



Stratham Planning Board Meeting Minutes
February 15, 2023
Stratham Municipal Center
Time: 7:00 pm

Members Present: Thomas House, Chair
David Canada, Vice Chair
Mike Houghton, Select Board's Representative
John Kunowski, Regular Member
Nate Allison, Alternate Member

Members Absent: Chris Zaremba, Regular Member

Staff Present: Mark Connors, Town Planner
Cordell Johnston, Town Attorney

1. Call to Order/Roll Call

Mr. House called the meeting to order at 7:00 pm and took roll call. Mr. House appointed Mr. Allison to serve as a voting member due to the absence of Mr. Zaremba.

2. Approval of Minutes

a. February 1, 2023

Mr. Kunowski made a motion to approve the February 1, 2023 meeting minutes. Mr. Canada seconded the motion. All voted in favor and the motion was approved.

3. Public Meeting:

- a. *JP Morgan Chase & Co. (Applicant), NP Stratham, LLC c/o Northstar Centers, LLC (Owners) -- Request for Preliminary Consultation to review a site plan for a proposed 3,322 square-foot bank with drive-through service facilities and associated improvements at 20 Portsmouth Avenue, (Map 4, Lot 14), Zoned Gateway Commercial. Applicant's representative is Bohler Engineering, 352 Turnpike Road, Southborough, MA 01772.***

Mr. House asked Mr. Connors to introduce the project. Mr. Connors indicated that the application pertains to the Parkman Brook Shopping Center at 20 Portsmouth Avenue. This is a preliminary consultation for a proposed bank with drive-through service facilities. The bank is proposed for part of the shopping center parking lot up front closer to Portsmouth Avenue in between the Chipotle Restaurant and the Citizen's Bank ATM facility. This would be a Chase Bank.

Mr. House welcomed the applicants to the meeting and asked for them to describe the proposal.

Randy Miron, senior project engineer for Bohler Engineering, introduced himself as well as Nick Dewhurst, assistant project manager. Mr. Miron displayed proposed plans and architectural elevations for the proposed bank to the Board. He explained the proposed Mr. Miron indicated that they are in the preliminary phases of developing the plans for the bank. They are here tonight to gather additional input from the Planning Board.

Mr. Kunowski inquired about the proposed traffic circulation and access to the bank. Mr. Miron indicated that the bank would utilize the existing site driveway and circulation patterns. Mr. Connors noted it is a state road and NHDOT would require an updated driveway permit. The Town and State will be looking to make sure the driveway is sufficient to handle the additional traffic and that there is adequate site circulation. Mr. Canada inquired why a driveway permit was necessary if there is no new driveway. Mr. Connors noted that it is required when a use is expanded.

Mr. Kunowski inquired if there is enough parking on the site to handle the proposed use. He noted that the bank would take up a significant parking area. Mr. Miron indicated that it was early in the design but that they may request a waiver from fully meeting the parking requirements. Mr. Connors indicated that parking would likely be tight. The Town would likely request a parking study showing that there is adequate parking to serve the facility if a waiver is requested. Mr. Houghton indicated that the parking could be inventoried during the peak hours to show how heavily utilized it is.

Mr. House inquired about the exterior building materials. Mr. Dewhurst indicated that the building would be clad in a mix of clapboard and brick in earth tones. He believes it is similar to some of the neighboring uses, including the Chipotle Restaurant. Mr. House said that the Town required a pitched roofline and you are proposing a mostly flat roofline so the proposal is not consistent with our standards. Mr. House recommended that the applicant review the Gateway architectural standards. Mr. Connors brought up an image of the neighboring Chipotle restaurant. There is a portion of that roofline that is flat but the majority of it, and the most visible side of the building, is a pitched roof line. Also the entrance and windows are oriented to the road -- Portsmouth Avenue. Mr. Houghton indicated that the Town is open to compromise and that many architects have done a good job of incorporating the Town's standards into their proposals.

Mr. House said he hoped the Board's input was helpful and noted that the applicant always had the opportunity to return with a revised preliminary application if that is helpful. Mr. Miron and Mr. Dewhurst thanked the Board and noted they would coordinate with the Town Planner.

- b. *EVgo Services, LLC c/o OWL Services (Applicant), NP Stratham, LLC c/o Northstar Centers, LLC (Owners) -- Request for Expedited Planning Board Approval to permit the replacement of seven parking spaces with six Level 3 electric vehicle charging stations and associated improvements at 20 Portsmouth Avenue (Map 4, Lot 14), Zoned Gateway Commercial. Applicant's representative is WB Engineers + Consultants, 1101 Wootton Parkway, Rockville, MD 20852.***

Mr. House asked Mr. Connors to introduce the project. Mr. Connors noted this was for the same property as the preliminary consultation and that six electric vehicle charging stations are proposed for a portion of the parking lot adjacent to the Citizen's Bank ATM facility and the Planet Fitness. The improvements are proposed for a portion of the existing parking lot so there

would be no loss of parking except for one space. Landscaping is proposed to shield views of the charging station transformer and associated equipment.

Mr. House asked the applicant's representative to come forward. Mike Kappas, representing Oscar W. Larson, Co. stepped forward. Mr. Kappas said he believed the application was reasonably straight-forward but he would be happy to answer any questions of the Board. Mr. House asked if he could explain the proposed equipment for the facilities. Mr. Kappas said there would be a transformer pad surrounded by bollards. There would also be a stepdown transformer and switchgear and three power cabinets. Mr. House inquired about fencing. Mr. Kappas indicated no fencing was proposed. Mr. Kappas noted that landscaping would surround the facilities on three sides and would screen views of the facilities. This was followed by a discussion of features identified on the plans.

Mr. Allison inquired if the 12-foot parking space would be handicap accessible. Mr. Kappas indicated he believed that was the intent. Mr. House noted that there was a proposed condition that the space include handicap signage. Mr. Kappas said that this is a grey area for EV charging spaces as the standards for such are not clear. He is not sure the intent is to limit the space to only handicap users. Mr. Connors noted that signage could be added that the space is available for handicap users but not exclusively limited to such users. Mr. Kappas indicated this would likely be acceptable.

Mr. Kunowski pointed out that the Citizen's Bank ATM facility was not shown on the Existing Conditions plan. He inquired about the state of parking on the site. Mr. Kappas noted this could be corrected. Mr. Houghton noted that EV charging stations are still parking, but just for a different type of vehicle. There was some discussion if the spaces would be limited to electric vehicles or if traditional gas-powered vehicle could occupy them. Mr. Kappas said the intent is for electric vehicles but he did not believe there would be significant enforcement of this. There is a growing need for facilities serving electric vehicles, he said.

Mr. House asked if there were any comments from members of the public.

Jim Joseph, 12 Aberdeen Drive, suggested that the EV charging stations be moved to the side of Planet Fitness. There is parking in that area, he said, but it is less utilized by the public. That would place the EV facility 'out of the way' from the busier highly utilized parts of the shopping center.

No other members of the public provided comments. Mr. Kappas said that they looked at several different areas of the shopping center and indicated this one worked best for several reasons including for providing electric service. Mr. House asked if there was a motion for the application.

Mr. Kunowski made a motion that the Planning Board approve the Expedited Planning Board Review Application for a minor site plan amendment to include the proposed electric vehicle charging station consistent with the designs and plans by EVgo Services LLC and OWL Services, dated February 6, 2023, subject to the following conditions:

- 1. The applicant shall work with the Town Planner to incorporate technical comments into the plans, including corrections to the existing conditions plan, handicap**

accessibility of the larger stall, and height of utility structures. The corrections shall be incorporated before the plans are signed by the Planning Board Chair.

2. Prior to the issuance of a building permit, the owner shall install a missing Stop sign at the site driveway subject to verification of the Town Planner.
3. The site shall be restored to existing conditions within 150 days if operations are discontinued. The owner of the property shall notify the Site Plan Review Authority by certified mail of the proposed date of discontinued operations and include plans for removal.

Mr. Houghton seconded the motion. All voted in favor and the motion was approved.

4. Public Hearing

- b. *Andrew J. Goddard (Owner) – Request for approval of a Site Plan Amendment and Conditional Use Permit to construct an accessory structure housing two residential units and associated improvements to an existing mixed-use site (office and residential) at 94 Portsmouth Avenue (Tax Map 13, Lot 89), Zoned Professional/Residential. Owner’s representative is Emanuel Engineering, Inc., 118 Portsmouth Avenue, Stratham, NH 03885.*

Mr. House announced that he would take this application out of order because the Town received an e-mail this evening from the applicant’s representative requesting that the application be postponed to the Planning Board’s April 5, 2023 meeting.

Mr. Canada made a motion that the Planning Board table the application to the Planning Board’s April 5, 2023 meeting. Mr. Houghton seconded the motion. All voted in favor and the motion was approved.

- a. The Planning Board will hold a public hearing to clarify its decision in the application outlined below previously decided on December 8, 2021. This public hearing is the result of a decision of the Superior Court remanding this case to the Planning Board:

Aberdeen West Cooperative (Owners) - Request for approval of a Conditional Use Permit to construct a medium-scale, 90 kilowatt ground mounted solar array at the Aberdeen West Cooperative, Lovell Road and Aberdeen Drive (Tax Map 19, Lot 36), Zoned Manufactured Housing/Mobile Home District. Owner/Applicant’s representative is Horizons Engineering Inc., 34 School Street, Littleton, NH 03561.

Mr. House announced that he is recusing himself from this matter as he is an abutter. Mr. Canada chaired the hearing. Mr. Canada stated that Mr. Kunowski and Mr. Allison were not board members at the time of the original decision and asked each if they reviewed the materials and were comfortable participating in the discussion and decision. Mr. Kunowski and Mr. Allison confirmed they had reviewed the materials and were comfortable participating.

Mr. Canada asked Mr. Connors to summarize the issues before the Board this evening related to this application. Mr. Connors noted that the Planning Board approved a site plan and conditional use permit for a medium-scale ground mount solar energy system at the Aberdeen West site in December 2021. Two public hearings and a site walk were conducted for the application. The

abutters at 58 Lovell Road filed an appeal of the Planning Board's decision challenging a number of different aspects of the Board's decision. A hearing was held in Rockingham Superior Court in September 2022 and a decision was made by the Court in November 2022. The Court remanded the case back to the Planning Board to clarify two main issues. The first relates to Note 8 of the 1988 site plan approval relating to the conservation restriction. During its original deliberations on this application, the Planning Board received guidance that there were essentially three options available to the Board related to this restriction: 1.) To deny the application on the grounds that the solar panels are not consistent with the conservation restriction; 2.) To approve the application with the interpretation that the panels represent a conservation use consistent with the restriction; or 3.) To amend the condition on the 1988 site plan approval to allow the project to move forward. The Board decided that the project was not prohibited by the 1988 condition because the B. The Board's decision was challenged by the plaintiff. The Court determined that the Board acted unlawfully by interpreting that the conservation restriction could allow for the panels. The Court also noted that the December 2021 decision included a condition of approval that amends the 1988 condition on the plan creating ambiguity in the record. The Court instructed the Board to clarify its intent and leaves open the ability of the Planning Board to amend the condition. The Court referenced a guidance document prepared by the NH Department of Justice and others for amending or terminating conservation easements originally introduced by the Applicant's counsel. Planning staff consulted with the Department of Justice and received a letter from the NH Attorney General's office that the conservation restriction does not constitute a charitable trust issue and therefore does not require review by the Attorney General's office. The decision recommends that the Board review the guidance document to determine if the application is consistent with the principles outlined in the guidance document. Mr. Connors advised the Board that he could stop there for now and the Board could consider the 1988 restriction at this time.

Mr. Canada asked if there were any questions of the Board. Hearing none, he asked if there was a motion to open the public hearing.

Mr. Kunowski made a motion to open the public hearing. Mr. Allison seconded the motion. All voted in favor and the motion was approved.

Mr. Canada asked if the plaintiff in the action would like to speak first.

Eric Maher, attorney with Donahue, Tucker & Ciandella, asked if this discussion was limited to the potential amendment of the condition. Mr. Canada confirmed that it would be.

Mr. Maher spoke on behalf of the abutters at 58 Lovell Road. Mr. Maher spoke to the issue of Condition 8 of the 1988 site plan approval. Mr. Maher agrees that Mr. Connors appropriately advised the Board to analyze whether to amend Condition 8 through the criteria set forth by the guidance document. The guidance document identifies seven criteria by which to measure a request to amend a conservation restriction. The criteria is used to identify whether the proposed amendment is low risk, more risk or high risk. If it is more risk or high risk it requires more scrutiny. If it is high risk, it must go before a probate court judge for modification and approval. Mr. Maher highlighted certain issues. First the amendment must clearly serve the public interest. The proposal is to take land designated as open space as part of the quid pro quo of the cluster subdivision in order to allow for a relaxation of zoning, to allow for a cost savings associated with the layout of infrastructure in a cluster subdivision and return to that designation. What is proposed is to take over 12,000 square feet of open space land and allow it to be used for a solar array to provide electricity to the residents of Aberdeen West Cooperative. Presumably it will result in a

239 decrease in electric consumption from the grid which may reduce the amount of electricity
240 produced by fossil fuel generators and thereby provide positive contribution in combating climate
241 change. Mr. Maher stresses the term “clearly” with regards to public interest and notes that the
242 public interest in this case is attenuated and predicated upon a reduction of energy consumption by
243 the residents of Aberdeen West. They benefit directly by this project. It is not a clear public benefit.
244 It has to go through several iterations and assumptions before a public interest can be gleaned.
245

246 Mr. Maher continued that regarding the proposal must comply with applicable laws including
247 zoning; the zoning ordinance in effect in 1988 and in effect now identifies that open space is
248 intended to be in its natural state without structures. This project is contrary to that by allowing
249 12,000 square feet of structures to be located in land designated as open space. A 50 foot buffer is
250 required to be established around the entirety of open space and this project is proposed within 30
251 feet of the property line and therefore is clearly not within zoning. It may be within zoning as it
252 relates to medium scale solar facilities but as it relates to an open space cluster subdivision, there
253 is a 50 foot natural buffer in which structures are prohibited so this is not consistent with zoning.
254 It is not consistent with the second criteria outlined in the Attorney General’s memo. The AG also
255 considers if the amendment will create a private benefit. This project creates a direct private benefit
256 for the private individuals that reside at Aberdeen West. They are taking the greenspace designated
257 as part of the give and take of the layout of a cluster subdivision and they are appropriating it for
258 their personal reason. Mr. Maher does not contend that a reduction in electricity cost is not a
259 laudable effort but believes that it cannot be seriously contended that there is no direct private
260 benefit.
261

262 Mr. Maher addressed that the project has to be consistent with the purpose of the underlying
263 conservation easement. The Court has determined that the proposed solar array is not consistent
264 with Condition 8. The Court said that Condition 8 requires that the area will be continued to be
265 used for conservation, recreation and park purposes in perpetuity. The Court stated that the array
266 is not an act of conservation. The Court reviewed the 1988 meeting minutes regarding the creation
267 of Condition 8 and stated the meeting minutes do not support a conclusion that the project would
268 be consistent with the intent and purpose of Condition 8. A 2021 memo from the Conservation
269 Commission expressed concern with the precedent being set with open space being used for a
270 separate purpose. Comments from a member of the Heritage Commission and Exeter Squamscott
271 River Advisory Committee were presented that state that open space is intended to remain in a
272 natural state and free from man-made structures.
273

274 Mr. Maher does not agree with comments submitted by Aberdeen West that purports the NH
275 Charitable Trust Division supports the Aberdeen West’s position that this is a permissible
276 amendment. Mr. Maher believes the letter indicates that an amendment is not permissible and
277 provided a description of the decision process for the Charitable Trust in a case in North Hampton.
278

279 Mr. Maher believes this project is a high risk amendment and provided examples of low risk
280 amendments as actions that would strengthen conservation, of more risk amendments where the
281 effect is neutral, and of high risk amendments. Mr. Maher noted that the zoning ordinance requires
282 that open space provide buffers between lots to enhance privacy and aesthetic values. Mr. Maher
283 spoke to the defendant’s argument that the size of the array in proportion to the size of the open
284 space is minimal and pointed to the proximity of the array to the plaintiff’s property.
285

286 Mr. Maher requested that the Board deny any request to amend Condition 8 to allow for the
287 construction of the solar array. Mr. Maher asked if the Board votes to grant the amendment, will

he be able to speak to the Conditional Use Permit criteria. Mr. Canada responded that he would.

Jeannie Oliver, Professor of Law and Staff Attorney at the Vermont Law School Energy Clinic spoke on behalf of Aberdeen West Cooperative. The Attorney General (AG) determined that this is not the type of Conservation Restriction subject to the AG's jurisdiction. It would be an error for the Board to impose the AG's guidelines to this application. The judge misrepresented Aberdeen's reference to the AG's guidelines. Ms. Oliver has stated in all filings that they are of the opinion that this is not a Conservation Easement or a Charitable Trust so the guidelines do not apply. The guidelines were initially referenced in response to the plaintiff's attorney's assumption that conservation easements cannot be amended. Ms. Oliver believes that even Conservation Easements that rise to the level of a Charitable Trust can be amended and that was the purpose of referencing the guidelines. Ms. Oliver will address the guideline principles but reiterates that if they are imposed on this application by the Planning Board, that would be an error of law that they will appeal.

Regarding the public interest and easement holder's mission. The Planning Board would be considered the holder of the restriction. The solar array is consistent with the Town's mission in the Master Plan and Zoning Ordinance and provided examples including protecting against climate change, supporting affordable housing, and the generation of renewable energy. Ms. Oliver believes the judge made an erroneous interpretation of conservation. There is no statute or town regulation that defines conservation. The solar array complies with the Zoning Ordinance and is less than half the allowable size. The second principle identified is compliance with federal, state, and local laws which Ms. Oliver states this project meets. The third principle is that the project does not jeopardize the holder's tax exempt status. This does not apply in this case as it only applies when the holder is a land trust or charitable organization. The fourth principle requires that the amendment must not result in a private benefit. This project has no tax law implications and therefore no private benefit. The fifth principle states that the amendment must be consistent with the conservation purpose and intent of the easement. There is no deeded easement and there is ambiguity as to what conservation means and Ms. Oliver does not agree with the judge's interpretation and noted that the holder and the grantor are in agreement with what conservation means with regards to this project. The sixth principle requires that the amendment be consistent with the documented intent of the donor, grantor, and any direct funding source. The project is consistent with the intent as evidenced by the application. The last principle requires a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement. There is no deeded easement and they can infer the intent of the parties from the meeting minutes that the note was intended to restrict further housing units.

Ms. Oliver notes that conservation is not a static concept and changes as times change. Climate Change is a serious issue and this project will contribute to the community reducing its carbon footprint. It will reduce 80 tons of carbon dioxide emissions. The Master Plan recognizes that Climate Change is a significant issue. Ms. Oliver feels that the amendment is consistent with the Attorney General's guidelines but also that the guidelines do not apply to this project.

Ms. Oliver responded to a couple of comments made by Mr. Maher. The project footprint is not over 12,000 square feet. The structures cover only 7,600 square feet with area in between the rows for a total of 12,000 square feet of disturbed area. There is no public access to the land and therefore the Attorney General has no jurisdiction over the site plan. It completely lacks any of the charitable trust principles. It was not funded by public money and it is private property. Ms. Oliver believes the land in question is common land and not open space and believes the judge erred in referring

to the land as open space.

Mr. Canada asked if anyone else would like to speak to the issue. Hearing none, he requested a motion to close the public hearing.

Mr. Kunowski made a motion to close the public hearing. Mr. Allison seconded the motion. All voted in favor and the motion was approved.

Mr. Canada called for a discussion as to whether the Board would like to leave the conservation restriction language in place or to amend the conservation restriction.

Mr. Houghton said he is inclined to amend the restriction. Renewable energy is consistent with the Master Plan and regarded with high importance. This is an opportunity for a development to take proactive steps to lower their costs consistent with the current focus on climate change and renewable sources of energy. Mr. Houghton feels in reading the 1988 Planning Board Minutes with respect to Note 8, it clearly implies that there was a desire that no additional homes be built vs. this type of development. There is no easement other than the note on the plan and with the changes through time confronting high and rising costs of energy, this is a worthy initiative.

Mr. Kunowski referenced the February 13th letter from the Attorney General's office discussing that there is no formal conservation easement or and stated he is supportive of changing the language around the conservation restriction.

Mr. Allison believes it is a matter of strictly changing language as there is really no easement in place. He presumes that since there is no easement and based on the public testimony at the time, there was a desire to make sure there would be no additional building units constructed. The language was presumably standard language put in place to protect against future living structures and increasing the density of the site. Mr. Allison is inclined to amend the language so it is consistent with a more contemporary condition that would be part of the Planning Board process.

Mr. Canada indicated he believes the project is worthy of amending Note 8 of the site plan. The Planning Board can also discuss the appropriateness of granting the Conditional Use Permit later. The Attorney General's opinion clearly seems to indicate that although there is not a Charitable Trust involved, the Court is remanding this back to us for the Planning Board to review the Attorney General's criteria so let's go through that process.

Criteria 1: Clearly serve the public interest and be consistent with the easement holder's mission.

Mr. Canada would like to hear concrete reasons why or why not this criteria is satisfied. Mr. Houghton stated that the project meets the public interest in that it reduces carbon footprint and on a macro scale it contributes to the reduction of energy costs and does not obstruct the interest of the Planning Board decision with respect to the addition of homes. Mr. Kunowski agrees with Mr. Houghton's comments. While the benefit initially is for the Aberdeen West community, each successive solar opportunity in the town has an additive effect for the community as a whole. He is supportive of continuing to reinforce the Town's commitment to renewable energy. Mr. Allison agrees with Mr. Kunowski's remarks and adds that solar arrays are important enough in town to be included in a special section in the zoning ordinance.

Criteria 2: Comply with all applicable federal, state, and local laws.

Mr. Canada notes there has been no indication or allegations that the project violates federal or state laws but that Mr. Maher commented that the project violates the local ordinance. Mr. Canada requests comments from the Board on that. Mr. Canada commented that this is part of the zoning process and since the Planning Board is discussing the project, it is not contrary to local laws.

Criteria 3. Not jeopardize the holder's tax exempt status or status as a charitable organization under either federal or state law (if the holder is a land trust or other charitable organization).

Mr. Canada commented that Ms. Oliver addressed this. The Planning Board is the easement holder and is not in danger of losing their tax exempt status. Mr. Kunowski added that without a recorded easement, this principle does not apply.

Criteria 4. Not result in "private inurement" or confer impermissible "private benefit" (as those terms are defined for federal tax law purposes and N.H. RSA 7:19-a).

These laws pertain to non-profits and charitable trusts and to prevent directors of charitable organizations from rewarding themselves for good work. Mr. Canada does not think this is applicable to this project

Criteria 5: Be consistent with the conservation purpose(s) and intent of the easement.

Mr. Houghton believes the project is within the intent of the easement. It is still space that is usable for recreational purposes for walking and it is consistent with the intent that there would not be additional homes built. It advances conservation principles by supporting renewable sources of energy.

Criteria 6: Be consistent with the documented intent of the donor, grantor, and any direct financing source.

Mr. Canada stated that the donor is Aberdeen and it is consistent with their purpose. There was no direct funding source.

Criteria 7: Have a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement.

Mr. Canada commented that the project has a neutral effect on conservation values. The project promotes water recharge and small animal and bird habitat. Mr. Kunowski stated that the intended conservation or open space use is not impacted or has a neutral effect.

Mr. Kunowski made a motion that the Planning Board amend the condition placed on the Aberdeen West's plans restricting further development of the site and memorialized as Note 8 on the site plan approved by the Board on May 25, 1988 to permit the installation of a 90 kilowatt ground mounted solar energy system consistent with the application and materials submitted by the Aberdeen West Cooperative including the plans by Horizons Engineering last revised February 14, 2023. The Board finds that the amendment comports with the guidance provided by the New Hampshire Department Justice and Society for the Protection of New Hampshire Forests as reflected in the Board's deliberations. Mr. Allison seconded the motion. All voted in favor and the motion was approved.

The Planning Board considered the Conditional Use Permit (CUP) Application. Mr. Canada stated that the judge remanded back two aspects of the CUP criteria. Mr. Connors spoke to this requirement. As part of the appeal, the Planning Board's approval of the Conditional Use Permit was also challenged by the plaintiff. The Court found that the Planning Board was deficient in at least providing a full record on two criteria of the CUP. There are 11 criteria required to grant a CUP and the Board does not need to go through all of them. However, in order to grant the CUP, the Board must find the application meets all 11 criteria. If the Board finds that the project fails on just one of the criteria, the application must be denied. The two criteria that the judge cited included Criterion IV related to external impacts [this language is included on Page 13 of the Minutes]. Mr. Connors read the Criterion language from the Zoning Ordinance into the record. Mr. Connors noted that when this originally was before the Planning Board, a Board member made a comment that the use is permitted in the zone therefore this criteria is met. The judge noted that the use is not permitted in the zone and is only permitted by CUP, so the Board can't use that logic to find the application meets that Criterion. Mr. Connors said it may be helpful for the Board to evaluate permitted uses in the zone so that is provided for your review.

The second criterion the Board will have to consider relates to the character of buildings and structures; that is Criterion VI. Mr. Connors read the Criterion language from the Zoning Ordinance into the record [this language is included on Page 12 of the Minutes]. Mr. Connors recommends reopening the public hearing to discuss each criterion and to take a roll call of each board member's position on both of the criteria.

Mr. Kunowski made a motion to open the public hearing. Mr. Houghton seconded the motion. All voted in favor and the motion was approved.

Ms. Oliver spoke on behalf of Aberdeen West Cooperative. Regarding both criteria, when the Planning Board made its decision in November 2021 there was ample evidence on the record to support the Planning Board's decision. The deficiency noted by the Court was that the Planning Board did not cite sufficiently to the record to support the decision. With respect to the external impacts criterion, in regard to traffic, that will be limited to the installation phase and will be no greater than building a residential home, mobile home, or other permitted uses in the zone. This project will produce no noise once installed. Any noise produced during the installation process will be of very limited duration during working hours and would be less than the noise associated with building a new home. There will be no odors, vibrations, dust, or fumes and no external lighting or glare. Regarding the location, height, and scale, this installation is 8 feet tall and is of similar height to a shed, is much smaller height than surrounding homes, is smaller than the mobile homes. In terms of mass, the panels consist of steel posts driven into the ground with solar panels on top and there is no mass to these projects compared to a home. The location is intended to minimize impacts to wetlands and hydric soils on the parcel so this is the only feasible location. The project requires no tree clearing and there is a landscaping plan to mitigate visual impacts.

Ms. Oliver spoke to the next criteria regarding compatibility with surrounding neighborhood. The structure is 8 feet tall which is similar to a shed. They are smaller than residential structures and contain no foundation. Solar was added to the zoning ordinance recently so this is an emerging land use in the Town of Stratham. This project is similar in size and scope to the Stratham Green solar project which is in the Residential/Agricultural Zone. The R/A Zone has similar permitted uses to the Manufactured Home Zone. This was all considered by the Planning Board previously, the judge was not satisfied that the Planning Board did not adequately record its reasoning in the decision.

Mr. Allison commented an observation related to the scale of the surroundings, this particular location [proposed for the solar panels] is about 2 feet lower than the road in elevation, so the 8 foot height would be viewed closer to 6 or 5 ½ feet as viewed from the road.

Mr. Maher spoke on behalf of the abutters at 58 Lovell Road. Ms. Oliver stated that the solar array will not emit noise, however the materials submitted by the Applicant state that the arrays would not be audible from 50 to 100 feet of the boundary of the array. However, the array is located within 30 feet of the property line in an area that would be audible. The typical sound associated with solar arrays is a persistent humming during energy generation. This is unlike other uses, like the construction of a home, because it will be during the entirety of operation. The abutter is concerned that this will create noise that will be constant and persistent.

Mr. Canada asked if there has been a study conducted on noise from solar arrays. He noted that he has solar panels on his roof that he does not hear. Mr. Maher responded that this comes from the Applicant's materials which suggest that a sound study can be conducted and explained how a sound study is conducted. Mr. Maher also stated that the few number of panels on a roof vs. this ground mount system might affect the amount of noise emitted.

Mr. Maher spoke regarding the impact on the surrounding neighborhood. He presented an aerial photograph showing the general nature and character of the neighborhood is residential with a large amount of greenspace and forested space. There are no ground mounted solar arrays in the area. At this scale and in this location it will be more akin to a quasi-industrial use. It is not a shed, it is much larger. The massing of steel and solar panels is atypical for the neighborhood. This is not like a house or a mobile home park, it is not like anything consistent with a residential neighborhood or within 30 feet of a house. Although there is a 2 foot drop in elevation from the road, there is not a significant change in relation to the abutter's property. It is largely on grade and there are no mature trees onsite to shield so this is completely dependent on the implementation of the landscape plan. Mr. Maher believes the proposed plan is deficient and presented a proposed plan for another project that is significantly more detailed for a project that is more than 200 feet from the nearest property line and 375 feet from the nearest residence. Mr. Maher described the example plan that envisions three canopy trees and five understory trees per 100 linear feet of buffer and prescribes the minimum height and caliper of trees at planting and maturity along with additional shrubs. Mr. Canada commented that the proposed landscape plan for this project will be discussed at a later point in the meeting and questioned if Mr. Maher should hold his comments until that time. Mr. Maher responded that he is addressing if the satisfaction of the criteria based on the landscape plan currently proposed. Mr. Maher asserts that the criteria are not met because the submitted landscape plan is deficient. Mr. Canada requested that this discussion be held until the Planning Board approves the Conditional Use Permit. Mr. Johnston advised that he understands Mr. Maher's point and clarified it for the Board.

Mr. Maher continued to compare the proposed plan for the subject project vs. the example provided in appraisal in the application. Mr. Maher noted the aforementioned appraisal states that landscaping around solar farms tends to follow a trend of larger plants the closer the project is to existing homes. Screens will vary depending on adjoining uses, but will typically start at 4 to 6 feet in height at the time of planting and often times will have an understory of a row of shrubs along visible corridors. Mr. Maher continued to describe the details of a landscape plan for residential solar arrays and asserts that the Aberdeen West plan does not provide sufficient visual and audible screening. Mr. Maher requests further guidance from the Planning Board on the required screening. He noted that when the Planning Board previously approved this, it required

the landscape plan be resubmitted to the satisfaction of the Town Planner, but I believe more guidance needs to be provided by the Board so my clients' rights are protected.

Mr. Allison asked if he could comment on the landscape plan Mr. Maher presented. Mr. Maher confirmed. Mr. Allison noted that the plan provided is for a major, major solar farm, and according to the scale on the bottom of the plan the project is perhaps 600 or 700 feet in extent. It is a much denser and taller configuration of solar panels than what is proposed here. Mr. Allison noted this project you have provided is not in scale with the application before us and is not a good comparison. Mr. Maher responded that the actual project was less than what was originally proposed and the vantage point of the abutter is important in each project. The Aberdeen project is much closer to the property line than that example and Mr. Maher reminds the board that this example was submitted by Aberdeen West in support of their own project and if a suitable buffer is not approved, then the two criteria in question cannot be met.

Mr. Houghton asked for clarification of Mr. Maher's comments regarding the proposed location of the panels "30 feet from the house". Mr. Maher confirmed Mr. Houghton's measurements that the abutter's residence is about 90 feet from the solar array.

Mr. Kunowski made a motion to close the public hearing. Mr. Allison seconded the motion. All voted in favor and the motion was approved.

Mr. Canada read Criterion VI of the Conditional Use Permit regarding the character of the buildings and structures: *The design of any new buildings or structures and the modification of existing buildings or structures on the site shall not be incompatible with the established character of the neighborhood. This shall include, but not be limited to, the scale, height, and massing of the building or structure, the roof line, the architectural treatment of the front or street elevation, the location of the principal entrance, and the material and colors proposed to be used.*

Mr. Canada requested comments from the Board as to whether or not the project meets that criterion.

Mr. Kunowski stated that in the Ordinance, public utilities are allowed in the Mobile Home District subject to site plan use and a conditional use permit, therefore this is an allowed use in the district. Mr. Canada stated that the judge did not agree with that argument since utilities are only permitted by conditional use permit.

Mr. Houghton stated that with regard to the aerial photo submitted by the abutter's attorney of the neighborhood, I would submit that five years from now the neighborhood will look very different as the Town has seen [greater interest in solar facilities] in just the last two years. Mr. Houghton said that when he thinks about this project in terms of its size, scale, massing, architectural lines, street elevations, and so forth, it is not imposing with respect to other structures in proximity to this area. It is representative of the heights, lines, and scales of buildings present so he does not see it as inconsistent from that perspective.

Mr. Canada stated that the project is a utility and utilities are required to be in place for us to live the lives we do. The streets are lined up and down with poles and wires bringing electricity to the properties. Although this utility is a different shape than what is there currently, it does fit in with the character of the neighborhood. The size, scale, and massing is diminutive compared to the housing that is there and what is permitted there. Mr. Canada believes it meets this criteria.

Mr. Canada requested a straw poll of each board member's position on Criterion VI of the conditional use permit. All members stated that the project meets Criterion VI.

Mr. Canada read Criterion IV of the Conditional Use Permit regarding external impacts: *The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare. In addition, the location, nature, design, and height of the structure and its appurtenances, its scale with reference to its surroundings, and the nature and intensity of the use, shall not have an adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.*

Mr. Canada requested comments from the Board as to whether or not the project meets the criterion.

Mr. Allison reiterated his previous statement regarding the elevation of the solar array being lower than the road. The audible vibrations are new information to Mr. Allison but the remaining items are not an issue and therefore believes the external impacts insignificant. Mr. Kunowski stated the noise discussion was new information to him as well, but that as a whole, the project meets Criterion IV and the landscaping plan is critical to addressing any negative impact. Mr. Houghton does not see that the external impacts from this project as more adversely impacted than if another structure was put there and in some instances it is less so. Mr. Canada does not see the project as adverse to the neighborhood and commented that the ordinance describes traffic, noise, odors, vibrations, dust, fumes, hours of operation, exterior lighting and glare and believes that this project would generate less of those items than a house. He provided examples of houses generating impacts (e.g. barking dogs, lights, noise, activity, agriculture) and noted that the solar array is static and believes that the project meets Criterion IV.

Mr. Canada requested a straw poll of each board member's position on Criterion IV of the conditional use permit. All members stated that the project meets Criterion IV.

Mr. Canada requested a discussion of the proposed landscape plan. Mr. Houghton believes more could be proposed on the landscape plan to help address the audible issues that were represented as well as the visual impact. Mr. Connors presented to the Board a revised landscape plan submitted by the Applicant dated February 14, 2023. The previous plan had 28 plantings and the new plan has 31.

Mr. Kunowski made a motion to open the public hearing. Mr. Canada seconded the motion. All voted in favor and the motion was approved.

Ms. Oliver stated that the plan was updated in response to Condition 3 of the Planning Board decision and the new plan reflects additional trees in the temporary access road area and on the western side of the array. Ms. Oliver notes that the Planning Board is bound by the provisions of the zoning ordinance that apply to medium-scale solar arrays. The ordinance exempts medium scale arrays from full compliance with site plan review regulations as opposed to large scale solar arrays. The applicable design standards for a medium scale solar array require reasonable efforts as determined by the Planning Board shall be made to minimize visual impacts. Ms. Oliver notes that the standard is not to eliminate but to take reasonable efforts to screen. She does not agree that it is appropriate to apply standards for plans approved in other towns or states. Ms. Oliver described

the details of the landscape plan and the tolerance and size of the plantings at planting and maturity. She reiterates that the Zoning Ordinance does not require the elimination of impacts and offers that the abutter can also supplement the plantings in their own property which currently does not have a tree line.

Mr. Houghton requested clarification on where on the plan the size of the plantings is noted and where will the responsibility be noted to ensure the health and maintenance of the plantings. Mr. Connors responded that he prepared a draft motion with a condition that requires the owner provide to the Town a security for the landscaping. Once installed, the Town can release the security up to 90% and the Town retains 10% for one year. Mr. Canada asked if there is obligation to replace dead trees in the future. Mr. Connors confirmed. Mr. Houghton asked if that requirement should be stated in the plan. Mr. Connors agreed that a note should be added that the owner is required to maintain the landscaping per the plan. Ms. Oliver agreed.

Mr. Maher expressed concern with the singular row of trees that will take 10 to 20 years to reach maturity and the width to create a visual buffer. The Applicant submitted buffer examples used by of other solar array projects and submitted materials that the closer to a residential property the more likely a double row of trees is needed as well as shrubbery and understory in order to create a more reasonable visual barrier. Mr. Maher contends that the Applicant previously agreed to multiple rows of trees, not zig zagging of trees and that the number of trees was not sufficient. While the increase of plantings in the new plan is appreciated, it is respectfully not enough because there is not enough to fill in the 8 to 9 foot gaps between the trees in the first 10 to 20 years. Mr. Maher notes that a cluster subdivision requires a 50 feet vegetative buffer for screening purposes. Aberdeen West Cooperative is a manufactured housing development approved as a cluster subdivision. The array is proposed within 30 feet of the property line without robust screening and Mr. Maher does not believe it is consistent with the Zoning Ordinance.

Mr. Canada asked what Mr. Maher would suggest for screening. Mr. Maher responded another row of trees located in a staggered manner as well as a requirement to provide an understory. Mr. Maher submitted a proposed condition to address that issue. He notes that the screen proposed for an electric charging station in a commercial district in Stratham where the nearest use is a parking lot has a more effective visual screen than what is proposed for this project.

Ms. Oliver stated that Aberdeen West was not approved as a cluster development subdivision and it predates those provisions of the zoning ordinance. Mr. Connors responded that this was questioned in the past and it is unclear how the Board approved Aberdeen West. Ms. Oliver also clarified that the documentation provided by Aberdeen West as property value studies were improperly cited by Mr. Maher as landscape examples. Ms. Oliver believes the request for two rows of plantings plus understory plantings goes beyond what is reasonable for this project.

Mr. Maher commented that an Applicant cannot submit materials to a Board and then dictate how those materials are used. It is the Board's responsibility to determine what is reasonable and he believes the abutter's request is reasonable and gave examples of the views from the abutting property and reiterated that the area was designated as open space on the approved site plan.

Jim Joseph of 12 Aberdeen Way, President of the Aberdeen West Cooperative, spoke regarding the financial constraints they are under for this project due to grants from the Public Utilities Commission. Aberdeen West has already contributed from their own finances to the landscape plan. They are a community of elderly, low income people and cannot continue to contribute

financially to this project.

Mr. Kunowski made a motion to close the public hearing. Mr. Allison seconded the motion. All voted in favor and the motion was approved.

Mr. Connors noted that the landscape plan was not an issue remanded to the Board but that the Court determined it would revisit this if a future appeal was filed. The existing condition allowed the Town Planner to approve changes to the plan. Mr. Connors asked Mr. Maher if his request is that landscape plan revisions be approved by the Planning Board in a public hearing. Mr. Maher confirmed that would be ideal or at least that further guidance be provided to the Town Planner as to what is a satisfactory landscape plan if the decision will remain with the Town Planner. Mr. Canada stated that the question is who will make the decision. Mr. Connors replied that the safest course of action is that if the Board wants to revise the plan, then the decision should be made by the Planning Board in a public hearing.

Mr. Canada asked the Board if they want to revise the landscape plan. Mr. Houghton would like to see the landscape plan revised. He believes a double row of trees abutting the property line facing the house is warranted. There is an impact that merits being addressed more aggressively than currently proposed and he would like to see the landscape plan expanded.

Mr. Canada and Mr. Houghton debated the pros and cons of a second row of trees.

Mr. Kunowski stated the Applicant can do more with the landscaping plan, but that the abutter might be asking for a lot and wonders if they can reach a compromise. He agrees that a new plan and a public hearing are warranted.

Mr. Allison has concern about the Planning Board designing landscape plans. He discussed the tolerance of the proposed plantings. He understands the concept of a second row and discussed the tolerance of the variety chosen. He stated a plan with a variety of species would be desirable but does not agree that an understory is reasonable. He qualified those opinions that they are designing landscaping which the Board should not be doing. He believes the plan was submitted with good intent, but would be more comfortable if the plan was created by a landscape architect.

Mr. Canada summarized that it seems to be the consensus of the Board that the Applicant submit a revised plan for the Board to review. He asked Mr. Connors if the Board can approve the Conditional Use Permit with the requirement that the Applicant return with a revised plan. Mr. Connors believes that can happen and that the site plan could not be signed until the landscape plan is approved.

Mr. Canada asked when construction is proposed to begin. Ms. Oliver said construction would not begin until after they have received final approval from the Planning Board.

Mr. Connors suggested two options: postponement or to approve the CUP with the condition that the Applicant return for a public hearing to review a revised landscape plan. Mr. Johnston agreed with the choices.

Mr. Houghton suggested the Board approve the Conditional Use Permit as it relates to the revisiting of Item 4 and Item 6 with the consideration that the Applicant come back and submit a revised landscaping plan to be approved at a future meeting by the Planning Board.

729 Mr. Connors presented proposed language: “Prior to Planning Board signature and within sixty
730 (60) days of this approval, the Applicant shall prepare a revised landscape plan consistent with the
731 Planning Board’s deliberations to be reviewed in the public hearing. The costs to hold the public
732 hearing shall be borne by the Applicant.”
733

734 Mr. Canada and Mr. Connors discussed the date of the hearing and determined that if a meeting
735 date is set tonight, then public notice would not be required. Mr. Connors asked the Applicant to
736 provide a reasonable amount of time. Ms. Oliver responded that the April 5, 2023 meeting would
737 be reasonable. Mr. Maher responded that his concern is that he has 30 days to file an appeal in
738 Superior Court and his decision to file an appeal may be dependent on the outcome of the planting
739 plan issue. From a procedural and cost standpoint, he prefers to defer making a decision this
740 evening and wait for the Applicant to submit a new plan. If a decision is made tonight, the deadline
741 for an appeal is within 30 days of tonight. Mr. Johnston agreed with Mr. Maher’s comments on the
742 timeline and explained the options to the Town – approve the CUP now subject to the abutter
743 appealing the decision within 30 days from tonight, or delay the decision for 60 days allowing the
744 abutters’ time to review the revised plan and perhaps approve of it. Mr. Johnston noted that the net
745 effect is the same if they continue the hearing and don’t issue the CUP approval now.
746

747 Ms. Oliver agreed to postpone the hearing until April 5, 2023 on the condition that the purpose of
748 the hearing is to discuss a revised landscaping plan and not to revisit the issues discussed this
749 evening.
750

751 **Mr. Kunowski made a motion to postpone for consideration the Planning Board approval of**
752 **the Conditional Use Permit and Site Plan until April 5, 2023 when a revised landscape plan**
753 **will be reviewed. Mr. Allison seconded the motion. All voted in favor and the motion was**
754 **approved.**
755

756 Mr. House returned to chair the meeting. He asked if there was any additional business before the Board.
757 Hearing none, he asked for a motion to adjourn.
758

759 **Mr. Kunowski made a motion to adjourn the meeting at 9:48 pm. Mr. Allison seconded the motion.**
760 **All voted in favor and the motion was approved.**
761