his well as required by the Town’s Site Plan Review Regulations. Since the Town’s Site Plan Review Regulations are not stricter than NHDES administrative rules relating to wells, this Board cannot deny Mr. Sullivan’s site plan application merely because the Abutters appear to take issue with the approval issued by NHDES. See c.f. Derry Senior Dev., LLC v. Town of Derry, 157 N.H. 441, 451-52 (planning board denial of site plan based on concerns about septic system was not sufficient when the plaintiff had all necessary State septic approvals and the town had not adopted regulations that were stricter than those of the State). The Abutters cannot point to any Town Site Plan Review Regulation that is violated by Mr. Sullivan’s well because the well is in compliance with all of the Regulations. His application cannot be denied for the reasons suggested by the Abutters.

3. Granting site plan approval would not “irreparably degrade the historic character of the area” nor would it “substantially alter the character of the area.”

The Abutters’ argument that the proposed use will degrade the historic character of the area and alter the character of the area conflates and confuses zoning issues with planning issues. Mr. Sullivan’s proposed coffee shop/existing dwelling mixed use is expressly permitted under the Town’s Zoning Ordinance. As such, the proposed use is inherently consistent with the character of the area as a use permitted by right. Permitted uses are *per se* reasonable. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 107 (2007). 15 New Hampshire Practice: Land Use Planning and Zoning §30.09 (Limits on Site Review) contains an excellent discussion of this principle:

Site plan review authority does not give the planning board the authority to deny a particular use simply because it does not feel that the proposed use is an appropriate use of the land. Whether the use is appropriate is a zoning question. If the planning board could deny uses it thought to be inappropriate, there would be no point in having zoning, for it would afford no protection to a landowner. If the use is permitted by the zoning ordinance, it cannot be barred by the site review process unless the use would create unusual public safety, health, or welfare concerns.

While this Board has authority to impose conditions that are reasonably related to the purposes set forth in the Town’s Site Plan Review Regulations to promote the safe and attractive development of the site, see id., this Board must accept the determination of the Town’s residents as a whole – as expressed through the terms of the Zoning Ordinance – that Mr. Sullivan’s proposed, permitted use is an appropriate use of the site. His proposal does not create unusual public safety, health, or welfare concerns. This Board’s duty is to ensure that Mr. Sullivan’s proposal complies with the Town’s Site Plan Review Regulations, which it does. His application should be granted.¹

To the extent this Board can consider the alleged “historic nature” of the area, the Abutters’ assertion that an approximately 640 square foot coffee shop along Route 4 – the main commercial thoroughfare in Town – would “irreparably degrade the historic character of the area” is nothing more than exaggeration. This Board should not simply accept this representation at face value. Section II(A) of the Town’s Site Plan Review Regulations provides that the Board seeks to establish “patterns of growth which *acknowledge the present* but honor the past.” (Emphasis added). Further, Section II(C)

¹ See also, e.g., the Town of Bedford Planning Board’s June 2019 approval of a 93-apartment workforce housing project even though 1,100 residents opposed the project. “The board can’t say ‘no’ because we don’t like [it],” said Harold Newberry, planning board member, stressing the board does not have the ability to deny an application simply because there is opposition to it. Rather, the board’s responsibility is to make sure the site plan meets town requirements, he said, explaining that if town planners denied the application without sufficient reason, it would likely be overturned by the courts.” https://www.unionleader.com/news/politics/local/controversial-workforce-housing-project-receives-green-light-in-bedford/article_c413bab6-8a56-51f6-8ab1-771aa846c26a.html

provides that another purpose of the Regulations is to promote “well planned high-quality commercial development and provide economic opportunities for residents.” Mr. Sullivan’s proposed coffee shop is consistent with these purposes. Moreover, at the March 12, 2020 public hearing, at least one Board member recognized that the area around the subject property is more likely to become primarily a business area in the near future (to the extent it is not already) rather than remaining or reverting to primarily single-family residential uses. Indeed, our Supreme Court has stated in similar contexts that “towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge.” Belanger v. City of Nashua, 121 N.H. 389, 392 (1981).

Nor would granting site plan approval “substantially alter the character of the area.” For the same reason set forth above, Mr. Sullivan’s proposed use will not substantially alter the character of the area because the Town’s Zoning Ordinance has already determined that it is an appropriate use of the site that is permitted by right. Indeed, this “character of the area” concept comes from the Zoning Ordinance – not the Site Plan Review Regulations. It is this Board’s job to interpret and apply the Site Plan Review Regulations for purposes of public health and safety. It is not this Board’s job to interpret and apply the Zoning Ordinance to determine whether it favors or disfavors the proposed use – that is the job of the Town’s residents expressed a whole through the Zoning Ordinance and, when necessary, it is the job of the ZBA in cases that come before it. See, e.g., RSA 676:5(III). Moreover, the Abutters’ argument to the contrary primarily relies upon two letters from Carol Ogilvie, which they characterize as “uncontested expert evidence.”² However, her representations have been contested on the record by Mr. Sullivan and his agents throughout this case, and they are further contested by way of this memorandum.

First, Ms. Ogilvie’s study area appears to have been chosen specifically to produce a finding adverse to Mr. Sullivan. Her study area primarily focuses upon residential properties along Bow Lake Road far removed from Mr. Sullivan’s property. Other than a few properties at the immediate intersection of Bow Lake Road and Route 4, Ms. Ogilvie did not include in her study area any of the numerous commercial or mixed-use properties along Route 4 in the vicinity of Mr. Sullivan’s property. For example, Ms. Ogilvie included a residential property on Bow Lake Road in her study area which is approximately 1,500 feet north of Mr. Sullivan’s property, but did not include the Burgess Auto Repair site in her study area which is approximately 1,200 feet east of Mr. Sullivan’s property on Route 4. The reason for this is clear. Ms. Ogilvie knew the conclusion she wanted to reach before preparing her study, and then reverse-engineered the study area to produce that conclusion. Had she rotated her rectangular study area 90 degrees to run lengthwise along Route 4, she would have captured many more mixed use and commercial properties than residential ones and produced a very different result.

² To the extent the Abutters rely upon representations of their appraiser, Mr. Sullivan relies upon the testimony and reports of his licensed appraiser, Vern Gardner, whose sound and proper reports and testimony are part of the certified record in this matter. Reference is made to Vern Gardner’s testimony and reports which support the proposition that Mr. Sullivan’s proposed use will not negatively affect surrounding property values.

Indeed, purely residential properties along Route 4 in this area appear to be the exception, not the rule. This is a decidedly mixed-use area, which includes the following uses within an approximately 1,000-foot radius of Mr. Sullivan's property: church, graveyard, construction equipment yard, telecom building, Coe Brown Private School, motel building, car sales, commercial parking lot, day care center, municipal center, and office building. If this area was ever comprised of purely historic/residential single family uses as the Abutters' suggest, that ship sailed long ago. This is an overwhelmingly mixed-use area, and Mr. Sullivan's proposed coffee shop fits squarely within it. There can be no genuine argument that granting his site plan application will substantially alter the character of the area.

Similar to her carefully chosen study area, Ms. Ogilvie's letters are fundamentally flawed from a technical standpoint. Ms. Ogilvie appears to be a retired planner now acting in a private consulting capacity. For expert planners to provide any credible opinion on the character of an area, they must review additional materials beyond an applicant's submissions and municipal regulations. Specifically:

A planner must search the records of a municipality to ascertain whether: (1) previous applications have been made with respect to this or other properties in the area; (2) the applications were granted or denied; and (3), if denied, there is a pattern to the denials or a common thread running through the material presented to the legislative body that would indicate a reason for denial other than one which could be supported by zoning or planning considerations.

Rathkopf's *The Law of Zoning and Planning* § 67:13 (4th ed.) (Proof by Experts – Planners). There is no evidence in the record that Ms. Ogilvie undertook any of these prudent steps in drawing her conclusions. Her materials reflect that she only reviewed some of Mr. Sullivan's application materials and some of the Northwood regulations. This lack of due diligence casts serious doubt on the credibility and validity of her representations. Land use boards do "not have to accept the conclusions of the experts." Cont'l Paving, Inc. v. Town of Litchfield, 158 N.H. 570, 575 (2009). For the foregoing reasons, this Board should reject Ms. Ogilvie's conclusions, which are fundamentally flawed and serve only the Abutters' cause.

4. Other issues raised by the Abutters.

To the extent the Abutters, in their March 12, 2020 letter or otherwise, raise issues regarding application or plan completeness and traffic issues, those points have been fully and adequately addressed by Mr. Sullivan's surveyor (Scott Frankiewicz, LLS) and traffic expert (Stephen Pernaw, P.E., PTOE) on the record in this matter.

5. Conclusion.

The Abutters' plan of attack throughout this case appears to be a "throw everything at the wall and see what sticks" approach with the aim of inventing issues for purposes of confusing or scaring the Board. It is important that the Board does not lose sight of the forest for the trees. While the Abutters have the right to voice their opinions, the subject of this application is not a Super-Walmart or a large-scale shopping center. Rather, it is a small walk-up/drive through coffee shop. The Abutters have, for lack of a better phrase, made a mountain out of a mole hill and turned what would have otherwise been a cut-and-dry site plan application for a small coffee shop into a year-long trial by ordeal.

It also important that this Board is aware that it has a constitutional obligation to assist Mr. Sullivan as landowner and applicant. It is the Town's "function to provide assistance to all their citizens" under Article 1, Part 1 of the New Hampshire Constitution. Carbonneau v. Town of Rye, 120 N.H. 96, 99 (1980). In the context of aiding property owners seeking municipal approval to develop their property, the Court aims to prevent municipalities from ignoring an application or otherwise engaging in dilatory tactics in order to delay a project. Kelsey v. Town of Hanover, 157 N.H. 632, 638 (2008).

This Board should not delay approval of Mr. Sullivan's site plan application any longer than it already has. He and his agents have unquestionably satisfied the Town's Site Plan Review Regulations over the past year of public hearings. This Board has more than enough information upon which to grant site plan approval. Mr. Sullivan is entitled to have his site plan application granted, and this Board should do just that.

Sincerely,

/s/ Brett W. Allard

Brett W. Allard, Esq.