STATE OF MAINE
LINCOLN, ss.

SUPERIOR COURT
DOCKET NO. WISSC-AP-2022-03

JOSEPH DOYLE and JILL DOYLE,

Plaintiffs,

v.

INHABITANTS OF THE TOWN OF BOOTHBAY HARBOR,

Defendant,

and

BOOTHBAY HARBOR WATERFRONT PRESERVATION,

Party-in-Interest

PLAINTIFFS' RULE 80B REPLY BRIEF

Plaintiffs Joseph and Jill Doyle ("the Doyles") hereby submit this Reply Brief in connection with the above Rule 80B appeal. This Reply responds to the opposing brief filed by Party-in-Interest Boothbay Harbor Waterfront Preservation ("BBHWP"). The Town of Boothbay Harbor has not submitted a brief in support of its Planning Board's site plan approval.

I. INTRODUCTION

BBHWP comes close to conceding the substantive issues raised by the Doyles in this appeal, devoting just over one page of their 20-page brief to those issues. Instead, BBHWP's Brief largely focuses on an argument that the Doyles should be barred from filing this appeal because they did not attend the September 8, 2021 meeting at which the Planning Board considered the merits of BBHWP's site plan amendment

The Town's administrative record regarding the site plan approval does contain any evidence that the Doyles were sent notice of the Planning Board meeting. It does establish that the Doyles did not receive notice. The record also establishes that the notice issue was timely

and duly raised at the Board of Appeals level and essentially waived by BBHWP at that level, and that the Planning Board again failed to provide the Doyles with their due process right to be heard when it revisited its findings on remand from the Board of Appeals No trial of the facts was needed to establish these facts. The Doyles presented their procedural and substantive arguments properly and at the first possible opportunity after having been deprived of the opportunity to be heard by the Planning Board.

II. ARGUMENT

A. The Record Demonstrates that the Town Failed to Provide Adequate Notice of the Planning Board meeting.

The administrative record contains no evidence that the Town posted public notice of the Planning Board's September 8, 2021 meeting, or that it sent individual notice to the Doyles at any address.[1] The Doyles' attorney's theory at the time was that notices were being sent to their incorrect address, which they had tried to correct through communications with the Town. However, once the Town provided the relevant records, it became clear that those records contain no evidence that individual notices were sent to *any* abutters, including the Doyles. The Court will recall from Plaintiffs' Brief that the Doyles were the first to inform the Town that BBHWP had violated its site plan approval by enlarging a "splash pad" and moving it immediately next to the Doyles' residence, and to suggest that site plan amendment was needed. Given the Doyles' level of involvement in bringing the need for the approval to the Town's attention, and in their close attention to the project in the two years since, their absence at the September 8 meeting should be telling enough that they were not made aware of that meeting. The record does, however, also include correspondence from the Doyles' counsel to the Code

[1] As the Court is aware, agendas and notices of hearing are typically included in the administrative record, where they exist.

Enforcement Officer which states that as of September 13, 2021, there had been no posted agenda for that meeting, and no notice received by the Doyles. Rec. at 124-128; 342-343.

The September 13, 2021 correspondence is appropriately part of the administrative record on appeal because it is the Code Enforcement Officer who is charged under the Land Use Ordinance ("LUO") with placing an application on the Planning Board's agenda for a meeting to be held at least 14 days after receipt of the application[2], and with notifying abutting property owners by mail of the meeting. LUO § 170-66(A)(3) and (4), respectively, Rec. at 233. Notably, Rule 80B does not require that only evidence directly before the reviewing body may be included in the record. Instead, it describes the record as being "the record of the proceedings of the governmental agency being reviewed." M.R. Civ. P. 80B(e)(1). Presumably if the record had contained the agenda, or a list of addresses to which notice was sent, the Court would have no concern with treating those items as part of the record even though they would have been created by the Code Enforcement Officer and not considered by the Planning Board in reviewing the application. Where notice is a part of the required administrative process and is handled by the Code Enforcement Officer, correspondence with the Code Enforcement Officer on that issue is appropriately part of the record.

Moreover, the September 13, 2021 letter regarding the notice failure was appropriately before the Board of Appeals, having been attached to the Doyles' appeal as Exhibit B (Rec. at 125; 142-145). BBHWP did not dispute inclusion of this evidence in the record before the Board of Appeals, and neither BBHWP nor the Town offered evidence during the appeal to dispute the Doyles' claim about the notice failure. Since the appeal was the Doyles' first chance to raise the notice issue, the September 13, 2021 letter is appropriately part of the Board of Appeals' record

[2] A time period which is certainly designed to provide ample time to notify the abutters and the public.

and therefore properly before this Court as conclusive evidence of the notice failure. The Court may also consider the multiple documents that would be in the record if they existed, but in fact are not: the posted agenda, a list of addressees to whom notice was sent, or any envelopes that were returned to sender. The record corroborates the assertion that the Town did not properly post an agenda or send out notice to the Doyles and other abutters.

B. The Doyles Participated in the Administrative Process.

Not having evidence to dispute the facts about the failed notice, BBHWP makes the almost comical assertion that the Doyles, not having been made aware of the September 8, 2021 meeting, have waived their appeal rights by not attending that meeting. Certainly this state's case law has come to a point where that result cannot be tolerated. The Town of Boothbay Harbor of course has an established, recent record of failing to comply with its own ordinances regarding public notice of land use applications. See *29 McKown, LLC v. Town of Boothbay Harbor*, 2022 ME 38, 277 A.3d 364, in which the same Code Enforcement Officer failed to publish notice of building permit applications as required by the LUO. As fully addressed in the Doyles' underlying Brief, both *29 McKown* and the predecessor case of *LaMarre v. Town of China*, 2021 ME 45, 259 A.3d 764, require that a municipality not only comply with the mechanics of posting and sending notice, but also that in the event of such failure, the abutters must be provided a meaningful opportunity to make their case before the original permitting authority.

The Doyles were fortunately able to learn quite soon thereafter of the September 8, 2021 meeting to which they had not been invited, and immediately sent notice of that fact to the CEO (see the September 13th letter). Unlike in some other notice failure cases, they were also able to timely appeal the decision. The corollaries here to *29 McKown* are clear, from the fact that the issue started with a permit violation that went unnoticed by the CEO, to the CEO's failure to

provide required notice, to the resulting inability of the abutter to participate in the case.[3] The only distinction here is that the present case involved failed notice of a planning board meeting instead of a building permit. *29 McKown* holds that where there has been a notice failure, the Court's required course of action is to remand the action to the original factfinder so that the person deprived of notice has a meaningful opportunity to be heard. The same result is required here.

BBHWP cites with emphasis a provision in Section 170-66(A)(7) which details the required notice for a public hearing called by the Planning Board on a site plan application, and ends with the statement that "failure to receive notice shall not invalidate the public hearing held." This provision is not dispositive for three reasons.

First, the subject section is not relevant here because the Planning Board did not hold a public hearing. Section 170-66(A) provides for the following process:

> Step 1: Application is received and processed by the CEO, who places it on an agenda for a Planning Board meeting and sends notice to abutters of "the time, date and place that the Planning Board will consider the application." § 170-66(A)(3) and (4), Rec. at 233.
>
> Step 2: Applicant "[attends] the designated meeting of the Planning Board to present the site plan application." § 170-66(A)(5).
>
> Step 3: The Planning Board at that meeting "shall review the application and determine whether it is complete." § 170-66(A)(6).
>
> Step 4: "If the application is determined to be complete, the Board shall then deem the application to be pending and determine whether or not to schedule the application for a

[3] This pattern of lax attention to ordinance requirements by both BBHWP and the Town has continued with inattention to shoreland zoning and floodplain permitting requirements and wastewater requirements, and subsequent violations of the site plan approval, resulting in a stop work order, all as discussed in Plaintiffs' Brief on the shoreland zoning matter.

public hearing." § 170-66(A)(7). "If a hearing is scheduled, it must be held within 30 days of acceptance of the application. 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." *Id*. It is this provision that states that "[f]ailure to receive notice shall not invalidate the *public hearing* held." *Id.* (emphasis added).

The problem with BBHWP's citation to Section 170-66(A)(7) is that the Planning Board did not hold a public hearing on this application. Instead, the Board acted on the application at the first meeting during which it was reviewed. Section 170-66(A)(7) is therefore inapplicable. Section 170-66(A)(4) is the relevant provision regarding failure to provide initial notice of an application, and does not purport to protect the validity of the decision in the event of failure to receive notice.

The second problem with BBHWP's argument is that this is not just an issue of failure to receive an application, such as where an abutter misses the mail or does not open the envelope. As discussed above, there is no evidence in the record indicating that an agenda was posted or that individual notices were sent.

The third problem with BBHWP's argument is of course that even if subsection A(7) did apply here, the Town has no authority to waive constitutional due process by way of an ordinance provision. Indeed, it is a problem in this case that the Planning Board chose not to hold a hearing. Not only would a hearing have been necessary in order to allow all "owners of property within 250 feet of the properties involved" the opportunity to be notified of and participate in the proceedings, it would in this case have given the Doyles at least another 14 days' notice and the opportunity to see the notice in the newspaper even if direct notice failed. Again, *29 McKown* has established that an abutter must be given a meaningful opportunity to

submit facts and argument before a permitting decision is made. The LUO provided the Planning Board with the option of holding a public hearing, but the Planning Board did not do so, compounding the due process problems caused by the initial notice failure. The Planning Board had another opportunity to hear evidence from the Doyles at the November 17 and 23, 2021 meetings at which it revised its initial findings following remand from the Board of Appeals.[4] It did not do so, and instead pushed any comments by the Doyles until *after* it made its decision and those comments could no longer have any impact.(See discussion and citations at Page 6 of Plaintiffs' Brief).

Even more astoundingly, BBHWP argues that the Doyles' failure to attend the September 8, 2021 meeting (caused by the above-discussed notice failures) means that they have waived any right to challenge the decisions, *including the notice failure*. Essentially BBHWP wants to compound the fact that the Doyles were deprived of the opportunity to participate in the decision by forbidding them as well from filing an appeal of the decision. But the Doyles, not having been able to participate in the only meeting held on the application, have challenged the decision in the correct way, through a timely filed administrative appeal which raised all the issues they would have raised had they been able to attend the meeting. The procedural posture here is identical to that in *29 McKown*. The Doyles raised objections to the changed project in their August 2021 letter that precipitated the request for site plan amendment. They could not participate at the initial Planning Board review because of the notice failure, but did appropriately file an appeal before the BOA. The Doyles then attended and attempted to contribute at the remand stage, but were foreclosed at those meetings from providing evidence or

[4] The Town did not provide minutes or video of the November 17, 2021 remand meeting, or video of the November 23, 2021 meeting upon request. The Freedom of Access Act requires that basic minutes or an audio or video recording be kept of all public meetings. 1 M.R.S. § 403. The Court cannot meaningfully review the Planning Board's decision without these records.

any substantive comment. They have participated to the greatest extent allowed by the Town's deficient proceedings, and therefore have preserved their standing and all issues on appeal.

C. A Trial of the Facts is Unnecessary.

BBHWP asserts that the Doyles would have to have requested a trial of facts to establish that they either were not sent or did not receive notice. Again, given the Doyles' high level of attention to BBHWP's failure to comply with its originally approved site plan, their attorney's frequent communication with the Town, and their consistent attention to this project over the following two years, the fact that the Doyles did not attend the September 8 meeting is telling enough that the CEO must have failed to provide notice of that meeting. But the notice failure is also established within this administrative record through the lack of an agenda and the lack of any evidence of notice. It is also confirmed by the fact that the Town did not assert or submit evidence during the local appeal process or before this Court that it did in fact comply with the notice provisions. More fundamentally, it is undisputed from the record that the Doyles missed the September 8 meeting by no fault of their own and that they consequently had no opportunity to raise their concerns before the Planning Board. It is this inability to be heard that matters in a post-*LaMarre* court. A trial of the facts is not needed to establish that the Doyles were deprived of due process.[5,6]

D. BBHWP Has Not Established that its Application Was Complete.

BBHWP glosses over the completeness issue by pointing to evidence that was included

[5] BBHWP notes that a trial of the facts must be called within 30 days of filing a Rule 80B complaint. This action was stayed by the Court (with agreement of the parties) shortly after it was filed in February of 2022, and that stay persisted until the Court entered a new further scheduling order on May 31, 2023. The Record, including the subject September 13, 2021 letter, was submitted to the Court on June 15, 2023, less than 30 days after the stay was lifted. Since Plaintiffs had no way of knowing until then that BBHWP disputed inclusion of this document in the record (BBHWP did not challenge it at the BOA level), there is good cause to now allow a trial of the facts if the Court deems it warranted.

[6] Notably, there was no trial of the facts as to notice in *29 McKown,* either. The notice issue was raised for the first time in an appellate hearing by the BOA and addressed by the Courts by reference to the records of the BOA meetings.

in the initial site plan submission. It fails to acknowledge that each of the noted omissions was relevant to the requested amendment and should have been updated with that submission. As to lighting, BBHWP states that "the amended plan did not propose any changes to the location of proposed lighting," but that is not noted in the application or in the submitted plans. The referenced stormwater plan was not updated to reflect the changed splash pad size and location and its bearing on stormwater plans. No updated details were provided on whether or how grey water from the splash pad would be safely handled. These issues were especially important given the new proximity of the splash pad to the Doyles' residence and potential for runoff into the harbor. As to financial capacity, BBHWP again references the financial capacity submissions made with the first application and states that "the minor amendment did not significantly impact on the cost of construction." But BBHWP did not make that case with its submission, nor did the Planning Board make such a finding. BBHWP appears to concede that the change to the splash pad impacted the cost of construction; it just characterizes that impact as not "significant," which of course is subjective. If there was a subjective determination to be made, it should have been made by the Planning Board after consideration of updated evidence.

E. The Approval Was Not Supported by Substantial Record Evidence.

BBHWP notably does not counter the assertions in Plaintiffs' Brief that the Planning Board's findings are insufficient to permit review of the decision. Plaintiffs' claim that the findings are insufficient stands unchallenged and should be granted.

BBHWP also does not provide meaningful argument to counter Plaintiffs' assertions that the record did not support the various substantive findings on sewage disposal, natural features, topography, stormwater and the various other relevant standards discussed at length in Plaintiffs' brief. Plaintiffs have satisfied their burden on these standards, and BBHWP has not demonstrated otherwise. The Planning Board's findings – even following a remand specifically

to clarify them – are hardly "detailed" as argued (without further explanation) by BBHWP.[7] As demonstrated within Plaintiffs' Brief, the Planning Board simply referred to evidence submitted with the original application and did not address in any substantive way the impacts of the new splash pad size and location on all of the relevant standards. The Court need not and should not blindly accept the Planning Board's conclusory findings where they so plainly did not address the changed circumstances before it. BBHWP attempts to explain the Planning Board's reasons for finding that these standards were not impacted, but it cannot alleviate the Planning Board of its responsibility to have made such findings in writing and to tie those findings to specific evidence in the record. Again, if changes were deemed immaterial to the standards, it was the Planning Board's duty to conclude and explain that on the record.

F. The Project Does Not Meet Buffer Requirements.

BBHWP answers the Doyles' argument that the amended plan does not meet buffer requirements by referring to the LUO requirement for a five-foot buffer and stating that the distance between the relocated splash pad and the Doyles' property line is approximately ten feet. BBHWP is essentially arguing that because the splash pad is over five feet from the Doyles' property line, it meets Section 170-35. The distance between the feature and the property line is immaterial. Section 170-35 cannot be satisfied by simply providing physical distance (especially a distance of 10-15 feet) between a site element and the property line. That section requires that there be visual screening within the required five-foot buffer strip. As established in Plaintiffs' Brief and clearly demonstrated on the original and amended site plans, visual screening is not being provided within the required buffer strip. The Planning Board neither waived that standard nor explained how the minimal vegetation shown on the plan would

[7] Lack of detail is a pattern for this planning board, as evidenced by the three total remands required in relation to this project.

meet Section 170-35. BBHWP has failed to rehabilitate the decision in its Brief, and understandably cannot do so as the plan is deficient on its face.

III. CONCLUSION

BBHWP and the Town have failed to counter the fact that the Doyles were deprived of a due process opportunity to be heard in response to the application. They have failed to demonstrate that the application and the Planning Board's findings responded to the impact of the significant changes made to the site plan. They have also failed to demonstrate that the application satisfied the approval standards. The approval must be vacated, or at the very least remanded to the Planning Board so that the Doyles can raise these failures before the decision-making body as required under the rulings in *LaMarre* and 29 McKown.

Respectfully submitted this 31st day of July, 2023.

Kristin M. Collins, Esq., Bar No. 9793
Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000
kcollins@preti.com