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July 31, 2023

VIA HAND DELIVERY
Teri Lambert, Clerk
Lincoln County Superior Court
32 High Street
Wiscasset, ME 04578

Re: *Boothbay Harbor Waterfront Preservation v. Town of Boothbay Harbor, et al.*
Docket No. AP-2023-004

Dear Ms. Lambert:

Enclosed for filing, please find the Reply Brief of Petitioner Boothbay Harbor Waterfront Preservation.

A copy of the enclosed is being served via electronic service pursuant to Rule 5(b) of the Maine Rules of Civil Procedure upon counsel noted below.

Thank you for your assistance in this matter.

Sincerely,

David P. Silk, Bar No. 3136

DPS/dlt
Enclosure
Copy to (w/encl.): Kristin M. Collins, Esq.
John Cunningham, Esq.
Joseph C. Siviski, Esq.

STATE OF MAINE
LINCOLN, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-2023-04

BOOTHBAY HARBOR WATERFRONT PRESERVATION, Petitioner, v. TOWN OF BOOTHBAY HARBOR, Respondent, and JOSEPH DOYLE and JILL DOYLE, Parties-In-Interest.	)	**REPLY BRIEF OF PETITIONER BOOTHBAY HARBOR WATERFRONT PRESERVATION**

I. INTRODUCTION

Petitioner Boothbay Harbor Waterfront Preservation ("BBHWP") hereby submits this Reply Brief in response to the brief filed by Parties-In-Interest Joseph and Jill Doyle (the "Doyles"). In their brief, the Doyles argue that the Town of Boothbay Harbor Planning Board's ("Planning Board") November 2021 shoreland zoning approval of a public shorefront park and working marina on BBHWP's 65 Atlantic Avenue property (the "Property") should be vacated based on an argument that the Doyles failed to preserve – namely, that a relocated 12-space parking area on the southerly portion of the Property (the "Upper Parking Area") does not conform to the shoreland setback to the greatest practical extent. The Doyles further assert that there are other reasons why the Planning Board's approval should be vacated; arguments that both the Planning Board and the Town's Board of Appeals' ("BOA") rejected. As set forth

below, the Doyles have not met their burden of showing that the Planning Board abused its discretion, made any error of law, or made findings not supported by substantial evidence in the record. *Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835. Accordingly, the court should affirm and reinstate the Planning Board's shoreland zoning approval.

II. ARGUMENT

A. The Planning Board Did Not Err in Concluding that the Upper Parking Area Met the Shoreland Setback to the Greatest Practical Extent.

The Doyles do not dispute that prior to BBHWP's acquisition of the Property, it was improved with a paved parking area that was much larger than the proposed Upper Parking Area. Doyles' 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").[1] 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.) The Doyles' support for this position relies principally on a January 13, 2022 letter from Colin Clark, Shoreland Zoning Coordinator for Maine Department of Environmental Protection, which was addressed to the BOA (not the Planning Board) and was submitted two months *after* the Planning Board approved BBHWP's shoreland zoning application.

In his letter and in subsequent communications with BBHWP, Mr. Clark opines that "the parking spaces proposed within the footprint of the former hotel . . . can be viewed as new

[1] 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.)

parking." (R. 285.) What the Doyles' Brief fails to mention 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 a June 23, 2022 email which the Doyles themselves provided to the Planning Board. *Id.* Mr. Clark's email, addressed to BBHWP 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 added).

The Planning Board did, in fact, evaluate whether the proposed Upper Parking Area conforms to all setback requirements to the greatest practical extent. The Planning Board's original approval specifically indicated that BBHWP's application satisfied the requirements of Section 170-101.10(B) of the LUO, which applies to principal and accessory structures. (R. 105.) In response to the BOA's first Order of Remand, the Planning Board further elaborated that "the

parking area near the southerly side of the property [referring to the Upper Parking Area] has been relocated to comply with setback requirements to the greatest practical extent." (R. 296.) The matter proceeded back to the BOA, which then issued a second Order of Remand, in which the BOA posed the following narrow question:

> Please specify the evidence in the record of the Planning Board proceedings in the above referenced matter on which the Planning Board relied 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. 326.) On February 9, 2023, the Planning Board provided a written response to the BOA's second Order of Remand. That response answered the narrow question posed by the BOA as follows:

> **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.**

(R. 337.)

The Planning Board's February 9, 2023 response addresses each of the requirements of Section 170-101.7(C)(2)(b) of the LUO, which applies to the relocation of nonconforming structures. With respect to each requirement, the Planning Board's response lists evidence in the record that supports the Planning Board's decision. As the Planning Board's response indicates, the size of the lot is shown on the Existing Conditions and Boundary Plan BBHWP submitted. (R. 094-096). The slope of the land and potential for soil erosion is shown on the Erosion

Control Plan BBHWP submitted. (R. 016.) The locations of structures are depicted on the existing conditions plan and site plan submitted by BBHWP. (R. 014, 094-096.)[2] The remaining factors, the Planning Board correctly noted, were not applicable as the Property is served public sewer and there is no septic system on-site, and no vegetation was removed given the hyper-developed state of the Property when BBHWP acquired it. [3]

The Planning Board's responses, taken together, could not be any clearer. The LUO grants the Planning Board the discretion to approve the relocation of nonconforming structures provided that the Planning Board considers certain factors enumerated in the LUO. *See* Section 170-101.7(2)(a) ("A nonconforming structure may be relocated within the boundaries of the parcel on which the structure is located, provided that the site of relocation conforms to all setback requirements to the greatest practical extent as determined by the Planning Board or its designee . . . .") (R. 420.) The Planning Board's responses indicate that each applicable factor was considered, and points to the evidence in the record to support the Planning Board's decision.

The court gives great deference to a board's finding of fact. *Tominsky v. Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142; (citing *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 5, 237 A.3d

[2] Not to mention the fact that the same information was shown on plans and materials submitted by BBHWP in connection with the Planning Board's October 14, 2020 approval of the Project, which was not appealed. *See* Docket No. AP-2022-03, Record at 046-053.

[3] The Doyles on pages 13 and 17 of their Brief assert that that the Planning Board should have considered the "the existing parking across the street" but they omit to say that at the time of application BBHWP did not own the parcel and that under the Ordinance, Section 170-101 10(A)(3):

> *Lots located on opposite sides of a public or private road shall be considered each a separate tract or parcel of land unless such road was established by the owner of land on both sides thereof after September 22, 1971.*

175). Such findings must be sustained unless the record compels a contrary conclusion. *Id.* The Doyles have not met their burden to show that the record before the Planning Board compels the contrary conclusion that the relocated Upper Parking Area did not meet the shoreland setback to the greatest practical extent standard. *Tarason v. Town of South Berwick*, 2005 ME 30, ¶ 6, 868 A.2d 230.

Further, the Doyles have not shown that the Planning Board abused its discretion in interpreting the Upper Parking Structure 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.[4]

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[4] 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, the Law 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, the 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,* 599 A.2d at 1154, 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,* 682 A.2d at 234. 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**

B. The Planning Board Did Not Err in Classifying the Park as an Institutional Use.

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.[5] "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."[6] BBHWP 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 decision was therefore consistent with, and not contrary to, the provisions of the LUO.

As noted above, 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, 703 ("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

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> **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.

(Emphasis Supplied).

[5] *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.)

[6] LUO § 170-101.12. (R. 438.)

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.) 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. BBHWP 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 absurd and unreasonable because it contradicts the broad language at the beginning of the definition that defines institutional as a "nonprofit or quasipublic use." The court must construe the LUO reasonably to avoid absurd or illogical results. *See, e.g., Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920. 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.

C. 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.[7] Such legally nonconforming conditions include lot

[7] *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

coverage. Furthermore, the LUO expressly allows nonconforming structures, lots, and uses to be transferred, and for the new owner to continue the nonconforming condition.[8] BBHWP therefore could have purchased the Property and continued to operate it in its then-existing condition, which was 86.22% impervious, indefinitely. Instead, BBHWP'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 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 the Law Court noted in the case of *Rockland Plaza Realty Corp. v. City of Rockland* discussed *supra* note 4, 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, 262.

LUO, including lot coverage). (R. 438.)

[8] 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. 405-06, 420-21.)

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 BBHWP'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.* [9]

D. BBHWP Submitted a Complete Application.

Finally, the Doyles argue that BBHWP's application lacked certain information regarding the shoreland setback and the size of parking areas to determine compliance, and accordingly,

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[9] On several occasions in their brief, the Doyles raise the ugly spectrums of pollution (see Doyles' Br. 12 and 26), soil erosion (*id.* at 13), vegetation (*id.* at 14), and *id.* at page 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 BBHWP submitted to the Planning Board with its SZP application included the Maine Department of Environmental Protection's September 18, 2020 approval of BBWHP's redevelopment under the Natural Resources Protection Act ("NRPA"). (R. 019-026.) The Doyles did not appeal that approval. That approved plan shows the reconfigured parking within the 75-foot setback. (R. 019). In issuing her approval, the MDEP Acting Commissioner found that BBHWP'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. 024-025). 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).

the Planning Board should have found BBHWP's application incomplete. Doyles' Br. 25. The Doyles' burden is to show the record compels the conclusion that the application was not complete. They have not met that burden. BBHWP submitted stamped plans prepared by a licensed landscape architect depicting the 75-foot shoreland setback line. (R. 014.) 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. Evidence supporting the Planning Board's determination that the number of parking spaces is included in the record of the companion appeal taken by the Doyles, docketed as AP-2022-03.[10] 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.) The record therefore does not compel the conclusion that the Planning Board erred in finding the application complete, and in finding that the parking areas were adequately sized for the proposed use.

III. CONCLUSION

Since BBHWP initiated its effort to redevelop the Property into a public shorefront park and working marina, there have been 15 Planning Board and 10 Board of Appeals meetings. The Doyles have made clear they do not want a public park next door and have at every turn made their voice heard. Having not appealed the initial site plan approval or NRPA permit, they attempted to turn the proceedings on the minor amendment into a reopening of those approvals. Despite their absence from the September 8, 2021 Planning Board public hearing, the Doyles

[10] *See* Docket No. AP-22-03, Record at 72.

raised any and all issues on their appeal from that approval, the BOA heard their appeal, the Planning Board issued further findings, and even assuming they have standing, the court has now before it the Doyles' numerous claims of error. However, under the applicable standard of review of the Planning Board's factual findings, the Doyles have not met their burden to show that the record before the Planning Board compels contrary findings.

The same holds true to this appeal. On the Planning Board's factual findings, the Doyles have not met their burden to show the record compels contrary findings, including the finding the Doyles never raised below, whether the 12 parking spaces had been relocated to the greatest practical extent. Nor have the Doyles shown that the Planning Board abused its discretion in concluding that the Upper Parking Structure is not new since parking was already present, that the public park is an institutional use, that when preexisting conditions exist compliance with 20% lot converge ratio is not required, and that BBHWP's application was complete.

For all of the above reasons, BBHWP respectfully requests that this Court reinstate the Planning Board's decision approving BBHWP's shoreland zoning application.

Dated: July 31, 2023

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