

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. LIN-25-566

BOOTHBAY HARBOR WATERFRONT PRESERVATION,
Petitioner/Appellee,

v.

TOWN OF BOOTHBAY HARBOR,
Respondent/Appellee,

And

JOSEPH DOYLE and JILL DOYLE,
Parties-In-Interest/Appellants.

On Appeal from Lincoln County Superior Court
Docket No. AP-2023-00004

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
I. INTRODUCTION	6
II. STATEMENT OF THE FACTS	6
A. Proceedings before Town of Boothbay Harbor municipal boards	7
B. Proceedings before the Superior Court	17
III. ISSUES PRESENTED	19
IV. SUMMARY OF THE ARGUMENT	19
V. STANDARD OF REVIEW	21
VI. ARGUMENT	22
A. The Doyles have waived any mootness claim and, even if not waived, the administrative record does not support the Doyles' mootness contention	22
B. The BOA decision vacating the Planning Board's approval of Preservation's SZ application was a final appealable decision	26
C. The Superior Court was authorized to retain jurisdiction of Preservation's appeal to allow the Planning Board to make additional findings	30
D. The Planning Board did not err when it found that Preservation's SZ application satisfied the SZ standards	31
1. The Planning Board correctly determined that the parking area is a nonconforming structure	31
2. By failing to raise the issue before the Planning Board, the Doyles have waived any claim that the Planning Board erred in finding that the parking area satisfies the applicable setback to the greatest practical extent and, even if not waived, the finding is supported by substantial evidence in the administrative record	35
3. The Planning Board did not err when it classified the Park as an institutional use within the meaning of the LUO	39
4. The Twenty Percent Lot Coverage Limit Does Not Apply	41
5. The Planning Board did not err in deeming Preservation's SZ application complete	43
VII. CONCLUSION	44
CERTIFICATE OF SERVICE	46

TABLE OF AUTHORITIES

Cases

<i>Aydelott v. City of Portland</i> , 2010 ME 25, 990 A.2d 1024	38-39
<i>Beal v. Town of Stockton Springs</i> , 2017 ME 6, 153 A.3d 768	38
<i>Bizier v. Town of Turner</i> , 2011 ME 116, 32 A.3d 1048	40
<i>Bureau of Employee Relations v. Me. Labor Relations Bd.</i> , 655 A.2d 326 (Me. 1995).....	26
<i>Bryant v. Town of Camden</i> , 2016 ME 27, 132 A.3d 1183	27, 28, 29
<i>Cannon v. Town of Mount Desert</i> , 2025 ME 86, 345 A.3d 115.....	21, 22
<i>City of Ellsworth v. Doody</i> , 629 A.2d 1221 (Me. 1993)	25
<i>Drew v. Town of York</i> , 2026 ME 15, 354 A.3d 345.....	23
<i>Driscoll v. Gheewalla</i> , 441 A.2d 1023 (Me. 1982).....	39
<i>Fleming v. Comm’r, Dep’t of Corrs.</i> , 2002 ME 74, 795 A.2d 692.....	20, 26
<i>Friends of Lincoln Lakes v. Bd. of Env’tl. Prot.</i> , 2010 ME 18, 989 A.2d 1128	22
<i>Gensheimer v. Town of Phippsburg</i> , 2005 ME 22, 868 A.2d 161.....	21
<i>Goldman v. Town of Lovell</i> , 592 A.2d 165 (Me. 1991).....	40
<i>Harding v. Comm’r of Marine Res.</i> , 510 A.2d 533 (Me. 1986).....	30, 31
<i>Jordan v. City of Ellsworth</i> , 2003 ME 82, 828 A.2d 768.....	22, 33-34
<i>Mack v. Town of Cape Elizabeth</i> , 463 A.2d 717 (Me. 1983)	39
<i>Murray v. City of Portland</i> , 2023 ME 57, 301 A.3d 777	22, 31
<i>Mayberry v. Town of Old Orchard Beach</i> , 599 A.2d 1153 (Me. 1991)	34

<i>New Eng. Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife,</i> 550 A.2d 56 (Me. 1988).....	35, 36
<i>Olson v. Town of Yarmouth,</i> 2018 ME 27, 179 A.3d 920.....	41
<i>Osprey Fam. Tr. v. Town of Owls Head,</i> 2016 ME 89, 141 A.3d 1114.....	38
<i>Rockland Plaza Realty Corp. v. City of Rockland,</i> 2001 ME 81, 772 A.2d 256.....	34, 34-35, 42, 43
<i>Rudolph v. Golick,</i> 2010 ME 106, 8 A.3d 684	22, 33
<i>Sahl v. Town of York,</i> 2000 ME 180, 760 A.2d 266	25
<i>Sanborn v. Town of Eliot,</i> 425 A.2d 629 (Me. 1981)	30, 31
<i>Seider v. Bd. of Exam'rs of Psychs.,</i> 2000 ME 206, 762 A.2d 551	36
<i>Summerwind Cottage, LLC v. Town of Scarborough,</i> 2013 ME 26, 61 A.3d 698...40	
<i>Tarbuck v. Jaeckel,</i> 2000 ME 105, 752 A.2d 176	31
<i>Tominsky v. Town of Ogunquit,</i> 2023 ME 30, 294 A.3d 142	22
<i>Town of Madison, Dep't of Elec. Works v. Pub. Utils. Comm'n,</i> 682 A.2d 231 (Me. 1996).....	34
<i>Verizon New England, Inc. v. Pub. Utils. Comm'n,</i> 2005 ME 16, 866 A.2d 844....	36
<i>Wells v. Portland Yacht Club,</i> 2001 ME 20, 771 A.2d 371.....	36
 <i>Maine Statutes and Other Authorities</i>	
30-A M.R.S. § 2691(3)(H)(2017)	27, 28
30-A M.R.S. § 4482-A(2)	28
Maine Rules of Civil Procedure 1	31
Alexander, <i>Maine Appellate Practice</i> § 402(a) (4th ed.2013).....	36

Boothbay Harbor, Me., Land Use Ordinance, Chapter 170

Art. III (Zoning Districts) Section 170-25(E).....	7
Art. V (Site Plan Review) Section 170.66(A)(7).....	11
Art. VI (Nonconformance) Section 170.83(G).....	41
Art. VIII (Shoreland Zoning)	
Section 170.101.7	41
Section 170.101.7(C)(2) & (3)	15, 18, 38
Section 170.101.10 (A) – (T).....	9
Section 170.101.10(A)(1)	39
Section 170.101.10(B)(1)	11, 12, 32
Section 170.101.10(G).....	9
Section 170.101.11(F)	24
Section 170.101.11(H)(1)(a).....	14
Section 170.101.12 (definition: “institutional”)	39, 40
Section 170.101.12 (definition: “nonconforming condition”)	41
Section 170.101.12 (definition: “structure”)	18, 32

I. INTRODUCTION

The Town of Boothbay Harbor Planning Board met on November 10, 2021, and spent three hours reviewing with its attorney John Cunningham, Boothbay Harbor Waterfront Preservation's shoreland zoning permit application. To aid them in that review, Attorney Cunningham provided board members with an 18-page checklist containing all the Shoreland Zoning standards. After Attorney Cunningham walked board members through each item on that checklist, the Planning Board voted to approve the application. And the board subsequently issued a written decision with findings of fact. Of the issues that the Doyles preserved by both raising before the Planning Board and then on appeal, the Doyles have not met their burden to show that the Planning Board misapplied the standards or made findings unsupported by the record. This Court should therefore affirm the Superior Court's decision.

II. STATEMENT OF THE FACTS

Boothbay Harbor Waterfront Preservation ("Preservation") is an independent 501(c)(3) nonprofit corporation and is the owner of real property located at 65 Atlantic Avenue, identified on the Town Tax Map 16 as Lot 24. (R. 1.) Preservation's mission is to preserve and protect in the Town a working waterfront, and to ensure public access to that waterfront. To that end, in 2019 Preservation purchased a waterfront parcel at 65 Atlantic Avenue approximately .84 acres in size

that had been occupied by the recently closed “Cap’n Fish” hotel (the “Property”). (R. 14-18.) The largely improved site located in the Limited Commercial/Maritime Shoreland District included two nonconforming hotel buildings and a large, asphalt and concrete parking area that encompassed virtually the entire area between the two hotel buildings.¹ The site included two piers, known as the North and South Pier, long used by fishermen and boaters. (R. 94, 137.) Preservation’s plan is to redevelop the Property as a public shorefront park, with continued use of the two piers, to be called the Eastside Waterfront Park (the “Park”) and to preserve what was known as the Hodgdon House that fronted on Atlantic Avenue (the “Project”). (R. 1-42, 83-97.)

A. Proceedings before Town of Boothbay Harbor municipal boards.

The Project required review and approval by the Planning Board under the Town’s site plan regulations in Article V and the shoreland zoning (“SZ”) requirements in Article VIII of the Town’s Land Use Ordinance (“LUO”).

¹ In 2019, Town’s inhabitants enacted the Limited Commercial/Maritime District (“LC/M”) with the stated purpose as follows:

The purpose of the Limited Commercial/Maritime District is to reserve a reasonable portion of the Boothbay Harbor waterfront for the protection of traditional water-dependent uses, such as bait suppliers, wholesale and retail lobster and fish markets, boat launching ramps, marine repair, marinas and similar marine activities; to allow development of new, compatible non-maritime uses, such as hotels, restaurants, and similar uses, and the creation new opportunities for public waterfront access and conservation of existing public physical and visual access to coastal waters.

Section 170-25(E) of the Town’s Land Use Ordinance. (R. 367.)

Preservation submitted such an application in 2020, which the Planning Board reviewed over the course of four meetings, ultimately approving the Project on October 14, 2020. Preservation later received Planning Board approval of certain minor amendments to the Project on September 8, 2021. While Preservation understood the October 14, 2020, and September 8, 2021, approvals to include the necessary review and approval under both the site plan regulations in Article V and the SZ requirements in Article VIII of the LUO², unfortunately the Planning Board's written findings from these meetings only referenced the site plan criteria in Article V. (R. 6.)

On October 25, 2021, Preservation submitted to the Planning Board an application for SZ approval. (R. 4-39.) The SZ application was supported, in part, by an Order of the Maine Department of Environmental Protection (“DEP”), in which the DEP made findings and concluded that the Park project complied with the requirements of the Natural Resource Protection Act, 38 M.R.S. §§ 480-A to - JJ, and 33 U.S.C. § 1341. (R. 19-32.)

² The Town likely also considered the October 14, 2020, site plan approval and the September 8, 2021, amendment to the site plan be the only approvals required by the Planning Board. Following the approval of the Project on October 14, 2020, Preservation began construction of the Project, which went on for months with no objection from the Town. While Preservation’s site plan application had addressed the SZ standards, it was not until after the Doyles pointed out the Planning Board’s written findings did not expressly address Article VIII standards that the Town required Preservation to go back to the Planning Board for SZ review.

In its SZ application, Preservation demonstrated to the Planning Board the Park Project's compliance with the LUO's SZ standards. (R. 6-13) (citing LUO § 170-101.10(A)-(T).) With respect to the standard for parking areas, LUO § 170-101.10(G), Preservation advised the Planning Board that:

The [Park] is improved with an existing large, paved and concrete parking area that spans from Atlantic Avenue to the existing water-dependent uses on the Property and does not meet current setback requirements. The Park project proposes to dramatically reduce the size of the existing parking area and move it back from the shoreline to the greatest practical extent. Areas in which paved parking is removed will be replaced with lawn, trees, or other aesthetic enhancements.

(R. 9.)

On November 8, 2021, Preservation submitted a supplemental letter to the Planning Board. (R. 40-42.) With respect to parking, and addressing whether the parking was legally non-conforming and as such whether the proposed relocation of a 12-space parking area (hereinafter referred to as the "Upper Parking Area") partially within the 75-foot setback met the greatest practical extent standard, Preservation explained as follows:

Under the LUO, a legally nonconforming condition is allowed to continue as long as it does not become more nonconforming. As documented in previous submissions to the Planning Board, the predevelopment condition of the property was 86.22% impervious, due in large part to two nonconforming hotel buildings and a large, asphalt and concrete parking area that encompassed virtually the entire area between the two hotel buildings. The existing parking area qualified as a nonconforming structure. Under the LUO, nonconforming structures may be relocated provided that the site of relocation conforms to all setback requirements to the greatest practical extent as determined by

the Planning Board. Similarly, nonconforming structures may also be reconstructed or replaced provided the reconstruction or replacement meets applicable setbacks to the greatest practical extent. What [Preservation] is proposing is not a new parking area, but rather, the relocation or replacement of the existing parking area at the Property.

In determining whether a relocated or replacement nonconforming structure meets the setback to the greatest practical extent, the Planning Board considers the following factors:

the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the location of the septic system and other on-site soils suitable for septic systems, and the type and amount of vegetation to be removed to accomplish the relocation.

Here, the lot is not only small, but it is also not very deep, allowing very little area outside the 75-foot setback to relocate the parking area. Furthermore, the presence of the Hodgdon House, which [Preservation] proposes to keep on-site due to its historic qualities, further limits the area in which parking may be relocated. Because the relocated parking area lies largely within the footprint of a nonconforming building that has been demolished, little, if any vegetation will need to be removed in order to accomplish the relocation. Furthermore, [Preservation] is proposed extensive landscaping, tree planting, and new lawn in the area of the old parking area. The relocated parking area therefore meets the shoreland setback to the greatest practical extent.

(R. 41- 42.)

The Doyles are Florida residents. (A. 41.) The Joseph D. Doyle Living Trust owns the property at 61 Atlantic Avenue that abuts the Preservation's property, and Joseph Doyle claims to be a trustee of that trust.³ (A. 32, 41) On

³ While not relevant to the 6 claims of Planning Board error they present in their appeal, the Doyles inaccurately suggest procedurally irregularities tainted the Planning Board's approval in 2020 of Preservation's site plan application. For example, they say "[n]otice of the site plan approval was never

November 9, 2021, in opposition to the Preservation's SZ application, the Doyles submitted to the Planning Board extended commentary and supporting documents. (R. 43-74.) The Doyles argued to the Planning Board that the Upper Parking Area was a new structure and had to be located entirely outside of the 75-foot setback from the shore. (R. 47.); *see* LUO §§ 170-101.10(B)(1), (R. 423; A. 143.). As support for their argument, the Doyles cited an email they solicited from DEP Shoreland Zoning Coordinator, Colin Clark, agreeing with the Doyles' position

sent to the Doyles." (Blue Br. 4.) Yet they cite no authority that requires notice of approvals issued at a public meeting must be sent to anyone. (*Id.*) On October 14, 2020, the Planning Board approved Preservation's initial site plan application for the Project. (R. 1; A. 14.) The Doyles did not participate in those proceedings, did not object, and did not appeal. (R. 44.) On September 8, 2021, the Planning Board approved Preservation's application for a minor amendment to the site plan that consisted of two changes, (1) a reduction in area of a brick paved gathering area and walkway, and (2) a relocation of a splash pad, a feature of the public shorefront park. (R. 4; A. 15.) The Doyles did not attend those proceedings. But they challenged the Planning Board's approval of the two minor site plan amendments by an appeal to the Board of Appeals. (A. 15.) After that Board heard their appeal on the merits, and after remand, it affirmed the Planning Board's decision. (A. 16-17.) The Doyles then filed an 80B appeal. (*Id.* at n. 3) Among other claims, the Doyles claimed that due to lack of actual notice of the Planning Board hearing on the site plan amendments, the Planning Board decision had to be vacated. The Doyles did not say that the Town failed to mail notice of Preservation's application to the address stated in the Town's property tax assessing records for 61 Atlantic Avenue and did not claim that such notice was not actually delivered at that address. They did not say notice of the hearing was not published in the local newspaper. Rather they claimed they did not receive the notice because they were out of the area, and had unilaterally asked the CEO that any notices be sent to their Florida address, and not the address stated in the assessing records for mailing property tax bills. (R. 44-45.) The LUO Section 170-66(A)(7) states:

Notice of the time, place, and date of such hearing shall be sent not less than 10 days before the hearing to the applicant and to owners of property within 250 feet of the properties involved. Property owners shall be those listed in the most recent tax records of the Town of Boothbay Harbor. Notice shall also be published at least twice in newspapers in general circulation for the Town of Boothbay Harbor, the first date of which shall be at least 14 days prior to the public hearing. *Failure to receive notice shall not invalidate the public hearing held.*

(R. 397; A. 118 (emphasis supplied).) The Superior Court agreed with the Doyles that they were entitled to actual notice, and ordered a remand to the Planning Board to redo the proceeding. As an interlocutory order, Preservation could not appeal that decision to this Court.

that the Upper Parking Area at the Park constituted a “new” structure. (R. 47, 61, 80, 112.) Mr. Clark would later reverse his position. (R. 253, 260-61).

On November 10, 2021, the Planning Board held a public hearing at which it reviewed Preservation’s SZ application, and took comments from the Doyles’ counsel. (R. 14-18; 76-79.)⁴ At that meeting, the Doyles never argued that if the Upper Parking Area was not new, that the depicted parking area had not been relocated to the greatest practical extent. (R. 99-100.) Following three hours of discussion regarding whether the Project met each and every applicable criterion for SZ approval, the Planning Board continued the public hearing to November 17, 2021. (R. 100; A. 5.) Prior to the Planning Board’s meeting, the Doyles provided written comments by letter dated November 16, 2021. (R. 80-82.) In that letter, the Doyles did not assert that if the Upper Parking Area was not new, that it had not been relocated to the greatest practical extent. (*Id.*)

On November 17, 2021, when the Planning Board met and approved Preservation’s SZ application, the Doyles’ counsel again spoke at length but again, he never told the Planning Board that if the board rejected the Doyles’ contention

⁴ In their Blue Brief at 4-5, the Doyles insinuate that the Planning Board engaged in ex-parte discussions of the SZ application. The Doyles do not seek to undo the SZ approval based on any ex parte discussions. Nonetheless they make the unsubstantiated claim that “some consideration of the merits must have taken place outside of the meeting.” (*Id.* at 7.) They rely on a discussion the Planning Board had in October 2022 that is not in the record. And that discussion, as they present it, simply says “in the past” the board circulated draft findings to the CEO, who would then prepare a draft and recirculate to the board prior to a meeting. (*Id.*) There is no indication that this process was followed in November 2021 when the Planning Board approved its written findings on Preservation’s SZ application.

that the Upper Parking Area was not new, that the board lacked any basis to find that Preservation's depicted relocated parking area met the greatest practical extent standard. (R. 99-100.)

On November 17, 2021, the Planning Board issued a written decision containing its findings and conclusions on the SZ application and approved a SZ building permit, No. 21-100. (R. 104-107; A. 50-52.) Regarding the parking area standard, the Planning Board rejected the Doyles' view that the Upper Parking Area was new, and approved the relocated parking within the 75-foot setback as shown on the submitted plans. (R. 99-101; 104-106; A. 50-52.) The board's written decision states: "Parking areas. The Board finds this standard to be met, based on the plans submitted, and the parking on the concrete pier is a nonconformity permitted to continue." (R. 105; A. 51.)

The Doyles appealed to the Town's Board of Appeals ("BOA"). (R. 111-209.) Noteworthy is that in their 99-page submission, among the 6 issues they raised,⁵ they did not raise as an issue that if correctly viewed as a nonconformity the proposed parking had been relocated to the greatest practical extent. (R. 111-

⁵ The six issues the Doyles raised were: 1. All Structures Related to the Park Are Subject to the 75-foot Setback; 2. The Parking Lot is New and is Subject to the Setback; 3. All New Structures Must Comply with the 20% Lot Coverage Cap; 4. The Project Must Comply with the Minimum Lot Standards; 5. No Further Clearing of Vegetation is Permitted; and 6. Pier Safety. (R. 46-50 (Nov. 9, 2021, letter to Planning Board), 111-116 (Dec. 16, 2021, letter to BOA).)

209.) *See also* (R. 215.) (“The main issue raised by the appellate is the new parking lot, which does not meet the 75 foot set back.”).

The BOA heard the Doyles’ appeal on January 13, 2022. (R. 213-217.) Rather than limit its appellate review⁶ to just the issues the Doyles raised, the BOA undertook to review whether all of the Planning Board’s findings were supported by evidence. (R. 357.) On January 18, 2022, the BOA issued a written Order of Remand, as in its view the Planning Board’s SZ approval required clarification on (1) whether the Planning Board considered all of the proposed parking at the Park, (2) whether parking on the concrete pier would be allowed to continue if the structure is rebuilt and if that parking is not for the same purpose as the prior parking, (3) recent communication from DEP, and (4) whether all permits from regulatory agencies required for the project were obtained, in effect, and updated to reflect any changes to the project after the permit’s issuance. (R. 218; A. 53.)

The Planning Board planned to act on remand during an October 12, 2022, hearing. (R. 247; A. 54.) Preservation supplied the Planning Board with a June 23, 2022, email from DEP Shoreland Zoning Coordinator Colin Clark, in which he agreed that the Town’s and Preservation’s view that the Upper Parking Area is a nonconforming structure and the location for which is governed by LUO

⁶ Section 170-101.11(H)(1)(a) of LUO provides that when hearing an appeal from a Planning Board decision the Board of Appeals acts in an appellate capacity only. (A. 153.)

subsection 170-101.7(C) reflected a reasonable interpretation of the LUO. (R. 260.) He added that it was doubtful that DEP would second guess the Town's interpretation of its LUO, and that if the Town viewed the parking area as a nonconforming structure the Planning Board would, as it had already, need to consider its proposed location under the LUO's "greatest practical extent" standard, *see* LUO § 170-101.7(C)(2), (3). (R. 260; A. 140-141.)

The Planning Board acted on the Order of Remand on October 12, 2022. (R. 278-280.) On December 14, 2022, the Planning Board issued its written response. (R. 296-297; A. 55-56.) The Planning Board clarified that its findings with respect to all of the proposed parking areas at the Park were based on the plans submitted by Preservation with its application. (R. 296; A. 55.) It made a finding that the parking area near the southerly side of the Park was relocated so as to comply with the shoreland setback to the greatest practical extent. (*Id.*) Regarding DEP's communication, the Planning Board concluded that the concerns raised thereby did not affect or require alteration of Preservation's SZ approval. (R. 297; A. 56.)

The BOA reconvened on January 31, 2023. (R. 298, 320-321, 326; A. 57.) Ultimately, the BOA again remanded to the Planning Board, this time for it to identify the evidence in the record of the Planning Board's proceedings on which the Planning Board "relied on to support its finding 'that the parking area near the southerly side of the property has been relocated to *comply with setback*

requirements to the greatest practical extent.” (R. 321, 326; A. 57.) (emphasis in original).

The Planning Board considered the BOA further remand during its February 8, 2023, meeting. (R. 333, 336.) On February 9, 2023, the Planning Board submitted its written response to the BOA and identified the specific evidence in the record upon which it relied in determining that the Upper Parking Area was relocated to the greatest practical extent. (R. 337; A. 58.) The response stated:

In reaching its decision the Planning Board determined relocating the parking area, which is a structure, is analogous to the “building relocation” referenced in the above section. The Planning Board then used the following evidence in the record for making its determination:

Size of the lot:	Submitted Existing Conditions & Boundary Plan L-1
Slope of the land:	Submitted Stormwater, Sedimentation & Erosion Control Plan L-6
The potential for soil erosion:	Submitted Stormwater, Sedimentation & Erosion Control Plan L-6
The location of structures:	Submitted Existing Conditions & Boundary Plan L-1 and Site Plan L-3
The location of the septic system:	Not applicable – Town sewer and water
Vegetation to be removed:	Not applicable – None to be removed

The Planning Board believes this fully addresses the request of the Board of Appeals.

(*Id.*)

The BOA took up the appeal again on March 9 and 30, 2023. (R. 346-348, 356-359; A. 59.) The BOA concluded that there was insufficient evidence in the record before the Planning Board to support the Planning Board’s finding that the Upper Parking Area was relocated to the greatest practical extent. (R. 359-360; A. 59.) Otherwise, the BOA concluded that all of the Planning Board’s other factual findings had sufficient evidentiary support, and that that the Planning Board committed no errors in its interpretation of the LUO. (*Id.*)

B. Proceedings before the Superior Court.

Pursuant to Rule 80B of the Maine Rules of Civil Procedure and the LUO, Section 170-101.11(H)(5), on August 23, 2023, Preservation sought review in the Superior Court. (A. 40-44, 154.) The Superior Court consolidated Preservation’s instant appeal, AP-2023-0004, with the Doyles’ two other Rule 80B appeals concerning the Park project for briefing and decision with AP-2022-03.⁷ (A. 31.); *see also* Order [on motion to consolidate] (May 22, 2023) (A. 5.)

After submission of the Rule 80B briefs, on April 30, 2024, the court issued an order finding the administrative record to be insufficient for appellate review. (A. 12-29.) The court reasoned that “[a]lthough the Planning Board concluded generally that the Preservation’s proposed parking areas satisfied the relevant Ordinance provisions, it failed to include any specific findings related to the setback requirement issues. Absent any explanation of the Planning Board’s reasoning, it is impossible for the Court to meaningfully review whether its ultimate conclusion was supported by substantial record evidence.” (*Id.* at A. 29.) The court elected to remand the matter to the Planning Board “to produce further

⁷ In AP-2022-0003, the Doyles appealed the BOA’s December 20, 2021, denial of their appeal of the Planning Board’s approval of Preservation’s amended site plan. (A. 31.) In AP-2022-0005, the Doyles’ cross-appealed the BOA’s decision vacating the Planning Board approval of Preservation’s SZ application. (*Id.*)

findings of fact and law, tied to a reviewable record, within 30 days.” (*Id.*) The court expressly retained jurisdiction of Preservation’s appeal. (*Id.*⁸)

The Planning Board issued its written supplemental findings on December 11, 2024, which the Town’s attorney filed with the Superior Court, AP-2023-0004, on December 16, 2024. (A. 60-64.) In its supplemental findings, the Planning Board stated the parking area constituted a structure within the meaning of the LUO, *see* LUO § 170-101.12. (A. 61.) Next the Planning Board found again that the parking area constituted a nonconforming structure, the relocation of which must comply with the applicable shoreland setback to the greatest practical extent, LUO § 170-101.7(C)(2), (3). (A. 62-63.) It also made evidence-based findings on each of the criteria provided by the LUO, *see* § 170-101.7(C)(2)(b), (3)(c), to determine that the plan met the greatest practical extent standard. (*Id.*) Each of its supplemental findings were based on information that had been before it in November 2021 and had been referenced in response to the BOA remand, to wit plans labeled L-1, L-3, and L-6 for the Park project. (*Id.*; R. 14, 16, 18; A. 47, 48, 49.) Once again, the Planning Board determined that the location of the parking area met the setback requirements to the greatest practical extent. (A. 63-64.)

⁸ The Superior Court amended its consolidated order on September 26, 2024. (A. 30-39.) The amended order instructed the Planning Board to make and file with the court its supplemental findings of fact “as quickly as practicable and without undue delay.” (A. 39.)

The Superior Court held that, in light of the Planning Board’s supplemental findings, “the Doyles are effectively asking this court to substitute its judgment for that of the Planning Board, which is contrary to binding authority.” (A. 10.) The court granted Preservation’s appeal, vacated the BOA’s March 30, 2023, decision vacating the Planning Board’s November 17, 2021, SZ approval, and remanded to the BOA with instructions to affirm the Planning Board’s SZ November 17, 2021, approval. (A. 11.)

III. ISSUES PRESENTED

1. Whether the Doyles have waived any argument that the SZ permit has expired and, even if not waived, whether there is anything in the administrative record that would permit this Court to decide that the SZ permit expired.
2. Whether the Doyles have waived any argument the BOA’s decision vacating the Planning Board’s SZ approval is not a final appealable decision, and, even if not waived, whether the BOA’s decision was a final decision.
3. Whether the Superior Court possessed the authority to retain jurisdiction to allow the Planning Board to make additional findings of fact.
4. To the extent raised before the Planning Board, whether the Doyles have shown that the Planning Board abused its discretion, made errors of law, or made findings unsupported by the record when on November 17, 2021, the board approved Preservation’s SZ application.

IV. SUMMARY OF THE ARGUMENT

Even if not waived, the Doyles’ mootness assertion is unsupported by the

administrative record and therefore cannot serve as a basis to dismiss the Doyles' own appeal. *See Fleming v. Comm'r, Dep't of Corrs.*, 2002 ME 74, ¶ 12 n.9, 795 A.2d 692.

Preservation did not need any approval from the BOA in order to proceed with the Project. The BOA only acted in an appellate capacity. Therefore, the BOA's decision vacating the Planning Board's November 17, 2021, approval of Preservation's SZ application was a final decision.

Even if not waived, the Superior Court acted well within its authority when it expressly retained jurisdiction pending the Planning Board's further findings.

As to the issues the Doyles raised before the Planning Board, the Doyles have not met their burden to show any basis to vacate the Planning Board's November 17, 2021. The Planning Board did not err in finding the relocated Upper Parking Area not to be a new structure when a much larger parking area previously existed on the site, and was to be relocated further from the resource to an already existing impervious surface. Even if not waived as an issue, the Doyles have not shown that the Planning Board's finding that the Upper Parking Area satisfies the applicable setback to the greatest practical extent is unsupported by the record, as evident by the material the Planning Board cited numerous times.

The Planning Board did not err in making the determination that the Park qualifies as an institutional use, given that Preservation is a nonprofit corporation

and the Park will be open to the public and is intended to be used for public purposes.

The Planning Board appropriately recognized that Preservation’s proposed 56.75% reduction in impervious lot coverage was reasonable and consistent with the intent of the LUO and its provisions regarding nonconforming conditions.

The Doyles’ have not met their burden to show the record compels the conclusion that the application was not complete.

V. STANDARD OF REVIEW

Because the BOA acted only in an appellate capacity, the “operative decision of the municipality” to be reviewed by this Court is the decision of the Planning Board. *Cannon v. Town of Mount Desert*, 2025 ME 86, ¶ 6, 345 A.3d 115 (citation omitted); *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶¶ 7-8, 868 A.2d 161. Because the Planning Board did not take in new evidence in acting on the various remands, the operative decision this Court reviews is the Planning Board’s November 17, 2021, decision.⁹ *Cannon*, 2025 ME 86, ¶ 6, 345 A.3d 115.

This Court’s review is limited; the operative decision is reviewed for abuse of discretion, error of law, or findings not supported by substantial evidence in the

⁹ The Planning Board’s written decision signed by the Planning Board’s Chair is undated but on the first page of the decision it is stated that the Planning Board met on “November 10, 2021” to consider the application. (R. 104-106; A. 50-52.) While the Planning Board did meet on November 10, 2021, to discuss the application, (R. 76-79.), it was at the Planning Board’s November 17, 2021, meeting when it acted on the application. (R. 99-100.)

record. *Murray v. City of Portland*, 2023 ME 57, ¶ 13, 301 A.3d 777 (citation omitted). “The substantial evidence standard does not involve any weighing of the merits of evidence. Instead, it requires [courts] to determine whether there is any competent evidence in the record to support a finding.” *Friends of Lincoln Lakes v. Bd. of Env'tl. Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128 (citation and internal marks omitted) (cleaned up).

The party seeking to overturn a board’s decision bears the burden of persuasion, and findings of fact must be sustained unless record evidence compels a contrary conclusion. *Tominsky v. Town of Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142. While the “interpretation of a local ordinance is a question of law” reviewed *de novo*, “local characterizations or fact-findings as to what meets ordinance standards will be accorded ‘substantial deference.’” *Rudolph v. Golick*, 2010 ME 106, ¶ 8, 8 A.3d 684 (citing *Jordan v. City of Ellsworth*, 2003 ME 82, ¶¶ 8-9, 828 A.2d 768). *See also Cannon*, 2025 ME 86, ¶ 7, 345 A.3d 115.

VI. ARGUMENT

A. **The Doyles have waived any mootness claim and, even if not waived, the administrative record does not support the Doyles’ mootness contention.**

Doyles assert first that Preservation’s SZ permit expired, thereby mooting their appeal. (Blue Br. 12-16.) This argument is not based on anything in the record. The argument is waived and even if not waived it is not reviewable given the administrative record is devoid of any facts sufficient to allow dismissal for

mootness. The argument was capable of being raised below but was not. The argument is waived. *Drew v. Town of York*, 2026 ME 15, ¶ 7, 354 A.3d 345.

In any event the Doyles' argument is without merit. They assert that the SZ permit expired within one year of its November 17, 2021, issuance, due to the absence of a positive determination that that a "substantial start" occurred. (Blue Br. 12-13.) Since November 17, 2021, there have been many proceedings regarding the SZ approval, before the Planning Board, as well as the BOA and the Superior Court. At no time during the appeal proceedings post-November 17, 2021, did the Doyles raise the issue that the SZ permit expired due to lack of substantial start. *See* (R. 299-308 (Jan. 25, 2023), 330-332 (Feb. 7, 2023), 339-342 (Mar. 7, 2023), 353-355 (Mar. 29, 2023); A. 53, 54, 55-56, 57, 58, 59, 60-64.). Likewise, the Planning Board never considered argument or evidence about the assertion. *See* (R. 320-326, 334-337, 346-348, 356-360; A. 53-64.).

They did not before the Superior Court seek a trial of the facts nor seek to supplement the record to support any assertion that the Preservation's appeal was moot due to the expiration in November 2022 of the SZ permit from alleged lack of substantial start. They did not raise the issue in their Rule 80B Brief filed July 17, 2023, in the Superior Court. (A. 5.) Only after they lost at the Superior Court, and then only in their Blue Brief filed with this Court on April 24, 2026, more than 3 and a half years after when they claim the SZ permit expired, do the Doyles

make the claim. This course of conduct speaks for itself on the lack of merit of their argument. And the argument ignores that the Doyles themselves made a contradictory concession, through counsel to the BOA on August 23, 2022, that “[Preservation] has been able to mostly complete [its] project....” (R. 230.)

Even if not waived, and even if contradicted by their own admissions, their mootness argument is without merit. Pursuant to the LUO, SZ permits “shall expire one year from the date of issuance if a substantial start is not made in construction or in the use of the property during that period. If a substantial start is made within one year of the issuance of the permit, the applicant shall have two additional years to complete the project, at which time the permit shall expire.” (A. 153 (LUO § 170-101.11(F)).) Ignoring their own admission, the Doyles’ argument that Preservation’s SZ permit expired relies on their assertion that “[t]he Town has never determined that [Preservation] made a substantial start on its project” to gain the additional two years to complete work. (Blue Br. 13.) They do not direct the court to any requirement that imposes on a town the affirmative duty to make findings for every permit issued that a substantial start occurred.

Moreover, as factual support for their argument, the Doyles cite only to their own representations made to the Planning Board on **November 9, 2021**, when they gave commentary in opposition to Preservation’s application. (Blue Br. 13.); (R. 43-51.). Then, the Doyles’ complained to the Planning Board that the splash pad

they observed at the project site during May of 2021 was bigger than they would have liked. (R. 44.) That statement made in **November 2021** cannot in any way support their argument that Preservation had not by **November 2022** made a substantial start.

Apart from this citation, the Doyles fail to cite any evidence in the record to support their claim. But whether there was a substantial start must be shown with evidence in the record. *See City of Ellsworth v. Doody*, 629 A.2d 1221, 1223-24 (Me. 1993); *Sahl v. Town of York*, 2000 ME 180, ¶¶ 13-14, 760 A.2d 266. And their own admission in the record regarding the status of Preservation's work is fatal to their argument.

The Doyles inject more "facts," none tethered to the record, to assert that even if a substantial start occurred, that that substantial start happened **before** the SZ permit was actually issued, in May, 2021, and therefore the permit expired because work authorized by the SZ permit was not by completed by May, 2023. (Blue Br. 14.) The Doyles then say that although the Superior Court issued an order tolling the permit deadlines, the stay order was meaningless because the period when the tolling began, October 3, 2023, occurred after May, 2023, when in their view the permit expired. (*Id.*) Despite the opportunity, they never raised this remarkable assertion before that court, that the court was engaged in a fools errand in issuing a stay because the permit had already expired. Nor in their appeal have

they challenged the propriety of that court's stay order. This course of conduct again speaks for itself on the complete lack of merit of their argument.

Leaving aside the other reasons stated above, the Court can and should reject the Doyles' mootness argument for the simple reasons that while it could have been raised below it was not, that it has no evidentiary support for it in the administrative record, and they have not challenged the stay order. *See Fleming*, 2002 ME 74, ¶ 12 n.9, 795 A.2d 692 (reasoning that the administrative record was devoid of sufficient facts to allow dismissal of the appeal for mootness); *Bureau of Employee Relations v. Me. Labor Relations Bd.*, 655 A.2d 326, 327 (Me. 1995) (in administrative appeals, the Law Court determines mootness based upon its examination of the administrative record).

B. The BOA decision vacating the Planning Board's approval of Preservation's SZ application was a final appealable decision.

The Doyles argue that this Court must dismiss this appeal because there is no final administrative decision ripe for judicial review. (Blue Br. 19.) Specifically, they argue that the remand to the Planning Board on Preservation's site plan amendment is incomplete, and that the BOA's decision vacating Preservation's SZ permit approval will not be ripe for review until there is finality on all municipal permits needed by Preservation. The argument is without merit as Preservation obtained a site plan approval and a SZ approval. The argument ignores that the BOA acted in appellate capacity only, it was not an administrative

body from whom permits were required for the Project. The Planning Board was that body for both site plan and SZ approvals. Preservation did not need any approval(s) from the BOA, such as a variance or conditional use approval. Neither 30-A M.R.S. § 2691(3)(H) nor *Bryant v. Town of Camden*¹⁰ apply because the BOA was not acting in a permit approval capacity.

Even if the statute applied, it offers no support for the Doyles' assertion. Below is the whole text of 30-A M.R.S. § 2691(3)(H), the Doyles partially cite for their assertion that Preservation cannot appeal the BOA's vacation decision at issue. The portion of the statute the Doyles omitted is italicized:

For purposes of this section, a decision of the board is a final decision when the project for which the approval of the board is requested has received all required municipal administrative approvals by the board, the planning board or municipal reviewing authority, a site plan or design review board, a historic preservation review board and any other review board created by municipal charter or ordinance. *If the final municipal administrative review of the project is by a municipal administrative review board other than a board of appeals, the time for appeal is governed by section 4482-A. Any denial of the request for approval by the board of appeals is considered a final decision even if other municipal administrative approvals are required for the project and remain pending. A denial of the request for approval by the board of appeals must be appealed within 45 days of the date of the board's vote to deny or within 15 days of final action by the board on a reconsideration that results in a denial of the request.*

30-A M.R.S. § 2691(3)(H) (2017) (emphasis supplied).

The plain language of subsection 2691(3)(H) treats a municipal board of

¹⁰ 2016 ME 27, ¶ 19, 132 A.3d 1183.

appeals’ **denial of a request for an approval** differently from an approval for purposes of appealability and finality. Leaving aside not applicable here, no decision by a board of appeals **granting** a request for approval may be appealed as a final administrative decision by an aggrieved party until the project has received all required municipal approvals. *Id* § 2691(3)(H). However, a **denial** of a request for approval by the board of appeals is considered a final decision subject to judicial review, even when other required municipal approvals are outstanding. *Id.*

Notwithstanding the statute’s plain language treating a municipal board of appeals’ denial of a request for approval differently from an approval for purposes of appealability and finality¹¹, the Doyles argue that subsection 2691(3)(H) “follows the rule set forth in *Bryant v. Town of Camden* providing that finality on all municipal permits is required before the Superior Court may hear an appeal regarding a project.” (Blue Br. 20.) (citing 2016 ME 27, ¶ 19, 132 A.3d 1183).

But, just as they read subsection 2691(3)(H) too narrowly, the Doyles read this Court’s decision in *Bryant* too broadly. This Court held in *Bryant* that the board of appeals’ approval of the applicant’s special exception permit conditioned on the planning board’s site plan review required additional process before a final

¹¹ When a final municipal review of an application for approval is directed to a municipal authority other than a board of appeals, appealability and finality of the decision on the application are governed by 30-A M.R.S. Section 4482-B. 30-A M.R.S. § 2691(3)(H); 30-A M.R.S. § 4482-A(2). Section 4482-B contains the same approval/denial dichotomy.

decision on the special exception permit approval could be reached. *Bryant*, 2016 ME 27, ¶¶ 4-7, 17-20, 132 A.3d 1183. That holding cannot reasonably be interpreted to apply to this case, where leaving aside the BOA was only acting in an appellate capacity and not as an approving body, the board attached no conditions to its decision to vacate, nor did it mandate additional process by the Planning Board. (R. 359-360; A. 59.). The BOA’s administrative review decision “fully decid[ed] and dispose[d] of the whole cause leaving no further questions for ... future consideration and judgment” by the Planning Board on the SZ application. *See Bryant*, 2016 ME 27, ¶ 12, 132 A.3d 1183 (citations omitted).

In any event, unlike the approval appealed in *Bryant*, this case involves an appeal from a decision to vacate an approval. (A. 40-59.) Even if applicable, the BOA’s decision vacating the Planning Board’s approval of Preservation’s SZ application was a final and appealable decision under subsection 2691(3)(H).

The Doyles background narrative on this argument ignores the record. For example, the Doyles ignore that Preservation has an approved site plan. The minor amendments the Planning Board approved in September 2021 were for two changes, (1) a reduction in area of a brick paved gathering area and walkway, and (2) a relocation of a splash pad, a feature of the public shorefront park. (R. 4.) As with any redevelopments, it is not uncommon for minor amendments to be sought, like eliminating one or two parking spaces, altering a lighting plan or relocation of

a portion of a walkway. Seeking a minor amendment does not render void the initial site plan approval. Nor does it render other permits obtained void.

C. The Superior Court was authorized to retain jurisdiction of Preservation's appeal to allow the Planning Board to make additional findings.

Separately from their finality arguments, the Doyles also argue, albeit cursorily, that as a result of its remand to the Planning Board, (A. 12-39.), the Superior Court could not retain jurisdiction and therefore its order granting Preservation's appeal apparently is a nullity. (Blue Br. 20-21.) So too would be the Doyles' appeal to this Court. The argument, never raised before the Superior Court, relies on the language of Maine Rule of Civil Procedure 80B(m).

The argument ignores Maine law has long recognized that, in an appropriate case, the Superior Court may expressly retain jurisdiction of a case pending further administrative proceedings. *Harding v. Comm'r of Marine Res.*, 510 A.2d 533, 536 (Me. 1986). Retention of jurisdiction by the Superior Court is appropriate when the additional administrative proceedings directly affect the substantive issues presented to the court, and when the result of the additional process will provide a more comprehensible record for review by the Law Court. *Id.*; *Sanborn v. Town of Eliot*, 425 A.2d 629, 631 (Me. 1981) ("When confronted with an inadequate record, the Superior Court has two choices. First, the court may set aside the Board's decision and require a new hearing by the Board. Second, it can

remand to the Board for further findings to develop the record within a stated time period, while explicitly retaining jurisdiction in order to demonstrate that the decision is not a final judgment.”); *accord Murray v. City of Portland*, 2023 ME 57, ¶¶ 13-19, 301 A.3d 777; *see also Tarbuck v. Jaeckel*, 2000 ME 105, ¶ 24, 752 A.2d 176.

The Superior Court’s retention of its jurisdiction with remand to the Planning Board was appropriate here, where the proceedings on remand directly affected the substantive issue presented to the court, and provided a more comprehensible record for review by this Court. *See Harding*, 510 A.2d at 536. Rule 80B(m) must not be read in a vacuum. The Superior Court was authorized to retain its jurisdiction in this matter, and it properly did so. *See Sanborn*, 425 A.2d at 630. *See also* Rule 1 of the Maine Rules of Civil Procedure (“[The Rules] shall be construed to secure the just, *speedy* and inexpensive determination of every action.” (emphasis supplied)).

D. The Planning Board did not err when it found that Preservation’s SZ application satisfied the SZ standards.

1. The Planning Board correctly determined that the parking area is a nonconforming structure.

The Doyles do not dispute that prior to Preservation’s acquisition of the site, it was improved with a paved parking area that was much larger than the proposed Upper Parking Area. (Blue Br. 8.) Nor do the Doyles dispute that the Upper

Parking Area is a “structure” as that term is defined in Boothbay Harbor’s Land Use Ordinance (“LUO”).¹² The Doyles contend, however, that the Upper Parking Area is new and therefore must meet the 75-foot shoreland setback set forth in Section 170-101.10(B)(1) of the LUO. (R. 114, 423; A. 143.) The Doyles’ support for this position relies principally on an email dated October 13, 2021, from Colin Clark, which was addressed to the CEO. (R. 113-114, 190.)

In his email, Mr. Clark viewed the parking spaces the Preservation proposed as relocated to the greatest practical extent from the shore as new because the relocated parking would be within the footprint of the former hotel, instead of as is nearer the shore.¹³ (R. 190.) What the Doyles omit is that in June 2022, prior to the Planning Board convening to address the BOA’s first Order of Remand, Mr. Clark conceded that the requirements of the LUO with respect to the relocation and reconstruction of nonconforming structures are “not expressly clear” and that “[i]n light of the lack of clarity, I do not expect the [DEP] would second guess the town’s interpretation of its ordinance.” (R. 285.) Mr. Clark made this statement in

¹² The LUO defines a structure in relevant part as “Anything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground or over the water; exclusive of fences, and poles, wiring and other aerial equipment normally associated with service drops as well as guying and guy anchors.” LUO § 170.101-12 (R. 440; A. 160.)

¹³ The Planning Board as part of the 2020 initial site plan approval process, which Preservation then understood to encompass shoreland zoning approval, had recommended that the existing non-pier parking be relocated further upland to the impervious area of the former hotel, just creating increased pervious area nearer the shore.

a June 23, 2022, email which the Doyles themselves provided embedded in their November 8, 2022, submission to the Planning Board. (R. 285.) Mr. Clark's email, addressed to Preservation President John O'Connell, states as follows:

John:

Thank you for your June 22 letter. As I outlined in my January 13, 2022 letter to the town Board of Appeals, new parking areas must meet the setbacks for structures. With respect to the parking spaces proposed within the footprint of the former hotel, this can be viewed as new parking and subject to the setback requirements for parking areas in Section 15(G) of Chapter 1000.

In your letter you indicate the town views the parking spaces proposed within the footprint of the former hotel not as new parking, but as the relocation or reconstruction of existing nonconforming parking, treating the existing nonconforming parking as nonconforming structures under Section 15(C) of Chapter 1000. This is an alternative interpretation and reflects that how the parking in this instance should be viewed is not expressly clear from the ordinance language. In light of the lack of clarity, *I do not expect the Department would second guess the town's interpretation of its ordinance. If the town interprets the nonconforming structure provisions as applying, evaluation of whether the proposed parking conforms to all the setback requirements to the greatest practical extent would be an important part of the town's evaluation.*

(R. 285.) (emphasis supplied).

The Doyles have not shown that the Planning Board abused its discretion in interpreting the Upper Parking Area as not new. While the "interpretation of a local ordinance is a question of law" reviewed *de novo*, "local characterizations or fact-findings as to what meets ordinance standards will be accorded 'substantial deference.'" *Rudolph v. Golick*, 2010 ME 106, ¶ 8, 8 A.3d 684 (citing *Jordan v.*

City of Ellsworth, 2003 ME 82, ¶¶ 8-9, 828 A.2d 768). Here, the Planning Board acted well within its discretion in determining that the Upper Parking Area was not a new structure given the parking already existed.

The Doyles rely on a number of cases to suggest zoning provisions that permit continued nonconformity should be strictly construed. In instances when a redevelopment occurs that reduces the nonconformity, this Court has stated that what governs is the intent and whether the Planning Board's interpretation is consistent with the intent. In *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 18, 772 A.2d 256, this Court reviewed a local board approval of a redevelopment of a parcel with nonconforming structures. In affirming the local board's approval of the development plan, the court stated:

Although zoning provisions permitting continued nonconformity, such as Rockland's Zoning Ordinance, should generally be strictly construed, *Mayberry [v. Town of Old Orchard Beach]*, 599 A.2d [1153,] 1154 [(Me. 1991)], our task in construing statutes and ordinances, including zoning ordinances, is nevertheless to discern the intent of the legislative bodies that enact them. *Town of Madison, Dep't of Elec. Works [v. Pub. Utils. Comm'n]*, 682 A.2d [231,] 234 [(Me. 1996)]. The Board's interpretations of the Zoning Ordinance are reasonable and supported by the plain language of the four provisions at issue here, which in turn reflect the intent of those who enacted the Ordinance. These renovations and expansions actually *reduce* the nonconformity of Ellsworth Builders' parcel rather than increase it. *Although the drafters of the Rockland Zoning Ordinance intended that nonconformities be reduced, it is also clear that even the strictest interpretation of the Ordinance does not require their immediate and complete elimination in contravention of its plain language, which provides for numerous exemptions and exclusions. The Board committed no error in interpreting the Rockland Zoning Ordinance*

provisions regarding building coverage, building height, parking, and landscaping.

Rockland Plaza Realty Corp., 2001 ME 81, ¶ 18 (emphasis supplied).

The Doyles also say that “DEP’s position that the parking area constitutes a new structure is credible” (Blue Br. 27.) and should be binding on the Planning Board. The Doyles ignore that on second thought, the DEP agreed that it was a local planning board interpretation based on the facts presented whether the proposed relocated parking constituted a new structure.

In short, the Planning Board did not err in its finding the relocated Upper Parking Area not to be a new structure when the Property was previously improved with a much larger paved parking area, which Preservation was seeking to relocate further from the resource.

2. By failing to raise the issue before the Planning Board, the Doyles have waived any claim that the Planning Board erred in finding that the parking area satisfies the applicable setback to the greatest practical extent and, even if not waived, the finding is supported by substantial evidence in the administrative record.

As discussed in the Statement of Proceedings before the Planning Board, *supra*, the Doyles never raised the issue that the parking had not been relocated to the greatest practical extent. Issues not raised before an administrative body like a Planning Board are deemed waived. *See New Eng. Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 58 (Me. 1988). The preservation rule

in the administrative appeal process is based on the doctrine of exhaustion of administrative remedies, thus “ensur[ing] that the agency and not the courts have the first opportunity to pass upon the claims of the litigants.” *Id.* at 59-60. *See also Wells v. Portland Yacht Club*, 2001 ME 20, ¶ 5, 771 A.2d 371; Alexander, *Maine Appellate Practice* § 402(a) at 242-43 (4th ed.2013). *See also Seider v. Bd. of Exam’rs of Psychs.*, 2000 ME 206, ¶ 39, 762 A.2d 551 (“Parties seeking a review of a final agency action are expected to raise any objections they have before the agency in order to preserve these issues for appeal.”). “An issue is raised and preserved if there was a sufficient basis in the record to alert the court and any opposing party to the existence of that issue.” *Verizon New England, Inc. v. Pub. Utils. Comm’n*, 2005 ME 16, ¶ 15, 866 A.2d 844 (quotation marks omitted).

Here the Doyles chastise the Planning Board for its failure at its November 10, 2021, meeting and in its initial findings adopted at its November 17, 2021, meeting “to describe how, or upon what evidence” it found the parking to have been relocated from the shoreline to the “greatest practical extent,” yet nowhere do the Doyles identify where in the record they raised this issue before the Planning Board.¹⁴

¹⁴ Preservation’s November 8, 2021, supplemental filing with the Planning Board in support of its SZ application explained in detail how the reduced and relocated parking area complied with the greatest practical extent standard. (R. 40-42.) The explanation referred to “the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent

Before the Planning Board, relative to the proposed parking area within 75-feet of the shore, the Doyles' only argument was that as a matter of law, although already existing in the setback, the parking area had to be deemed a new structure, and therefore none of the parking could be located within the 75-foot set back. The Doyles never claimed to the Planning Board as a fallback that even if the parking was not new, that Preservation had otherwise failed to show the parking area had been relocated within the 75-foot setback to the greatest practical extent.

Their 99-page appeal letter to the Board of Appeals listed six issues. (R. 111-209.) Absent from that list is any claim that the Planning Board erred in finding that applicant had demonstrated that the parking area had been relocated to the greatest practical extent. Having not raised the issue before the Planning Board, and having not raised the issue in their appeal to the Board of Appeals, the Doyles have waived the issue. That the Board of Appeals over the objection of Preservation undertook to review all of the Planning Board's findings, and not limit its review just to the 6 issues the Doyles raised, does not change the fact that the Doyles waived the issue. That is because the decision that this Court reviews directly is that of the Planning Board.

Even if not waived, the Doyles have not shown the lack of any competent

properties, the location of the septic system and other on-site soils suitable for septic systems, and the type and amount of vegetation to be removed to accomplish the relocation." (R. 41.) These features were all evident in the plans Preservation included in its SZ application. (R. 14-18.)

evidence in the record to support the Planning Board's finding. Findings of fact must be affirmed "if they are supported by any competent evidence in the record even if the record contains inconsistent evidence or evidence contrary to the result reached by the Board." *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 26, 153 A.3d 768 (cleaned up). Here, the Planning Board determined that the parking area satisfies the applicable setback to the greatest practical extent based on its review of the L-1, L-3, and L-16 plans submitted by Preservation with its SZ application. (A. 61-64; *see also* R. 14, 16, 18.)

The Doyles argue that the Planning Board did not consider all of the factors required by the LUO for the board to determine whether the parking area was relocated such that it satisfies the applicable setbacks to the greatest practical extent. *See* LUO § 170-101.7(C)(2), (3). (R. 420-421; A. 140-141.) But the Planning Board specifically made supplemental findings on each of those factors and indicated their relevance to and weight in its determination. (A. 61-64.)

Evidence inconsistent with or contrary to the result reached by the Planning Board, which the Doyles rely upon to assert that the Planning Board was mistaken, is not a basis to overturn the Planning Board's decision. *Beal*, 2017 ME 6, ¶ 26, 153 A.3d 768. *See also* *Osprey Fam. Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 9, 141 A.3d 1114.

"[The court] may not substitute its judgment for that of the municipal body,

but is limited to determining whether, from the evidence of record, facts could reasonably have been found by the zoning body to justify its decision.” *Aydelott v. City of Portland*, 2010 ME 25, ¶ 17, 990 A.2d 1024 (citing *Mack v. Town of Cape Elizabeth*, 463 A.2d 717, 719-20 (Me. 1983)); *see also Driscoll v. Gheewalla*, 441 A.2d 1023, 1026 (Me. 1982) (a reviewing court “is not free to make findings of fact independent of those explicitly or implicitly found by the municipal zoning authority”).

3. The Planning Board did not err when it classified the Park as an institutional use within the meaning of the LUO.

The Planning Board found that the park is an institutional use that is not subject to a minimum lot size requirement or a minimum shore frontage requirement under the LUO.¹⁵ “Institutional” is defined in the LUO as a “nonprofit or quasipublic use, or institution, such as a church, library, public or private school, hospital, or municipally owned or operated building, structure or land used for public purposes.”¹⁶ Preservation is a Maine nonprofit corporation seeking to redevelop the Property as a park used for public purposes. The Park fits comfortably within the definition of an institutional use. The Planning Board’s

¹⁵ See Planning Board Decision at Section II(A)(1) and corresponding LUO provision at Section 170-101.10(A)(1) (providing that institutional uses within the Shoreland Zone adjacent to tidal areas zoned for commercial fisheries and maritime activities are not subject to minimum lot standards). (R. 104, 423; A. 50, 143.)

¹⁶ LUO § 170-101.12. (R. 438; A. 158.)

decision was therefore consistent with, and not contrary to, the provisions of the LUO.

While the interpretation of a local ordinance is a question of law, the court accords “‘substantial deference’ to the Planning Board's characterizations and fact-findings as to what meets ordinance standards.” *Bizier v. Town of Turner*, 2011 ME 116, ¶ 8, 32 A.3d 1048; *see also Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, ¶ 11, 61 A.3d 698 (“A court will not substitute its judgment for that of a board. Moreover, local characterizations or fact-findings as to what meets ordinance standards will be accorded substantial deference.”) (internal quotation and citation omitted). That is why “in certain factual situations, even though the terms of the zoning ordinance are . . . defined by the Court as a matter of law, whether or not the proposed structure or use meets the definition in the application thereof may be a matter of fact for initial Board determination.” *Goldman v. Town of Lovell*, 592 A.2d 165, 168 (Me. 1991) (quotation marks omitted).

Here, the LUO defines “institutional” broadly as a “nonprofit or quasipublic use, or institution. . . .” (R. 438; A. 158.) The remaining language in the definition is preceded by the word “such as,” meaning the remaining components of the definition are intended to be examples that are illustrative (but not exclusive) of the types of uses that qualify as institutional uses. Preservation is a nonprofit

corporation. The Park will be open to the public and is intended to be used for public purposes. The Doyles' assertion that the Park must be owned by the Town, and not a nonprofit corporation, in order to qualify as an institutional use, is unreasonable because it contradicts the broad language at the beginning of the definition that defines institutional as a "nonprofit or quasipublic use." *See Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920 (court construes ordinances reasonably to avoid absurd or illogical results). The Planning Board did not err in making the factual determination that the Park qualifies as an institutional use. The Doyles have not met their burden to show that the record before the Planning Board compels a contrary conclusion.

4. *The Twenty Percent Lot Coverage Limit Does Not Apply.*

Under the LUO, a legally nonconforming condition is allowed to continue as long as it does not become more nonconforming.¹⁷ Such legally nonconforming conditions include lot coverage. Further, the LUO expressly allows nonconforming structures, lots, and uses to be transferred, and for the new owner to continue the nonconforming condition.¹⁸ Preservation therefore could have purchased the Property and continued to operate it in its then-existing condition,

¹⁷ See LUO § 170-101.12 (defining "nonconforming condition" as including nonconforming structures, which are structures that do not meet any one or more of the applicable dimensional requirements in LUO, including lot coverage). (R. 438; A. 158.)

¹⁸ LUO § 170-83(G); *see also* LUO § 170-101.7 (allowing transfer of ownership of nonconforming structures, lots, and uses in the shoreland zone). (R. 406, 420-21; A. 126-127, 140-141.)

which was 86.22% impervious, indefinitely. Instead, Preservation's application sought approval for a project that dramatically reduced impervious surface coverage at the Property from 86.22% to 29.47%. The Doyles argue that this 56.75% reduction in impervious lot coverage is not good enough, and that instead, the LUO demands that any redevelopment of the Property must meet the 20% lot coverage limit in Section 170-101.10(B)(4) of the LUO, which in this case would require at least a 66.22% reduction in impervious surface coverage. This is an overly restrictive interpretation that is inconsistent with the overall intent of the LUO, which permits in certain circumstances the relocation, reconstruction, expansion, change of ownership and change of use of nonconforming structures.

As this Court noted in the case of *Rockland Plaza Realty Corp. v. City of Rockland* discussed *supra*, when addressing similar provisions in the City of Rockland's ordinance:

Although the drafters of the Rockland Zoning Ordinance intended that nonconformities be reduced, it is also clear that even the strictest interpretation of the Ordinance does not require their immediate and complete elimination in contravention of its plain language, which provides for numerous exemptions and exclusions. The Board committed no error in interpreting the Rockland Zoning Ordinance provisions regarding building coverage, building height, parking, and landscaping.

2001 ME 81, ¶ 18, 772 A.2d 256.

Requiring any redevelopment of the Property to meet the 20% lot coverage requirement in the LUO without regard to the LUO's flexibility in the treatment of

nonconforming structures would be inconsistent with the overall intent of the LUO. Further, it would discourage responsible redevelopment of nonconforming properties and limit opportunities to reduce nonconformities. The Planning Board appropriately recognized that Preservation's proposed 56.75% reduction in impervious lot coverage was reasonable and consistent with the intent of the LUO and its provisions regarding nonconforming conditions. *Id.*¹⁹

5. *The Planning Board did not err in deeming Preservation's SZ application complete.*

Finally, the Doyles argue that the Planning Board erred in deeming Preservation's SZ application complete as in the Doyles' view, the application

¹⁹ On several occasions in their Blue Brief, the Doyles raise the ugly spectrums of pollution (*see* Blue Br. 12 and 26), soil erosion (*id.* at 13), vegetation (*id.* at 14), and (*id.* at 26) they say that removing all parking from the 75-foot setback "is of critical importance to ensuring the health of Maine's water bodies to and the aesthetic beauty of its shoreline." And once again the Doyles omit from telling the court that part of the material Preservation submitted to the Planning Board with its SZ application included the Maine Department of Environmental Protection's September 18, 2020, approval of Preservation's redevelopment under the Natural Resources Protection Act ("NRPA"). (R. 19-26.) The Doyles did not appeal that approval. That approved plan shows the reconfigured parking within the 75-foot setback. (R. 14-19; A. 45-49.) In issuing her approval, the DEP Acting Commissioner found that Preservation's proposed redevelopment met all NRPA standards, including those pertaining to preserving existing scenic and aesthetic views, soil erosion, water quality, wetlands and waterbodies protection. (R. 24-25). The Order of Approval stated:

The proposed project is located in Boothbay Harbor, which is a scenic resource visited by the general public, in part, for the use, observation, enjoyment and appreciation of its natural and cultural visual qualities. The proposed project is located within a highly developed area of Boothbay Harbor and as such the proposed installation of structures discussed above, including the footpath, shoreline stairs, park benches and access drive and parking lot will be compatible with the developments surrounding the project site. The proposed float expansion will also be compatible with the surrounding area as nearby properties contain similar float systems. Since the proposed project will blend into the surrounding viewshed, the project will not result in an unreasonable visual impact.

(R. 021).

lacked certain information regarding the shoreland setback and the size of parking areas to determine compliance. (Blue Br. 37-38.) The Doyles' burden is to show the record compels the conclusion that the application was not complete. They have not met that burden.

Preservation submitted stamped plans prepared by a licensed landscape architect depicting the 75-foot shoreland setback line. (R. 14-18; A. 47-49.) The Planning Board did not err in relying upon this information. Further, regarding the parking areas, the number of spaces required to support the project had already been determined during the Planning Board's prior site plan review and approval of the project in October 2020. The Doyles did not appeal that approval.

As to the size of the parking areas—specifically the relocated Upper Parking Area—the dimensions of each of the parking spaces and the width of the travel aisle in between them is specifically prescribed by the LUO. (R. 383-85; A. 104-106.) The record therefore does not compel the conclusion that the Planning Board erred in finding the SZ application complete, and in finding that the parking areas were adequately sized for the proposed use.

VII. CONCLUSION

For all of the above reasons, Preservation respectfully requests that this Court affirm the Superior Court judgment that reinstated the Planning Board's

November 17, 2021, decision approving Preservation's SZ application and issuance of the SZ building permit.

Dated: June 12, 2026

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CERTIFICATE OF SERVICE

I, David P. Silk, Esq., pursuant to Rules 1E(d)(1) and 7(c)(2) of the Maine Rules of Appellate Procedure, certify that on June 12, 2026, I caused electronic service upon counsel for each party to the appeal identified below, by transmitting a pdf document entitled “BRIEF OF APPELLEE” as an attachment to an email sent to each email address, as follows:

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