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July 17, 2023

VIA COURIER

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-23-4

Dear Teri,

Enclosed please find for filing Parties-In-Interest Rule 80B Brief in the above captioned docket. Because the Doyles' cross-appeal issues have been consolidated with Plaintiffs' appeal for briefing, they reserve the right to file a surreply related to issues raised for the first time in this Brief.

Please feel free to contact me if you have any questions regarding the enclosed.

Sincerely,

Kristin M. Collins

KMC:bjb
cc: Joseph Siviski, Esq. (*via email*)
David Silk, Esq. (*via email*)
John Cunningham, Esq. (*via email*)

STATE OF MAINE
LINCOLN, ss.

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

BOOTHBAY HARBOR WATERFRONT PRESERVATION,	)	
Petitioner,	)	
v.	)	
TOWN OF BOOTHBAY HARBOR,	)	**RULE 80B BRIEF OF PARTIES-IN-INTEREST JOSEPH AND JILL DOYLE**
Respondent,	)	
and	)	
JOSEPH DOYLE and JILL DOYLE,	)	
Parties-In-Interest.	)	

I. INTRODUCTION

The Board of Appeals ("BOA") of the Town of Boothbay Harbor ("Town") correctly vacated the Town Planning Board's issuance of shoreland zoning approval to Petitioner Boothbay Harbor Waterfront Preservation ("BBHWP"). BBHWP's development has been marked by notice failures, inattention to relevant approval standards, and violations of the approvals that have been issued.[1] In the present case, BBHWP looks to have its shoreland zoning approval reinstated following the Planning Board's vacation of that approval for failure to comply with setback provisions. In the case filed at Docket No. AP-2023-04, the Doyles seek vacation of BBHWP's site plan approval for other failures to comply with the Town's Land Use Ordinance.

The present case requires consideration of the intent of shoreland zoning to carefully protect

[1] See, e.g. Notice of Violation, Rec. at 243.

Maine's shoreline by eliminating nonconformities over time. Though BBHWP has removed the hotel buildings and parking lots from the prior development on its property, and is starting from a mostly blank slate, its proposed waterfront park improperly seeks to benefit from grandfathering (legal nonconformities) that attached to the prior development. The BOA correctly found that BBHWP had not met its burden to demonstrate that a planned parking lot – incorrectly billed as the reconstruction of an existing, nonconforming parking lot – was proposed to be set back from the shoreline to the greatest practical extent. Additionally, BBHWP's shoreland zoning approval must because BBHWP cannot take advantage of nonconforming lot coverage maintained by the prior development, because the lot does not contain sufficient area for the use proposed, and because the application materials were insufficient to allow the Planning Board to accurately apply the shoreland zoning standards.

II. FACTUAL AND PROCEDURAL HISTORY

Joseph and Jill Doyle are direct abutters to the property at 65 Atlantic Avenue in the Town of Boothbay Harbor (the "Property") for which BBHWP sought various approvals from the Town's Planning Board (the "Development") related to a proposed mixed-use development.[2] Rec. at 111. The Property was last used as a waterfront hotel and marina which included structure setbacks and lot coverage that were not compliant with current shoreland zoning standards codified in the Town's Land Use Ordinance ("LUO"). Rec. at 94-97. The Development sought to remove most existing improvements (e.g. hotel buildings and parking lots) from the Property and replace them with a waterfront "park" including walkways, pavilions and a large "splash pad" for children, and commercial and recreational wharf space. Rec. at 6-15. The site plan also referenced conversion of

[2] While BBHWP frequently refers to its development as a "park," its approved site plan includes a general store, apartments, commercial and recreational marinas, "splash pad," other park uses and associated parking, all on a 38,000 square foot lot.

an existing house on the Property to two apartments and a general store. Rec. at 14. BBHWP would later abandon these two proposed uses when it sought shoreland zoning approval for the Development. Rec. at 77.

Following approval of its site plan, BBHWP started work on the Development. As more fully described in the brief on the site plan appeal under Docket No. AP-2023-04, the Doyles had never received notice of the site plan application or approval, and were surprised to learn that a project had been approved and even partially constructed. The Doyles repeatedly took measures to insure that the Town had the correct mailing address for them, through phone calls, in person comments, and letters and emails from their counsel. Nevertheless, the Town continually failed to properly send notices to the Doyles. There is no evidence in the record that notice of relevant hearings was sent to the Doyles at all, much less to an incorrect address (e.g. copy of returned mailing).[3]

Through their attorney, the Doyles on August 13, 2021 sent a letter to the Town's Code Enforcement Officer ("CEO") which, among other issues, raised concern that (1) the splash pad had been built in a different location (much closer to the Doyles) and larger than approved, and (2) the Planning Board had not reviewed any of the Town's shoreland zoning standards prior to issuing site plan approval to BBHWP. Rec. at 56-59. The Planning Board's findings of fact from the October 14, 2020 site plan approval referenced only the site plan criteria in Article V of the LUO and not the shoreland zoning standards under Article VIII of the LUO. *Id.*

Following the Doyles' complaint, BBHWP on October 25, 2021 submitted a request to the Planning Board for a "building permit" under the shoreland zoning standards. Rec. at 40-42. It submitted a further letter on November 8, 2021 which discussed approvability of the Development

[3] For further discussion and record references related to these notice failures, please see the brief and record in AP-2023-04.

under the shoreland zoning standards. The Doyles responded to BBHWP's application by a letter dated November 9, 2021, which raised multiple issues regarding the Development's proposed lot coverage, setbacks and other issues of compliance with the shoreland zoning standards. Rec. at 43-51. On November 10, 2021, the Planning Board considered BBHWP's shoreland zoning application, and on November 17, 2021, the Planning Board made findings of fact and approved the shoreland zoning application. Rec. at 76-78; 99. While the Doyles' attorney was present at the November 10th and 17th meetings, the Planning Board, over his objection, allowed only limited questions from him prior to making its findings of fact, and then did not take further public comment until after it had completed its review and findings on the relevant approval standards. Rec. at 76-78; 99; video of November 10, 2020 meeting, at 13:35-17:00.

Moreover, it appears that the Planning Board had likely conferred about and made its findings on an *ex parte* basis before the November 10, 2021 hearing. At the October 12, 2022 meeting that would later be held on remand from the Board of Appeals, the following exchange occurred regarding the Planning Board's past approval procedures:

> Chair: So I'm going to make a motion that the November 9th Planning Board meeting we'll hold a public hearing to discuss the remand order from the Zoning Board of Appeals.
>
> Member Dunsford: But we should circulate some draft language before then. We send our ideas to [CEO Geoff Smith], I guess that's how we normally do this?
>
> Town Attorney: Mr. Chair, because of course this is a very important issue and we will be under a lot of scrutiny, I want to remind the board of the legal requirement that the board cannot conduct its business outside the confines of a public hearing – excuse me, a public meeting. If people are sending you information, you can read it or not at your decision, and you may make your own notes as to ideas you want to bring up at the meeting but you must not discuss the matters amongst yourselves outside of a public meeting. Or circulate drafts to one another.
>
> Member Dunsford: John what we've done in the past is each of us does a draft of things. We send them in to Geoff. He sort of mixes it all up and once he has them all he gets ready to share it and then he sends it to everybody and then we come to the meeting, we're prepared.

> Town Attorney: Right, but he should not do that. So, we will not be doing that.
>
> Chair: He can't take our comments individually, put them together and then say…
> Town Attorney: Because then you would be discussing and considering the matter outside of a public meeting. You're not allowed to do that.
>
> Chair: So you can make comments to yourself and bring them up at the meeting but you can't share it with the rest of the board.
>
> Member Dunsford: So we should have gone to jail several years ago then.
>
> Town Attorney: Well you're off the hook on that but I'm pointing out what the law requires.[4]

Reviewing the October 10, 2021 meeting in light of this information, it is notable how little meaningful discussion is had regarding the approval standards, evoking concern that indeed some consideration of the merits must have taken place outside the meeting. Taken together with the prior notice failures, these procedural irregularities deprived the Doyles of a meaningful opportunity to be heard regarding this project.

At its November 17 and 23, 2021 meetings, the Planning Board voted to adopt written findings on both the shoreland zoning standards and on the site plan revision at issue in Dkt. No. AP-2022-3. Rec. at 99; 101. The plan for the Development, as approved, depicts a new parking lot within 75 feet from the shoreline. Rec. at 14. The Planning Board's findings of fact do not explain why the Planning Board found the parking lot to be a reconstructed nonconforming structure, rather than a new structure. Rec. at 104-106. The findings also do not describe how, or upon what evidence, the parking lot met the standard under Section 170-101.7(C) of the LUO, which states that a reconstructed nonconforming structure must be moved away from the shoreline to the "greatest practical extent." *Id.* The Planning Board's findings also do not address any of the other issues raised by the Doyles in their letter dated November 9, 2021. *Id.*

[4] BBHWP has included in the record the minutes of the October 12, 2022 Planning Board meeting, but has not included the video. This appears to have been an oversight, as other meeting videos have been provided. The video in question can be viewed at https://www.facebook.com/100064844524505/videos/480038337502604, starting at 1:17:35.

The Doyles timely submitted an appeal of the shoreland zoning decision to the Town's Board of Appeals on December 16, 2021. The BOA, acting in an appellate capacity, held several hearings and ultimately remanded the application back to the Planning Board on two separate occasions. The first remand order, dated January 18, 2022, requested that the Planning Board address four specific questions with the intent of receiving further explanation of the Planning Board's rationale related to application of parking and shoreland zoning standards. Rec. at 218. Seven months later, the Planning Board still had not addressed the remand and had to be prompted to do so by the Doyles. Rec. at 230; 234.

On December 14, 2022, the Planning Board finally held an additional hearing on the remand that included public comment, and provided a response to the BOA dated on the same date. Rec. at 296. The BOA then reviewed the Planning Board's decision at subsequent hearings, and issued another remand order dated February 2, 2023, which requested that the Planning Board specify which record documents it was relying upon in finding that the proposed parking lot met the "greatest practical extent" standard for nonconforming structures. Rec. at 326. The Planning Board, after another public meeting held on February 8, 2023, issued a further response to the Planning Board with the same date, which listed record documents pertaining to the issues on appeal. Upon receipt of the Planning Board's response and in depth review of the Planning Board meeting videos and minutes, on March 30, 2023 the BOA voted 3 to 0 to vacate the Planning Board's shoreland zoning approval on the grounds that there was insufficient evidence in the record to find that the parking area within the 75' setback had been moved back from the shoreline to the greatest practical extent. Rec. at 360. BBHWP timely requested reconsideration from the BOA, but the BOA denied the request. BBHWP then timely submitted the present Rule 80B appeal to this Court.

III. STANDARD OF REVIEW

Pursuant to Section 170-108 of the LUO, the Board of Appeals reviewed the Planning Board's decision in an appellate capacity. Rec. at 455. In such a case, the Superior Court reviews the Planning Board's decision directly. *Fitanides v. City of Saco*, 2015 ME 32, ¶ 8, 113 A.3d 1088, 1091. The Planning Board's decision must be set aside if it was based upon "an error of law, an abuse of discretion, or findings not supported by substantial evidence in the record." *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024.

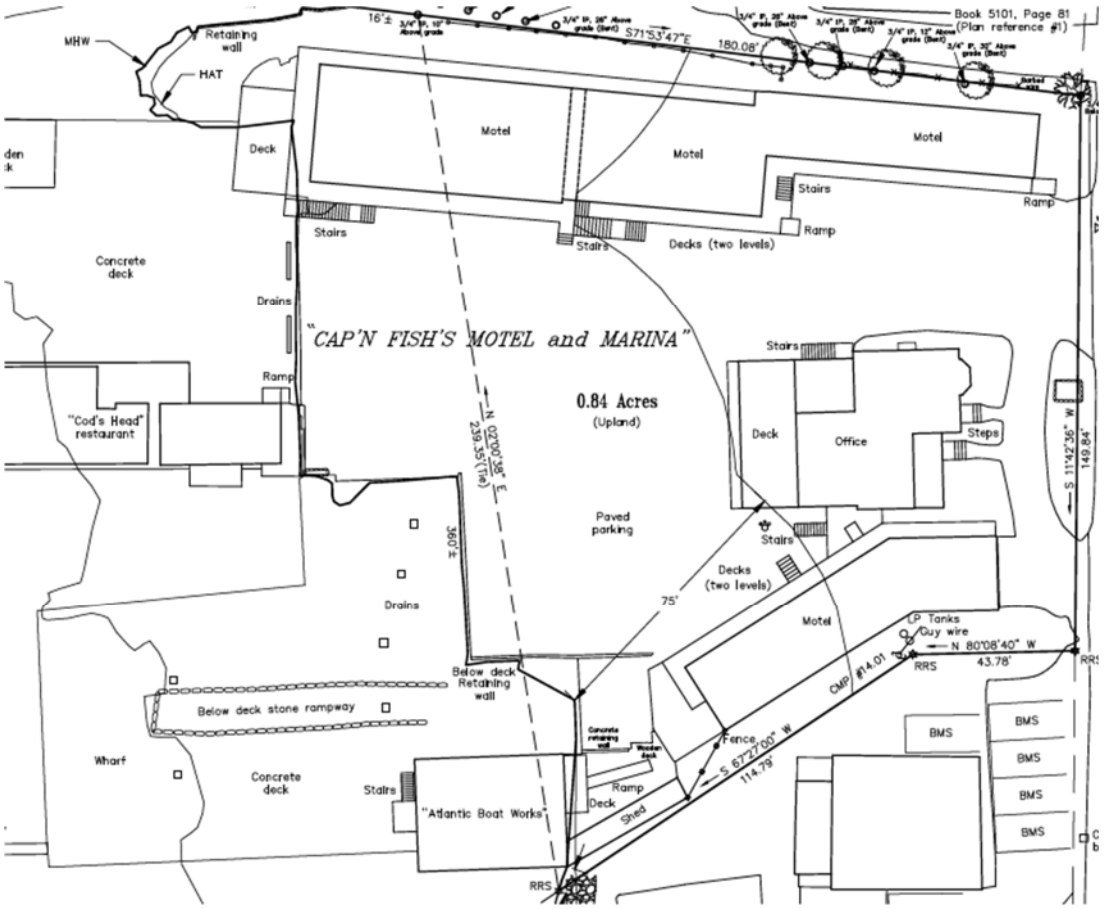
The interpretation of local ordinances is a question of law that the court reviews *de novo*. *Rudolph v. Golick*, 2010 ME 106, ¶ 8, 8 A.3d 684. The court examines an ordinance for its plain meaning and construes it "reasonably in light of the purposes and objectives of the ordinance and its general structure." *Id.* at ¶ 9. The court will not construe an ordinance "to create absurd, inconsistent, unreasonable or illogical results." *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 23, 82 A.3d 148.

IV. ARGUMENT

A. The Planning Board's decision as to the parking lot was not supported by substantial evidence in the record.

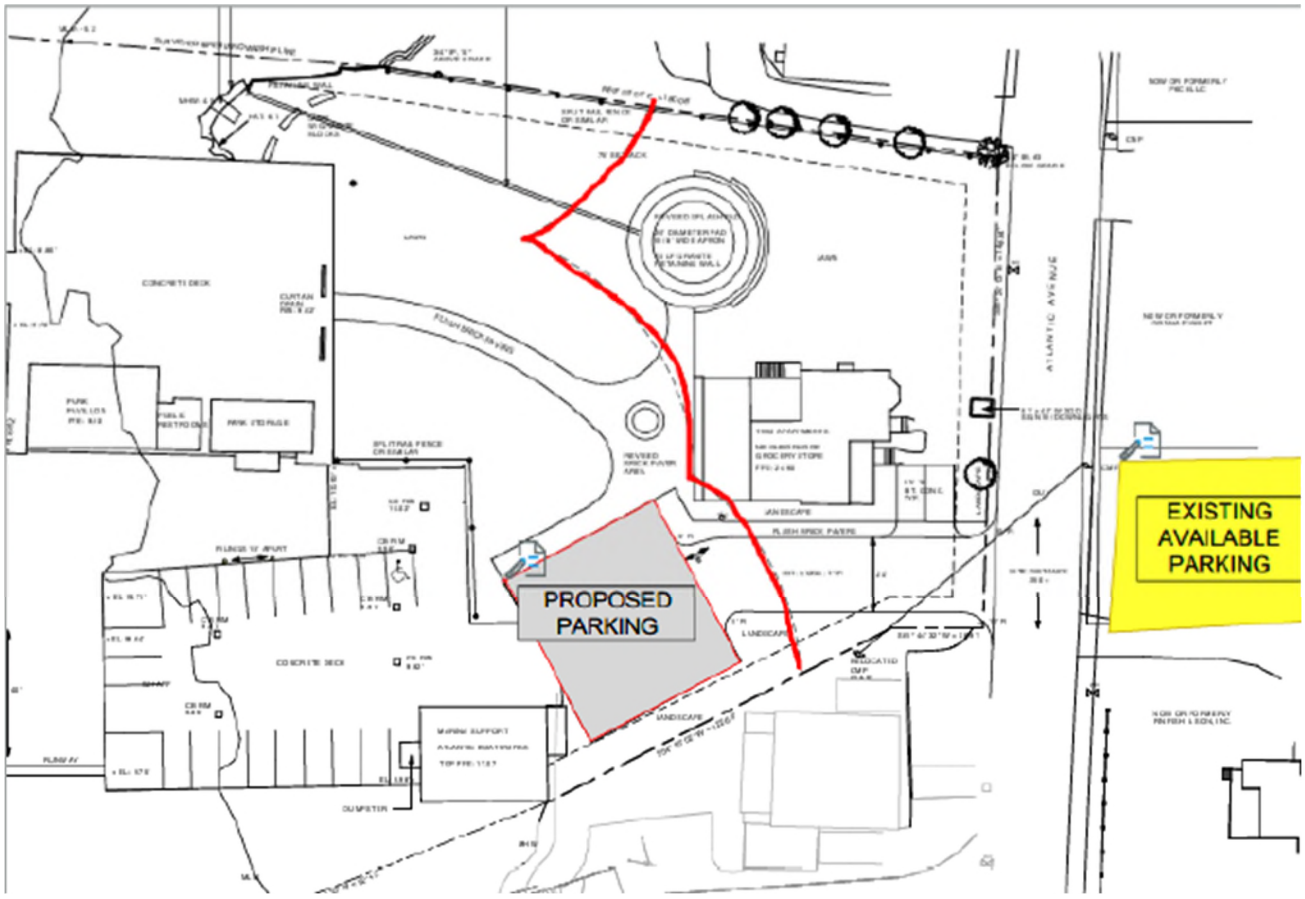
1. <u>The Parking Lot is a new structure that cannot be located within the 75' setback</u>.

The Development replaced a hotel and marina that included two nonconforming hotel buildings and a large asphalt and concrete parking area that served those uses and spanned most of the area between the two hotel buildings. See existing conditions plan, Rec. at 96, and excerpt below:



See Rec. at 95. Structures, including the parking lot, covered approximately 86% of the lot, whereas the shoreland zoning standards cap lot coverage at 20%. The parking lot was located largely within the mandatory setback of 75' from the high-water mark of the harbor. *Id.*

As part of the Development, BBHWP proposed a new, smaller parking area (labeled below) to serve its park use. The new parking area is to be located in an area of the site that was formerly covered by a hotel building and a small portion of the original parking area. The existing wharf parking would be improved to serve the wharf use that would remain on the site.



See Rec. at 340. As the above graphic demonstrates, the proposed parking area is located within the 75' setback, denoted here by the red line overlaying a dashed line shown on the plan. As a new structure, it would not be permitted to be located within the 75' setback. See Section 170-101.10(B)(1) ("All new principal and accessory structures shall be set back at least…75 feet, horizontal distance, from the normal high-water line of other water bodies, tributary streams, or the upland edge of a wetland.") Rec. at 423.

The Planning Board allowed BBHWP to avoid the 75' setback requirement by construing the parking area not as a new structure, but as the reconstruction and/or relocation of the previously existing nonconforming parking lot (which by the time of the shoreland zoning approval had been removed for 14 months). Section 170-101.7(C)(2) provides that subject to certain restrictions

(discussed below) a nonconforming structure[5] may be relocated on its site. Section 170-101.7(C)(3) provides that subject to certain similar restrictions, a nonconforming structure may be reconstructed if it is damaged or destroyed by over 50% of its value. Rec. at 421. In its agent's submission letter dated October 28, 2021, BBHWP stated that "[a]ll principal and accessory structures proposed as part of the Project meet the 75-foot setback applicable in the LC/M District, are grandfathered from such setback, or are functionally water dependent uses as to which the 75-foot setback does not apply." Rec. at 137. It further stated that, "[t]he Park project proposes to dramatically reduce the size of the existing parking area and move it back from the shoreline to the greatest practical extent." Rec. at 138.

The Planning Board appears to have accepted BBHWP's argument, since it permitted the new parking lot to be located within the setback. The Planning Board came to that conclusion despite the new parking area sharing no identity in time, location, features or purposes with the parking area that had been removed. It must be emphasized that BBHWP has razed and removed the hotel buildings and associated parking from the original development and is proposing a full redevelopment of the parcel with new uses. The relocation and expansion provisions in Section 170-101.7 refer to "any nonconforming structure" with the intent being that the structure following relocation or reconstruction is still principally the same in character as what came before it. That is not the case here, where the parking lot is smaller, shaped differently, serves a different use (park vs. hotel), and is located on a significantly different part of the site. This is not a situation where an original parking lot is being rebuilt because it is failing, or where the structure a parking lot serves is being was relocated and therefore the parking lot is being relocated to join it. Instead, this is a new

[5] "Nonconforming structure" is defined as "a structure which does not house or is used for a functionally water-dependent use, or which does not meet any one or more of the following dimensional requirements, setback, height, lot coverage, or in, on or over the water or wetland, but which is allowed solely because it was in lawful existence at the time this article or subsequent amendments took effect." LUO § 170-101.12, Rec. at 438.

development from scratch, which should afford the developer the opportunity to design the project in compliance with shoreland zoning standards.[6]

Because the intent of zoning is generally to abolish nonconforming structures and uses, "zoning provisions that restrict nonconformities are liberally construed, and zoning provisions that allow nonconformities are strictly construed." *Wolfram v. Town of North* Haven, 2017 ME 114, ¶ 9, 163 A.3d 835, 839, citing *Day v. Town of Phippsburg,* 2015 ME 13, ¶ 15, 110 A.3d 645. If the reconstruction and relocation allowances under shoreland zoning are instead to be applied so liberally that a completely new structure serving a completely new use may perpetuate the nonconformities possessed by its predecessors, these nonconformities would never be remedied over time.

Colin Clark, the shoreland zoning coordinator at Maine Department of Environmental Protection, repeatedly stated on the record that the proposed parking lot was a new structure and not the relocation or reconstruction of an existing nonconforming structure. In an email to the CEO dated October 13, 2021, he referred to the lot as a "new parking lot [which] would need to meet the setback." Rec. at 190. In a January 13, 2022 letter, Mr. Clark stated that "[a] parking lot was approved by the planning board as park (sic) of this project in an area that was once part of the prior hotel. The area for this new parking area is located within 75ft of the resource. A new parking lot would need to meet the setback for the district in which it is located."[7] He then reiterated in a June 23, 2022 email to a representative of BBHWP that "new parking areas must meet the setbacks for structures. With respect to the parking spaces proposed within the footprint of the former hotel, this

[6] It is likely that BBHWP was not considering the shoreland zoning standards at all when it created the site plan for the development, since it did not file for shoreland zoning approval or reference the relevant standards when it originally submitted the project.

[7] The BOA referenced Clark's January 13, 2022 letter in paragraph number 3 of its January 18, 2022 remand order and transmitted the Clark letter with the remand order. BBHWP has not included the referenced Clark letter in the Record, so it is included with this Brief as a Supplemental Record.

can be viewed as new parking and subject to the setback requirements for parking areas in Section 15(G) of Chapter 1000."[8] Rec. at 284. As the entity which administers the minimum shoreland zoning guidelines and generally oversees municipal implementation and application of shoreland zoning standards, DEP's position that the parking area constitutes a new structure is credible and should be respected as it comes from the agency that drafted the standards.

2. Parking lots must meet structure setback requirements.

Parking lots are treated separately from other structures under the shoreland zoning standards. Section 170-101.10(G) provides that "[p]arking areas shall meet the shoreline and tributary stream requirements for the district in which such areas are located." Rec. at 426. This requirement is written as an absolute; there is no exception listed for reconstructed or relocated nonconforming parking lots. It makes sense that parking lots would be required to be located outside of the setback in all circumstances, since they of course risk pollution if located close to the shore. But even if the standard nonconforming structure replacement or relocation provisions apply to parking lots, Section 170-101.7 would apply to require any reconstruction or replacement to be set back to the greatest practical extent.

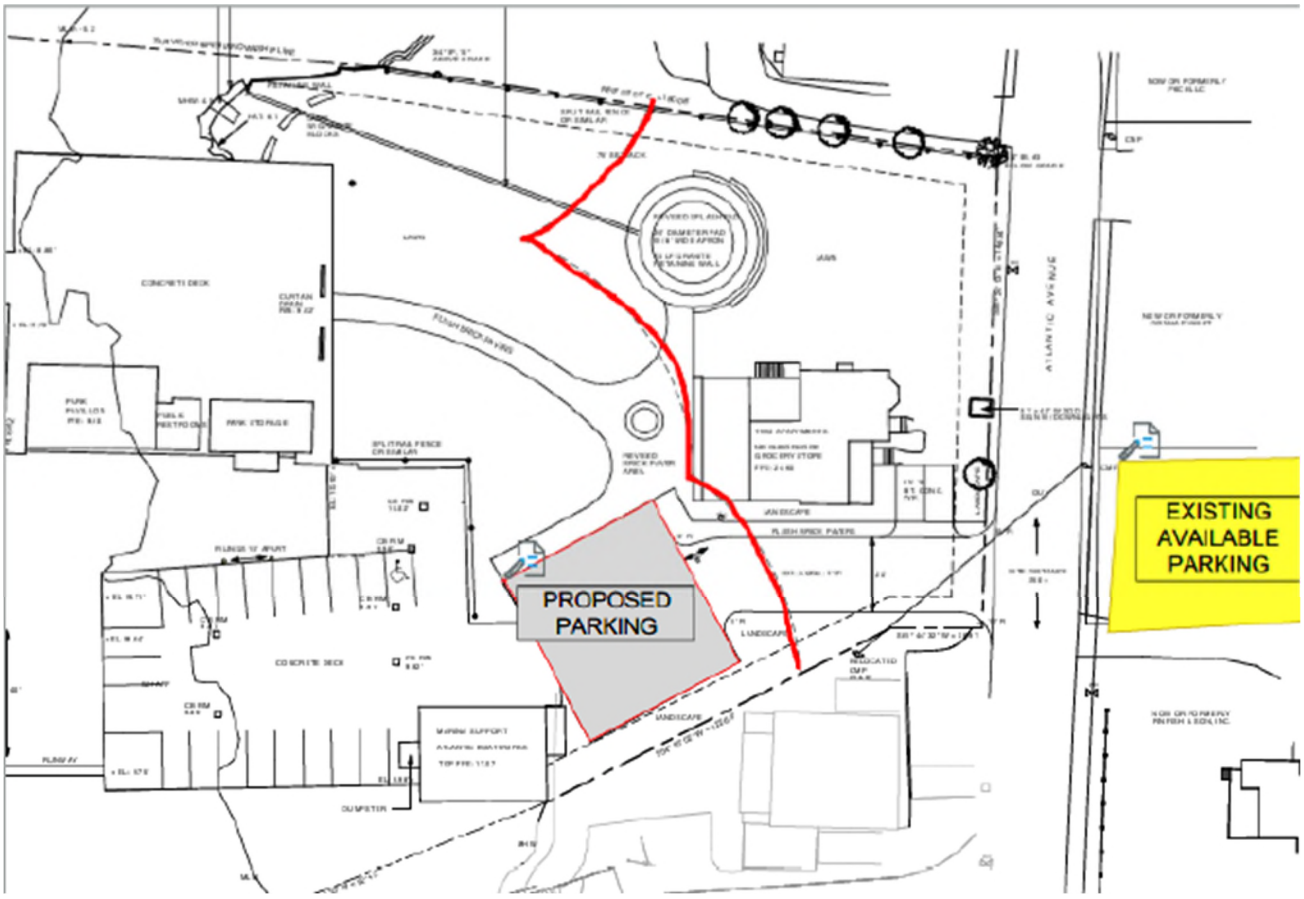
3. The parking lot is not set back to the greatest practical extent.

Even if the proposed parking area appropriately counts as the reconstruction or relocation of a nonconforming parking area, the Planning Board could not have properly granted the permit because there was no evidence in the record that the parking lot was being set back to the greatest practical extent according to the narrow standards that guide that determination. Section 170-101.7(C)(2)(b) provides that, "[i]n determining whether the building relocation meets the setback to the greatest practical extent, the Planning Board or its designee shall consider the size of the lot, the

[8] Chapter 1000 is the Maine DEP rule setting forth the minimum guidelines for municipal shoreland zoning ordinances. The analogous provision in Boothbay Harbor's LUO is Section 170-101.10(G). Rec. at 426.

slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the location of the septic system and other on-site soils suitable for septic systems, and the type and amount of vegetation to be removed to accomplish the relocation. These factors were simply not part of the applicant's or Planning Board's discussion of the location of the parking area.

The applicant's submissions do not provide substantial evidence for any of these six criteria. In a letter dated October 28, 2021 and submitted with the shoreland zoning application, BBHWP's agent states in a conclusory fashion that, "[t]he Park project proposes to dramatically reduce the size of the existing parking area and move it back from the shoreline to the greatest practical extent." Rec. at 138. He does not cite any the impediments listed under Section 170-101.7(2)(b)(2) as the reason why it could not be set wholly outside of the setback. Similarly, a letter from BBHWP's attorney that was submitted in support of the shoreland zoning application fails to establish facts supporting the greatest practical extent factors. Rec. at 170. The attorney mentions that the lot is small and "not very deep." However, a quick glance at the plan demonstrates that there are no impediments to locating the parking area outside of the setback, to include the area between the splash pad and Atlantic Avenue, and even an existing parking area across Atlantic Avenue. Rec. at 340. Again, the following graphic that was before the Planning Board on remand demonstrates the availability of other suitable areas, including the existing parking area across the street:



BBHWP's attorney argued in his letter to the Planning Board that the presence of the "Hodgdon House" is an impediment to location of the parking further back from the shoreline, but again, the site plan demonstrates other practical locations outside the setback. In considering other locations for the proposed parking, the area where the splash pad is proposed should be considered available, since it is only existing and not proposed structures that matter in this analysis.

Finally, BBHWP's attorney noted the benefit of not needing to remove vegetation since the new parking lot would be located in an unvegetated area where a hotel building used to be. The ordinance standard notably does not consider *lack* of vegetation where a structure is proposed to be located. Instead, it considers whether placing the structure further outside the setback would result in the cutting of excess vegetation. Relocating the parking lot outside the setback would not have resulted in removal of vegetation since the other possible locations outside of the setback were also

unvegetated. Moving the parking lot out of the setback would allow BBHWP to revegetate an area within the setback, which should be the predominate goal.

There is no mention in the record that the site contains steep slopes or other impediments, or that locating the parking area behind the setback would cause erosion. BBHWP's attorney stated that the land "slopes gently from Atlantic Avenue down to the harbor." Rec. at 328. The grading and erosion control plan, Rec. at 145, further demonstrates this. The project is served by public sewer, removing consideration of the septic elements. Rec. at 337. In short, BBHWP's only support for the greatest practical extent analysis related to the size of the lot and the mere existence of the Hodgdon House, but yet the plans specifically contradict that these are impediments to meeting the setback. It is apparent from the face of the site plan that the size and existence of other structures were not true impediments to construction for the purposes of Section 170-101.7(2)(b)(2), and the applicant offered no testimony or evidence explaining why the setback could not be met.

Turning to the Planning Board's evaluation of the greatest practical extent issue, its written findings do not provide any basis demonstrating that the factors were properly found. The minutes of the November 10, 2021 meeting note only that "the current parking area would be grandfathered." Rec. at 77. The written findings of fact state only that the standard for parking in Section 170-101.10(G) "is met, based on the plans submitted."[9] Rec. at 105. Following a remand order from the BOA (Rec. at 218), which directed the Planning Board to make additional findings regarding "all of the proposed parking on the site" and allowed it to take new evidence, the Planning Board chose to address the remand without receiving or considering evidence that was not already in the record. Rec. at 279. In its findings of fact following remand, the Planning Board provided only the conclusory statement that, "the parking area near the southerly side of the property has been

[9] This is the standard requiring parking areas to be the setback in the district in which they are located.

relocated to comply with setback requirements to the greatest practical extent." It did not make any findings about the Section 170-101.7(C)(2)(b) factors.

The Board of Appeals then issued a second order of remand which requested that the Planning Board "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.*" Rec. at 326. BBHWP attempted to assert how the Development met the greatest practical extent factors (Rec. at 328), but the Planning Board's review was confined to the record and could not be augmented at that point through a further submission by BBHWP. Even if it could, BBWHP's letter if anything proves that the greatest practical extent factors are <u>not</u> met. It notes that "most of the lot is within the 75' shoreland setback," but does not demonstrate why (1) the parking lot could not be set back further within that 75'; or (2) why the parking lot could not be set on the portions of the property which BBHWP concedes are outside of the 75' setback and which, again, appear to be eminently usable for the parking area (see Rec. at 340). The Planning Board then responded to the BOA's remand order without providing any explanation at all of the evidence which it felt supported its finding that the greatest practical extent standards had been met. Instead, the Planning Board simply pointed to record documents that are only tangentially relevant to the greatest practical extent standards. Rec. at 337. For example, for size of the lot, it pointed to the existing conditions plan. For slope of the land, it pointed to the sedimentation and erosion control plan. The Planning Board did not provide any explanation of *how* it felt those documents demonstrated the relevant factors.

The problem with the Planning Board's original and remanded findings is not one of clarity, but of substance. A review of the minutes and video of the two November 2021 meetings demonstrates that the Planning Board did not consider <u>any</u> of the Section 170-101.7(C)(2)(b) factors

in allowing the parking lot to be located within the setback. The minutes do not reference any greatest practical extent discussion at all. Turning to the video of the November 10, 2021 meeting, only the following relevant comments were made with regard to the greatest practical extent analysis (see 1:09:40):

> "My thinking on this, John, is that that whole center area was parking when it was a hotel, right down to the waterfront, and so this is a preexisting nonconforming use which is being set back to the greatest possible extent…"
> "That's where we're going, the greatest possible extent, because they had required spaces."
> "Because they had required spaces. So I think it's grandfathered."
> "So we need to give John the reason."
> "I got it."

Therefore the Planning Board's only rationale was that the applicant was required to have these parking spaces. This appears to have been based upon a general application of the term "practical" (although the Board used the term "possible") The Planning Board clearly did not evaluate any of the factors it was supposed to have before reaching its conclusion about greatest practical extent. In the subsequent remands to the Planning Board, it could only expound on the rationale it did use, and could not articulate another one. As the Board of Appeals realized, a third remand to the Planning Board would solve nothing; it cannot now be forced to make up justifications for its findings that were never there in the first place.

Again, even if the Court forgives the Planning Board's failures and looks directly at the record, there is no substantial evidence that the greatest practical extent criteria are met. BBHWP had a mostly clean site to work with. If it is truly building a park, that should require minimal structural development. A simple look at the site plan shows plenty of room for the parking area on the parcel either behind or straddling the shoreline setback line, including an existing and available parking area across Atlantic Avenue. There was no evidence in the record that these areas were unavailable or unable to be used, despite multiple opportunities to enter that evidence in contradiction to evidence and argument offered by the Doyles.

4. The greatest practical extent issue was preserved.

Not being able to demonstrate that the parking lot complied with the greatest practical extent standard, BBHWP relies instead on an argument that the issue has not been properly raised before this Court because the Doyles did not raise it before the Planning Board. This argument is not sustainable given the procedural history of this case. The seminal case on issue preservation in the administrative context is *New England Whitewater Center, Inc. v. Dept. of Inland Fisheries and Wildlife*, 550 A.2d 56 (Me. 1988). It discusses that the concept of issue preservation in the administrative context "is premised on the broader doctrine of exhaustion of administrative remedies. Thus, the rule requiring that an issue be raised before the administrative agency in order for it to be preserved on appeal is not specifically based on a need for factfinding. Rather, it is based on '[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, and ensures that the agency and not the courts has the first opportunity to pass upon the claims of the litigants'" *Id.* at 60 (internal citations omitted). Here, the Planning Board not only had one opportunity to pass on the issue of whether the greatest practical extent factors were present; it had three. BBHWP presented information on greatest practical extent with its application, and the Planning Board considered the question at its November 10, 2021 meeting. The issue was also placed squarely before the Planning Board, acting its factfinding capacity, during the two remand proceedings. The Planning Board had all arguments before it and the ability, as granted by the BOA in the remand order, to consider new evidence. The Board was amply aware of the Doyles' argument that the plans and submissions did not satisfy the practical extent standard, and had ample opportunity to address that issue in its two decisions following remand. With several Planning Board and BOA meetings focusing squarely on the issue of greatest practical extent, it borders on the absurd to suggest that the issue was not raised and exhausted at the administrative level. Per the

standard set forth in *New England Whitewater*, the Planning Board certainly "had a fair opportunity to resolve [the issue] prior to being ushered into litigation." *Id.* at 61.

Furthermore, the Doyles did raise the issue of relocation or reconstruction of the nonconforming parking lot in their first letter to the Planning Board dated November 9, 2021, which referenced the conditions and ordinance authority under which a nonconforming structure could be relocated or replaced. Rec. at 48. The Doyles' predominate argument before the Planning Board was that (as confirmed by Maine DEP) the parking lot is a new, not nonconforming structure. The reconstruction and greatest practical extent standards were noted in the alternative.

The Court should question the fairness of expecting the Doyles to have further belabored this and every other issue and sub issue before the Planning Board, when they were not given a meaningful opportunity and due process to raise their issues before the decision was made. The video of the November 10, 2021 meeting reveals that the Planning Board did not provide the Doyles' counsel with opportunity to speak with any substance before the board proceeded to its findings of fact. The bulk of Attorney Anderson's comments were allowed only after the board had made up its mind, including its finding that the parking lot was an existing nonconforming structure. *New England Whitewater* discusses that issue preservation may be excused if the agency would not have considered changing its decision if the information had been raised. *Id.* at 60-61. It would have been futile for the Doyles to have raised their concerns at the end of the November 10, 2021 meeting, since as confessed by Planning Board member Jon Dunsford at a later meeting, the Planning Board had likely made findings outside of the public process prior to the decision meeting (see Mr. Dunsford's comment at pages 4-5 of this Brief). The appropriate remedy was for the Doyles to appeal and challenge the sufficiency of the findings of fact and the underlying basis for the approval, which they did.

5. The appeal as to the parking lot must be sustained.

The LUO contains a specific provision detailing the standard of review under appeal on the shoreland zoning provisions. Section 170-101.11(H)(3)(b) provides that "When the Board of Appeals hears a decision of the Planning Board, it shall hold an appellate hearing, and may reverse the decision of the Planning Board only upon finding that the decision was contrary to specific provisions of the article or contrary to the facts presented in the record to the Planning Board." This is similar to the Superior Court's general standard of review in a Rule 80B appeal, as stated above. It was an error of law for the Planning Board to consider the new parking lot to be the relocation or reconstruction of the previously existing nonconforming parking lot. Further, and as the Town's BOA correctly found, there was nothing in the record before the Planning Board demonstrating compliance with the greatest practical extent factors. It is apparent on the face of the plan that there were other design opportunities that would have allowed the parking area to be located further or entirely outside of the setback. The materials ultimately referenced, however vaguely, by the Planning Board in its second decision on remand do not demonstrate lack of land area, impeding buildings, steep slopes, or any of the other factors that could have been considered. The path from these plans to a greatest practical extent determination would need to have been set forth in specific detail to overcome the facial presumption that the project could have been designed to meet the setback. The applicant and Planning Board failed to provide such explanation despite multiple opportunities to do so. The evidence on the record simply cannot pass the straight-face test to satisfy the deliberately exacting shoreland zoning standards. If this lax attention to detail is to be sustained, Maine's shoreline will surely suffer.

B. The Planning Board erred in classifying the Development as an institutional use.

Apart from the parking lot issue which ultimately resulted in vacation of BBHWP's approval, the Planning Board committed other errors of fact and law that independently justify that result. One

of these is its classification of the Development as an institutional use rather than as a recreation facility. Rec. at 104. This definition is critical, as "public and private recreational facilities" in the shoreland zone require a 40,000 square foot minimum lot size, whereas "governmental, institutional, commercial or industrial uses adjacent to tidal areas zoned for commercial fisheries and maritime activities" require no minimum lot area. § 170-101.10(A)(1). Rec. at 423. The court reviews *de novo* questions regarding the proper characterization of proposed uses under a land use ordinance. *Jordan v. City of Ellsworth*, 2003 ME 82, ¶ 9, 828 A.2d 768. The Planning Board's characterization of the type of use as a "park and marina" (Rec. at 104) is a finding of fact that is afforded deference, but how that characterization best fits in the various use definitions is a question of law to be decided by this Court.

The shoreland zoning definitions under the LUO define a "recreational facility" as "[a] place designed and equipped for the conduct of sports, leisure-time activities, and other customary and usual recreational activities, excluding boat-launching facilities." Rec. at 439. The table at § 170-101.10(A)(1) contains the further modifier that the 40,000 minimum lot size pertains to *public or private* recreational facilities, suggesting that a facility such as a park or waterpark would still be subject to the 40,000 square foot minimum whether it is publicly or privately owned, or whether or not it is open to the general public. The description of the uses to which the 40,000 minimum lot size applies therefore squarely covers a privately held but open-to-the-public park which contains a splash pad and dock for recreational use and green areas for picnicking, sports, and other leisure-time activities.

By contrast, the proposal does not meet the definition of an institutional use. That term is defined under the shoreland zoning definitions 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." Rec. at 438. While Development is held by a

nonprofit corporation, it is not similar to any of the uses given, or at least it is much more similar to the uses referenced in the definition of a recreational facility. The Planning Board seems to have focused only on the "land used for public purposes" part of the "institutional" definition, but in context, it is only "*municipally* owned or operated" "land used for public purposes" that qualifies as institutional. The Planning Board's categorization also negates the more specific language in the definition of "recreational facility" that would bring the use under that header if the "public purposes" of the land are for recreation. The shoreland zoning standards are to be interpreted so that the more restrictive of two conflicting provisions takes precedence. LUO § 170-101.2, Rec. at 419. The categorization of the Development as an institutional use, especially given the active recreational components of the splash pad and recreational marine facilities, was plainly incorrect as a matter of law. BBHWP cannot meet the minimum lot size requirements for the shoreland zone and therefore its approval cannot stand.

C. The Development does not comply with the 20% lot coverage cap.

The Development as depicted in BHWP's site plan calls for lot coverage of 29.47%. The Doyles during the Planning Board proceedings (see, e.g. Rec. at 47) disputed this measurement as being too low and noted that it was contrary to other submissions by BBHWP stating the final lot coverage would be more like 50%. For the purposes of argument, it is conceded by all parties that the lot coverage for the Development certainly exceeds the 20% lot coverage cap set forth in Section 170-101.10(B)(4). That section provides that, "[t]he total footprint area of all structures, parking lots and other nonvegetated surfaces, within the Shoreland Zone shall not exceed 20% of the lot or a portion thereof, located within the Shoreland Zone, including land area previously developed." Rec. at 424 (emphasis added). BBHWP asserted in its application, and the Planning Board appears to have agreed, that the lot coverage could be exceeded because the lot coverage under the previous Cap'n Fish's Motel development also exceeded the 20% cap. BBHWP made much of the fact that

the Development would reduce the prior lot coverage, but that is not the standard – the standard is one of strict compliance with the coverage cap unless a particular structure's lot coverage is grandfathered under nonconformity provisions.

It is the purpose of the Town's shoreland zoning to "promote land use conformities." LUO § 170-101.7(A). Rec. at 420. The objective of the Town's shoreland zoning regulations, as with all zoning, is "to abolish nonconformities as speedily as justice will permit." *Day v. Town of Phippsburg*, 2015 ME 13, ¶ 15, 110 A.3d 656, 649. A grandfather clause exists only to allow the "limited continuance of nonconformities" in order to avoid a constitutional takings claim. Zoning provisions that allow nonconformities are strictly interpreted to limit their application. *Id.* Thus, the Town's grandfathering (nonconformance) provisions are intended to ensure, in this case, that the owner of the hotel and marina could maintain those buildings and those uses. They do not exist to allow a new owner to completely redevelop a site with new uses while continuing to violate the Town's shoreland zoning requirements. It is for precisely this reason that the shoreland zoning standards look for fair opportunities to eliminate nonconformities. For example, when a nonconforming structure is placed on a new foundation, or reconstructed, it is required to be removed from the setback to the extent practical.

In this case, BBHWP asserted that the excessive lot coverage of the prior development was a "legally nonconforming condition" that was allowed to be retained in the new development. But there is no such concept as a "nonconforming condition." Nonconformities fall under the categories of nonconforming use, nonconforming structure, or nonconforming lot. See, generally, LUO § 170-101.7, Rec. at 420 et. seq. The definition of "nonconforming structure" is "[a] structure which…does not meet any one or more of the following dimensional requirements, setback, height, lot coverage, or in, on or over the water or wetland, but which is allowed solely because it was in lawful existence at the time this article or subsequent amendments took effect." Rec. at 438

(emphasis added). Grandfathering pertaining to lot coverage is therefore tied specifically to each preexisting structure, not to the use or to the lot. Thus it was incorrect for the Planning Board to tally and grandfather the total lot coverage applicable to the prior development's hotel buildings and parking lots and other structures, when those structures were being removed and not replaced. If this incorrect application of the shoreland zoning standards is upheld, lot coverage would never be reduced over time because successor developments could each take advantage of the previous development's coverage regardless of the nature or scope of the new development or the fact that the structures that created the coverage have long since disappeared.

The Planning Board's allowance of the continued nonconforming lot coverage is clearly contradictory to the language of the LUO and to the purposes of shoreland zoning, and the approval cannot be sustained. The Court cannot allow any lot coverage attributable to structures that no longer remain to be used by this development. This includes at the very least the hotel buildings, but also (per the above argument) the former parking areas. There is not enough information in the record to determine the lot coverage of the "existing development" that will remain, but if that coverage exceeds 20% already, the new structural development proposed by BBHWP cannot be permitted.

D. The application lacked information necessary to determine compliance.

The Doyles have continuously noted that the plans presented by BBHWP are insufficient to demonstrate compliance with the shoreland zoning standards, which must result in a finding that the Planning Board's decision was not based on substantial evidence in the record. First, the submitted plans show the alleged location of the 75' setback line as a clean, curved line that is plainly a "best fit" measurement from the shoreline and does not follow its natural contours. A submitted site plan is required under the LUO to include "[t]he location of the Shoreland Zone and the seventy-five-foot or hundred-foot Shoreland Zone setback." § 170-66, Rec. at 397. Without the precise 75'

measurement having been shown on the plans, it was impossible for the Planning Board to rely on substantial evidence in the record when evaluating whether the structures proposed in the Development met the setback requirement, or (to the extent that a structure was nonconforming) met the setback to the greatest practical extent. This is not an issue that can be addressed on remand; rather, it is an inherent deficiency in the application materials. The Planning Board should have found the application incomplete and not proceeded to make findings. Having failed to do that, its findings must be found not to have been based upon substantial evidence in the record.

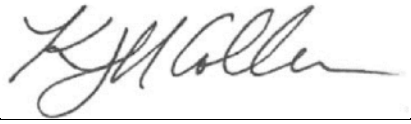
BBHWP's application also did not include traffic estimates associated with the proposed uses, or estimated parking requirements. Section 170-101.10(G)(2) requires that "[p]arking areas shall be adequately sized for the proposed use." There is no evidence in the record as to the amount of parking needed for the proposed development; therefore the Planning Board lacked substantial evidence to determine whether the parking areas, particularly the new one to be located within the shoreline setback, needed to be the size proposed. The Planning Board's initial findings state in a conclusory fashion that the parking standard is "met, based on the plans submitted." Rec. at 105. Despite being specifically asked to do so by the BOA on remand, the Planning Board still failed to address the size of the parking lots or the amount of parking required, finding again just that the parking standard was met. Rec. at 296. Again, it is impossible to understand how the Planning Board could have found the size of the parking lots to be "adequately sized" when it had no competent evidence as to the amount of parking needed. This is a problem in the clarity and thoroughness of the findings but also in the quality of evidence presented to the Planning Board. Even BBHWP's agent in his lengthy submission letter only stated, again in a conclusory fashion, that the parking is "adequately sized" and referred to the Planning Board's findings under its prior and separate site plan review. BBHWP had an obligation in this application to provide evidence demonstrating substantial compliance with the shoreland zoning standards, including adequacy of

parking. It failed to do so, and the Planning Board's conclusory finding cannot be sustained.

V. CONCLUSION

The shoreland zoning review that resulted in approval of the Development was marked by overly permissive and inexact application of the shoreland zoning standards. It is very concerning that the Planning Board, looking at the complete redevelopment of a site into a park of all things did not take the opportunities mandated by the LUO to bring the property into conformance with the shoreland zoning standards. The result is that the park contains a parking lot and all its associated pollution that will be located within the shoreline setback when it plainly did not have to be. The development contains significantly more than the allowable lot coverage, even though BBHWP was starting with an essentially blank slate for a development that by its nature requires minimal coverage. And all of these findings were based upon a process that did not result in thorough findings of fact explaining the unorthodox conclusions, despite repeated opportunities provided by the BOA to do so. None of this is academic; strict adherence to shoreland zoning is of critical importance to ensuring the health of Maine's water bodies and the aesthetic beauty of its shoreline. The Town's Board of Appeals correctly concluded that the approval must be vacated, and the Court should conclude the same.

Respectfully submitted this 17th day of July, 2023.



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STATE OF MAINE
LINCOLN, ss.

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

BOOTHBAY HARBOR WATERFRONT PRESERVATION,	)	
Petitioner,	)	
v.	)	
TOWN OF BOOTHBAY HARBOR,	)	**PROPOSED SUPPLEMENTAL RECORD**
Respondent,	)	
and	)	
JOSEPH DOYLE and JILL DOYLE,	)	
Parties-In-Interest.	)	

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JANET T. MILLS
GOVERNOR

MELANIE LOYZIM
COMMISSIONER

January 13, 2022

Wendy Wolf, Chair
Town of Boothbay Harbor
Board of Appeals
11 Howard Street
Boothbay Harbor, ME 04538

Subject: Boothbay Harbor Waterfront Preservation – Eastside Waterfront Park

Dear Ms. Wolf and Members of the Board of Appeals:

The Department of Environmental Protection (Department) has received materials regarding the administrative appeal of Boothbay Harbor Waterfront Preservation – Eastside Waterfront Park, whose property is located at 65 Atlantic Avenue (Map 16 Lot 24)., in the Town of Boothbay Harbor.

The some of the issues identified in the appeal filed on behalf Joseph and Jill Doyle, direct abutters to the above-referenced project have been reviewed and the following findings are the DEP position as it relates to the Chapter 1000 Guidelines For Municipal Shoreland Zoning Ordinances (Guidelines):

1. *Structures and Parking Related to the Park and the 75-foot Setback*

   A parking lot was approved by the planning board as park of this project in an area that was once part of the prior hotel. The area for this new parking area is located within 75ft of the resource. A new parking lot would need to meet the setback for the district in which it is located. Per the Guidelines 15 B 1 & 15 G 1:

   B. Principal and Accessory Structures

   (1) All new principal and accessory structures shall be set back at least one hundred (100) feet, horizontal distance, from the normal high-water line of great ponds classified GPA and rivers that flow to great ponds classified GPA, and seventy-five (75) feet, horizontal distance, from the normal high-water line of other water bodies, tributary streams, or the upland edge of a wetland, except that in the General Development I District the setback from the normal high-water line shall be at least twenty five (25) feet, horizontal distance, and in the Commercial Fisheries/Maritime Activities District there shall be no minimum setback. In the Resource Protection District the setback requirement shall be 250 feet, horizontal distance, except for structures, roads, parking spaces or other regulated objects specifically allowed in that district in which case the setback requirements specified above shall apply.

G. Parking Areas

(1) Parking areas shall meet the shoreline and tributary stream setback requirements for structures for the district in which such areas are located, except that in the Commercial Fisheries/Maritime Activities District parking areas shall be set back at least twenty-five (25) feet, horizontal distance, from the shoreline. The setback requirement for parking areas serving public boat launching facilities in Districts other than the General Development I District and Commercial Fisheries/Maritime Activities District shall be no less than fifty (50) feet, horizontal distance, from the shoreline or tributary stream if the Planning Board finds that no other reasonable alternative exists further from the shoreline or tributary stream.

Therefore, it is the opinion that the setback for this new parking lot would be 75ft.

2. *Two Dwellings on the property*

When the Department was asked to review this part of the project it was determined based on the uses that existed back in 2020 that the property did contain a legally existing dwelling. The proposal to add a second dwelling on the property would require the additional dimensional requirements for the zone to be met and based on the level of development that was not going to be an approvable item unless other proposed uses were removed. No uses were removed and therefore the addition of the second dwelling on the property would not meet the dimensional requirement for the lot.

I have personally been to this site many times and communicated with the applicant's consultant, the Municipal Code Enforcement Officer and Planning Board on these issues as well as others on this project including Lot Coverage, Non-conforming Structure removal and replacement. I have always advised that the key to this project is to make sure that any Shoreland Zoning Standards including Dimensional Requirements for new portions of this project must be followed and that any legally existing nonconformities must work within the standards to allow for these to continue. It appears that some of these items have not been adhered to and it appears that this project needs a closer look to ensure compliance o the local ordinance and the Guidelines.

Thank you in advance for thoughtfully considering our comments. Please contact me if you have any questions or seek further clarification in this matter. I may be reached by telephone at 441-7419 or via email at Colin.A.Clark@maine.gov.

Sincerely,

Colin A. Clark
Shoreland Zoning Program
Division of Land Resource Regulation
Bureau of Land and Water Quality