

STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
CIVIL DOCKET NO. HAN-24-365

MONIKA MCCALLION, BRANDAN MCCALLION
and
OLD BEARS, LLC.,
Appellants

vs.

TOWN OF BAR HARBOR,
Appellee

and/or

W.A.R.M. MANAGEMENT, LLC.,
Defendant/Intervenor

On Appeal from the Maine Superior Court
(Hancock County)

BRIEF FOR APPELLANTS

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I. Introduction

Appellants Monika McCallion, Brandan McCallion and Old Bears, LLC, request that this Court vacate the judgment of the Superior Court, remand to the Town of Bar Harbor Zoning Board of Appeals (“ZBA”) with instructions to vacate its decision, grant the Appellants’ appeal and deny W.A.R.M. Management’s Short-Term Rental (STR) registration renewal.

The ZBA incorrectly denied Appellants’ appeal of the Town of Bar Harbor’s (“the Town’s”) issuance of an STR registration renewal for 12 Bogue Chitto Lane, by finding that the *timing* of the issuance beyond the renewal deadline was a result of the Town’s own error. Appendix CA. 0019. The Town failed to issue any findings of fact or conclusion of law concerning the underlying renewal eligibility of 12 Bogue Chitto Lane (“the Property”) as a short-term rental, which was an express basis for the appeal, and a necessary predicate for issuing the renewal and for determining the administrative appeal. A. 0017-19.

This appeal presents pure questions of law: Whether written determinations made in the renewal process for the Property are subject to judicial review; Whether the board made the required findings and conclusions on all material issues; Whether the Board granted equitable relief not available under the code; Whether, if the timing issue was properly resolved, the Property was otherwise eligible for registration renewal.

The clear goal of the Town of Bar Harbor Code is to regulate vacation rental units, limit the amount of vacation rental units in the town, ensure that the vacation rentals are operated in compliance with the code, and to eliminate non-conforming uses. By denying the appeal of the issuance of the registration renewal, the ZBA ignored the requirement for short-term rental operators of strict Code compliance for short-term rental registration renewal, including the requirement that an entire dwelling unit is rented, rather than distinct component parts.

II. Statement of Facts/Procedure

W.A.R.M Management, LLC, is a Delaware company (Record (“R.”) 00201) that has been operating short term rental units in the Town of Bar Harbor since 2014. R. 00213. Its operation of a short-term rental (vacation rental-2 (VR-2)) at the Property was rendered non-conforming by the Land Use Ordinance Amendment passed by the Bar Harbor voters on November 2, 2021 (effective December 2, 2021). R. 00306, 00320. The Property is on the shore of Frenchman’s Bay in the Town of Bar Harbor (A. 0053; R. 00299) and is in the Limited Shoreland Residential District. A. 0044.

Appellants Brandan and Monika McCallion are the sole members of Old Bears, LLC; the McCallion’s and Old Bears, LLC, own three parcels in the Bogue Chitto Subdivision. R. 00180, 00186-187, 00191. One of the Appellants’ three parcels directly abuts the Property. A. 0017. Appellants have experienced “noise,

depreciation of property value, spoliation of the seaside aesthetic; constant turnover in neighbors creates an unpleasant hotel atmosphere.” A. 0048.

The 12 Bogue Chitto short-term rental business continued as a lawful non-conforming pre-existing use for the years 2021 and 2022 via the registration renewal process, administered by Code Enforcement. R. 00229-233, 00253-258. Continuation of the non-conforming use is and was subject to terms, conditions, standards, requirements and deadlines set forth in the Town of Bar Harbor Code (“Code”). A. 0037-42; 0033.

W.A.R.M. Management was acutely aware of these changes to the Code relative to short-term rentals. R. 00379-381. W.A.R.M. Management was operating two separate VR-2 units at the time Bar Harbor adopted the ordinance concerning short-term rentals. R. 00229-233, 00337-348. W.A.R.M. Management participated in registration applications and registration renewal applications for both of its VR-2 rental properties both before and after the Town adopted the new regulations concerning short-term rentals. R. 00330-333; 00213-21; 00221-223; 00225-227; 00229-30; 00253-254; A. 0043-44.

W.A.R.M. Management certified numerous times, in reference to these properties, including 12 Bogue Chitto Lane, that it would operate in compliance with all applicable laws of the Town of Bar Harbor. Id. W.A.R.M. Management certified multiple times that it was advertising, and offering for rent, an entire

dwelling unit. R. 00229, 00253. W.A.R.M. Management certified multiple times that it would post the registration numbers on all advertisements of the rental unit. A. 0043; R. 00253.

The Town implemented a new electronic registration system for the registration year of 2023. R. 00035-36. The administration of this new system failed. R. at 00039. As a result, W.A.R.M Management's application for a short-term rental registration renewal was not reviewed for eligibility and compliance before the deadline of May 31, 2023. R. 00036. The 2022 permit expired by its terms on May 31, 2023. R. 000253-254. The administering body, the Office of Code Enforcement, did not review the application or make any administrative determinations relative to eligibility or compliance until October 30, 2023. R. 00050-51.

In September, 2023, Appellants discovered that W.A.R.M Management was operating the Short Term Rental without a registration (R. 000279) and then discovered that W.A.R.M Management, in addition to operating without a registration, was operating the non-conforming rental business in violation of the Code: it was not offering the entire dwelling unit for rent, but was instead offering a portion of the dwelling unit. It was offering an optional "Garden Suite" upgrade, to accommodate four additional guests, at an additional charge of \$700 per person.

The Garden Suite includes a queen bed, two twin beds, a sitting room, and a bathroom. A. 054; 60.¹

Angela Chamberlain, Town CEO, issued a Notice of Violation to W.A.R.M Management for operating without a registration on September 6, 2023. R. 00264. Ms. Chamberlain on November 2, 2023, sent a letter reporting the notice resolved. R. 00274. W.A.R.M Management supplemented the incomplete application, and CEO Angela Chamberlain approved the registration renewal on 10/30/2023. R. 0089; A. 043-45. The renewal contained administrative findings of fact relative to the Property and the conditions for renewal, including: There are no outstanding violations; the land use district is Shoreland Limited Residential; that the request for a short-term rental was for a VR-2 renewal; that the VR-2 rental is a prohibited use in this district but has been renewed annually as allowed under sections 125-69Y(2)(b) of the Bar Harbor Land Use Ordinance; that the structure was found to comply with Chapter 174 of the Town of Bar Harbor Code A. 043-45.

Appellants timely appealed the registration renewal. A. 051.²

The ZBA held a de novo evidentiary hearing and denied the appeal. A. 017-18. The Board focused almost exclusively on the issues relating to timeliness of

¹ A. 0060: There is also a "GARDEN SUITE" accommodating up to 4 more guests which is available for an additional fee of \$700/person. Many guests just rent this additional area to have the additional space and more great views. The Garden Suite is located on the lowest level, where French doors open out to the lovely large blue stone natural setting patio! Breathtaking water views from all angles. The Suite features a queen bed, two twin beds, a sitting area, a bathroom with shower.

² The bases for the appeal here were raised below. A. 0050.

the application and the failure of the new registration system. Id.; R. 00116-145 *generally*. Specifically, the Board found that the registration renewal “should have been issued before the May 31, 2023, deadline, based on Ms. Levitt’s submission and fee payment.” A. 018. It found that the “vacation rental-2 registration renewal application for 12 Bogue Chitto Lane was submitted and accepted by the Town within the time limits set forth in the Land Use Ordinance.” A. 0019. The Board made no findings of fact or conclusions of law concerning whether the Property was eligible for renewal, or whether it met the applicable standards for the renewal. The ZBA found that a timely renewal application was enough to deny the appeal. Id. There were no findings of fact or conclusions of law concerning the necessary condition that “STRs must comply (it cannot be in violation) with Chapter 125.”³

Errors of law, abuses of discretion, and facts not supported in the record, were appealed to the Superior Court, where Appellants sought a trial on the facts. A. at 010-16; 02. The motion for trial on the facts was denied; the appeal was denied. A. 03. Appellants specifically sought review of the Board’s interpretation of the meaning of “in violation” as used in the LUO, its failure to consider the predicate language in Code section 174-7(E) “if all requirements of this chapter

³ §174-5(A) (A. 0038), which further states “Refer to Chapter 125 for information on where the STRs are allowed, related definitions, and standards.” Those standards include the definition of a VR-2 rental as “An entire dwelling unit that is not the primary residence of the property owner and is rented . . .” A. 0032.

have been met,” (A. 013) and the finding of fact that the short-term rental operated at the property was not “in violation.” Id.

The Superior Court found that any substantial evidence of the status of “in violation” (and the concessions by both the Town and W.A.R.M Management to this status) was of no legal significance. A. at 08. The Court essentially found that the written decision to approve or deny a registration renewal is immune from challenge based on factual ineligibility for renewal. Id. This appeal follows.

III. Questions Presented:

- A.** Are the written decisions of the Code Enforcement Officer, and the Zoning Board of Appeals, subject to judicial review?
- B.** Can the Zoning Board of Appeals substitute findings and conclusions relating only to the irregular timing of the registration renewal in place of reviewing the material issue of the renewal application relative to standards for renewal eligibility, including whether the Property was “in violation”?
- C.** Did the Zoning Board of Appeals abuse its discretion by granting equitable relief exceeding its jurisdiction by disregarding the Code requirements for deemed expiry and registration forfeiture and doing what it thought should be done instead of what the Code required?
- D.** Even if the Town could waive the deemed expiry and ineligibility under § 125-69(Y)(2)(b), could the Zoning Board of Appeals conclude that the

Property was eligible for registration renewal because it was not “in violation”?

IV. Standard of Review

Where a municipal board conducts a de novo review of the CEO’s determination, the Law Court reviews the Board’s decision directly. *Raposa v. Town of York*, 2019 ME 29, ¶ 12, 204 A.3d 129, 133.

Review of administrative decision-making is deferential and limited; the operative decision is reviewed for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record. *Wolfram v. Town of N. Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835, 838; *Aydelott v. City of Portland*, 2010 ME 25, ¶ 10, 990 A.2d 1024, 1026.

The substantial evidence standard requires the court "to examine the entire record to determine whether on the basis of all the testimony and exhibits before the [Board] it could fairly and reasonably find the facts as it did." *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475, 479 (Me. 1982) (internal citations omitted). To prevail on appeal, the plaintiffs must demonstrate "not only that the Board's findings are unsupported by record evidence, but also that the record compels contrary findings." *Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283, 284 (Me. 1991). The burden of persuasion rests with

plaintiffs, who seek to overturn the Board's decision. See *Mack v. Mun. Officers of the Town of Cape Elizabeth*, 463 A.2d 717, 720 (Me. 1983).

The Court reviews the interpretation of municipal ordinances de novo. *Nugent v. Town of Camden*, 1998 ME 92, ¶ 7, 710 A.2d 245. In construing ordinances, the court first looks "to the plain meaning of its language to give effect to the legislative intent, and if the meaning . . . is clear, [does] not look beyond the words themselves." *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903. "The terms or expressions in an ordinance are to be construed reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole." *Jordan v. City of Ellsworth*, 2003 ME 82, ¶ 9, 828 A.2d 768 (internal quotations and citations omitted).

V. Local Regulatory Scheme

Bar Harbor voters passed an Amendment to the Code, effective December 2, 2021, to regulate and define categories of short-term rentals within the Town. R. 00306. The objectives to be obtained through the Amendment include: excluding VR-2 Rentals from certain zones; limiting the number of VR-2 rental units to a maximum of 9% of dwelling units within Bar Harbor; prohibiting the transfer of short-term rental registration upon land ownership transfer; and ensuring strict compliance with promulgated regulations via limitations on renewals for short-

term rentals not meeting the new requirements through a wait-list process and eliminating non-conformities. *Id.*

The general structure of the Code addressing lawfully pre-existing, non-conforming, short-term rentals, when read together with the Code relative to non-conformity in general, indicates a statutory scheme devised to eliminate non-conformities and to prohibit enlarging, increasing or extending the area of non-conforming uses and structures. *See generally* Chapter 125, Article IV. R. 00438.⁴ Specifically, the Code allows for the continuation of a duly registered VR-2 short-term rental, even when not a permitted use in a particular zone, but only in strict compliance with Section 125-69Y(2)(b)[1][a]. A. 034.⁵ The operative effect of this provision is to eliminate non-conforming short-term vacation rentals that do not comply with the pertinent regulations (as a new registration would necessarily be denied in a zone where VR-2 rentals are not a permitted use). *Id.*

Continued operation of short-term rentals is allowed but must be registered according to the new designations (here, VR-2). § 125-69(Y)(2)(a)(1). A. 033-34. The LUO sets forth a bright line date for annual renewal, May 31 of each year;

⁴ 125-53, e.g., declares “All nonconformities shall be encouraged to convert to conformity whenever possible and, when required by this chapter, shall convert to conformity.” R. 00348.

⁵ The registration must be renewed annually in accordance with this chapter and with Chapter 174, Short-Term Rental Registration. Any registration not renewed by the annual expiration date (May 31) will be deemed expired, and will not be eligible for renewal. An applicant whose registration has expired may apply for a new VR-1 or new VR-2 registration and will be required to follow all the requirements for a new VR-1 or new VR-2 registration.

failure to comply with this statutory deadline results in expiration of the registration and ineligibility for renewal of the registration. § 125

69(Y)(2)(b)(1)(a). A 034.⁶ Failure to strictly comply with this section results in an option to apply for a new registration, adhering to all requirements for a new registration. *Id.* While these code sections set forth the deadline for renewal, other sections of the Code set forth the mandatory elements for a renewal: Compliance with Chapter 125 and Chapter 174.

Under § 125-109 (A. 032), a Vacation Rental-2 is defined as “an entire dwelling unit that is not the primary residence of the property owner and is rented to a person or a group for less than 30 days and a minimum of four nights.” Under § 125-48(c) (R. 00436-437) Vacation Rental-1 is a permitted use in the Shoreland Limited Residential Zone. Vacation Rental-2 is not listed as a permitted use in that zone, and thus it is not a permitted use in that zone. *See* § 125-7 (R. 00434), § 125-48 (R. 00436-437).

Code § 174-6 (A. 0039) restates and emphasizes that all registrations expire on May 31 of each year. Any registration and registration renewal “shall be filed with the CEO on forms provided for that purpose.” § 174-7 (A. 039). The registration renewal is a “shall issue,” but only if the dwelling unit has met all

⁶ Any existing VR-2 must be renewed, by May 31 and according to code every year or else it is forfeited. § 125-69(Y)(2)(a)(1). A. 0034.

requirements of Chapter 174. § 174-7(E) (A. 039). Chapter 174 includes both prohibitive and prescriptive elements: No person(s) shall advertise for rent, rent, or operate an STR without a valid registration issued pursuant to Chapter 174 (§ 174-5(B) (A. 038); The registration number shall be posted on all advertising, including, but not limited to, online platforms (§ 174-5(D)) (emphasis supplied) (A. 038). “The words “shall” and “will” are mandatory, and the word “may” be permissive.” § 125-108(F) (A. 028).

Bar Harbor Office of Code enforcement is tasked with administrative duties concerning the short-term rental regulatory scheme. *See* Code § 174-2(A) (A. 037). These duties include on-site inspections to ensure compliance with all terms and conditions attached to permits and approvals under Code Chapter 125. Code § 125-100(C) (A. 020). The phrase, “in violation,” appearing in the code sections at issue, is not a defined term under the Code, and thus is defined according to the current edition of Webster’s Collegiate Dictionary. Code § 125-108(A) (A. 028). Accordingly, “violation” means “the act of violating: the state of being violated: as **a. INFRINGEMENT, TRANSGRESSION.**” *Violation*, Merriam-Webster Collegiate Dictionary (11th ed. 2003).

VI. Argument

A. The written decisions of the Code Enforcement Officer, and the ZBA, are subject to review.

Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation, or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. Me. Rev. Stat. tit. 30-A, § 2691.

The Code Chapter 174 (Short Term Rental Registration) (A. 042) states in relation to Short-Term Rental Registration: In accordance with the process outlined in § 125-103, (A. 023), the Board of Appeals may, upon written application of an aggrieved party received by the Planning Department within 30 days of any decision or enforcement action which interprets this chapter, hear an appeal from such decision.

For purposes of this section, the term "decision" is limited to an order, decision, or enforcement action made in writing. This is in accord with Code § 125-103(A), (A. 023): The Board of Appeals may, upon written application of an aggrieved party received by the Planning Department within 30 days of any decision or enforcement action by a municipal body or official who or which interprets this chapter, hear appeals from such decision. For purposes of this section, the term “decision” is limited to an order, decision, ruling or enforcement action made in writing.

Under Code § 125-109, (A. 0029) Aggrieved Person is defined as:

“An owner of land whose property is directly or indirectly affected by the granting or denial of a permit or variance under this chapter; a person whose land abuts land for which a permit or variance has been granted; or any other person or group of persons who have suffered particularized injury as a result of the granting or denial of such permit or variance.”

Judicial review is available. *See* Code § 125-107. (A. 027).

For purposes of judicial review of local appellate decisions, an abutter generally has standing to participate in and appeal from local administrative decision-making regarding zoning and land use issues. *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 12, 974 A.2d 903, 908. The proximate location of the abutter's property, together with a relatively minor adverse consequence sufficiently demonstrates a potential for particularized injury. *Forester v. Westbrook*, 604 A.2d 31, 32 (Me. 1992) (collecting cases).

The Board has the power to hear and decide whether an applicant has met the factual conditions required by a local ordinance; there is no discretion to grant a permit if the conditions in the ordinance do not exist. *Wakelin v. Yarmouth*, 523 A.2d 575, 577 (Me. 1987). Whether a proposed use falls within a given categorization contained in zoning regulations is a question of law, on which the zoning board's determination is subject to review. *Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 318 (Me. 1967) (internal citations omitted). The meaning of terms or expressions in zoning ordinances is a question of construction and one of law for the court. *Id.* *See also Adams v. Town of Brunswick*, 2010 ME 7 at ¶ 11, 987

A.2d 502, 507 (Whether a proposed use falls within the terms of a zoning ordinance is a question of law that we review de novo.); *Salisbury v. Town of Bar Harbor*, 2002 ME 13 at ¶ 14, 788 A.2d 598, 602 (issuance of certificate of occupancy may be challenged if permittee meaningfully exceeds authority under the permit).

The issues concerning the propriety of the registration renewal are the proper subject of review; they have been preserved. A. at. 050.

B. Authorizing the irregular timing of the registration renewal cannot substitute for reviewing the substance of the renewal application relative to standards for renewal eligibility, including whether the Property was “in violation.”

Me. Rev. Stat. tit. 30-A § 2691(3)(E) requires that “all decisions become a part of the record and must include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial of relief.” Where a municipal board fails to make findings as to whether a standard is met according to the local ordinance, the result is remand to that board for findings applying the standard. *See D'Alessandro v. Town of Harpswell*, 2012 ME 89, ¶ 8, 48 A.3d 786, 789. Alternatively, where the board has made no findings of fact or conclusions of law supporting its decision, the granting of a permit can be error as a matter of law. *See Fissmer v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 18, 170

A.3d 797, 801. The Law Court will not imply findings or create an analytical construct and attribute it to a municipal decision-maker, in usurpation of administrative functions. *Fissmer v. Town of Cape Elizabeth*, 2017 ME 195, ¶ 17, 170 A.3d 797, 801 (citing *Appletree Cottage*, 2017 ME 177).

Appellants presented to the ZBA factual and legal issues still in controversy here: misapplication of LUO § 125-69(Y)(2)(b) (strict compliance with registration deadlines, deemed expiry and renewal ineligibility) A. 050; legal misapplication of §174-7's eligibility standard and factual non-compliance with that code section A. 050. Appellants also contested findings of fact: timeliness of the renewal application; finding that the property was not in violation; finding of eligibility for VR-2 registration; finding of the existence of a registration to renew; finding that the registration was allowed under the LUO; and the finding that the Property was in compliance with Chapter 174. A. 050.

The application of Code § 125-69(Y)(2)(b) (concerning timing of the renewal) received consideration below and is addressed elsewhere in this brief. The remaining issues received no statement of findings and conclusions.

The Board relied upon § 174-7(E) as a basis for its decision; however, that section was cited for the conclusion that the Office of Code Enforcement has the power or obligation to correct its own mistakes. A. 019. This was in relation to the timing of the registration renewal. *See generally* Decision. A. 0017-19. § 174-

7(A)⁷ states “All applications for STR registrations shall be filed with the CEO on forms provided for this purpose;” § 174(E) (A. 039) states: “The Code Enforcement Office shall issue a registration to the property owner if the dwelling unit has met all requirements of this chapter”. § 174-5 (A. 038) states “STRs must comply (it cannot be in violation) with Chapter 125, Land Use Ordinance.”, which, thus incorporated, means that the “shall issue” is predicated on strict compliance with both Code Chapters 174 and 125.

Code § 174-9 (A. 041) states: “It shall be a violation of this chapter for any person to advertise for rent, rent, or operate an STR without a valid registration.”

It is undisputed that W.A.R.M. Management was operating without a valid registration at the time the CEO made the challenged decision, and this is acknowledged before the Board. R. 00071:18-72:17; R. 0075:9-18. Under Code § 174-7(E) this is a “violation.”

Contrary to the CEO’s interpretation of the ordinance (discussed below) it is a “violation” of LUO Chapter 125 for the operator of a VR-2 to rent out less than the entire dwelling unit. *See* LUO 125-109 (A. 030). The record is clear that W.A.R.M. was not offering the entire dwelling unit for rent as a Vacation Rental-2(VR-2) but was instead offering a portion of the dwelling unit: It was offering an optional “Garden Suite” upgrade, to accommodate four additional guests, at an

⁷ A. 039.

additional charge of \$700 per person.⁸ The “Garden Suite” includes a queen bed, two twin beds, a sitting room, and a bathroom. A. 054; 059. The CEO repeatedly denied that this practice was a “violation” within the meaning of the code, R. at 0083,⁹ when, according to the plain language of the code, doing so constituted acts of violating the terms of the registration.

LUO 174-5(D) requires the posting of the unique registration number on all advertisements for rent. A. 038. W.A.R.M. Management did not operate in strict compliance with this LUO section (A. 052-64). This failure to comply with the LUO is a “violation,” according to the Code Enforcement Officer. R. 069:23-70:7.

Appellants raised these material issues concerning whether the standards for the registration renewal were met at the ZBA hearing. A. 0050. The Board did not include any findings or conclusions (nor set forth the reasons or basis for failing to

⁸ **Dwelling Unit:** “A room or group of rooms which is designed, equipped and intended exclusively for use as residential living quarters by only one family at a time, which contains independent living, cooking, sleeping, bathing and sanitary facilities, and which is separate and independent from other such rooms or groups of rooms.”

Vacation Rental-2(VR-2): An entire dwelling unit that is not the primary residence of the property owner and is rented to a person or a group for less than 30 days and a minimum of four nights.” A. at 0032.

⁹ 10 But I will ask you this: In review of
11 those exhibits, do you see -- do you see where she is
12 in fact not renting out or W.A.R.M. Management is not
13 in fact renting out the entire premises? Do you see
14 that?

15 MS. CHAMBERLAIN: Yes.

16 MR. CHARD: And is that a violation?

17 MS. CHAMBERLAIN: No.

18 MR. CHARD: That's not a violation?

19 MS. CHAMBERLAIN: No.

even consider these issues) in its Decision. This constitutes an abuse of discretion under Me. Rev. Stat. tit. 30-A § 2691(3)(E). This Court may not imply findings or create the analytical construct for the Board. Accordingly, the granting of the permit renewal should be considered error as a matter of law under *Fissmer* or remanded, under *D'Alessandro*, for findings and conclusions with reasons and basis on these material issues raised at the hearing.

C. The ZBA abused its discretion by granting equitable relief exceeding its jurisdiction by disregarding the requirements of deemed expiry and registration forfeiture; it did what it thought should be done instead of what the Code required.

This appeal concerns the continuation of a nonconforming use pursuant to a zoning ordinance. A. 066. Code § 125-53 requires that “all nonconformities shall be encouraged to convert to conformity whenever possible, and, when required by this chapter, shall convert to conformity.” R. 00438. Public policy demands the strict construction of provisions in a zoning ordinance which concern the continuation of a nonconforming use. *Gagne v. Lewiston*, 281 A.2d 579 (1971) at 5. This policy must be carried out within the legislative standards and the municipal regulations. *Id.* at 6. Provisions of a zoning regulation for the continuation of such uses should be strictly construed, and provisions limiting nonconforming uses should be liberally construed. *Id.* at 5, quoting *Inhabitants of*

the Town of Windham v. Sprague, 219 A.2d 548 (Me. 1966). The municipal officers may permit an exception to an ordinance only when the terms of the exception have been specifically set forth by the municipality. 30-A M.R.S.A § 4103(5)A(2). The Town of Bar Harbor Zoning Board of Appeals does not have jurisdiction to grant equitable relief. *See generally* Code § 125-103 (A. 0023-27); Rules of Procedure Bar Harbor Board of Appeals (R. 00010) “The Board of Appeals will only consider questions based on the Bar Harbor Land-use Ordinance and will not consider any other questions such as equitable estoppel...”

All registrations expire on May 31 of each year, per § 125-69(Y)(1)(a) (A. 0033); § 174-6(A) (A. 0039). Renewals are administered under § 125-69(Y)(2)(b), § 174-7(C) (A. 0039). The full text of § 125-69(Y)(2)(b) is set forth here:¹⁰

(b) Continuance of registration for vacation rental-1 (VR-1) and vacation rental-2 (VR-2).

[1] Any duly registered VR-1 or VR-2 may continue the use as a VR-1 or VR-2 and is eligible for renewal but only in strict compliance with the following:

[a] The registration must be renewed annually in accordance with this chapter and with Chapter 174, Short-Term Rental Registration. Any registration not renewed by the annual expiration date (May 31) will be deemed expired and will not be eligible for renewal. An applicant whose registration has expired may apply for a new VR-1 or new VR-

¹⁰ This code section incorporates Chapter 174, including § 174-5(A), which provides that STRs must comply “(it cannot be in violation)” with Chapter 125 (A. 0038) and § 174-7(E), which conditions the issuance of the registration on the dwelling unit meeting all requirements of Chapter 174. A. 0039.

2 registration and will be required to follow all the requirements for a new VR-1 or new VR-2 registration.

The VR-2 Registration for 12 Bogue Chitto Lane expired by its own terms, and the terms of § 125-69(Y)(2)(b), on May 31, 2023. A. 0067. In proceedings concerning late registration renewals, the Town promulgated a memorandum on September 26, 2022, stating that “There are no exceptions to the renewal deadline and no provision which gives me the authority to modify or waive that deadline.” R. at 00291. This is the interpretation of § 125-69(Y)(2) previously adopted by the Board in appeals concerning this ordinance section (AB-2022-02, R. at 00287, and AB-2022-05, R. at 000295). Ms. Chamberlain, at hearing, acknowledged that there is no code section that authorizes her office to approve in October what is believed to be an application in January. R. 0061:18-23. Ms. Chamberlain issued the permit because she deemed it appropriate, not on the basis of a section of the Code. R. 0062:12-16. The deliberations show that the Board was acting to give relief in the form of what it should do, and not on the basis of Code authority. See R. 0098:9-100:21. The Board spent significant time considering whether there was a Code section supporting the relief ultimately given. R. 00133:23-140:25. The Board finally settled on 174-7(E), A. at 019, giving no analysis concerning the second clause “if the dwelling unit has met all requirements of this chapter.” This constitutes error of law and abuse of discretion.

The Code provides a mechanism for obtaining a VR-2 registration after the deemed expiry and legal ineligibility for renewal under of § 125-69(Y)(2)(b): an application for a new VR-2 registration, following all the requirements for a new VR-2 registration. A. 034. This provision shows exactly how the Code is meant to work: controlling the numbers of STRs in the Town by eliminating non-conforming uses when required by the Code. Operators can obtain a new registration, within the statutory Town cap, *if the dwelling is eligible (conforming) under the Code. See generally* § 125-69(Y) A. at 0033-34. If the dwelling is nonconforming in its VR-2 use, as here, then a new permit would necessarily be denied in the administrative review process.¹¹

As the Board exceeded its statutory authority by granting equitable relief, the registration renewal should be vacated, as there is no alternative basis for the Boards Decision. Alternatively, this Court should apply § 125-69(Y)(2), hold that the registration was deemed expired effective May 31, 2023, and was thus ineligible for renewal on October 30, 2023, and order an entry vacating the registration renewal.

¹¹ This also overcomes any mootness argument advanced by Appellees, which will be addressed if advanced.

D. Even if the Town could waive the deemed expiry and ineligibility under § 125-69(Y)(2)(b), the Board could not have concluded that the Property was eligible for registration renewal because it was “in violation”.

As set forth herein, and without regard to the expiry and ineligibility issue under § 125-69(Y)(2)(b), the Property was not eligible for registration renewal because it was not in compliance with Chapter 125. § 174-5(A) (A. 0038). Code § 174-5(A) refers to Chapter 125 for definitions and standards; Vacation Rental-2 is defined as:

“An Entire Dwelling unit that is not the primary residence of the property owner and is rented to a person or a group for less than 30 days and a minimum of four nights.” A. 0032.

It also commands that that STRs must comply “(it cannot be in violation)” with Chapter 125. A. 0038. “In violation” means “the act of violating; the state of being violated.” *Violation*, Merriam-Webster Collegiate Dictionary (11th ed. 2003).¹² If the Board had found that the Property met the standards, including operating a STR consistent with the definition of a VR-2, that finding would be unsupported by any evidence. A contrary finding is compelled, in view of the plain evidence

¹² It does not refer to outstanding notices of violation.

that W.A.R.M. was not renting out an entire dwelling unit, but instead reserving a “Garden Suite” for a separate, and additional, rental payment. A. at 0054.¹³

The standards in Code § 125-69(Y)(2)(b) incorporate Chapter 174¹⁴ including § 174-7(E), which conditions registration renewal on the dwelling unit meeting all requirements of Chapter 174. Two requirements contained in Chapter 174 are: No person(s) shall advertise for rent, rent, or operate an STR without a valid registration (§ 174-5(B)) and a valid registration number shall be posted on all advertising, including but not limited to, online platforms (§ 174-5(A)). If the Board found that the Property had met these requirements, they did not say so.

The evidence in the record compels a finding that W.A.R.M. Management did rent and operate and STR without a valid registration. The evidence in the record compels a finding that W.A.R.M. Management did not post a valid registration on all advertising, including online platforms. The evidence in the record compels a finding that W.A.R.M. Management meaningfully exceeded the terms of the un-renewed VR-2 registration by withholding the Garden Suite. These findings preclude eligibility for registration renewal under the Code, whether or not timely.

¹³ The Board may have implicitly adopted the CEO’s interpretation that renting less than the entire dwelling unit was not a violation but made no express finding on this issue.

¹⁴ The registration must be renewed annually in accordance with this chapter and with Chapter 174. A. 0034.

VII. Conclusion

The Board abused its discretion by failing to issue written findings and conclusions relative to all material issues before it in this appeal. The Board focused solely on the timing of the issuance of the registration renewal and did not address the material issues concerning ineligibility as a result of non-compliance with the code and the status of being in violation.

Under the plain language of the Code, W.A.R.M. Management's non-conforming VR-2 registration was ineligible for renewal. The 2022 registration expired by its own terms on May 31, 2023. By operation of the Code, it was deemed expired and ineligible for renewal. The Town revived the registration, granting a renewal on October 30, 2023, when the proper procedure under the Code required an application for a new registration, with the requirement to follow all the requirements for a new registration. This revival is not authorized by the Code and constitutes unauthorized equitable relief and an error of law.

Even if the Board has the authority to revive a short-term rental registration that has expired according to its terms (and according to Code), and is, per the Code, ineligible for renewal, 12 Bogue Chitto Lane was ineligible for renewal on account of W.A.R.M. Management's rental practices in violation of the Code. The Board implicitly adopted an erroneous interpretation of "in violation" to mean the

existence of notices of violation, where the term refers to the status of being in violation of the Code.

W.A.R.M. Management maintained the status of being in violation of the Code because it operated without a valid registration, it failed to post its registration number on all advertisements, and it was offering for rent and renting less than the entire dwelling unit. Reserving the “Garden Suite” with three beds, a sitting room and a bath is plainly in violation of the Code, contrary to any interpretation presented by Code Enforcement. It is undisputed that the former two violations existed from May 31, 2023, through October 2023. The record compels a finding that W.A.R.M. Management’s reservation of the “Garden Suite,” its act of violating, was in effect during this period.

On these bases, the Board decided incorrectly. The registration renewal should be vacated and denied as a matter of law. Should there not be adequate findings and conclusions to ascertain the framework of the decision to allow denial as a matter of law, this matter should be remanded to the Board for findings on all material issues which it did not address in its decision as set forth herein, and an entry granting the appeal and denying the registration renewal.

Dated: November 19, 2024

/s/ Colin W.B. Chard, Esq. /s/
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CERTIFICATE OF SERVICE

I, Colin W.B. Chard, Attorney for Appellants, Monika McCallion, Brandon McCallion, and Old Bears, LLC, in the above matter, hereby certify that I have made service of the foregoing **Appellants' Brief and Appendix** to the following persons by sending them each a copy by electronic mail and two physical copies of the Appellants' Brief and one physical copy of the Appendix to the addresses below.

David A. Lourie, Esq.
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And by delivering ten physical copies of Appellants' Brief and eight copies of the Appendix to:

Matthew Pollack, Esq.
Clerk of the Law Court
Maine Superior Judicial Court
205 Newbury Street Room 139
Portland, ME 04101

Dated at Portland, Maine this 19th day of November, 2024.

By: /s/ Colin W.B. Chard, Esq. /s/
Colin W.B. Chard, Esq.
Attorney for Appellant's