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July 17, 2023

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

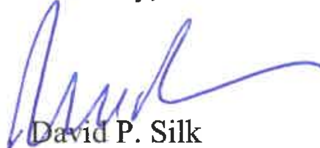
Re: *Joseph Doyle, et al. v. Inhabitants of the Town of Boothbay Harbor, et al.*
Docket No. WISSC-AP-2022-003 and
Boothbay Harbor Waterfront Preservation v. Town of Boothbay Harbor, et al.
Docket No. AP-2023-004 (consolidated for briefing)

Dear Ms. Lambert:

Enclosed for filing please find Party-In-Interest Boothbay Harbor Waterfront Preservation's Rule 80B Brief for filing in AP-2022-003.

Thank you for your assistance.

Sincerely,



David P. Silk

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

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.	)	PARTY-IN-INTEREST BOOTHBAY HARBOR WATERFRONT PRESERVATION'S RULE 80B BRIEF

I. INTRODUCTION

Plaintiffs Joseph and Jill Doyle (the "Doyles") lack standing to appeal the Town of Boothbay Harbor (the "Town") Planning Board's September 8, 2021 decision to approve an application for a minor amendment to a previously approved site plan filed by Party-In-Interest Boothbay Harbor Waterfront Preservation ("BBHWP"). Even assuming the Doyles have standing, and can be deemed to have timely raised the issues they now advance in their appeal, the Doyles fail to show that the Planning Board made any error of law, abused its discretion, or made findings not supported by evidence in the record when at a public hearing on September 8, 2021, it voted unanimously to approve BBHWP's application. This Court should therefore deny the Doyles' appeal and affirm the Planning Board's September 8, 2021 decision.

II. FACTS AND PROCEDURAL HISTORY

BBHWP is an independent 501(c)(3) nonprofit corporation and is the owner of real property located in the Town at 65 Atlantic Avenue, identified on the Town Tax Map 16 as Lot 24 (the "Property"). (Record ("R.") 002, 021, 055.) BBHWP's mission is to preserve and protect in the Town a working waterfront and public access to that waterfront. To that end, after BBHWP purchased the Property, it proceeded with plans to redevelop the Property as a public shorefront park, a marina, a neighborhood grocery store and two residential dwellings, to be called the Eastside Waterfront Park (the "Park"). (R. 024, 049-053.) Prior to BBHWP's acquisition of the Property, it was the site of the "Cap'n Fish" hotel, and was improved with two nonconforming hotel buildings and a large, asphalt and concrete parking area that comprised virtually the entire area between the two hotel buildings. (R. 048, 058, 061.) The predevelopment condition of the Property, depicted in aerial photographs submitted to the Planning Board and part of the record of this appeal, was over 86% impervious. (R. 004, 007, 009, 047.)

In the Spring of 2020, BBHWP applied to the Planning Board seeking all necessary Planning Board approvals for the Park (the "Application"). The Application was reviewed over the course of several public Planning Board meetings throughout that spring and summer, culminating in the Planning Board's approval of the Park on October 14, 2020. (R. 095-103.) The Doyles did not participate in those proceedings, did not object, and did not appeal. (R. 092-94, 124.)

On August 23, 2021, BBHWP submitted an application for a minor amendment to the Application that consisted of two changes: (1) a reduction in area of a brick paved gathering area and walkway, and (2) the relocation of a splash pad, a feature of the Park, to a location further from the coastal wetlands abutting the Property (the "Minor Amendment Application"). (R. 104-

111.) At a public hearing held on September 8, 2021, the Planning Board approved the Minor Amendment Application. (R. 112-123.) The Doyles did not attend the public hearing and did not provide any written comments to the Board. (R. 112-114.) The Doyles thereafter appealed the Planning Board's approval of the Minor Amendment Application to the Town's Board of Appeals ("BOA") which, acting in an appellate capacity, denied the appeal. (R. 130-132.) The Doyles then further appealed to this Court pursuant to M.R. Civ. P. 80B by Complaint dated January 28, 2022.

III. 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. *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶¶ 7-8, 868 A.2d 161. The court in essence ignores the BOA decision. *Id.* Because the Planning Board did not take in new evidence in response to a remand order from the BOA, the operative decision this Court reviews is the Planning Board's September 8, 2021, decision. This Court's review of the Planning Board's decision-making is limited; the operative decision is reviewed for abuse of discretion, errors of law, or findings not supported by substantial evidence in the record. *See, e.g. Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835.

The court gives great deference to a board's finding of fact. *Tomasino v. Town of Casco,* 2020 ME 96, ¶ 5, 237 A.3d 175. Such findings must be sustained unless the record compels a contrary conclusion. *Id.* Since the Planning Board approved BBHWP's Minor Amendment Application, to the extent they have standing, the Doyles have the burden of showing that the record before the Planning Board compels a contrary conclusion. *Tarason v. Town of South Berwick*, 2005 ME 30, ¶ 6, 868 A.2d 230. Thus, if there is any competent record evidence upon

which the board could have relied in making its finding, the court must affirm that finding if any such evidence is found in the record. *See Town of Minot v. Starbird*, 2012 ME 25, ¶ 11 n.4, 39 A.3d 897 (citing *Forester v. City of Westbrook*, 604 A.2d 31, 33 (Me. 1992)). Additionally, 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).

IV. ARGUMENT

A. The Doyles Lack Standing to Challenge the Planning Board's September 8, 2021 Decision.

The Doyles admit that they did not appear before the Planning Board when on September 8, 2021 at a public hearing, the Planning Board approved the Minor Amendment Application. See Pl.'s Amend. Compl. ¶¶ 23-27. The Doyles do not assert that the Town did not comply with the public notice requirements in the Ordinance applicable to a public hearing, which requires two forms of notice: (i) publication of the notice in the local paper, and (ii) the mailing of the notice of the meeting to be sent not less than 10 days prior to the hearing to owners of property within 250 feet of the properties involved, using the addresses in "the most recent tax records" of the Town.

The Town's Land Use Code ("LUO") provides in relevant part:

> 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 public hearing. 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. 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.*

LUO § 170-66(A)(7) (R. 234.) (emphasis supplied).

The Doyles also do not challenge the content of the notice of the public hearing, nor do they claim that the public hearing notice provisions in the Ordinance do not provide for adequate public notice. Given that the Doyles do not dispute that notice of the public hearing was given as required by the Ordinance and have no issue as to the Ordinance notice requirements, the Doyles have waived any claim that the notice of public hearing provisions in the Ordinance were not adequate. Due process only requires adequate notice, not actual notice. *Town of Freeport v. Greenlaw*, 602 A.2d 1156, 1160 (Me. 1992).

The Doyles also do not challenge the legality of last sentence of Section 170-66(A)(7) of the LUO, which states: "Failure to receive notice shall not invalidate the public hearing held." Yet the Doyles are asking this Court to find that the Doyles' claimed failure to receive the notice invalidates the action the Planning Board took at is September 8, 2021 public hearing, when it approved the minor amendment to BBHWP's previously approved Application. The Doyles' claim is simply untenable. Because the Doyles' appeal seeks to invalidate the Planning Board's action taken at a public hearing for failure to receive notice, and the LUO specifically states otherwise, the Court must deny the Doyles' appeal.

The Doyles rely on the notice provision in Section 170-66(A)(4) of the LUO to support their claim that the Town failed to provide adequate notice of BBHP's Minor Amendment Application. Pl.'s Br. 3. However, that Section 170-66(A)(4) merely provides that "[a]butting property owners shall be notified by mail of a pending application by the Town. This notice shall indicate the time, date and place that the Planning Board will consider the application." But as can be seen from looking at Section 170-66(A), this provision does not require abutters to

receive actual notice, nor does it specify the address to which the notice must be sent. The notice requirements for a public hearing set forth in Section 170-66(A)(7), set forth above, are more specific. The Doyles do not allege that the more specific notice requirements in Section 170-66(A)(7) were note met, and because it is an undisputed fact that the Planning Board reviewed the Minor Amendment Application at a public hearing held on September 8, 2021, the notice requirements of Section 170-66(A)(7) control.[1] And ends the Doyles' case.

Beyond being legally barred from seeking to invalidate the Planning Board's approval of BBHWP's Minor Amendment Application that occurred at the Planning Board's September 8, 2021 public hearing, their absence from the public hearing and resulting failure to raise before the Planning Board the issues they now raise sinks their appeal for two reasons.

First, because they did not appear before the Planning Board, the Doyles lack standing to challenge the Planning Board's September 8, 2021 decision. Standing can be raised at any time. *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 7, 10 A.3d 718. To show standing to file an 80B appeal in the Superior Court, the Doyles must prove "(1) *that [they were] a party at the administrative proceeding*, and (2) that [they] suffered a particularized injury as a result of the agency's decision." *Friends of Lincoln Lakes v. Town of Lincoln,* 2010 ME 78, ¶ 8, 2 A.3d 284 (quoting *Norris Family Assocs., LLC v. Town of Phippsburg,* 2005 ME 102, ¶ 11, 879 A.2d 1007)(emphasis supplied). Failure to demonstrate standing before this Court requires that their petition be dismissed. *Friends of Lincoln Lakes*, 2010 ME 78, ¶ 9; *accord Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218, 220 (Me. 1981) (noting that standing is a "threshold issue" implicating a court's authority decide substantive merits).

[1] Given the nature of the minor amendments, the Doyles' cannot show that the Planning Board abused its discretion or committed an error of law in proceeding directly to a public hearing on the Minor Amendment Application.

Second, and tied to the standing requirement of appearing before the administrative body, is the rule that issues not raised before an administrative body like a Planning Board are deemed waived. *See, e.g. 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 has 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). "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 operative decision is the Planning Board's September 8, 2021 decision made at a public hearing to approve BBHWP's Minor Amendment Application. Since the Doyles did not appear they do not have standing to challenge that decision. And since they did not raise any issues before that board when it made its operative decision, the Doyles have waived their claims of error.

Clearly anticipating they would be challenged for lack of standing, and ignoring the notice requirements for a public hearing in Section 170-66(A)(7), and the fact that the LUO further provides that "[f]ailure to receive notice shall not invalidate the public hearing held," the Doyles' claim that their lack of appearance is due to their failure to receive the notice of the September 8, 2021 meeting, brought on they say by the Town not using a corrected mailing address they claim at some point to have supplied to the Town prior to the September 8, 2021

public meeting. They also assert that the Town's website did not have a posting of the public hearing.

Based on material not in the record, the Doyles assert that when an abutter who does not dispute that proper notice of a public hearing was given but makes a claim that the municipality did not also mail to them by individualized notice and/or they did not receive individualized notice in a manner not required by the LUO, that negates the adequate notice of the public hearing. In other words, once they make a request for individualized notice, even without any confirmation it will be given, they are entitled as a matter of law to have individualized notice of a public sent to them to ensure actual notice, and if not received, they can void any action taken at the properly noticed public meeting.

While the Doyles spin a mighty tale, they ignore that the court's review is limited to the record before the Planning Board. *29 McKown LLC v. Town of Boothbay Harbor*, 2022 ME 38, ¶ 11, 277 A.3d 364 (stating that because the BOA did not have *de novo* jurisdiction the court could not consider material submitted to the BOA, but was limited to the reviewing the operative decision directly (citing *LaMarre v. Town of China,* 2021 ME 45, ¶ 4, 259 A.3d 764)). *See also* M.R. Civ. P 80B(f) ("review shall be based upon the record of the proceeding before the governmental agency"). The corollary to that rule is "the court should not consider facts that were not in the record before the governmental agency unless it has permitted introduction of evidence pursuant to 80B(d)…." *Chase v. Town of Machiasport*, 1998 ME 260, ¶ 9 n.4, 721 A.2d 636.

Rule 80B(d) is clear that when a party wants the court to consider evidence that does not appear in the record of the governmental actional being reviewed, and it is not stipulated, the party must within 30 days of when the complaint was filed request a motion for trial of facts.

Required with that motion is a detailed offer of proof setting forth what the party intends to offer. The rule also states that the failure of a party to file the motion "shall constitute a waiver of any right to a trial of the facts."[2]

Here, if the Doyles wanted to present to the court the issue of whether their failure to attend the September 8, 2021 meeting (and thus obtain standing) should be excused due to evidence not in the record, they could have filed a motion for trial of the facts with an offer of proof. But even if such a motion had been timely filed and subsequently granted, discovery would have occurred and likely taken the wind out of the Doyles' story. In any event, they cannot now present a due process claim because that claim relies on material not in the record before the Planning Board.

The Doyles' Complaint at paragraph 20 asserts that at some point in time and in some unstated manner, the Doyles "provided the code officer with their correct address to ensure they would receive notice of any future Planning Board meetings." Nowhere do the Doyles address whether the code officer has any legal duty to provide individual notices to anyone who gives the code officer an address change. And having not addressed that point, the Doyles were on notice of the LUO provisions regarding notice of a public hearing. They had counsel. The LUO is clear

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[2] As stated in *Baker's Table, Inc. v. City of Portland*, 2000 ME 7, ¶ 9, 743 A.2d 237:

> The purpose of Rule 80B(d) is to allow the parties to an appeal of a governmental action to augment the record presented to the reviewing court with those facts relevant to the court's appellate review of agency action. Rule 80B(d) is not intended to allow the reviewing court to retry the facts that were presented to the governmental decisionmaker, nor does it apply to any independent civil claims contained in the complaint. Rather, it is intended to allow the reviewing court to obtain facts *not in the record* that are necessary to the appeal before the court. See *Palesky v. Secretary of State*, 1998 ME 103, ¶¶ 5–9, 711 A.2d 129, 131–132…The record may also be supplemented with regard to certain subsidiary issues that, although not independent claims, nevertheless involve facts which are not in the record. See *Boisvert v. King*, 618 A.2d 211, 214 (Me. 1992) (holding a trial of the facts was required, on a Rule 80B(d) motion, where there was an issue regarding the timeliness of an appeal).

on how notice is given and the Doyles have waived any argument that the code officer has a legal duty to provide individualized notice under the LUO. The Doyles therefore gain nothing by alleging that they "never received the required notice because the Town mailed it to the incorrect address." Pl.'s Br. 3. That is because at no time do the Doyles dispute that the notice of the September 8, 2021 public meeting was in fact correctly mailed to the address the Town had in its property tax records for the owner of 61 Atlantic Avenue. Nor have the Doyles asserted that anyone at the Town agreed to their unilateral request to mail them individualized notice of a public hearing other than in the manner provided in the Ordinance.[3]

A trial of the facts on the due process claim the Doyles now belatedly present would have been brief, and if such a motion for trial of the facts had been timely presented in February 2022 and supported by an offer of proof, if granted, this Court could have issued an order on the future course of proceedings that allowed for discovery and disposition of that issue. For if dispositive, it would have obviated the need for the delay, *now over 2 years*, until the processing of the Shoreland Zoning Permit was completed, for briefing on the merits. And if the court agreed that there was a due process violation, it would have acted on the Doyles' remedy request at that time.[4] But the Doyles waited more than 2½ years to make the due process claim and then based their claim not on the applicable provision in the LUO, but on documents not in the record.

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[3] When a codes officer gives advice contrary to what the Ordinance states, the property owner has no right to rely on that advice. *See Shackford & Gooch, Inc. v. Town of Kennebunk,* 486 A.2d 102, 103–104 (Me.1984) (citations omitted)("[T]the unauthorized act of a municipal officer cannot be grounds for estopping the municipality. *See Lewiston v. Grant,*120 Me. 194, 202, 113 A. 181, 185 (1921). The improper verbal representations of the building inspector do not estop the Zoning Board of Appeals from enforcing violations of the provisions of the zoning ordinance.").

[4] Nowhere in the Doyles' Rule 80B Complaint do they make any claim of a due process violation, the Complaint does not even contain the phrase "due process." The Complaint does not seek as a remedy a remand to the Planning Board to redo the September 8, 2021, hearing from scratch. In numerous filings the Doyle s made in this action seeking a delay to the briefing schedule, they never once alerted the court that they sought to unwind the Planning Board's September 8, 2021, action. *See* March 9, 2022, Doyles' Consented to Motion to Stay; October 18, 2022,

Knowing that they failed to file a motion for trial of facts, and that such a motion is necessary when a party wants the court to consider material that was not before the administrative agency when it made its decision, the Doyles instead unilaterally put one-sided material in the record,[5] and seek to have the Court decide just on that information that there was a due process violation.[6]

To justify their flagrant disregard of the Rules, the Doyles' excuse is that "[i]t would have been a waste of judicial resources" to file a motion for trial of the facts. Pl.s' Br. 2. The Doyles do not cite any case holding that a party who seeks to put before the court evidence not in the record need not file a motion for a trial of the facts if in the party's view, it would be a waste of judicial resources. It is an untenable assertion on its face. Far fewer judicial resources would have been spent if the Doyles had filed the motion. But likely to avoid scrutiny of their so-called due process claim, they did not. Their excuse likely stems from the fact that the Doyles missed the 30-day deadline to request a trial of the facts. The rules would have no meaning if a deadline can be disregarded on such a basis. The Doyles have waived the right to include the letter in the record or use it as the sole base to present a due process claim as to excuse their lack of standing.

Doyles' Motion to Stay; and January 18, 2023, Doyles' Motion to Stay. The Doyles even filed a proposed amended complaint, and therein did not raise the issue. *See* Doyles' Motion for Leave to Amend Complaint (Nov. 14, 2022). The motion was never granted and never raised in subsequent status calls with the court when inquiry was made at the end of those calls as to "anything else."

[5] In so doing it should be noted that although the Doyles filed their appeal in early 2022, they waited until June 9, 2023, to circulate a proposed record, less than 7 days before their brief was due on June 15, 2023, and after objection, refused to submit to the court the issue whether the September 12, 2021 letter should be submitted in the record.

[6] Rule 80B(e) provides that if there is dispute as to whether a certain document was part of the record before the Planning Board, the dispute is to be submitted to the court before the record is filed. The Doyles refused to follow this rule when they inserted the letter in the record. By letter dated June 16, 2023, BBHWP asked the court to address the dispute.

The Doyles next claim that their September 12, 2021 letter and underlying allegations contained therein should be taken at face value because those allegations "have not been disputed during the administrative process." Doyles' Br. 2. The public hearing before the Planning Board occurred on September 8, 2021. (R. 112.) The Doyles' letter is dated after that date, so it was never part of the administrative process. The Doyles never asked the Planning Board to reconsider. The BOA acted in an appellate capacity and on remand, the Planning Board limited itself to the record before it on September 8, 2021, so the letter was never part of any administrative process. And again, the Doyles never filed a Rule 80B(d) motion.

The Doyles unverified narrative at page 4 of their brief, the two full paragraphs, one beginning with "Upon" and other beginning with "On August 13, 2021" should be stricken, as they are in essence offers of proof that should have been appended to a motion for a trial of the facts and were not before the Planning Board when it made its September 8, 2021 decision. As an example, there is no support for the assertion that "the Doyles repeatedly requested information for the Town." Pl.s' Br. 4. In any event, the Doyles' attorney certainly was aware of Maine's Freedom of Access law, and the ability to visit the Town office and ask to see records.

The Doyles at page 5 of their brief, and again not based on anything in record, assert that the Town "failed to post or publish notice of the Planning Board's September 8, 2021 hearing to the Town website or in any other public place." Pl.'s Br. 5. The Doyles do not dispute that notice of the public hearing as required by Section 170-66(A)(7) was given. They do not assert that the contents of the notice of the public hearing were somehow inadequate. The Doyles admit that notice was sent and delivered.

None of the cases the Doyles rely on aid them here. In *Demers v. Town of Lyman*, AP-21-17 (Aug. 16, 2022, York Cty. Sup Ct.) the public notice was mailed 9 days prior to the public

hearing, and not as the local ordinance required, which was not less than 10 days prior to the meeting. Because the notice given did not comply with the requirements of the local ordinance, the court proceeded to analyze whether actual prejudice occurred. Based on a showing that none of the notices to abutters had been delivered prior to the hearing, the court found actual prejudice. The court did not hold – or even suggest – that when notice of a public hearing is in fact given as required by the operative ordinance, the notice is deficient if notice is not actually received. The Doyles make no claim here that all of the other abutters failed to receive notice prior to the hearing. Nor do they contend that the notice sent to the address in the property tax records for 61 Atlantic Avenue was not delivered prior to the hearing date.

Citing two Law Court cases, the Doyles next argue that even if the notice requirements for the public hearing were met, that they are "entitled to a right to be heard," and though notice was delivered prior to the meeting, they were entitled to actual notice, and therefore their right to participate before the Planning Board at its September 8, 2021 public hearing was violated. Pl.'s Br. 10.

Neither of the Law Court cases cited by the Doyles support their claim of a due process violation. In *29 McKown LLC v. Town of Boothbay Harbor*, 2022 ME 38, 277 A.3d 364, the underlying issue was whether the local code officer erred in approving a "demolish-and-rebuild permit." Unlike here, the court had before it undisputed facts, which included the fact that the town failed to give notice of the permit application as required by the ordinance (publication in the local newspaper for seven days to allow for public comment). *Id.* ¶¶ 2, 7 n.3. The court concluded that the failure to provide the public notice was a due process violation. *Id.* ¶ 7. Since the Doyles do not dispute the LUO's notice requirements for the public hearing were met here, the decision is of no help to them.

In *LaMarre v. Town of China*, 2020 ME 45, 259 A.3d 764, the issue was whether the local code officer erred in issuing an after-the-fact permit. The court noted that "[t]here is no statutory requirement for a CEO to notify abutters of permit applications." *Id.* ¶ 13 n.5. And in the case no notice given. Due to this fact, and because the local board acted in an appellate capacity only, the court said adequate public notice had not been given. *Id.* ¶ 13. To remedy this common problem, the court "strongly urge[d]) municipalities to provide for de novo review of CEO decisions by boards of appeals." *Id.* ¶ 15. This case does not help the Doyles here, because the Doyles do not dispute that the LUO's notice requirements for a public hearing were met.

The Doyles do not assert that the Ordinance notice provisions for a public hearing fall short of the Freedom of Access Act requirement that "notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned." 1 M.R.S. § 406.

Section 170-66(A)(7) controls here. All of what the Doyles present is simply an end run around of that last sentence of that section, which again provides that failure to receive notice shall not invalidate the actions taken at a Planning Board public hearing. Given that the Doyles (1) do not dispute that the Town gave proper notice of the Planning Board's September 8, 2021 public hearing, and (2) their failure to file a motion for trial of the fact on their claim they effectively changed their address with the person at that Town responsible for maintaining the Town's property tax records, the Doyles lack standing to challenge the Planning Board's September 8, 2021 decision. The court must dismiss their complaint.

B. The Planning Board Did Not Abuse Its Discretion in Determining that BBHWP Submitted a Complete Application.

Even assuming the Doyles have standing to pursue this appeal have not waived the arguments they belatedly raise for the first time before this Court, their claims fail on the merits and their appeal should be dismissed. The Doyles first argue that BBHWP did not submit a complete application, listing a number of items the Doyles claim were not submitted with BBHWP's revised application. A careful review of the record, however, reveals that to the extent applicable, each of these items were addressed in BBHWP's submissions to the Planning Board in connection with its original application, as noted below:

- **Topographical information**. Elevation contours are depicted on the Existing Conditions and Boundary Plan (Sheet L-1) submitted to the Planning Board. (R. 047.)

- **Location of proposed lighting**. BBHWP submitted a description of proposed lighting, cut sheets, and a lighting plan. (R. 074-077.) The amended plan did not propose any changes to the location of proposed lighting.

- **Stormwater plan**. BBHWP submitted a Stormwater, Sedimentation & Erosion Control Plan (Sheet L-6). (R. 052.)

- **Cross sections and other details of all sidewalks**. The LUO defines "sidewalk" as a "paved way for pedestrian traffic which is constructed parallel to a road." LUO § 170-113 (R. 327.) There are no new roads or sidewalks proposed as part of the Project. Access to the Property is via Atlantic Avenue, which has no sidewalk on the side of the road adjacent to the Property. Because there are no existing or proposed sidewalks on the Property, this requirement does not apply.

- **Financial Capacity**. BBHWP submitted a letter from First National Bank to satisfy this requirement in connection with its original application. (R. 057.) The minor amendment did not significantly impact on the cost of construction.

In light of the above, the Planning Board properly concluded that "all information necessary to review the proposed amendments *was either included with the original application* or had been provided with the application for the amendments." (Emphasis added) (R. 173.) The record before the Planning Board does not compel a contrary conclusion. *See Tarason v. Town of South Berwick*, 2005 ME 30, ¶ 6, 868 A.2d 230. To the contrary, the record in fact supports the Planning Board's determination that BBHWP submitted a complete application.

C. The Planning Board's Decision Was Supported by Substantial Evidence in the Record.

The Doyles next argue that the Planning Board's decision is not supported by substantial evidence in the record because the Planning Board's approval is "insufficient to permit judicial review, and does not cite substantial evidence in the record to support its conclusion." Pl.'s Br. 12. This argument misapplies the legal standard governing the court's review.

As the party bearing the burden of proof, the Doyles must show on appeal that the evidence before the Planning Board compelled a contrary conclusion. *See Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995). The court may not substitute its judgment for that of the Planning Board, and the Planning Board's "decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it. *Id.* (citing *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717, 720 (Me.1983). "Further, '[a] demonstration that no competent evidence supports the local board's findings is required in order to vacate the board's decision.'" *Gensheimer v. Town Of Phippsburg*, 2005 ME 22, ¶ 17, 868 A.2d 161 (quoting *Thacker v. Konover Dev. Corp.*, 2003 ME 30, ¶ 8, 818 A.2d 1013).

Here, in response to a remand order from the Boothbay Harbor Board of Appeals, the Planning Board issued detailed findings in support of its September 8, 2021 approval of the minor amendments to the Project. Those findings addressed each and every standard applicable to projects requiring site plan review in the Town of Boothbay Harbor. (R. 173-175.) With respect to each standard, the Planning Board made specific findings as to whether (a) the proposed minor amendment did not change BBHWP's approved plan with respect to that standard; or (b) the proposed minor amendment complied with that standard, citing the specific evidence in the record on which the Planning Board's finding was based. *Id.* The Doyles argue that this was not enough, and that the Planning Board should have explained with greater

particularity its rationale as to why the minor amendment met each and every applicable standard in the LUO. This is not what the law requires. As the party seeking to vacate the Planning Board's decision, the Doyles bear the burden of proving that the record before the Planning Board compels a contrary result. The record, in fact, supports the Planning Board's findings. Given the modest scope of the proposed amendments – which called for the relocation of a single Project feature further away from the coastal wetland, the addition of a dry surface around that feature to meet ADA recommendations, and a corresponding reduction in the surface area of a brick paver walkway to ensure that overall impervious coverage remained consistent with what was originally approved by the Planning Board in October 2020 – it was not surprising that the Planning Board found that BBWHP's proposed minor amendments did not change the approved plan with respect to several of the standards in the LUO. For example, the LUO standard regarding "natural areas" in Section 170-69(J) would clearly not be implicated given the fact that the predevelopment condition of the Property was 86.22% impervious and neither the original Project nor the proposed minor amendment involved the removal of vegetation. Similarly, the Planning Board did not err in concluding that the standard regarding "shoreland relationship" was not implicated given the splash pad already met the required shoreland setback in the LUO and was proposed to be moved further away from the shore. The Planning Board acted diligently in its review of the Minor Amendment Application and the Doyles have failed to meet their burden that the Planning Board's decision should be vacated.

The foregoing assumes that the Doyles have not waived the arguments set forth in their brief, not only by failing to appear as a party before the Planning Board at any time during the

Planning Board's review of the BBHWP's Application and Minor Amendment Application,[7] but also by failing to raise many of their arguments in their appeal to the BOA. The Doyles' appeal to the BOA raises three arguments: (1) that BBHWP's application was incomplete; (2) that the Planning Board's findings approving the Minor Amendment Application were inadequate; and (3) that there were "errors in approving the [Minor] Amendment Application." (R. 127-128.) To the extent the Doyles have standing to pursue this appeal and have not waived all arguments given their failure to participate in the proceedings before the Planning Board, the only arguments the Doyles can credibly argue have been preserved are limited to the arguments they raised to the BOA. *Brown v. Town of Starks*, 2015 ME 47, ¶ 6, 114 A.3d 1003, ("In order to preserve an issue for appellate review, a party must timely present that issue to the original tribunal; otherwise, the issue is deemed waived.").

D. The Project Meets All Applicable Approval Standards.

The Doyles finally argue that the Project does not meet all approval standards because the Project does not meet a buffer requirement in Section 170-35 of the LUO and a lighting standard in Section 170-45 of the LUO. This argument in the Doyles' brief is without merit.

First, with respect to the buffer requirement, in commercial districts such as the Limited Commercial/Maritime district in which the Property (and the Doyles' property) are located, only a five-foot buffer is required. LUO § 170-35(A)(3). By Plaintiffs' own admission, the distance between the splash pad and the property line is "approximately 10 feet," which is double the buffer that the LUO requires. Pl.'s Br. 5. The actual distance in fact exceeds 15 feet, as shown on the scaled site plan included in the record. (R. 123.) Furthermore, while "buffer" is not defined in

[7] The Doyles should have been aware of BBHWP's Project since its inception. The record reflects that the Doyles themselves had an application before the Planning Board on May 13, 2020, the same evening at which BBHWP first presented the Project to the Planning Board. (R. 018-019.)

the LUO, Section 170-35(B) provides that screening within buffer strips may consist of "natural or man-made barriers, existing vegetation or new plantings." (R. 203.) Such natural barriers may include trees, and man-made barriers may include fencing. *Id.* Thus, the row of trees and split-rail fence between the Property and Plaintiffs' property shown on the approved site plan – the presence of which Plaintiffs do not dispute – easily satisfies the buffer requirement. Furthermore, it should be noted that the Minor Amendment Application did not propose any changes to the buffer between the Property and the Doyles' property. The Planning Board approved BBHWP's original application, which featured the same buffer, in October 2020, and that decision was not appealed. The Doyles cannot reopen this issue now.

Second, with respect to the lighting requirement, there is robust support in the record that the Project meets this standard. Contrary to Plaintiffs' assertions, a lighting plan was included with BBHWP's original application. Those materials noted the following:

> **8. Description and details regarding site lighting.**
>
> **Lighting for the site is noted on the plan below and will include three KIM ArcheType X Wall building mounted full cut-off LED lights, three LED KIM Pavilion landscape bollards on the path between the tree grove and the north pier, existing decorative lights on the north pier railing, and LED uplights within the tree grove. The wall mounted lights are strategically placed to assure safe vehicular and pedestrian circulation without over lighting the site.**
>
> **Per the recommendation of the Planning Board, the lights on the park sign along Atlantic Avenue will be down lights to minimize glare and light pollution.**
>
> **Cut sheets for the building mounted and the bollard lights are below.**

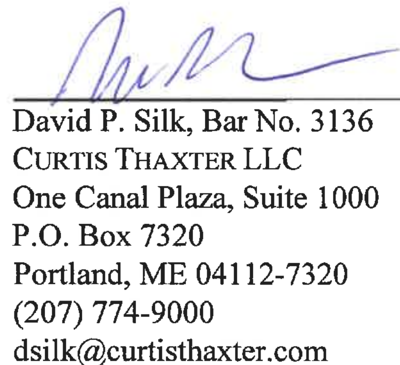
(R. 074.) Furthermore, locations of proposed lighting were depicted on a lighting plan that BBHWP submitted to the Planning Board (R. 077.) Notably, as shown on the plan, no lighting is proposed on or surrounding the splash pad. This is likely because the splash pad is not intended to be operated after dusk, negating the need for lighting in this area of the Property. BBHWP's

amended site plan application therefore sought to relocate a feature of the Project that does not require lighting. The Planning Board, therefore, was not required to make an explicit finding regarding lighting because the record clearly supports its decision. *Forester v. City of Westbrook*, 604 A.2d 31, 32 (1992) ("If there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings."). Accordingly, the Minor Amendment Application met all applicable LUO standards.

V. CONCLUSION

In light of the foregoing, Party-In-Interest Boothbay Harbor Waterfront Preservation respectfully requests that the Court exercise its sound discretion to deny Plaintiffs' 80B appeal.

Dated: July 17, 2023



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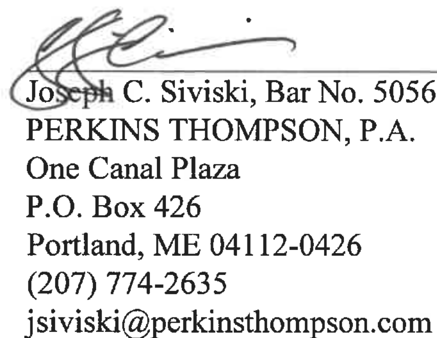

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