

## Town of Milton

# Appeal from an Administrative Decision

## Application Instructions

Instructions to applicant for an Appeal from an Administrative Decision from the Milton New Hampshire Zoning Board of Adjustment. The Zoning Board of Adjustment strongly recommends that, before making any appeal, you become familiar with Milton's Zoning Ordinance and with New Hampshire Statutes Title LXIV, RSA Chapters 672 to 677, covering planning and zoning.

### Appeal from An Administrative Decision:

If you have been denied a building permit or are affected by some other decision regarding the administration of the Milton Zoning Ordinance, and you believe that the decision was made in error under the provisions of the Zoning Ordinance, you may appeal the decision to the Zoning Board of Adjustment. The appeal will be granted if you can show that the decision was indeed made in error.

If you are appealing an administrative decision, a copy of the decision appealed from must be attached to your application.

Pursuant to RSA 676:7 the State law of New Hampshire, the Town of Milton is required to notify the applicant and every abutter of the public hearing by certified mail, return receipt requested. The cost of required publication or posting of notice and the cost of mailing said notices shall be paid by the applicant.

According to RSA 672:3, "abutter" is defined as "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board". For purposes of receiving testimony only, and not for purposes of notification, the term abutter shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration. For purposes of receipt of notification by a municipality of a local land use board hearing, in the case of any abutting property being in condominium or other collective form of ownership, the term abutter means the officers of the collective or association, as defined in RSA 356:B, XXIII. Please note: All roads, highways, railroads, rivers, ponds and streams are neutral.

Prepare a list of all abutting property owners (use attached sheet), verify the list at Milton's Town Office, and return it with three (3) sets of 1" x 2-5/8" mailing labels and your application. List the names and mailing addresses of the applicant and/or property owner and authorized agent (surveyor), not more than five (5) days prior to submission, per RSA 676:4, 1(b). The accuracy of the list is the applicant's responsibility.

The Zoning Board of Adjustment will schedule a public hearing within 30 days of receipt of your properly completed application. Public Notice of the hearing will be posted and printed in Foster's Daily Democrat and notice will be mailed to you, all abutters, and other parties whom

After the public hearing, the Board will reach a decision. You will be sent a Notice of Decision. If you believe the Board's decision is wrong, you have the right to appeal. The Selectmen or any party affected, have similar rights to appeal the decision in your case. To appeal, you must first ask the Board for a rehearing. The motion for rehearing must be in the form of a letter to the Board. The motion must be made within 30 days of the Board's decision, and must set forth the grounds on which it is claimed the decision is unlawful or unreasonable.

The Board may grant such a rehearing if, in its opinion, good reason is stated in the motion. The Board will not reopen a case based on the same set of facts, unless its' convinced that an injustice would be created by not doing so. Whether or not a rehearing is held, you must have requested on before you can appeal to the courts. When a rehearing is held, the same procedure is followed as for the first hearing, including public notice (Fosters) and notice to all abutters. (Applicable fees will be charged to the applicant motioning for the rehearing).

Fees are charged to cover the cost of preparing and mailing the legally required notices:

|                               |             |
|-------------------------------|-------------|
| Application Fee .....         | \$150.00    |
| Abutter Notice .....          | \$8.00 each |
| Public Notice Fee .....       | \$150.00    |
| Site Identification Sign..... | \$5.00      |

Please make checks or money orders payable to the Milton Zoning Board of Adjustment. Mail or deliver the completed application with all the necessary attachments to:

Zoning Board of Adjustment  
PO Box 310  
Milton NH 03851

**\*\*\*Important\*\*\***

Property Identification signs must be posted on the property for the 5-days prior to hearing. Failure to post may result in application not being accepted.

#### **Site Walk Authorization**

The owner(s), by filing an application, hereby give permission for any member of the Milton Zoning Board of Adjustment and such agents or employees of the Town or other persons as the Zoning Board of Adjustment may authorize, to enter upon the property which is the subject of the application at all reasonable times for the purpose of such examinations and inspection as may be appropriate.

Owner(s) Signature: \_\_\_\_\_

Authorized Agent Signature: \_\_\_\_\_

**Town of Milton**  
**"Appeal from an Administrative Decision"**

Date Received: \_\_\_\_\_ Public Hearing: \_\_\_\_\_

Applicant(s) Name: Three Ponds Investment, LLC

Mailing Address: 76 Exeter Road, Newmarket, New Hampshire 03857

Phone: (603)659-2351

Land Owner's Name(s): Three Ponds Investment, LLC

Map # 23 Lot # 40 & 44 Zone: Low Density Residential

Physical Address of Property: Northeast Pond Road and Bolan Road (undeveloped wood lot)

*Note: This application is not acceptable unless required statements have been made.*

Article: VI, Section: 5 & 9 of the Milton Zoning Ordinance

Relating to the interpretation and enforcement of the provision of Milton's Zoning Ordinance. Decision of the Enforcement Officer to be reviewed:

Please see the attached Narrative. The Applicant is appealing the interpretation, construction,  
and application of the Milton Planning Board made on December 7, 2021 and February 1, 2022

Applicant's Signature: \_\_\_\_\_ Date: 3/3/22

Property Owners Signature: \_\_\_\_\_ Date: 3/3/22

[illegible]

Date on which this list was prepared: 3/3/2022

Signature of Preparer: 

## ABUTTERS LIST

|   |  |   |
|---|--|---|
| <p>Name: <u>Matthew R. Boldstridge</u><br/> Address: <u>223 Northeast Pond Rd</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>17</u></p>                | <p>Name: <u>Michael J. &amp; Joanne M. Dubois</u><br/> Address: <u>199 Northeast Pond Rd</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>18</u></p>        | <p>Name: <u>Mercier Family 2014 Rev Trust</u><br/> Address: <u>PO Box 498</u><br/> <u>Milton, NH 0381</u><br/> Map <u>23</u> Lot# <u>19</u></p>               |
| <p>Name: <u>James &amp; Lisa Brown</u><br/> Address: <u>377 Bolan Road</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>35</u></p>                       | <p>Name: <u>Richard C. Fernald</u><br/> Address: <u>397 Bolan Road</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>38</u></p>                              | <p>Name: <u>Kimberly Kisor Rodriguez</u><br/> Address: <u>PO Box 1293</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>39</u></p>                  |
| <p>Name: <u>Timothy &amp; Stephanie Hunt-Townsend</u><br/> Address: <u>194 Northeast Pond Rd</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>41</u></p> | <p>Name: <u>Mark S. Bossie</u><br/> Address: <u>186 Northeast Pond Rd</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>42 &amp; 43</u></p>                  | <p>Name: _____<br/> Address: _____<br/> Map _____ Lot# _____</p>  |
| <p>Name: <u>Michael J. Seaman</u><br/> Address: <u>Lauren M. Desotto</u><br/> <u>168 Northeast Pond Rd. Milton, NH</u><br/> Map <u>23</u> Lot# <u>44-5</u></p>      | <p>Name: <u>Bertram M. &amp; Laura A. Tilton-Chase</u><br/> Address: <u>162 Northeast Pond Rd</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>44-4</u></p> | <p>Name: <u>Thomas R. &amp; Dianne Aubert</u><br/> Address: <u>5 Gary Drive</u><br/> <u>Rochester, NH 03867</u><br/> Map <u>23</u> Lot# <u>10-3</u></p>       |
| <p>Name: <u>Todd C. McLeod</u><br/> Address: <u>12 New Road</u><br/> <u>Haverhill, MA 01830</u><br/> Map <u>23</u> Lot# <u>45</u></p>                               | <p>Name: <u>James M. &amp; Jerra-Marie Sullivan</u><br/> Address: <u>371 Bolan Road</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>46</u></p>             | <p>Name: <u>Joseph H. Stanley</u><br/> Address: <u>PO Box 794</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>47</u></p>                          |
| <p>Name: <u>Federal Nat'l Mortgage Assoc</u><br/> Address: <u>100 N. Tryon Street</u><br/> <u>Charlotte, NH 28202</u><br/> Map <u>23</u> Lot# <u>48</u></p>         | <p>Name: <u>Thomas E. Lamb Living Trust</u><br/> Address: <u>12 Evergreen Drive</u><br/> <u>Merrimack, NH 03054</u><br/> Map <u>23</u> Lot# <u>49</u></p>              | <p>Name: <u>John Tankevich, Jr.</u><br/> Address: <u>PO Box 483</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>50</u></p>                        |
| <p>Name: <u>Arlene S. Bisson Rev Trust</u><br/> Address: <u>344 Bolan Road</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>52</u></p>                   | <p>Name: <u>Palmisano Living Trust</u><br/> Address: <u>340 Bolan Road</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>54</u></p>                          | <p>Name: <u>Brownell Family Rev Trust</u><br/> Address: <u>PO Box 246</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>55</u></p>                  |
| <p>Name: <u>Gallagher Family Rev Trust</u><br/> Address: <u>22 April Drive</u><br/> <u>Nashua, NH 03060</u><br/> Map <u>23</u> Lot# <u>56</u></p>                   | <p>Name: <u>George M. Murray</u><br/> Address: <u>46 Locke Road</u><br/> <u>Chelmsford, MA 01824</u><br/> Map <u>23</u> Lot# <u>57</u></p>                             | <p>Name: <u>Renee Porter &amp; Denise Hudson</u><br/> Address: <u>PO Box 363</u><br/> <u>Milton, NH 03851</u><br/> Map <u>23</u> Lot# <u>58</u></p>           |
| <p>Name: <u>Timothy &amp; Shannon Foy</u><br/> Address: <u>86 Hermon Street</u><br/> <u>Winthrop, MA 02152</u><br/> Map <u>23</u> Lot# <u>59</u></p>                | <p>Name: <u>Stacy &amp; Daniel Venis</u><br/> Address: <u>192 Bay Road</u><br/> <u>Stoughton, MA 02072</u><br/> Map <u>23</u> Lot# <u>60</u></p>                       | <p>Name: <u>Celina M. Hill Rev Trust</u><br/> Address: <u>26 Midway Park</u><br/> <u>Somersworth, NH 03878</u><br/> Map <u>23</u> Lot# <u>61 &amp; 96</u></p> |

## ABUTTERS LIST

|  |  |  |
|--|--|--|
| Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: <u>Debra L. Cuddahy Rev Trust</u><br>Address: <u>14 Rockledge Road</u><br><u>Rochester, NH 03867</u><br><br>Map <u>23</u> Lot# <u>95</u>       | Name: <u>Arthur Greenough</u><br>Address: <u>139 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>97-1</u>         |
| Name: <u>Diane Deblois</u><br>Address: <u>147 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>97-2</u>                  | Name: <u>Michael T. &amp; Cynthia G. Kilkenny</u><br>Address: <u>169 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>97-3</u> | Name: <u>John P. &amp; Jodi B. Oberto</u><br>Address: <u>PO Box 300</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>97-4</u> |
| Name: <u>Kelth M. &amp; Celina L. Downs</u><br>Address: <u>187 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>97-5</u> | Name: <u>Michael &amp; Jennifer Bukowski</u><br>Address: <u>119 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>98</u>        | Name: <u>Gerard Plante</u><br>Address: <u>109 Bolan Road</u><br><u>Milton, NH 03851</u><br><br>Map <u>23</u> Lot# <u>99</u>              |
| Name: <u>Same as applicant</u><br>Address: _____<br><br>Map <u>23</u> Lot# <u>149</u>  | Name: <u>Steven M. Oles, LLC</u><br>Address: <u>PO Box 249</u><br><u>Rochester, NH 03866</u><br><br>Map _____ Lot# _____                             | Name: <u>Marc Jacobs, CSS, CWS</u><br>Address: <u>PO Box 417</u><br><u>Greenland, NH 03840</u><br><br>Map _____ Lot# _____               |
| Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  |
| Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  |
| Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  |
| Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  | Name: _____<br>Address: _____<br><br>Map _____ Lot# _____  |

**NARRATIVE FOR APPEAL OF ADMINISTRATIVE DECISION**  
**TAX MAP 23, LOTS 40 AND 44**

I. Introduction and Factual Background:

Three Pond Investments, LLC (“Applicant”) appeals the decision of the Milton Planning Board, interpreting, applying, and constructing Section VI, Article 9(a) to prohibit structures associated with an open space development from exceeding 35-feet in height from a singular point in the grade to the highest point of the building.

This Appeal of an Administrative Decision arises out of the Planning Board’s February 1, 2021 decision on the Applicant’s June 28, 2021 Application for Site Plan and Application for Major Subdivision (“the Application”). The Applicant’s sought approval for an open space development on Tax Map 23, Lots 40 and 44 to construct six six-unit condominium buildings on a 5-acre portion of the Property, and to reserve the remaining 43.96 acres for open space.

As part of the Application, the Applicant supplied the Planning Board with a series of plan sets for the property. The plan sets submitted in November of 2021 reflected that the Project would retain a 75’ wooded buffer between buildings and abutting properties, will the existing tree line extended well beyond the abutting properties and entering into abutting properties.

The pages of the plan set also reflect the height of the various structures on the Property reflected that, at points, the heights of the structure would range between 34 and 38 feet high. However, at no point would the height of any structure exceed thirty-five feet when looking at average grade to the average roof height.

At a hearing on the Applicant’s Application on December 7, 2021, the Planning Board voted to require the Applicant to revise the Project plans to insert a 100’ wooded buffer. The Planning Board also determined that the Applicant required a conditional use permit from the Planning Board to exceed Article VI, Section 9(a)’s 35-foot height limitation and, after a vote, denied a conditional use permit to exceed the 35-foot height limitation.

Thereafter, the Applicant submitted modified plans for the Planning Board’s consideration, which reconfigured the Project to comply with the Planning Board’s directive to comply with the 100’ buffer. On February 1, 2022, the Planning Board reconvened the hearing on the Applicant’s Application. During the hearing, the Applicant stated that he had “two scenarios to present to the board.” The first scenario would shrink the subject buildings to conform to the 100’ buffer and to “meet the height requirement” in the Zoning Ordinance as interpreted by the Planning Board. The second proposal addressed the Planning Board’s inquiry of whether it was possible to move the buildings elsewhere on the Property, which was limited due to the presence and location of wetlands on the Property. The Applicant’s engineer represented that the proposal “adheres to the 100-foot buffer” and would comply with the height requirement after grading the site.

During the February 1, 2022 hearing, the Applicant expressly addressed the issue of height, noting that while compliance with the height requirement could be achieved through the use of grading and site improvements, the Planning Board could also grant a waiver for a three-foot exceedance on the thirty-five-foot restriction. In support of this position, the Applicant “guaranteed” that the height of the buildings would not exceed the existing tree line. The Applicant’s engineer further explained the methodology used to calculate building height, explaining that, while one portion may exceed 35-feet, the structure on average would be at or below the thirty-five-foot limitation. As the Applicant’s engineer stated, “[w]e can adhere to the 35 feet.”

The Planning Board ultimately voted in the negative on a motion to “give the [Petition] more time to prepare renderings and additional plans and, thereafter, voted in the affirmative to “deny the plan as presented” at the hearing because, in pertinent part, “the plans did not show that the building heights do not exceed 35 feet as per definition in the Zoning Ordinance.”

Further facts will be discussed below.

## II. Grounds for Appeal.

The Planning Board misinterpreted, misconstrued, and misapplied the Zoning Ordinance in four ways. First, the Planning Board erred in determining that the proposed buildings for the Project exceeded the height requirement set forth in Article VI, Section 9(a) of the Zoning Ordinance and, thus, necessitated a conditional use permit. Second, the Planning Board erred in determining that it could not revisit whether to grant a conditional use permit once it had denied a conditional use permit with regard to a prior iteration of the Project plans. Third, the Planning Board erred in refusing to grant a conditional use permit.

Separately, the Planning Board erred when it required the Applicant to design the Project to have a 100’ buffer, instead of the 75’ buffer proposed by the Applicant.

Each point will be addressed in turn.

### A. No Conditional Use Permit was Required

First, the ZBA should overturn the Planning Board’s December 7, 2021 and February 1, 2022 decisions because the Planning Board erred in its application of Article VI, Section 9 of the Zoning Ordinance. The Planning Board erred in its application of Article VI, Section 9(a) because the Planning Board’s interpretation fails to consider the Town’s established and recognized practice for calculating height.

Article VI, Section 9(a) of the Town’s Zoning Ordinance states that “Open Space Developments are subject to the following lot, dimensional, and building separation requirements,” and identifies 35 feet as the height requirement. The Zoning Ordinance contains no definition or methodology for the calculation of height under Article VI, Section 9(a) of the Zoning Ordinance.

Upon information and belief, the Town has a custom and practice of regularly measuring building height in a manner consistent with the 2015 International Building Code. Chapter 2 of the 2015 International Building Code, defines a building's height as "[t]he vertical distance from grade plane to the *average height* of the highest roof surface." (Emphasis added.) "Grade plane" is defined as "a reference plan representing *the average finished ground level* adjoining the building at exterior walls." (Emphasis added.) The International Building Code provides that "[w]hen the finished ground levels slopes away from the exterior walls, the reference plane shall be established by the lowest points within the area between the building and the lot line or, where the lot line is more than 6 feet from the building, between the building and a point 6 feet from the building." Notably, the conclusion that the 2015 International Building Code is supported by the Planning Board's Chair and the Town's Building Inspector, who at a meeting of the Planning Board on September 19, 2019 conceptually discussing the subject open space development, represented that height would be determined by the standards reflected in the International Building Code.

When the Applicant submitted plans for the subject open space development, the Applicant measured height in accordance with the 2015 International Building Code, in accordance with the Town's historic practice and in accordance with the State Building Code. However, when the Planning Board determined that a waiver was required from Article VI, Section 9's 35-foot height restriction, the Planning Board measured height in a manner contrary to that envisioned under the Town's Zoning Ordinance. As such, the Planning Board's determination (and subsequent denial of the Applicant's Application for failure to comply with Article VI, Section 9(a)) was unlawful, unreasonable, and contrary to the meaning and intent of the Zoning Ordinance.

**B. The Planning Board erred in denying the Conditional Use Permit**

Evening assuming, for the sake of argument that the Planning Board's properly determined that a conditional use permit was required to exceed Article VI, Section 9(a)'s height requirement, the Planning Board's decision to deny the conditional use permit to allow for a height exceedance was unlawful, unreasonable, and contrary to Article VI, Section 9(f) of the Zoning Ordinance.

Article VI, Section 9(f) provides that "the Planning Board may authorize variations from [Section 9(a)'s] standards, except for any requirement provided by state regulation or mandated elsewhere in this ordinance, by up to 25 percent by a Conditional Use Permit issued pursuant to Section 5 for the purpose of providing flexibility in the design of the subdivision to meet the objectives of this section."

Article VI, Section 5 authorizes the Planning Board to issue conditional use permits "to modify the requirements" of Article VI when: (1) such modifications are consistent with the purposes and objectives of Article VI, (2) all lots comply with the NH Department of Environmental Services for subsurface wastewater management, (3) the standards fall within the standards contained in Article VI, and (4) the conditional use permit would not be detrimental to public health, safety, or welfare.

The Planning Board's decision on December 7, 2021, initially denying the conditional use permit for the height exceedance makes no application of the above-referenced criteria. The

Planning Board's statement fails to consider that, at most, the Applicant would seek to exceed the height limitation by a measure of three to five feet under the Planning Board's (erroneous) height calculation, and makes no determination as to what criteria the conditional use permit would fail to satisfy.

Presumably, the Planning Board determined that Sections (1) and (4) were not satisfied; however, the evidence in the record does not support those conclusions. For one, as part of this Project, the Applicant has proposed to modify the topography at the building sites to effectively create a "bowl," meaning that the finished grade is going to be substantially lower than the existing conditions on the Property. As such, while the structures may (arguably) exceed 35 feet at certain points from the finished grade, the finished grade will be several feet lower than the current grade. The tree line at the Property is in excess of 35-feet from current grade. Therefore, even if the structures exceeded 35-feet at certain points, due to the change in the finish grade, the proposed structures will be completely screened by view by the existing vegetative buffer. Further, at the time the conditional use permit was denied, the Applicant proposed a 75-foot vegetative buffer, which was subsequently extended to 100-feet, meaning that a full 100' foot vegetative buffer, comprised of mature standing trees would exist to shield the proposed structures from view. This is not including the fact that the Applicant further agreed to paint buildings in a manner to blend in with the environment. Lastly, the Planning Board's conclusions are at odds with the Planning Board's own statements reflecting that the Applicant's Application reflecting a development proposal far superior to a conventional subdivision comprised of eighteen separate, two-acre lots with duplexes.

In light of the above, the facts clearly reflect that the grant of a minor exceedance from the 35-foot height limitation was consistent with the purposes and objectives of Article VI. Moreover, the Planning Board made no finding and the record does not support that the grant of such a minor exceedance would jeopardize public health, safety, or welfare. The Applicant's Application was thoroughly vetted by the Town's selected engineers, and the Applicant accepted and incorporated all but one recommendation (which was related to the material used for curbs).

For these reasons, the Planning Board's decision was unlawful and unreasonable when it denied the conditional use permit for a height exceedance and denied the application for failure to comply with the Planning Board (erroneous) interpretation of Article VI, Section 9(a)'s height requirement.

#### C. The Planning Board Could Revisit whether to Grant a Conditional Use Permit

Lastly, the Planning Board's decision was unlawful with regard to its statement on February 1, 2022, when it declined to revisit the issuance of a conditional use permit to allow an exceedance from the height restrictions for the Applicant's January 2022 Plans.

As reflected above, the Applicant submitted two alternative, modified plans -- one that moved the buildings 25 feet further from adjoining properties and a second that moved two buildings to another location on the 48.99-acre parcel. However, the Planning Board clearly stated that, because it had denied a conditional use permit earlier in the process regarding a prior set of plans and building configuration, it could not revisit that decision.

There is no proposition in law or in the Zoning Ordinance that precludes the consideration for a conditional use permit after the denial of that conditional use permit, but upon a material change to the application. Indeed, in the analogous circumstances of the Fisher Doctrine, a material change in circumstances (which can include a material change in project designs and plans) constitutes a clear basis for a municipal land use board to consider an application for a previously denied land use approval. See generally CBDA Dev v. Town of Thornton, 168 N.H. 715 (2016). However, the Planning Board, without citation to authority or support, simply refused to revisit the matter on February 1, 2022. For that reason, the Planning Board decision was contrary to the law and evidence because the Planning Board failed to apply the criteria set forth in Article VI, Section 5.

For these reasons, the Planning Board's decision was contrary to the law and evidence because the Planning Board failed to apply the criteria set forth in Article VI, Section 5 to the revised plans before it – plans that had been materially revised to address the express concerns of the Planning Board related to distance to abutting properties.

#### D. The Planning Board's Decision to Impose a 100' Buffer

The Planning Board clearly misapplied Article VI, Section 9(h) of the Zoning Ordinance when it voted on December 7, 2021 to establish a 100' wooded buffer.

Article VI, Section 9(h) of the Zoning Ordinance provides:

Landscape Buffer: Depending on the abutting land uses, the Open Space Development may have a buffer of less than 100 feet between abutting land uses and the development and a buffer up to 150 feet but no less than 100 feet between any new structure and an existing public road to retain the community's rural character. The buffer area shall remain free of buildings and whenever possible, the natural vegetation shall remain. The Board may require vegetative plantings to supplement or replace inadequate natural buffers. Only the primary access road may be permitted in the landscape buffer.

The Applicant submitted plans reflecting a 75' wooded buffer from any buildings on the Property and the property lines for abutting properties. The plans submitted by the Petitioner in November of 2021 reflecting the 75' buffer further reflect that the tree line extends far into abutting properties, meaning that, when coupled with the proposed 75' wooded buffer on the Petitioner's Property, there would be a substantial amount of additional vegetative screening under existing conditions.

At the time of the Planning Board's December 7, 2021 decision to require that the Project plans be revised to reflect a 100' wooded buffer, the Town had already been told by the Town's Engineers Gale Engineering on October 4, 2021 that the buildings could not be rotated to achieve a 100-foot buffer. Therefore, the only means by which to establish the 100-foot buffer, while maintaining the yield would be to require extensive re-engineering and reconfiguration of the Project.

The Planning Board, in requiring a 100' buffer on December 7, 2021, made no findings and cited to no evidence in the record for its reasonable to not permit a lesser buffer as authorized and permitted in Article VI, Section 9(h) of the Zoning Ordinance. There is no evidence to suggest that the added 25' of buffer demanded by the Planning Board was necessary to "retain the community's rural character" and the evidence was clear from Gale Engineering that, even with a 55' buffer, the Project "can be built without impacting vegetation on abutting properties" and that "the proposed development will not have adverse effects to lake water quality and residential uses down-gradient."

Based on the evidence in the record (or the lack thereof), the Planning Board's decision to adhere to the 100' buffer was clearly not supported by the evidence and constituted a misapplication of the Zoning Ordinance.

### III. Conclusion:

For the reasons set forth above, the Applicants request that this Board determine that no conditional use permit was required related to the heights of any of the structures associated with the Applicant's Application and that the 75' buffer was sufficient and compliant with Article VI, Section 9(h) of the Zoning Ordinance.

In the alternative, the Applicant's request that the ZBA determine that, if a conditional use permit was required, the Planning Board erred in denying the Applicant's request for a Conditional Use Permit. Lastly, and also in the alternative, the Applicants request that the ZBA determine that the Planning Board could revisit its prior denial of a conditional use permit upon a material change in the project plans.

The Applicant appreciates the ZBA's careful consideration of this matter.