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**TOWN OF NEEDHAM
MASSACHUSETTS
BOARD OF APPEALS**

***Appeal of Building Inspector Decision
DENIED***

***Holly Clarke, Gregg Darish, Robert DiMase, Matthew & Nicole Heideman, Carl
Jonasson, Ann & Peter Lyons, and Eileen Sullivan, Appellants***

Needham Enterprises, LLC, Owner

***1688 Central Avenue
Building Permit #BC-23-10079
Map 213, Page 199***

Appeal filed October 19, 2023

Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Ann and Peter Lyons, and Eileen Sullivan, appellants, applied to the Board of Appeals for an Appeal of Building Inspector Decision ("ABID") of Building Permit #BC-23-10079 ("Building Permit") issued to Matthew Borrelli and Needham Enterprises, LLC ("Owner") dated September 19, 2023, for the construction of a childcare facility at 1688 Central Avenue. The ABID asserts that the Building Permit plans on file do not demonstrate that the construction, alteration or use as proposed complies with the Zoning By-Law ("By-Law") as limited by the Dover Amendment, M.G.L. c. 40A, Section 3. The property is located at 1688 Central Avenue, Needham, MA in the Single-Residence A (SRA) Zoning District. A hybrid public hearing was held in person in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham, MA, on Thursday, November 16, 2023 at 7:45 p.m. and livestreamed on Zoom ID number 869-6475-7241 and continued on December 14, 2023. The Board closed the public hearing on December 14, 2023, and deliberated that night and on January 18, 2024.

Documents of Record:

- 1688 Central Avenue, Notice of Appeal Building Permit #BC-23-10079 prepared by C. Dylan Sanders, Beveridge & Diamond, Clerk stamped October 19, 2023.
- Application for Hearing, Clerk stamped October 23, 2023.

- 1688 Central Avenue, Major Project Site Plan Review Decision, Planning Board, March 1, 2022.
- *Needham Enterprises, LLC v. Needham Planning Board*, Land Court No. 22MISC000158 (JSDR), Memorandum of Decision, Commonwealth of Massachusetts, Land Court, Department of the Trial Court, dated August 15, 2023.
- Letter with Exhibits 1-4 from Evans Huber, Frieze Cramer Rosen & Huber, dated November 13, 2023.
- Erosion Control Plans prepared by Glosa Engineering, Inc., stamped by Registered Engineer, dated November 9, 2023.
- Memorandum with Exhibits 1-20 from Appellants submitted November 13, 2023.
- Letter from Joe Prondak, Building Commissioner, dated November 8, 2023.
- Letter from Planning Board, prepared by Lee Newman, Director Planning and Community Development, January 4, 2022.
- Email from Tara Gurge, Assistant Public Health Director, November 7, 2023.
- Emails from Chief Tom Conroy, Fire Department, November 7, 2023.
- Letter from Thomas A. Ryder, Town Engineer, dated November 8, 2023 and email dated November 15, 2023.
- Email from Kimberly Grasso, November 7, 2023.
- Email from Joe Abruzese, November 11, 2023.
- Email from Robert Dimase, November 11, 2023.
- Email from Alan Langsner, November 13, 2023.
- Email from Patricia Falcao, November 13, 2023.
- Email from Leon Shaigorodsky, November 12, 2023.
- Email from Meredith Fried, November 13, 2023.
- Letter from Evan Gold and Sharon Cohen Gold, November 13, 2023.
- Email from Karen Langsner, November 13, 2023.
- Email from Robert Onofrey, November 14, 2023.
- Email from Andrea Dannenberg, November 14, 2023.
- Email from Norman MacLeod, November 13, 2023.
- Email from Stanley Keller, November 14, 2023.
- Email from Mike Grasso, November 15, 2023.
- Email from Randy Hammer, November 15, 2023.
- Email from Sally McKechnie, November 15, 2023.
- Email from Robert Dimase, November 16, 2023.
- Email from Dustin Pevear, November 16, 2023.
- Choose Safe Places for Early Care and Education Guidance Manual, April 2017.
- GIS Views of Property 1999, 2009, 2011-12, 2013, 2019.
- Transcript *Needham Enterprises, LLC vs. Needham Planning Board*, et al., Status Conference before the Honorable Jennifer S. D. Roberts, August 22, 2023.
- Email from Timothy McDonald, Director, Needham Department of Health and Human Services, December 4, 2023.
- List of Pertinent Cases, provided by C. Dylan Sanders, December 9, 2023.
- Letter with Exhibits A-D from Sarah A. Turano-Flores, Nutter McClennen & Fish LLP, dated December 12, 2023.

- Email from Michael Connelly, December 8, 2023.
- Email from Alan Langsner, December 12, 2023.
- Email from Meredith Fried, December 12, 2023.
- Letter from Margaret Abruzese, December 13, 2023.
- Abutters' Requests for Rulings and Decision from the ZBA, distributed at the meeting of December 14, 2023 (undated).

The Public Hearing

1. November 16, 2023

Prior to opening of the Public Hearing on November 16, 2023, Jonathan D. Tamkin, Chair, recused himself and designated Mr. Goldman to chair the hearing and appointed Mr. Friedenberg and Ms. Elzon to serve as the members on this appeal. Mr. Tamkin left the meeting and premises at 7:35 p.m.

Mr. Goldman opened the hearing at 7:45 p.m. by reading the public notice.

a. Appellants' Presentation

C. Dylan Sanders, the attorney representing the Appellants, noted he represented nine individuals composed of seven families. He identified that all the Appellants are direct abutters or neighbors to the property. He acknowledged that the Appellants agree that a childcare facility can be built in this residential area. Their objections are to the issuance of the Building Permit, the design, the siting and the bulk of the proposed project in their residential neighborhood. He noted that the neighborhood had concerns about the Planning Board's Site Plan Review Decision but did not appeal that decision pursuant to M.G.L. c.40A, §17. They felt the conditions imposed by the Planning Board protected the neighborhood.

Mr. Sanders reported that the Appellants are appealing the Building Inspector's Decision based on the following:

- The issuance of the Building Permit is premature as the project is still the subject of a judicial appeal. The neighbors' appeal is pending in the Appeals Court. The decision on this appeal may result in a retrial of the Owner's appeal of the Planning Board's Site Plan Review Decision and may affirm the Planning Board's Decision with all or some of the conditions.
- By virtue of the Land Court's decision in this case, the project does not have a Site Plan Approval from the Planning Board as required by the By-Law.
- The Land Court in its decision did not say that the Owner is entitled to a building permit. He may apply for one.
- The project proposes two non-residential buildings on the lot (including the existing 4,800 square foot barn) in violation of Section 3.2.1 of the By-Law.
- The Building Permit did not include a stormwater management plan and erosion control plan required by Section 5.3.2 of the By-Law. Mr. Sanders acknowledged that both plans have since been filed. He argued they were insufficient to protect the neighborhood both

during construction and during the future childcare operation.

- No landscape plan to provide an at least 25-foot-wide landscape transition area and screening between an institutional use and a residential use was submitted as required by Section 4.2.14 of the By-Law.
- There are environmental concerns regarding potential releases of hazardous materials associated with the prior uses at the site which included an excavation company, refuse yard, race cars assembly and repairs, and a landscaping company. The Health Department had requested a licensed site professional (“LSP”) be engaged to assess the site and provide a report. Mr. Sanders requested that the conditions established in the Site Plan Review Decision relating to environmental assessment of the site be included as part of an amended Building Permit if the Board denies this ABID.
- The Planning Board included in the Site Plan Review Decision conditions relating to the requirement of Section 5.3.5 of the By-Law regarding traffic studies and mitigation plans and these should be included as part of an amended Building Permit. He felt it would be easy to incorporate these into an amended Building Permit as the Owner was agreeable to these conditions in the Site Plan Review process.
- The Planning Board included in the Site Plan Review Decision conditions relating to the requirements of Section 5.3.4 of the By-Law regarding lighting mitigation measures which should be included in an amended Building Permit if the Building Permit is upheld.

Mr. Sanders said that the project would negatively affect the neighborhood due to the additional traffic generated by the project on an already busy street; the lack of soil and erosion mitigation plan; no conditions to address the environmental concerns during and post construction; the small front setback; the allowance of a second non-residential structure on the lot; and the Building Inspector issuing a Building Permit on a project that is currently under appeal.

b. Building Commissioner’s Presentation

Joe Prondak, Building Commissioner, reported that he issued a Building Permit based on the following and in consultation with Town Counsel:

- It is not the Town’s responsibility to curtail the Owner from building the project due to a pending appeal of a Land Court judgment. The Owner is proceeding at his own risk should the appeal prevail.
- The Owner did go through a Site Plan Review process as required by the Town By-Law. The Planning Board’s Site Plan Review Decision was appealed and annulled by the Land Court.
- The Owner has been made aware that the barn can only be used as accessory to the childcare facility. The childcare use is protected by the Dover Amendment and is permissible in the residential zone, and as such it is entitled to an accessory use. If the Owner were to use the structure for anything other than accessory to childcare, they would be in violation of the By-Law and the Building Department has authority and remedies to cure that violation. Mr. Friedenbergl asked what the mechanism for enforcement was if there was a violation of the accessory use limitation in the future. Mr. Prondak stated he had the enforcement authority relative to such a violation with a

process in place to bring the violation into compliance.

- The Owner submitted a Stormwater Management Plan as required under the Stormwater By-Law which showed drainage and significant underground storage in the parking area and hard surface areas of the project. The primary purpose of the Stormwater By Law is to protect the Charles River from stormwater discharge as mandated by the federal Clean Water Act, not to protect adjoining properties. However, based on the plan there should not be runoff to the adjacent properties because of this project.
- The Landscape Plan required under the By-Law cannot be required under the Dover Amendment. The Dover Amendment only allows for reasonable regulation pertaining to bulk, height, yard size, lot area, setbacks, open space, parking and building coverage. Open space is not tied to landscaping. Open space refers to non-built areas. Mr. Goldman asked the Building Commissioner what his rationale was for determining that landscape was different than open space. Mr. Prondak responded that open space is an area that does not contain a building, which is different from landscaped area. The By-Law is silent on the definition of open space.
- There is no Building Department jurisdictional regulation pertaining to environmental contamination. This is the purview of the Health Department. They reviewed this issue and their concerns were addressed in a condition of the Site Plan Review Decision, and that condition is no longer effective following the Land Court case. Mr. Goldman noted that in materials prepared by the Appellants they indicated that the Health Department had concerns in 2021. Mr. Prondak reported that the Health Department was consulted as part of the Building Permit application process under the Viewpoint Cloud and they approved the application.
- The Dover Amendment does not allow the Town to require traffic mitigation. However, Mr. Prondak did review an independent Traffic Study for the project which indicated that the drop-off and pick-up was staggered over a two-hour period at the rate of 10-15 cars at any one time, and there was a queuing lane on the property to accommodate 10 to 12 cars. Mr. Prondak felt that traffic was sufficiently addressed and that the project did not generate traffic that would significantly impact the flow of traffic in the area.
- The Dover Amendment does not allow the Town to regulate lighting. However, lighting spill onto adjacent properties typically is easily addressed, controlled and remedied if issues come up. Mr. Friedenberg inquired if lighting was included in the plans reviewed. Mr. Prondak replied that a lighting plan was included but he did not review it.

Ms. Elzon asked if the number of parking spaces was sufficient for the project. Mr. Prondak noted the By-Law is silent on the number of parking spaces required for childcare use. When silent, the By-Law allows the Building Inspector to use the recommended parking calculations based on the *ITE Parking Generation Manual* or another source determined by the Planning Board. Mr. Prondak noted that the Planning Board determined in the Site Plan Review process that the proposed number of parking spaces was adequate for this project and he agrees.

c. Needham Enterprises, LLC's Presentation

Evans Huber, attorney representing the Owner and recipient of the Building Permit, noted that under Section 7.2.1 of the By-Law no Building Permit shall be issued until the proposed construction complies with all aspects of the By-Law. The only issue before the Board is

whether the Building Permit was issued in violation of a specific provision of the By-Law. Appellants need to identify a specific By-Law provision which is being violated.

Mr. Huber argued that the issues of concern to the Appellants are issues addressed by a Site Plan Review which is outside the jurisdiction of the Board and is the sole authority of the Planning Board. The Planning Board conducted a Site Plan Review, which the Land Court found was impermissible for this project.

Mr. Huber disagreed that the project violated Section 5.3.5 of the By-Law. This section refers to the protection of pedestrian and vehicular movement “*within the site and egressing from it, through the selection of egress points and provisions for adequate sight distances.*” This By-Law does not address off-site traffic issues such as traffic on Central Avenue, police detail, or changing timing of traffic lights at intersections.

Mr. Huber noted that Section 3.2.1 of the By-Law, which does not allow for more than one non-residential building or use on a lot, is not violated by the presence of the barn. Consistent with prior Planning Board Decisions, Mr. Huber noted that Temple Beth Shalom and Temple Aliyah house multiple uses – a place of worship and childcare – on a lot because they are protected under the Dover Amendment. In both locations, multiple uses on a single lot in a residential area were allowed.

Mr. Friedenbergl asked if he thought there was a difference between use and structure in the application of the Dover Amendment to this By-Law provision. Mr. Huber did not think there was a difference based on the Town’s practice and case law, i.e., *Petrucci v. Bd of Appeals of Westwood* where the Court found the prohibition of multiple uses and buildings impermissible with regard to a childcare facility because of the Dover Amendment. On that basis, he believes that the presence of the barn is not a violation of the By-Law.

Mr. Huber noted that the barn qualified under Section 1.3 of the By-Law as an accessory structure and use as it will be incidental, subordinate, and customary to the principal use. In court, Pat Day, the Director of the Needham Children’s Center (“NCC”), testified that the current program uses 2,000 square feet of storage space, and Marc Gluesing, architect, testified that the proposed childcare building was designed with minimal storage space because it was always the understanding that the barn was going to provide storage for the childcare facility. Nothing in the By-Law refers to the size of an accessory building. Both David Roche, the prior Building Commissioner, and Mr. Prondak found the barn would not be in violation of the By-Law if it was used exclusively for uses accessory to the childcare facility.

Mr. Huber reported the permit complied with the Stormwater By-Law and Section 5.3.2 of the By-Law. The Owner submitted a Stormwater Management Plan signed and stamped by a MA Certified Civil Engineer which was found to be adequate and in compliance by the Building Commissioner. This plan was also reviewed by the Engineering Department and a Town Peer reviewer under the Site Plan Review process.

There was discussion regarding whether the Appellants could provide evidence of the inadequacy of the Stormwater Management Plan. Mr. Huber noted that the Stormwater

Management Plan as well as other issues were presented at the Planning Board Site Plan Review public hearings, and that this is not the forum for the presentation of such evidence. That evidence could be presented if the Appeals Court orders a retrial of the appeal of the Major Project Site Plan Review Decision.

Mr. Huber noted that landscaping is not expressly listed as an area of review under the Dover Amendment, therefore it is not a permissible area of regulation under Section 4.2.14.1 of the By-Law. He objected to the idea that the term “open space” as used in the Dover Amendment and landscaping were the same and concurred with the Building Inspector’s definition of “open space” as the part of a lot on which no structure stands. Mr. Huber reported that the Landscape Plan was reviewed three times and eventually approved by the Design Review Board. Mr. Friedenberg asked what binds the Owner to build the Landscape Plan. Mr. Huber responded he does not believe that the Board can now require compliance with that plan, but the Owner intends to build per the Landscape Plan as submitted and presented to the Planning Board.

Mr. Goldman asked if there were any objection for the Board to impose conditions to the Building Permit regarding this issue. Mr. Huber said there would be no objections for the Landscape Plan. However, he stated that the Board does not have the authority as a general matter to impose conditions. Mr. Goldman asked if there could be consensus for agreed conditions: Landscape Plan and Erosion Control Plan. Mr. Huber noted that the Owner will be implementing the Erosion Control Plan approved by the Engineering Department.

Mr. Huber reported that the on-site parking provided meets the established Town’s parking requirement which has been used in the past for childcare programs established under Section 5.1.2 of the By-Law which is calculated as follows: 8 parking spaces plus 1 space for every 40 students, plus 1 space each for the maximum number of staff on duty. The Board has used this formula many times with respect to childcare facilities. The program will operate with 115 students and 18 employees, so the parking requirement is 29 spaces ($8+3+18=29$). The project includes 30 on-site spaces, which satisfies the requirement of the By-Law. GPI, the Town’s peer reviewer retained by the Planning Board during its public hearing, noted in its letter dated August 26, 2021, that the 30 parking spaces were sufficient and more than satisfied the average parking demand established by *ITE Parking Generation Manual, 4th Edition*.

Mr. Huber reported that the Building Permit meets Section 5.3.4 of the By-Law. A Lighting Plan was submitted which meets the requirements, although lighting is not included in the Dover Amendment’s permissible scope of Town review. There will be no light spillage off-site.

Mr. Huber noted the By-Law does not require a Construction Management Plan. None was submitted and no By-Law was violated.

Regarding contamination, there is no By-Law provision that regulates this. If there are any concerns of the appellants about possible contamination, the avenue for addressing that is through the Mass Department of Environmental Protection (DEP). Mr. Huber did not believe the Board has the authority to revoke the Building Permit based on this.

Mr. Goldman asked if Mr. Huber had any concerns about the allegations of hazardous materials

at the site in light of the proposed childcare use. Mr. Huber responded that the Owner contracted a Licensed Site Professional (LSP) to advise the Owner. The LSP determined there was no visible evidence of hazardous materials on site. If volatile organic compounds (VOC) are present, DEP's remediation would be to cap it with an impervious area and require any pervious area to be covered by 12" of clean fill. The Owner is planning to cover the pervious areas accessible to the children with 12" of clean fill.

Mr. Goldman inquired if there was a report from the LSP. Mr. Huber said there was no report and that the LSP only provided consultation. Mr. Huber noted that the Owner will be capping the impervious area and any pervious areas accessible to children are to be covered by 12 inches of clean fill regardless of the environmental status of the property.

d. Public Comment

The following written comments were received by the Board in advance of the public hearing:

- The Engineering Department had no issues with the Stormwater Plan and requested an Erosion Control Plan through Viewpoint Cloud. They had no issues with the issuance of the Building Permit.
- The Fire Department had no issues.
- The Health Department had no further comments on this proposed development.
- The Planning Board had no comment.
- The Building Department denied the request to revoke or suspend the Building Permit #BC-23-10079. (*See Building Commissioner's testimony above.*)
- Karen Lagsner had concerns with environmental and traffic issues.
- Alan Lagsner had concerns with the siting, environmental, traffic and bike safety.
- Robert Onofrey had concerns with contaminations, traffic and front setback.
- Andrea Dannenberg supports the cancellation of the Building Permit.
- Norman MacLeod supported the implementation of the Planning Board's Site Plan Review Decision.
- Sharon and Evan Gold had concerns about traffic, pedestrian/bicycle safety and emergency access issues.
- Mike Grasso had concerns about environmental issues.
- Leonard Shaigorodsky had concerns about traffic.
- Patricia Falco had concerns about permitting a commercial facility in a residential neighborhood and about traffic.
- Meredith Fried opposed the Building Permit and had concerns about traffic and environmental issues.
- Kim Grasso had traffic concerns.
- Robert DiMase had siting, environmental, traffic concerns, barn, lighting and screening concerns.
- Stanley Keller opposed the issuance of the Building Permit in light of the pending appeal and had concerns about traffic, and pedestrian safety.
- Sally McKechnie opposed the issuance of the Building Permit.
- Randy Hammer opposed the issuance of the Building Permit and had concerns about

environmental, traffic and parking.

- Joe Abruzese had concerns about which he plans to testify.
- Dustin Pevear was concerned about traffic and siting.

The Board heard the following when the hearing was opened for public comment:

Carolyn Reulback, 45 Longfellow Road, associated with the NCC, asked that a time limit be imposed on how long people talk and that courtesy be observed. Mr. Goldman asked how long the limit should be. She proposed a three-minute limit as public comments have been as long as 45 minutes and individuals associated with the NCC were attacked through social media. She was in support of the Building Permit.

Joe Abruzese, 30 Bridle Trail Road, made a presentation regarding setbacks and number of buildings on the site. With the exception of Temple Aliyah, all the uses in the area are residential. Central Avenue is a two-lane road without shoulders or sidewalks. He noted that the residential front setbacks in the neighborhood average 105 feet. Temple Aliyah is setback at 213 feet. He thought the proposed 10,000 square foot building and the 4,000 square foot barn should be set back further than the proposed 64 foot setback (which meets the minimum required 35 foot front setback for the SRA District). He proposed an alternative setback of 150' to 200' as more in line with the character of the area. He thought providing a larger front setback for the childcare facility would provide for safety and allow for a longer driveway for childcare traffic to queue up inside the property instead of waiting on Central Avenue.

Mr. Abruzese stated that the barn was not originally planned as accessory to the childcare facility. The Owner initially intended to retain the barn for his personal use. Mr. Abruzese provided a video clip from a Planning Board Zoom public hearing where Mr. Huber acknowledged that initially he was unaware of the limitation of the use of the barn if protection of the Dover Amendment was sought. Once made aware of this limitation the barn use was limited in support of the childcare use. Mr. Abruzese believed the barn is being used as a pawn to protect the back of the property for a future use. He was in support of a single building, single use, set back further on the property, as big as 10,000 to 12,000 feet in size. He felt the Owner could pursue other options on the site. Mr. Goldman said the jurisdiction of the Board is limited and Mr. Abruzese's vision for the property is beyond the scope of the Board.

Mr. Huber clarified that originally the Owner wanted to use the barn for both the childcare facility and for his use. However, in seeking the protection of the Dover Amendment, the Owner agreed that the barn's use would be limited in support of the childcare facility. He noted that under oath, Pat Day and Marc Gluesing testified that the barn will be used in support of the childcare use and for no other purpose.

Nicole Heideman (an Appellant), 1708 Central Avenue, is the direct abutter to 1688 Central Avenue. She feels that the character of the neighborhood is being negatively affected by having a childcare facility next door. She had concerns about the change in her view by the removal of trees, the current construction site and the future childcare facility. She was concerned about the increase in traffic created by the childcare facility and the safety of her children as they wait for their school bus. She felt a compromise and reasonable restrictions could be arrived at. She was

most concerned about the environmental impact from the prior uses on the lot and the lack of environmental tests. She was in support of testing. She was also concerned about environmental issues during construction.

Robert Dimase (an Appellant), 1681 Central Avenue, is a direct abutter across the street. He was concerned about safety as a result of the increase in traffic from the childcare use on Central Avenue, the lighting spillover from the project and the possible installation of a septic system for the project in light of the environmental concerns.

Kristy Thompson, 50 Windsor Road, is a neighbor and a researcher in the field of environmental toxicology. She said there is little knowledge on the impact of toxicants on epigenetics. She reported that the neighbors looked at the GIS Mapping database history of the property, based on the CDC's *Choose Safe Places for Early Care and Education Manual, April 2017*, from 1999 to 2019. These GIS maps showed structures indicating auto repair, junk yards, and storage containers at the site, all of which could be sources of contamination. She was concerned about the soil disturbed by the construction.

Holly Clarke (an Appellant), 1652 Central Avenue, is an abutter to Temple Aliyah. She felt that the Dover Amendment permits the Town to conduct reasonable review under Section 3.2.1 of the By-Law, which limits to one non-residential building on a lot, as a regulation of bulk and open space. That review should involve a balancing of the importance to the childcare facility of having more than one non-residential building on the site against the negative effects of that on the neighborhood. She thought the Board should consider the reasoning behind the Planning Board's Site Plan Review Decision. Mr. Goldman responded that the Land Court has determined the Site Plan Review Decision is null and void. She disagreed with the effect of that decision on this issue. She noted that the Land Court decision did not address Section 3.2.1 of the By-Law or the barn, and thought the barn was not protected by the Dover Amendment and, as a result, is subject to the By-Law's prohibition of more than one non-residential building on this lot. Mr. Goldman asked if her concerns would be alleviated if the two buildings were connected. She thought it might, but that the density on the property was out of character with the neighborhood. She was concerned about being able to access the south bound lane on Central Avenue with the increase of traffic generated by the childcare program. Ms. Clark reported that the Site Plan Review Decision required traffic mitigation such as adjusting the timing of traffic lights on Central Avenue, requiring a police detail at the driveway, and requiring a traffic study to be conducted after 4 weeks of operation, all of which was agreed to by the Owner, as well as an enrollment cap of 115 students to manage traffic and parking concerns. She thought landscaping and lighting was important to mitigating bulk. She'd like to see the lighting and landscaping plans be implemented and for the building to be set back further from Central Avenue to provide a longer driveway to permit more cars to wait on the driveway rather than on Central Avenue.

Gregg Darish (an Appellant), 43 Country Way, is an abutter. He thought the project will negatively impact the character of the neighborhood. He was skeptical of the Owner's intentions regarding the commitments he made to the Planning Board during the Site Plan Review process. The Appellants sought legal representation when the Planning Board's attorney said in court he did not represent the abutters. Mr. Darish said the judge told the neighbors that they could plead

their case through hearings such as this. He was concerned about traffic and safety issues. Because of all the prior uses at the site, he was concerned about the environmental issues. Mr. Darish questioned why a site test recommended by the Board of Health (“BOH”) and included as a condition in the Site Plan Review Decision was no longer necessary. Mr. Friedenberg clarified that the Board was reviewing whether the issued Building Permit was in conformance with zoning, and that there are other agencies that deal with any environmental issue. Mr. Friedenberg asked if anyone had contacted DEP or asked the Health Department to contact DEP. Mr. Darish raised the issue of why this land was sold without permitting any environmental testing and ultimately sold for what he thought was far less than his estimate of its value, other than because of an environmental issue at the property. Mr. Goldman reiterated that the Board’s jurisdiction is limited. Mr. Darish urged that the Board suspend the Building Permit so that testing can be conducted.

Margaret Abruzese, 30 Bridle Trail Road, questioned whether the issuance of a building permit is lawful if the use of the building is not identified in the plan.

She provided a transcript of the Status Conference at the Land Court where the judge explained what the intent of her Decision was. She noted that the judge did not agree with Mr. Huber’s request for language that would describe the Owner as entitled to a building permit, but rather said that the Owner was entitled to apply for a building permit and let the Building Commissioner proceed in usual course to review the application. Ms. Abruzese did not believe that the judge was prohibiting the Building Commissioner from imposing any of the conditions included in the Site Plan Review Decision as part of the building permit.

Ms. Abruzese did not think the submitted single page Stormwater and Erosion Control Plans met the By-Law requirements. The By-Law is meant to protect the safety and health of Needham residents; therefore traffic mitigation and environmental concerns would be appropriate and should be addressed in the Building Permit.

Ms. Abruzese thought that cases governing use and governing configuration are different matters. Having two large buildings on a single lot could be viewed largely as a commercial childcare complex in a residential neighborhood.

Ms. Abruzese thought that the Health Department’s comment that they had no further comments on the Building Permit application may mean that they have no further comments from the ones they expressed to the Planning Board and they still have those original concerns. Ms. Abruzese said they are scheduled to go before the Board of Health on Friday to discuss this property. Mr. Goldman said to take their concerns to the Board of Health and if the Board of Health still have concerns, ask them to please make those clear and available to this Board.

Mr. Friedenberg moved to continue the Public Hearing to December 14th at 8:00 p.m. in the Charles River Room, Public Services Administration Building, 500 Dedham Avenue, Needham, MA. The meeting will also be livestreamed on Zoom. Ms. Elzon seconded the motion. The motion was unanimously approved.

This session of the public hearing adjourned at 10:30 p.m.

2. December 14, 2023

The Board included Howard S. Goldman, Acting Chair; Peter Friedenber, Associate Member; and Valentina Elzon, Associate Member. Mr. Goldman opened the hearing at 8:37 p.m. by reading the notice of hearing.

Mr. Goldman provided an overview of the Board's role in an ABID, set the ground rules of the meeting and provided general administrative information regarding the ABID as follows:

- The Board's jurisdiction in an ABID is limited to determining whether the project complies with the By-Law.
- Childcare projects are protected by the Dover Amendment under MGL c. 40A, Section 3, which allows the Town to apply reasonable regulations "*concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.*"
- If an appellant argues that a project violates a specific regulation contained in the By-Law, the Board will consider whether that regulation concerns bulk, height, yard size, lot area, setback, open space, parking or building coverage.
- If it does fall within one of these categories, the ZBA would next consider whether that specific provision of the By-Law is reasonable as applied to the proposed childcare facility.
- An ABID is not a Special Permit or a Variance proceeding. The Board does not possess the ability to place conditions on a project.
- In an Appeal, if the project complies with the By-Law, the ZBA has no discretion to deny or to revoke a building permit.
- The Board's review is limited to determining whether the project complies with the By-Law.

Mr. Goldman set the following rules for the meeting:

He would only receive comments from members of the public who have not been heard previously. The comments would be limited to five minutes; and he asked that the comments be courteous. The public comment period would be followed by closing comments from the Appellants' and Owner's attorneys. His goal was to close the public comment period of the public hearing and begin deliberations among the Board to create the basic framework for crafting the Decision.

Mr. Goldman noted that under MGL c.40A, Section 15, the Board needs to vote on an ABID within 100 days from the filing of the ABID. It requires the unanimous vote of the Board to overturn the Building Commissioner's decision. The next meeting will be held on January 18th meeting on Zoom.

Eric Sockol, 324 Country Way, expressed concerns about the safety of children, the environmental issues and the pro-developer preferential treatment received by the Owner throughout the approval process.

Stanley Keller, 325 Country Way, was concerned about the Owner's conflict of interest as a Town official and the integrity of the Town's process relating to this project; he questioned why the Town did not appeal the Land Court Decision and thought the Court's decision was wrong; he thought that the issuance of the Building Permit before the appeal of the Land Court's decision is resolved was premature; and he thought that the By-Law provision prohibiting two structures on this property unless one is ancillary to the other applied here. He thought that the barn was a trojan horse to limit the setback of the building from the road and thus protect the future development of the back of the property. He asked if a lease had been looked at to ascertain the control of the barn.

Carole Sullivan, Executive Director of NCC, reported that the childcare program had been in operation serving families for 43 years. She supported the issuance of the Building Permit which the Land Court determined they were eligible to apply for. The new facility is specifically designed to create an environment which will nurture children. They have been involved in the development of the facility for the past three years which originally had an estimated opening date of October 2023. She noted that there was a childcare crisis in Massachusetts. The NCC has a one year wait list.

She reported that the barn is currently used by the NCC as storage and it is critical accessory storage space for the program.

Mr. Goldman asked what was being stored in the barn. Ms. Sullivan said that buggies, bookcases, equipment and blocks were stored in the barn. Mr. Friedenberg asked what Ms. Sullivan anticipated storing in the barn after the new childcare facility opens, and she responded that it would be the same stuff as is currently being stored in the barn as well as other things. Mr. Friedenberg asked if there was a lease and if the lease included the barn. She answered that the lease had not yet been signed so far as she knew, and that the barn was included in the lease.

Patricia Falcao, 19 Pine Street, noted that the 3.5-acre site was bought at a below market rate without any environmental testing being permitted. She was concerned that no environmental test has been conducted, about the setbacks and the traffic on Central Avenue. She thought it was an open question as to whether there was small-town corruption involved in the project because the owner and his parents were former elected Town officials with controlling oversight over public employees.

Susanne Teachout, Director of NCC, reported that a 15-year lease had been signed. The barn is included for storage. Currently the childcare program stores their equipment and materials in a two-car garage. Materials include bikes, outdoor equipment, water tables, and summer equipment. The program's art supplies, cleaning/janitorial supplies, and toiletries are stored in four closets at the church.

Pete Lyons, 1689 Central Avenue, lives directly across from the property. He was concerned about the setback, the height and bulk of the building. He noted that the foundation is five feet above ground level. He was concerned about the runoff on the property. He also had issues with the siting of the building on the property and the traffic impact. He would like to see the

childcare traffic queuing on the property. Since the former residence was demolished on November 6, the construction traffic has made the traffic worse on Central Avenue. He has noticed construction going on beyond the allowed hours and that the site is not secure with the gates not closed at night and the construction fencing falling over. He wondered why a 10,000 square foot building does not have sufficient storage on site and needs a 4,000 square foot barn for storage.

Sarah Turano-Flores, attorney representing the NCC, asserted that there were procedural defects in the filing of the ABID that require the dismissal of the appeal. She stated that:

- The ABID was untimely under MGL c. 40A, Sections 8 and 15 and Article III of the Rules of the Board. The Appellants filed a letter of Appeal with the Town Clerk on October 19, 2023, 30 days after the issuance of the Building Permit on September 19, 2023. However, the Appellants filed the Board's official application form and applicable filing fee on October 23, 2023 (four days after the deadline). Based on the Board's Rules anything other than a complete official application and fee will be considered as mere notice of intention to seek Board action. She concluded that failure to complete the ABID with the Board and pay the filing fee in accordance with its Rules within 30 days is a fatal error and deprives the Board of jurisdiction to hear this appeal;
- The Appellants did not appeal the Building Commissioner's Enforcement Denial Decision letter within 30 days as required under MGL c. 40A, Sections 7 and 15. Mr. Prondak issued an Enforcement Denial Decision on November 1, 2023 in response to the Appellant's request letter of October 19, 2023 to revoke or suspend the Building Permit. The Appellants failed to submit a response letter to the Enforcement Denial Decision within the required 30 days, thereby failing to exhaust their administrative remedies, creating another procedural error and depriving the Board of jurisdiction to hear this appeal;
- Without a response to Mr. Prondak's detailed Enforcement Denial Decision letter which found no zoning violations regarding the Appellant's claims about the two non-residential buildings on one lot, the lack of identification of barn use, the lack of landscape plan, the lack of parking requirements and general design requirements, his determinations are final as the Zoning Enforcement Officer of the Town under Section 7.1 of the By-Law and the claims are not subject to further review.

She agreed with Mr. Sanders' claim that the Appellants met the statutory application scheme under MGL c.40A. However, they did not follow the established strict comprehensive procedural framework which includes the Board's Rules and the Zoning Enforcement Officer's determination and therefore renders this Board without jurisdiction. Failing to appeal the Building Commissioner's determination letter within 30 days demonstrates the Appellants' failure to exhaust the administrative remedies available to them.

Ms. Turano-Flores said the Land Court's determination is the final word and governs the law of this case until overturned. The Building Commissioner was lawfully entitled to issue the Building Permit. The pending appeal does not bar him from issuing the permit.

She noted that there were also issues unrelated to zoning that are outside the jurisdiction of the

Board which they cannot review, namely the hazardous waste allegations which is a Chapter 21E matter governed by state agencies.

She characterized the NCC as a highly credentialed childcare provider who has been waiting for three years to provide badly needed childcare. Despite the passion on the issues, she said the process is a legal one. The Building Commissioner, as the Town's Zoning Enforcement Officer, has rendered his decision with the support of the professional expertise of the DPW, Fire, Police and Health Departments who indicated they had no further comments. She thought it would be a highly extraordinary measure for the Board to overturn the Building Commissioner's determination in addition to the consideration of the Appellants' procedural failures.

Mr. Sockol added that his children all attended the NCC and was supportive of the program. His issues were directed at the Owner. His concerns were the front setback, the lack of testing of the soil, and the lack of storage without the barn. He feared the back of the lot would be available for a future 40B project.

Mr. Huber found the allegations that Mr. Borrelli, as a Select Board member, had undue influence over Board members and public employees to be disturbing. He noted that Mr. Borrelli is no longer a member of the Select Board. Mr. Huber challenged Mr. Sockol's allegation that Mr. Borrelli received preferential treatment. Mr. Huber felt Mr. Borrelli was treated far worse than any Owner as seen by a costly year and a half Site Plan Review process followed by a year and a half of litigation before the Land Court where the Court determined that the Planning Board's Site Plan Review Decision had no merit.

Mr. Huber affirmed that the barn will be used as storage accessory to the childcare facility as attested by the project architect and the head of the NCC in testimony given under oath. There was no intention of enlarging the proposed building by 1,800 square feet for storage when there is a barn with that capacity on site.

Mr. Huber asked that the Board review his letter where he substantiates there is nothing in the Building Permit that violates the By-Law, which should be the scope of this hearing.

Mr. Sanders appreciated the tone and decorum of the public hearing set by the Board. Mr. Sanders disagreed with Ms. Turano-Flores' conclusions, as set forth in his responsive letter to the Board. He noted that the Appellants filed the appeal stating the bases for the appeal with the Town Clerk within the required 30 days and provided a copy to the Building Commissioner and to the Board. The statute does not require any particular form. He thought local administrative Rules were laudable. The Board is free to adopt them but is not, however, free to use them to interfere with the right to appeal under the statute.

Mr. Sanders argued that there was no consequence to the Appellants' failure to appeal the Building Commissioner's letter of November 1, 2023, as the purpose of such an appeal is to provide an avenue of appeal to third parties who did not have notice of the issuance of the Building Permit. The Appellants were aware of the issuance of the Building Permit and appealed it in a timely matter.

Mr. Sanders agreed there was abundant process in this case, notably the Planning Board's Site Plan Review with its agreed-upon conditions to address the many stakeholders' concerns. But since the Site Plan Review Decision was set aside by the Court, the Appellants have come before the Board to revisit the issues addressed by the Planning Board.

Mr. Sanders argued that the Building Permit should not have been issued because:

- There is an appeal pending in the Appeals Court;
- A Site Plan Approval is required under the By-Law and there is no longer any approval in place after the Land Court Decision;
- The Board and the Appellants were not parties to the Land Court proceedings and are not bound by the Land Court Decision;
- The Appellants were satisfied with the conditions in the Site Plan Review Decision. The Owner, not the Appellants, appealed the Site Plan Review Decision to set aside those conditions. At the Land Court, the Appellants were told the ABID process before the Board is where their concerns could be addressed rather than in the Land Court proceedings themselves; and
- There is no comprehensive Construction Management Plan in place to account for the construction site issues that arise - such as hours of construction, construction dust, parking of construction vehicles, and idling of trucks. Events have demonstrated why such a plan is necessary here in light of problems already experienced by the neighbors and complaints made to the Building Commissioner.

Mr. Sanders provided a handout titled: *Abutters' Requests for Rulings and Decision from the ZBA*.

Mr. Prondak informed the Board that he has been working in Needham for only six months. He wanted to address only the issue of Mr. Borelli's undue influence. He does not know Mr. Borrelli nor does he know anyone in Needham. Neither he, nor his office or staff have any allegiance to Mr. Borrelli. None of his superiors have asked him to provide any deference to Mr. Borrelli nor would he allow such deference under his direction.

Mr. Goldman asked about construction site issues identified and how they are being addressed. Mr. Prondak reported that on November 27 he was notified that there were concrete trucks backed up on Central Avenue and construction was ongoing until 9:30 p.m. The Town's By-Law limits construction work to 8:00 p.m. The next day he addressed the issues with Mr. Borrelli. According to Mr. Borrelli the backup was due to a concrete truck breaking down and holding up the schedule of concrete trucks to deliver concrete for the foundation forms. Mr. Prondak was assured it was a one-time event. Even with a Construction Management Plan, Mr. Prondak said there are always unforeseen events which need to be addressed.

Mr. Goldman asked what people should do if there are complaints. Mr. Prondak responded that people should call him or his office with any building issues that arise. His office or he will respond immediately. Mr. Prondak said he spoke with Mr. Borrelli today and told him that he has a hard 7:00 a.m. construction start time and 8:00 p.m. end time at the site.

Mr. Goldman asked about the enforcement of the barn's use. Mr. Prondak said that the Owner

and childcare program are aware that the barn is limited to storage accessory to the childcare program. Any violation of this use will be strictly enforced. He has an enforcement process available to him to bring a violation into compliance which includes issuing cease and desist orders and going to court to get an enforcement order.

The following written comments were received by the Board before the December 14 session of the public hearing:

- The Health Department and the BOH will provide no further additional comments. They approved a septic permit application on November 20, 2023. The BOH heard an informal presentation from the neighbors on November 17, 2023 but chose not to take any actions. In September the BOH had an extensive discussion about their regulatory intervention powers and role, which intervention would have to be based on an official written report and evidence from DEP, the Fire or the Public Health Departments about spills or the like, and not anecdotal accounts or old photographs. There are no reports from the DEP or Fire Department of any environmental spills at the site.
- A letter from Ms. Turano-Flores regarding the administrative process.
- A letter from Mr. Sanders in response to Ms. Turano-Flores' letter.
- An email from Meredith Fried supporting the revocation of the Building Permit.
- An email from Michael Connelly noting that the scope of the Board's jurisdiction is limited and the issues brought before the Board are outside the Board's jurisdiction and urged support of the Building Commissioner's determination.
- An email from Robert DiMase identifying construction site violations.
- An email from Alan Langsner requesting a pause on the project.
- A letter from Margaret Abruzese about the BOH's position, the Board's jurisdiction, and Dover Amendment and its childcare use protections.

There were no additional comments from the public.

Mr. Friedenberg moved to close the public hearing. Ms. Elzon seconded the motion. The motion was unanimously approved. Mr. Goldman then invited the Board members to begin their deliberation and offer their preliminary thoughts on the evidence and arguments presented to the Board.

Board Deliberation (December 14, 2023)

Mr. Friedenberg thanked the public for their thoughtful comments and submissions, in particular the Appellants' team for their submission of relevant cases.

Despite the many issues identified, he noted and concurred with Mr. Goldman that the Board's jurisdiction is narrowly focused. The central question before the Board is: are there violations of the provisions of the By-Law that are applicable to the project within the contours of the Dover Amendment and the Land Court Decision that would merit the Building Permit be revoked?

Mr. Friedenberg asked the Chair for direction whether to focus on the administrative issues brought by Ms. Turano-Flores and the premature nature of the permit or on the more substantive zoning issues. Mr. Goldman directed that the focus on the zoning issues be first.

Mr. Friedenbergr thought that as long as the barn is used as accessory to the childcare facility it has the same protection under the Dover Amendment. It has been made clear tonight that the barn is included in the premises to be leased to the childcare facility and will be used by them as accessory to the childcare facility. That protection makes the prohibition of Section 3.2.1 of the By-Law inapplicable to the barn and the barn may continue to exist on the property, as long as the barn is used accessory to the childcare facility. The Board's focus is narrow and is based on the presented information that the barn will be used as storage for the childcare program. Mr. Friedenbergr found the evidence of the barn's use being incidental to the purposes of the childcare facility to be solid and clear. Additionally compelling was the prior Building Commissioner reaching the same conclusion that the barn, if used as storage for the childcare facility, was a permitted use and not a zoning violation. Should that use change, however, Mr. Friedenbergr instructed the community to report any violation to the Building Commissioner for enforcement.

Mr. Friedenbergr was not troubled that the barn's use was not identified in the plot plan. He wished it had been. The Owner, however, has been clear about the barn's use, even if it has morphed over time in some people's minds, and the substantiation of the use by a signed lease has convinced Mr. Friedenbergr of the barn's use as storage for the childcare program.

Mr. Friedenbergr noted that Stormwater Management and Erosion Control plans are not identified in the Dover Amendment as subject to reasonable regulation by the Town. Nevertheless, the Owner submitted Stormwater Management and Erosion Control plans which were reviewed by the Building Commissioner and the Engineering Department which were found to be adequate. Mr. Friedenbergr did not find grounds of a zoning violation here to revoke the Building Permit.

Mr. Friedenbergr agreed that landscaping is an important concern, especially for abutters. However, landscaping is not identified as subject to reasonable regulation by the Town under the Dover Amendment. He did not believe the By-Law pertaining to landscaping could be applied per the Dover Amendment. He was encouraged that the Owner is voluntarily implementing a landscape plan. He concluded that the absence of a landscaping plan was not grounds to revoke the Building Permit.

The parking calculations used to determine the required parking identified by Mr. Huber is the same formula the Board has used in the past for determining parking requirements for childcare facilities. Based on the formula, Mr. Friedenbergr found the project parking to be sufficient. The Building Commissioner concurred. He did not see parking as a basis for revoking the Building Permit.

Mr. Friedenbergr thought that the general design requirements under Section 5.3 of the By-Law viewed through the Dover Amendment lens were not applicable and their absence was not grounds to revoke the Building Permit.

Mr. Friedenbergr noted that a Construction Management Plan is not required under the By-Law and the absence of such a plan is not a basis for revoking the Building Permit. He thought the Building Commissioner's approach was reasonable to address any construction issues that arise. Again, Mr. Friedenbergr instructed the community to bring any construction site concerns to the

Building Commissioner when they come up.

Overall, Mr. Friedenbergr concluded that he found no compelling grounds based on the By-Law as modified by the Dover Amendment and the Land Court case to revoke the Building Permit.

Ms. Elzon concurred with Mr. Friedenbergr's assessments. She agreed that the Board can only focus on what is presented to them. Based on information presented, the barn will be used ancillary to the childcare and is protected by the Dover Amendment. She found *Petrucci v. Board of Appeals of Westwood* supportive of the protected accessory use of an accessory building on a single lot. Unlike the Westwood case, the Needham barn is dimensionally conforming. If that use changes, she encouraged the public to bring that information to the Building Commissioner.

Ms. Elzon noted that there is common understanding between the parties about the landscape plan. However, per Mr. Goldman's instructions, the Board cannot add conditions to the Building Permit here. The Board can only uphold or overrule the Building Commissioner's decision. Furthermore, under the Dover Amendment it appears that landscape plans are not subject to reasonable review.

Mr. Goldman concurred with both Mr. Friedenbergr and Ms. Elzon. He was troubled by the traffic concerns and how they will be handled on Central Avenue during rush hours. If this were a Special Permit proceeding, the Board would have jurisdiction over traffic and could require a Traffic Management Plan. Unlike the case of *Primrose School Co. v Natick*, this is an ABID and not a Special Permit where the Board was able to impose conditions. The Board in this case is a Board with limited jurisdiction and cannot impose conditions.

Mr. Goldman noted that the Board must act unanimously if they are to overturn the Building Commissioner's Building Permit.

Mr. Friedenbergr moved to adjourn and continue the matter for final Board deliberation and vote to January 18, 2022 at 7:30pm on Zoom. Ms. Elzon seconded the motion. The motion was unanimously approved.

The meeting adjourned at 10:15 p.m.

Board Deliberation and Vote (January 18, 2023)

The Board included Howard S. Goldman, Acting Chair; Peter Friedenbergr, Associate Member; and Valentina Elzon, Associate Member. On Zoom, Mr. Goldman opened the hearing from December 14, 2023 at 7:38 p.m. by reading the notice of hearing.

Mr. Goldman reminded everyone that the public portion of the public hearing was closed and the Board deliberations had begun at the last meeting. The deliberations would continue and conclude with a vote that evening. He noted that Town Counsel and staff had prepared a draft Decision.

He highlighted the Appellant's major issues identified in the ABID seeking to revoke the Building Permit: the staying of the Building Permit while the appeal was pending in court; the adequacy of stormwater management and erosion control plans; the lack of Site Plan Review approval; the two non-residential structures on one lot; the lack of environmental testing; the parking requirements; the lack of landscape plan; the lack of a construction management plan; and the lack of a lighting plan. Also under consideration is whether the Board has jurisdiction to hear the ABID in light of the timing of the filing of the application form and the payment of the filing fee.

Two Non-Residential Buildings on One Lot.

Mr. Goldman felt that even though the By-Law prohibits two non-residential uses on one lot, based on the existing long-term lease qualifying the barn's limited use for storage associated with the childcare facility, the protection of the Dover Amendment, and the two Building Commissioners' opinions there was no ground to revoke the permit on this basis.

Ms. Elzon concurred. She felt there was sufficient testimony to ascertain that the use of the barn was accessory to the childcare facility and there was an adequate available enforcement process if that limited use was ever violated.

Mr. Friedenbergh thought the accessory use of the barn for the childcare facility cloaked it with the same Dover Amendment protection as the facility itself, and that the barn was therefore not prohibited by Section 3.2.1 of the By-Law.

Mr. Friedenbergh added that he had rewatched the videos of the public hearings and he continued to maintain his positions on the other issues as presented at last month's deliberations.

Parking.

Ms. Elzon thought the 30 parking spaces provided were adequate, as affirmed by the Building Commissioner and the Planning Board and are consistent with Section 5.1.1 of the By-Law.

Stormwater Management and Erosion Control Plans.

Mr. Goldman noted that the submitted Stormwater Management and Erosion Control Plans appear to be effective as determined by the Engineering Department. He had no concerns about these. Ms. Elzon concurred adding that stormwater was not an area subject to regulation under the Dover Amendment. Mr. Friedenbergh agreed.

Barn Use Not Identified in the Plans.

Mr. Goldman said that based on the testimony from the Owner's counsel about the barn, the lease between the Owner and NCC, and the Building Commissioners' determination of the barn use and his enforcement authority, he did not feel that the failure to identify the proposed use of the barn on the building plans was grounds to revoke the permit.

Lack of Environmental Testing.

Mr. Goldman reported that the BOH communicated that they only act on questions of environmental contamination if there is information on a reported Chapter 21E release. Even though there are general concerns about the uses at the property there have been no reported

Chapter 21E releases. The Health Department had no comment on the issuance of the Building Permit. Furthermore, the Board has no jurisdiction or authority on the basis of environmental issues to deny a Building Permit.

Mr. Friedenberg shared Mr. Goldman's concerns about the environmental issues raised by the Appellants. He did not believe the Board had jurisdiction to revoke the Building Permit based on environmental concerns.

Landscape Plan.

Mr. Goldman did not believe a landscape plan was required by the By-Law in the context of the Dover Amendment.

Mr. Friedenberg added that the Board concluded that a landscape plan was not required under the Dover Amendment. However, the Board was reassured by the Owner's representative's statements that the Owner plans to implement the landscape plan approved in the Site Plan Review. The lack of a landscape plan was not grounds for revoking the Building Permit.

Ms. Elzon concurred that the Dover Amendment did not allow for the requirement of a landscape plan. She also believed that open space was understood as absence of a structure on the land and as such was not broad enough to encompass a requirement of a landscape plan.

Lighting and Construction Management Plans.

Mr. Goldman thought there was sufficient evidence that there will not be any light spillage and that the Owner's counsel indicated that the Owner is sensitive to lighting issues. Under the Dover Amendment the lack of lighting or construction management plans did not violate the By-Law. Mr. Goldman noted it was essential for the Owner to adhere to the hours of construction operations, take effort to keep the site clean, and secure the property at night. He believed the neighbors and the Building Commissioner will be keeping a watchful eye on the project. Mr. Friedenberg and Ms. Elzon concurred.

Board's Jurisdiction to Hear the Appeal.

Mr. Goldman reported that the attorney representing NCC had filed an amicus brief arguing that the Board lacks jurisdiction. Even though the Appellants filed an ABID with the Town Clerk within the required 30 days of the issuance of the Building Permit, they failed to file the Board's form and pay the filing fee within the 30 days per the Board's Rules. According to this brief, this delay in filing the form and paying the filing fee invalidated the application and the Board's jurisdiction.

Mr. Goldman thought the filing of the ABID on October 19, 2023 with the Town Clerk and notifying the Building Department and the Board was a constructive notice, and that the failure to comply with the Board's procedures did not create grounds for a defective ABID.

Mr. Friedenberg thought the Appellants met the statutory deadline. He found the arguments why the failure to file the Board's application form and pay filing fees was equal to failing to file the appeal within the statutory timeframe well-reasoned, but he did not accept them. He felt the Appellants complied with the statutory requirements by filing with the Town Clerk and notifying

the Building Department and the Board within 30 days. He felt the application form and the filing fee were insubstantial administrative steps when considered in light of the materials that were timely filed on October 19, 2023.

Ms. Elzon agreed with Mr. Friedenbergl that the filing complies and satisfies the statute per her reading of MGL c.40A, Section 15.

Mr. Goldman identified three questions before the Board to consider:

1. Should the Building Permit have been stayed while the Appellants pursue an appeal of the Land Court case?
Ms. Elzon – No; Mr. Friedenbergl – No; Mr. Goldman – No.
2. Does the Board have jurisdiction to hear the ABID where the Appellants initial filing contained a detailed memorandum but the Board application form and filing fee were filed shortly after the 30-day period?
Ms. Elzon – Yes; Mr. Friedenbergl – Yes; Mr. Goldman – Yes.
3. Should the Building Permit #BC-23-10079 issued to Matthew Borrelli and Needham Enterprises, LLC dated September 19, 2023 for the construction of a childcare facility located at 1688 Central Avenue be revoked by the Board because the plans and application submitted do not demonstrate that the construction or use proposed comply with the Town Zoning By-Law as limited by the Dover Amendment and MGL c.40A, Section 3?
Ms. Elzon – No; Mr. Friedenbergl – No; Mr. Goldman – No.

Mr. Friedenbergl moved to deny the Appeal of Building Inspector Decision and uphold the issuance of Building Permit #BC-23-10079 issued to Matthew Borrelli and Needham Enterprises, LLC dated September 19, 2023 for the construction of a childcare facility located at 1688 Central Avenue. Ms. Elzon seconded the motion. The motion was unanimously approved. Vote: Ms. Elzon – Aye; Mr. Friedenbergl – Aye; Mr. Goldman – Aye.

The meeting adjourned at 8:04 p.m.

Findings of Fact and Rulings on Appeal:

On the basis of the evidence presented at the hearing, the Board makes the following findings of fact:

1. The lot located at 1688 Central Avenue (the “Premises”) contains 143,002 square feet and is located in the Single Residence A Zoning District. The lot was improved with a 1,663 square feet single-family dwelling, a garage comprising 400 square feet, a second garage comprising 600 square feet and a barn comprising of 4,800 square feet. At the time of this decision, the house and garages have been demolished; the existing barn remains on the property.

2. On March 1, 2022, the Planning Board issued a Major Project Site Plan Review Decision (“the Planning Board’s Decision”) to Needham Enterprises, LLC (“the Owner”). The Planning Board’s Decision conditionally approved the demolition of the single-family residence and two garages at 1688 Central Avenue and the construction of a 10,034 square foot childcare facility with a new drive and parking area with 30 on-site parking spaces (the “Project”). The conditions included in the Planning Board’s Decision required, among other things, that the proposed childcare facility be constructed with a minimum front yard setback of 120’ (where the minimum front yard setback in the SRA District is 35’), and that the existing 4,800 square foot barn be demolished and removed.
3. The Owner appealed the Planning Board’s Decision to Land Court, *Needham Enterprises, LLC v. Needham Planning Board*, Land Court Docket No. 22MISC000158 (JSDR), challenging the Planning Board’s Decision and particular conditions that the Planning Board had imposed on the Project.
4. On August 15, 2023, the Land Court issued a Memorandum of Decision that annulled the Planning Board’s Decision. The Land Court noted that the proposed childcare facility complied with all applicable dimensional and density requirements of the Single Residence A District for an institutional use, namely, front, side and rear setback, maximum building height, maximum number of stories, maximum lot coverage and maximum floor area ratio. The Land Court stated that “[a]ny analysis of this Project by local officials should have ended there” and that the site plan approval process imposed on the Project “went well beyond the reasonable regulation of childcare facilities permitted by the Dover Amendment.” Memorandum of Decision at 20.
5. On August 22, 2023, the Land Court issued its Judgment, which Ordered, Adjudged and Declared “(1) that the March 1, 2022 decision of the [Planning] Board exceeded its authority and is hereby annulled, (2) that the Project complies with the dimensional requirements of the local zoning bylaws and, pursuant to G.L. c.40A, §3, is not subject to further review thereunder, and (3) that the LLC is entitled to apply for a building permit without further action by the Board.”
6. The Land Court’s Judgment was not appealed by the Planning Board. However, Holly Clarke, Gregg Darish, Robert DiMase, Matthew Heideman, Nicole Heideman, Carl Jonasson, Ann Lyons, Peter Lyons and Eileen Sullivan have filed two appeals relative to *Needham Enterprises, LLC v. Needham Planning Board*, Land Court No. 22MISC000158 (JSDR). This group had attempted unsuccessfully to intervene in the Land Court case prior to trial. They have appealed the denial of their motion to intervene, and also appealed the Land Court’s Judgment. Both appeals remain active with the Appeals Court as of the date of this decision.
7. The Owner applied for a building permit for the Project. On September 19, 2023 the Building Department issued Building Permit BC-23-10079 (“the Permit”) to allow the demolition of the single-family dwelling and the two garages, and the construction of a 10,048 square foot childcare facility with a new parking area with 30 on-site parking

spaces, and the retention of the existing 4,800 square foot barn.

8. The childcare facility will be leased to and operated by Needham Children's Center ("NCC"), a pre-school program that has been in operation for the past 43 years. NCC is currently located in the Baptist Church at 858 Great Plain Avenue in Needham. This site is closing and NCC intends to relocate its program to 1688 Central Avenue. The new facility is intended to serve approximately 115 students and eighteen staff members. NCC has signed a 15-year lease for 1688 Central Avenue. This lease includes use of the existing 4,800 square foot barn by NCC for the program's storage.
9. Pursuant to Section 4.2.4 of the By-Law ("Table of Regulations for Public, Semi-Public and Institutional Uses in the Rural Residence Conservation, Single Residence A, Single Residence B and General Residence Districts and for the Institutional District") an Institutional Use must provide a minimum lot area of 43,560 square feet, minimum frontage of 150 feet, a minimum front yard setback of 35 feet, minimum side and rear yard setbacks of 25 feet, a maximum floor area ratio of .30, maximum lot coverage of 15%, and the maximum height of a building is 2 ½ stories and 35 feet. The Premises and the Project that are the subject of Building Permit #BC-23-10079 satisfy all of these dimensional requirements.
10. Pursuant to Section 3.2.1 of the By-Law (Schedule of Use Regulations), the following is a prohibited use in the SRA Zoning District: "More than one non-residential building or use on a lot where such buildings or uses are not detrimental to each other and are in compliance with all other requirements of this By-Law."
11. Section 5.1.2 (Required Parking) of the By-Law sets the required number of parking spaces for various uses. Section 5.1.2 does not contain any specific number of required parking spaces for childcare or daycare uses. However, this section states in part: "In the event that the Building Inspector is unable to determine if a particular use relates to any use within the table of 'Required Parking' (Section 5.1.2), the Planning Board shall recommend to the Building Inspector a reasonable number of spaces to be provided based on the expected parking needs of occupants, users, guests, or employees of the proposed business, with said recommendations based on the most recent edition of the ITE Parking Generation Manual or an alternative technical source determined by the Planning Board to be equally or more applicable."
12. On October 19, 2023, Holly Clarke, Gregg Darish, Robert DiMase, Matthew and Nicole Heideman, Carl Jonasson, Amy and Peter Lyons and Eileen Sullivan ("the Appellants") filed an Appeal of a Building Inspector Decision ("ABID") of Building Permit #BC-23-10079 at 1688 Central Avenue with the Town Clerk and submitted copies to the Building Department and the Board as required by MGL 40A, Sections 3 and 15.
13. The Appellants' October 19, 2023 submission included a letter/memorandum from counsel C. Dylan Sanders. This letter/memorandum was addressed to the Town Clerk, Board, and the Building Commissioner, and it details the grounds on which the Appellants' assert the Building Permit must be revoked. The submission did not include the Board's standard

application form or the Board's filing fee. Upon receipt of this submission, Daphne M. Collins, the Zoning Specialist to the Board, sent an email to attorney Sanders on October 19, 2023 notifying him that the application form and the filing fee were missing.

14. The Board has adopted Rules as authorized by M.G.L. c.40A, §12. These rules were first adopted on January 28, 2010 and were most recently amended on November 16, 2023. Article III, Section 1 of the Board's Rules states as follows:

Section 1. Application Form

Every application for action by the Board shall be made on an official application form, entitled "Board of Appeals – Application for Hearing," which shall be furnished by the clerk upon request. Any communication, purporting to be an appeal, a petition or an application, shall be treated as mere notice of intention to seek Board action, until such time as it is made on a complete official application form and the applicable filing fee is paid. To be a complete form, the applicant must consult with the Building Inspector and all information called for by the form must be furnished by the applicant in the manner therein prescribed with precise language identifying the applicable provisions of the Zoning By-Laws and the specific nature of the appeal, petition or application. The form to be used is hereby made a part of these Rules.

15. The Appellants subsequently filed a *ZBA Application for Hearing* with the \$200 *ZBA Application Fee* with the Town Clerk on October 23, 2023.
16. In a letter dated November 1, 2023, the Building Commissioner responded to the Appellants' ABID, providing his detailed determination that the documents submitted for the Project fully comply with the provisions of the By-Law, and denied the Appellants' request to revoke or suspend Building Permit #BC-23-10079.

The Board makes the following rulings on the issues presented in this appeal:

17. Board Jurisdiction to Hear This Appeal. NCC, through counsel, argues that the Board lacks jurisdiction to hear this appeal, for two reasons. First, NCC argues that the Appellants timely filed a letter/memorandum on October 19, 2023 outlining the grounds for their appeal, but failed to provide an application form and appeal fee until several days later, on October 23, 2023, which was after the expiration of the 30 day appeal period. Second, NCC argues that the Appellants failed to appeal the Building Commissioner's letter dated November 1, 2023. In that letter, the Building Commissioner responded to the request made in the Appellant's October 19, 2023 filing that he revoke or suspend the Building Permit during this appeal. The Building Commissioner declined that request to revoke or suspend the Building Permit. The Board finds that the omission of the application form and filing fee within the 30-day appeal period does not deprive it of jurisdiction to hear this appeal. The Board also finds that where the Appellants filed a letter/memorandum on October 19, 2023, their failure to separately appeal the Building Commissioner's November 1, 2023 letter (in which he responded to the October 19, 2023

letter/memorandum) does not deprive the Board of jurisdiction to hear this appeal.

18. Appellants' Pending Appeal of Land Court Case 22MISC0001568 (JSDR) to the Appeals Court. The Appellants argue that the issuance of the Building Permit was premature because their appeals of the Land Court's (a) decision to deny intervention and (b) Judgment are still pending with the Massachusetts Appeals Court. This argument does not provide a basis for this Board to revoke the Building Permit. The Land Court's Judgment stated that the Project complies with the dimensional requirements of the By-Law and is not subject to further review thereunder, and that Needham Enterprises, LLC is entitled to apply for a building permit without further action by the Planning Board. The effectiveness of this Judgment has not been stayed by either the Land Court or the Appeals Court. It is presently effective and may be relied upon by all parties. The Appellants have cited no authority to support the argument that the Building Permit must not have been issued, or must now be revoked, based on the current posture of their appeals.
19. Supposed Lack of Stormwater Management and Erosion Control Plan. The Appellants argue that the failure to submit a Stormwater Management and Erosion Control plan to the Building Commissioner in support of the Building Permit was in violation of Sections 7, 5.3.2 and 5.3.3 of the By-Law, and requires the Board to revoke the Building Permit. This argument does not provide a basis for this Board to revoke the Building Permit, for several reasons. Regulation of childcare facilities must be consistent with the Dover Amendment. Stormwater Management and Erosion Control are not regulations concerning the bulk, height, yard size, lot area, setbacks, open space, parking, or building coverage within the meaning of M.G.L. c.40A, §3, third par. Nevertheless, the record before the Board shows that the Owner submitted Stormwater Management and Erosion Control plans to the Town Engineering Department for review, and that the Engineering Department found them to be satisfactory. The Appellants have provided no information, expert or otherwise, to suggest that those plans are insufficient to properly address stormwater or erosion control at the Premises. The Board finds that the matter of stormwater management and erosion control plans provide no basis to revoke the Building Permit.
20. Lack of Site Plan Approval. The Appellants argue that Site Plan Review was required for the Project, and that in the absence of a Site Plan Approval decision from the Planning Board issuance of the Building Permit violates Section 7.4 of the By-Law. This argument does not adequately credit the fact that the Land Court, in its Memorandum of Decision dated August 15, 2023, stated that the Planning Board "*erred in requiring the LLC to undergo the ZBL's major site plan review special permit process for this project. The Statue expressly prohibits it.*" In its Judgment dated August 22, 2023, the Land Court stated "(1) that the March 1, 2022 decision of the [Planning] Board exceeded its authority and is hereby annulled, (2) that the Project complies with the dimensional requirements of the local zoning bylaws and, pursuant to G.L. c.40A, §3, is not subject to further review thereunder, and (3) that the LLC is entitled to apply for a building permit without further action by the Board." The Land Court ruled unequivocally, after a trial on the merits, that this Project is entitled to proceed to a building permit without the need for any further approvals under the By-Law.

21. Two Non-Residential Buildings on One Lot. The Appellants argue that the Building Permit plans violate Section 3.2.1 of the By-Law by allowing two nonresidential structures—the new 10,034 square foot childcare building and the existing 4,800 square foot barn—on the lot. In support of this argument, the Appellants raise questions about whether NCC needs, or will actually use, the existing barn, and whether others (specifically the Owner) will use it instead. The Appellants also assert that the barn is too large and out of keeping with appearances of the neighborhood generally. Section 3.2.1 of the By-Law does not provide a basis to revoke the Building Permit for the following reasons: First, the existing 4,800 square foot barn does not violate any setback, height, lot coverage, floor area ratio or other dimensional requirement contained in the By-Law. Other than Section 3.2.1's prohibition on multiple non-residential structures on the same lot, the existing barn is a dimensionally conforming structure. Second, representatives of NCC testified during the public hearing that the existing barn is included in their lease, that NCC has a need to use it as storage space, and that NCC will in fact use it as storage space. Finally, the Building Commissioner stated during the hearing that use of the existing barn by anyone other than NCC would be unauthorized and would prompt enforcement of the By-Law. Where the childcare operator intends to use an existing barn as storage accessory to the childcare use, and the existing barn does not itself violate any particular dimensional regulation contained in the By-Law, the Board concludes that Section 3.2.1 must be applied to this childcare use in a manner consistent with the Dover Amendment. So applied, Section 3.2.1 does not compel the demolition and removal of that existing barn, or the revocation of the Building Permit.
22. Failure of Building Permit Plans to Indicate Intended Use of the Barn. The Appellants argue that the plans on file with the Building Department do not indicate an intended use of the barn, and that the Owner should be required to state definitively what the barn's use will be once the Project is completed. As noted above, NCC addressed this argument by stating that the barn is included in its lease of the Premises, and that it intends to use the barn for storage. The Building Commissioner has stated that use of the barn by anyone other than NCC would be unauthorized and would prompt zoning enforcement. The Board finds that the existing barn can only be accessory to the childcare facility, that NCC's use of the existing barn has been made sufficiently clear in the record, and that the lack of notation to this effect on plans submitted to the Building Department does not support revocation of the Building Permit.
23. Environmental Testing. The Appellants argue that there has been no independent environmental assessment of the Project site, including representative soil testing. The Appellants state that previous uses of the Premises have included storage of abandoned vehicles and equipment, a race car building and repair shop, operation of an excavation business including equipment storage and repair, and a lawn care business including storing equipment, related materials and refuse. The Appellants state that these prior uses suggest the threat of releases and possible presence of hazardous substances including oil. The Board's jurisdiction and review on appeal of a building permit are limited to interpretation and enforcement of the By-Law. The Board finds that the appropriate regulatory scheme for addressing concerns of environmental contamination at the property is M.G.L. c.21E, and that the current record of possible environmental contamination provides no basis for

the Board to revoke the Building Permit for violation of the By-Law.

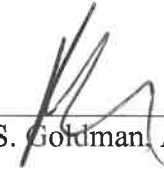
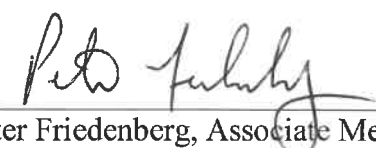
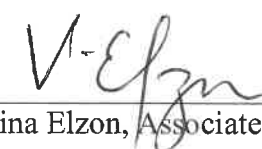
24. Landscape Plan. The Appellants argue the failure to submit a landscape plan is in violation of Section 4.2.14 of the By-Law and requires the Board to revoke the Building Permit. Regulation of childcare facilities must be consistent with the Dover Amendment. Landscaping is not regulation of the bulk, height, yard size, lot area, setbacks, open space, parking, or building coverage within the meaning of M.G.L. c.40A, §3, third par. Open space in this context refers to the presence or absence of a structure on land, and does not include landscaping. It is therefore not included among the areas that the By-Law may permissibly regulate for this Project. Nevertheless, the Owner represented during the hearing that it would install landscaping in accordance with the landscaping plan previously reviewed and approved by the Planning Board. The Board therefore finds no ground to revoke the Building Permit on the basis of the failure to submit a landscaping plan for the Project.
25. Parking Requirements. The Appellants argue that the plans submitted with the application for the Building Permit failed to demonstrate that the Project complies with relevant parking requirements of the By-Law. As noted above, Section 5.1.2 of the By-Law does not specify a specific number of required parking spaces for childcare facilities. Rather, it states that “[i]n the event that the Building Inspector is unable to determine if a particular use relates to any use within the table of ‘Required Parking’ (Section 5.1.2), the Planning Board shall recommend to the Building Inspector a reasonable number of spaces to be provided based on the expected parking needs of occupants, users, guests, or employees of the proposed business, with said recommendations based on the most recent edition of the ITE Parking Generation Manual or an alternative technical source determined by the Planning Board to be equally or more applicable.” The Building Commissioner concluded that the 30 proposed parking spaces is sufficient to address the parking needs of the Project. This finding is consistent with the Planning Board’s finding relative to parking: When it performed site plan review of the Project, the Planning Board found in its decision (with the benefit of analysis from its own peer review engineer) that 30 parking spaces was more than sufficient to satisfy the By-Law. This finding satisfies the above-quoted provision of Section 5.1.2 of the By-Law as applied to the parking requirement for this Project. In addition, the Board notes that parking requirements for childcare uses in Town have historically been based on the following formula: 8 parking spaces plus 1 for every 40 students, plus 1 space for the maximum staff on duty. The program will operate with 115 students and 18 employees, so the parking requirement based on application of this formula is 29 spaces ($8+3+18=29$). The Project includes 30 on-site spaces. The Appellants provided no information to the Board, expert or otherwise, to show that the Project lacks sufficient parking spaces to serve the parking needs of its customers and staff. The Board finds no ground to revoke the Building Permit on the basis of the Project’s compliance with the parking requirements of the By-Law.
26. Lighting. The Appellants argue that the Project plan fails to provide measures to mitigate off-site glare and off-site light spill in violation of Section 5.3.4 of the By-Law. Childcare facilities are protected under the Dover Amendment. Lighting is not regulation of the bulk, height, yard size, lot area, setbacks, open space, parking, or building coverage within the

meaning of M.G.L. c.40A, §3, third par., and is therefore not subject to regulation by the Town through the By-Law under the Dover Amendment. Nevertheless, the Owner submitted a lighting plan with its application for Building Permit #BC-23-10079. The Board finds no ground to revoke the Building Permit on the basis of this Section of the By-Law.

27. Construction Management Plan. The Appellants argue that the Owner failed to provide a Construction Management Plan. There is no section of the By-Law which requires a Construction Management Plan. The Building Commissioner, as zoning enforcement officer under Section 7.1 of the By-Law, has the most experience in administering the By-Law and Building Code along with the available enforcement process to address any concerns that may arise. The Board finds no grounds to revoke the Building Permit for failure to provide a Construction Management Plan to the Building Department.

Decision:

On the basis of the foregoing findings, following due and open deliberation, upon motion duly made and seconded, the Board declines to reverse the ruling of the Building Commissioner and upholds the issuance of Building Permit #BC-23-10079.


Howard S. Goldman, Acting Chair
Peter Friedenberg, Associate Member
Valentina Elzon, Associate Member

Appeals from this Decision, if any, shall be made pursuant to Massachusetts General Laws, Chapter 40A, §17, and shall be filed within twenty days after the date of filing of this Decision in the Office of the Town Clerk.