

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET # LIN-25-566**

Joseph and Jill Doyle

Appellants

v.

Town of Boothbay Harbor

and

Boothbay Harbor Waterfront Preservation

Appellees

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

**REPLY BRIEF OF APPELLANTS
Joseph and Jill Doyle**

July 6, 2026

Kristin M. Collins, Bar No. 9793
PRETI FLAHERTY
P.O. Box 1058
Augusta, ME 04332-1058
207-623-5300
kcollins@preti.com
*Attorneys for Appellants Joseph
and Jill Doyle*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
I. INTRODUCTION / SUMMARY OF ARGUMENT.....	4
II. ARGUMENT.....	4
A. Mootness is not Subject to Waiver, and the Subject Permit has expired.....	4
B. The Decision is Not Ripe for Appeal.....	6
C. The Superior Court Should Not Have Retained Jurisdiction over the Shoreland Zoning Approval.....	10
D. The Parking Area is Not an Existing Nonconforming Structure.....	11
E. Appellants Did Not Waive the “Greatest Practical Extent” Issue.....	12
F. The Planning Board’s Finding that the Application was for an Institutional Use Was in Error.....	13
G. The Application Did Not Meet the Lot Coverage Standards.....	14
III. CONCLUSION.....	15
IV. CERTIFICATE OF SERVICE.....	17

TABLE OF AUTHORITIES

Maine Supreme Judicial Court

<i>Bryant v. Town of Camden</i> , 2016 ME 27, 132 A.3d 1183.....	6
<i>Chretien v. Chretien</i> , 2017 ME 192, 170 A.3d 260.....	5
<i>State v. Baldwin</i> , 305 A. 2d 555 (Me. 1973).....	5
<i>Stewart v. Town of Sedgwick</i> , 2000 ME 157, 757 A.2d 773.....	8
<i>Wells v. Portland Yacht Club</i> , 2001 ME 20, 771 A.2d 371.....	15

First Circuit

<i>Harris v. University of Massachusetts Lowell</i> , 43 F. 4 th 187.....	5
<i>Ruskai v. Pistole</i> , 775 F. 3d 61 (1 st . Cir. 2014).....	4

Maine Statutes

30-A M.R.S. § 2691.....	6-10
30-A M.R.S. § 4482-A.....	9
30-A M.R.S. § 4482-B.....	9

Boothbay Harbor Land Use Ordinance

Section 170-101.7.....	13-14
------------------------	-------

I. INTRODUCTION / SUMMARY OF ARGUMENT

BBHWP, the developer of the subject property, has failed to articulate any legal or practical reason why this Court should review the Town's application of the shoreland zoning standards to its application, when (1) the Town's review of the site plan standards, on remand from the Superior Court, remains pending; (2) the pending application has materially changed from the one on appeal; and (3) the original approval has expired. The Court should provide for a consolidated and accurate judicial review of BBHWP's current application and defer action until the Town's proceedings are complete. If the Court is to proceed with substantive review, it should apply the shoreland zoning standards narrowly, in favor of eliminating nonconformities and restoring the natural environment.

II. ARGUMENT

A. Mootness is Not Subject to Waiver, and the Subject Permit has Expired.

Mootness is a basic jurisdictional question that, as noted in Appellants' principal Brief, must be considered *sua sponte* by the Court. *Chretien v. Chretien*, 2017 ME 192, 170 A.3d 260, fn. 3; *Ruskai v. Pistole*, 775 F. 3d 61, 67 (1st. Cir. 2014). Because it is a core jurisdictional issue rooted in the intent to preserve judicial resources and avoid advisory decisions, mootness need not have been raised before the original tribunal. BBHWP's mootness argument fails under the

weight of judicial authority allowing the issue of mootness to be raised at any time, including by the court.

In *Harris v. University of Massachusetts Lowell*, 43 F. 4th 187, fn. 7, the First Circuit Court of Appeals noted that the university had failed to raise the issue of mootness until oral argument on its appeal. The Court held that “its oversight does not result in waiver” due to the Court’s “independent obligation to examine [its] own jurisdiction.” *Id.* (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)). Maine has followed suit, routinely holding that “jurisdiction can never be waived nor can it be conferred on a Maine Court by consent. *State v. Baldwin*, 305 A. 2d 555 (Me. 1973) (citing *Green v. State of Maine*, 245 A.2d 147 (Me. 1968)).

As to the substantive question of whether the subject permit has expired, BBHWP offers no record evidence that its permit was preserved by having made a “substantial start,” arguing instead that the Town has no affirmative duty to have made such determination. It takes only the administrative record and the Superior Court’s Consolidated Amended Order to understand that BBHWP did not meet the substantial start and substantial completion deadlines. With nothing in the record as to the cost of the project or the amount spent, there is no way the Code Enforcement Officer could determine “substantial start,” where that term is defined as “completion of 30% of a permitted structure or use measured as a percentage of

estimated total cost.” There is no estimate of total cost of the project anywhere in the record. Moreover, the record demonstrates that if there was a substantial start, that was made when the splash pad and other improvements were constructed in May of 2021, causing the permit to expire by May of 2023 and well before the October 3, 2023 stay of permit expiration. Contrary to BBHWP’s assertions, the record does provide clear evidence that the demolition was completed in June of 2020 (R.238) and that earthwork and installation of the splash pad and walkways were completed by May of 2021 (R.35; 44). If BBHWP is meant to have met the “substantial start” deadline, nothing but the May 2021 work could have caused it to do so, which means that the two-year period from that date to complete the work did necessarily expire prior to the Superior Court’s issuance of the stay.

B. The Decision is not Ripe for Appeal.

As discussed in Appellants’ Blue Brief, Rule 80B, 30-A M.R.S. § 2691(3)(H), and the rule established by *Bryant v. Town of Camden* (2016 ME 27) require that all proceedings on all municipal permits be complete before the case proceeds to judicial review. BBHWP in its response states, “[Appellants’] argument is without merit as Preservation obtained a site plan approval and a SZ approval.” Red Br. at 26. While it is true that at a time, BBHWP held a site plan approval and a shoreland zoning approval, that is no longer the case since the Superior Court vacated the shoreland zoning amendment that matches its

approved, amended site plan. This means plainly that BBHWP does *not* hold site plan and shoreland zoning approval for the version of the project it constructed, and cannot hold those approvals until the Planning Board has completed its review of the amendment application. It is worth emphasizing that the application currently before the Planning Board is materially different even from the site plan and shoreland zoning plan approved by the Planning Board in 2021¹, meaning that any approval that comes out of the present process will be on a different version of the plan that is now before this Court. This is true even if the Planning Board does not – as it may do – disallow the principal amended feature (a large “splash pad” which is the main subject of the amendment) to remain in its place. Simply put, the Superior Court’s issuance of a decision on the shoreland zoning approval was premature. Various issues will have to be decided anew by the Planning Board, Board of Appeals, and Superior Court if the current proceedings before the Planning Board are appealed by either party.

BBHWP misunderstands the purpose and intent of the last provision of 30-A M.R.S. § 2691(H), which states that, “[a]ny 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.” The

¹ Among other changes, the plan now before the board includes a different parking layout and capacity in the “replacement” parking lot, removal of an auxiliary parking lot, and an increase in calculated impervious surface coverage.

decision by the Board of Appeals that gave rise to BBHWP's appeal was to grant the Doyles' appeal seeking to *vacate* the Planning Board's issued permit. It was not a "denial of a request for approval," but rather the approval of a request for denial. The Board of Appeals in this matter acted in an appellate capacity only; the operative decision was that of the Planning Board. *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 4, 757 A.2d 773, 775.

It is important to remember that municipal boards of appeal may address all sorts of administrative appeals (both zoning and otherwise), but they also act as the primary jurisdictional authority for variances (see 30-A M.R.S. § 4353), conditional uses and special exceptions. In these latter cases where they serve as the primary decision-maker, they render a decision on a "request for approval," and on those cases, the language cited by BBHWP applies. This makes sense, because a variance or conditional use approval is a predicate to being able to proceed with other approvals. For example, if a builder needs a setback variance to build a home, and the request for variance is denied, it makes sense to allow that builder to appeal since it cannot obtain decisions on other needed permits in the absence of that predicate variance.

In cases in which a planning board renders the final decision that is subject to appeal to a board of appeals, Section 2691(4) and, more specifically, 30-A M.R.S. § 4482-A applies. Notably, Section 4482-A states that, "[t]his section

governs the review process for a municipal land use decision that is not a significant municipal land use decision under section 4482, except as provided in section 4482, subsection 3, or a decision of a board of appeals under section 2691.” (Emphasis added). In other words, where an appeal is from a municipal land use decision, it is subject to the “final decision” requirement under Section 4482-A(2), and as defined in Section 4482-B. It cannot proceed to judicial review until the site plan amendment remand proceedings have been completed.

Even if the Court accepts BBHWP’s argument regarding the intent of 30-A M.R.S. § 2691(H), there are two facets of this case that render paragraph H inapplicable here. First, the Court cannot ignore the fact that the application and plan now pending before the Planning Board are distinct from those at issue here, meaning that the approval at issue is moot – the project will not cannot proceed as approved in 2021. Second, now that the Superior Court has reversed the Board of Appeals’ vacation of the shoreland zoning approval, this case is no longer the appeal of a denial; it is the appeal of a grant for a project that requires other approvals and may generate other appeals. It is the intent of the final judgment rule, both in common law and as invoked in Rule 80B and 30-A M.R.S. § 4482-A to avoid this type of piecemeal and disjointed judicial review.

C. The Superior Court Should Not Have Retained Jurisdiction over the Shoreland Zoning Approval.

As with mootness, the issue with Rule 80B(m) is a jurisdictional issue that can be raised at any time, including by this Court. When BBHWP argues that retention of jurisdiction over the shoreland zoning case was appropriate because it would “directly affect the substantive issues presented to the court” or because “additional process would provide a more comprehensible record for review by the Law Court,” (Red Br. at 30), it misses the point. The Superior Court’s decision to retain jurisdiction over the shoreland zoning standards, while vacating and remanding the site plan standards, created a *less* comprehensible record for the Law Court, confused the issues, and heightened the judicial burden of this case. The result of that decision is that Appellants are now before the Law Court because their choice was to do so or concede various shoreland zoning issues, but the Law Court’s decision can only be advisory at best because no one knows what version of the plan will be approved. Again, there is nothing in the Land Use Ordinance that treats the shoreland zoning and site plan requirements as pertaining to different permitting processes; they are two sets of standards that must be reviewed when relevant to a project. The Superior Court’s rendering of a decision on just the shoreland zoning standards, while remanding the site plan standards, did not aid in the clear and speedy resolution of this case.

D. The Parking Area is Not an Existing Nonconforming Structure.

The broad application of the term “nonconforming structure” sought by BBHWP would result in properties never being brought into compliance with modern shoreland zoning standards. Under its interpretation, as long as a structure is being replaced with another structure that could be called the same thing (a building for a building, a parking lot for a parking lot), it could be replaced without regarding for zoning rules, even if the new structure is wholly different in size, location or use than its predecessor. This is antithetical to the purposes and principles of zoning laws.

Colin Clark at Maine DEP acknowledged that while he believed the proposed parking area was not the replacement of a nonconforming structure, he did not expect the DEP to second-guess the town’s interpretation of its ordinance. This does not mean he thought it was the correct interpretation, only that the Department wouldn’t take extraordinary action to intervene in the permitting. While the Department might defer to the determinations of a planning board on a legal issue, the Court may not do so. The question of whether the parking area is a new or replacement structure is a legal issue, which the Court must resolve de novo, without deference to the Planning Board’s determination. Maine DEP’s point of view is relevant to the legislative intent of Chapter 1000, the mandatory shoreland zoning ordinance developed by the Department in accordance with 38

M.R.S. § 438-A. The agency that wrote the definition of nonconforming structure determined that this parking lot is not one. The record is clear that the new parking lot proposed by the applicant is significantly smaller, spans a significantly different location on the site, and serves significantly different purposes. BBHWP could have designed that parking lot in conformance with shoreland zoning, as mandated by shoreland zoning and by decades of zoning precedent, and the Planning Board erred as a matter of law in not requiring it to do so.

E. Appellants Did Not Waive the “Greatest Practical Extent” Issue.

BBHWP argues that Appellants have waived the “greatest practical extent” issue by failing to have raised it before the Planning Board. It misses the fact that Appellants were not given an opportunity to speak at the Planning Board hearing until after the Planning Board had rendered its findings and decision on the application.² It also applies the rule of issue preservation too narrowly. Appellants challenged the parking lot’s compliance with the setback standards in comments submitted for the Planning Board hearing. Though they focused their argument before the Planning Board on the fact that the parking lot should not be considered a nonconforming structure in the first place, Appellants did generally challenge the parking lot’s compliance with the relocation standard, including specifically with

² See video of November 17, 2021 meeting, R. 100.

Section 170-101.7(C)(3) regarding relocation of a nonconforming structure. R. 176-177. Issue preservation does not require an appellant to have anticipated and challenged every possible finding or conclusion of an administrative body before it renders its decision, or to make every alternative argument. Rather, an issue is considered preserved for appeal if there is sufficient basis in the record to alert the administrative body and opposing county of the issue. *Wells v. Portland Yacht Club*, 2001 ME 20, ¶ 5, 771 A.2d 371, 373 (Me. 2001) (citing *Farley v. Town of Washburn*, 1997 ME 218, ¶ 5). The greatest practical extent became more pointed after the Board rejected the requested conclusion that the parking lot was not a nonconforming structure. Appellants disputed that finding on appeal, thus further preserving it.

F. The Planning Board’s Finding that the Application was for an Institutional Use Was in Error.

As it did before the Planning Board, BBHWP suggests that its project should be considered an “institutional use” simply because it is a nonprofit entity. The Land Use Ordinance does not suggest the analysis should be that simple. Under BBHWP’s analysis, as long as a property is run by a nonprofit entity, it may avoid the minimum lot size standards applicable to all other uses. BBHWP’s argument also focuses too narrowly on the park/marina portion of the property, failing to mention the fact that the project, as approved, will involve a grocery store and a marina, neither of which can reasonably be classified as “institutional” uses.

Application of the zoning definitions to the multiple and varied facets of this development, some of which are plainly commercial, compels a legal conclusion by this Court acting under a *de novo* standard, that the development does not, at least in its entirety, meet the definition of an “institutional use.”

G. The Application Did Not Meet the Lot Coverage Standards.

In arguing that the development should not be required to meet lot coverage standards, BBHWP promotes an interpretation that would result in properties never being required to come into conformance with zoning requirements. It advocates for a rule that a property can be almost entirely bulldozed and rebuilt under a new plan and use, while taking advantage of nonconformities enjoyed by the prior development. This take is antithetical to the ordinance’s stated purpose, “to promote land use conformities, except that nonconforming conditions that existed before the effective date of this article or amendments thereto shall be allowed to continue, subject to the requirements set forth in § 170-101.7.” § 170-101.7.

BBHWP does not respond to Appellants’ argument that it is not entitled to nonconformities of the prior development related to lot coverage except as they apply to structures that were retained. BBHWP concedes (Red Br., p. 41, fn. 17) that the definition of a “nonconforming structure” applies to a *structure* that does not meet lot coverage. While a nonconforming structure may be replaced, thus retaining its entitlement to nonconformities, a new structure cannot be built while

taking advantage of a prior, different structure's nonconformities. The nonconformities attached to a different structure, and were lost with its demolition. It makes plain and simple sense that when a previous development is demolished and replaced with a new one, the new development must be built in conformance with zoning standards. The obvious and required ruling on this point is that BBHWP must meet the 20% lot coverage limit *except to the extent* of coverage attributable to previously existing structures that were retained.

III. CONCLUSION

BBHWP has presented no compelling argument why it is prudent for the Law Court to decide this case at this juncture. While this case presents important and significant shoreland zoning questions, it is premature to reach them when the Planning Board has not yet even allowed the plan in question to move forward, and when the shoreland zoning approval in question is stale, expired, and subject to substantial revisions before the development will be finally approved.

If the Law Court is to nevertheless reach the substantive issues presented by this case, Appellants urge the Court to consider the long-term ramifications of a decision that would allow shoreland zoning nonconformities to be perpetuated through successive, significant redevelopments of a property. The purposes of shoreland zoning, to protect the natural environment and keep Maine's coastline

natural to the extent possible, would never be achieved if new structures and new uses were able to take advantage of the noncompliance of their predecessors. If the Law Court does reach the merits of this case, it should take the opportunity to support shoreland zoning by applying the rules strictly in favor of compliance whenever possible.

Respectfully Submitted,

Dated: July 6, 2026



Kristin M. Collins, Bar No. 9793
PRETI FLAHERTY
P.O. Box 1058
Augusta, ME 04332-1058
207-623-5300
kcollins@preti.com
*Attorneys for Appellants Joseph
and Jill Doyle*

CERTIFICATE OF SERVICE

I, Kristin M. Collins, hereby certify that I served electronically the foregoing Reply Brief of Appellants and two copies via U.S. Mail, first-class, postage prepaid when prompted to the parties listed below addressed as follows:

Daniel C. Stockford, Esq.
Brann & Isaacson
PO Box 3070
Lewiston ME 04240
dstockford@brannlaw.com

Joseph C. Siviski Esq.
Perkins Thompson, P.A.
One Canal Plaza
Portland ME 04101
jsiviski@perkinsthompson.com

David P. Silk Esq.
Curtis Thaxter LLC
200 Middle Street, Suite 1001
PO Box 7320
Portland ME 04112
dsilk@curtisthaxter.com

Anthony F. Muri, Esq.
Muri Associates LLC
P.O. Box 301
Rockport, ME 04856
amuri@murilaw.com

Dated: July 6, 2026

/s/ Kristin M. Collins

Kristin M. Collins, Bar No. 9793
PRETI FLAHERTY
P.O. Box 1058
Augusta, ME 04332-1058
207-623-5300
kcollins@preti.com
*Attorneys for Appellants Joseph
and Jill Doyle*