

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET HAN- 24-365

MONIKA MCCALLION et al.
Plaintiffs- Appellant

v.

TOWN OF BAR HARBOR, *et al.*

Defendant and Intervenor-Appellees

ON APPEAL FROM THE SUPERIOR COURT
HANCOCK COUNTY

Docket No. HAN- 24-365

**BRIEF OF APPELLEE-INTERVENOR
W.A.R.M. MANAGEMENT, LLC**

David A. Lourie, Esq.
Town Attorney
189 Spurwink Avenue
Cape Elizabeth, Maine 04107
Maine Bar #1041
david@lourielaw.com
207-749-3642

A. TABLE OF CONTENTS

	<u>Page</u>
A Contents of Brief	2
B Table of Authorities	2
C Introduction	2
D Statement of Fact	3
E Statement of the Issues Presented	4
D Summary of Argument	4
E Argument	4
F Conclusions and Statement of Relief Requested	7
Certificate of Service	12
Addendum: Abbreviated copy of Appellants' 2025 ZBA Appeal	13

B. TABLE OF AUTHORITIES

Bryant v. Town of Wiscasset Mem Dec April 18, 2024

Hamilton v. Board of Licensure In Medicine, 2024 ME 43

Hatfield v. Comm'r of Inland Fisheries, 566 A.2d 737, 1989

Town Of Mount Vernon v. James Landherr, 2018 ME 105, 190 A.3d 249

73 C.J.S. Public Administrative Law and Procedure § 290

C. INTRODUCTION TO BRIEF

Appellee-Intervenor W.A.R.M. Management, LLC (“WARM”) joins in the Brief of Appellee Town. WARM, and requests that this Court first consider the *threshold issue* of mootness and dismiss the Appeal as the controversy over the Code Enforcement Officer’s 2023 belated action in granting her approval of the 2024 annual renewal of WARM’s Short Term Rental (“STR”) registration has lost all vitality, due to Appellants’ failure to timely appeal the subsequent issuance of

annual renewal of registration for the premises for 2024; but is currently seeking to Appeal the 2025 Approval on the same basis as 2023.¹

The absence of any discussion of the obvious , threshold, *mootness* Issue in Appellants' Brief is explicable only as a calculated attempt to gain tactical advantage by only stating Appellants' position as to mootness in their Reply Brief. Nevertheless, this Brief will focus upon the threshold² issue of the *mootness* of Appellants' 80B action now before the Court, and will seek leave of the Court to rebut any *mootness exception* argument advanced by Appellants, if warranted.

¹ Appellants recently sought to breathe life into this Appeal by timely filing an Appeal to the ZBA (sent via priority overnight FedEx to the Board of Appeals on 2/12/25) from WARM's 2025 Approval. This attempt to resuscitate Appellants' lapse claims which went unchallenged in 2024 is discussed below in the context of possible exceptions to *mootness*, and a 3 page abbreviated copy attached hereto as an Addendum, arguing that: "Since the Decision in AB-2023-03 was wrong, this means that it will be set aside, and the registration renewal for the year 2023 will be denied (*nunc pro tunc*) and become a nullity. Because that registration renewal will be denied, that will create a condition where the registration was not renewed annually in that year. Where it was not renewed annually, it will be ineligible for renewal in any following year. WARM must apply for a new registration, which will be denied . This is because VR-2 use in the Limited Shoreland Residential is not a permitted use."

² "We turn first to the threshold issue, (A) whether this appeal is moot and should be dismissed. If the dispute survives the mootness analysis, we then consider (B) Sparks v. Sparks, 2013 ME 41, 65 A.3d 1223; "This case presents several threshold issues of justiciability. "Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character" Hatfield v. Comm'r of Inland Fisheries, 566 A.2d 737, 739-40 (Me. 1989) (quoting Connors v. International Harvester Credit Corp., 447 A.2d 822, 824 (Me. 1982)).

D. STATEMENT OF FACT (AS TO MOOTNESS)

Intervenor adopts the Statement of Fact filed by the Town with regard to the merits, and adds the following in support of Intervenor's contention that the Law Court Appeal is moot. Intervenor W.A.R.M. Management, LLC to Appellant's

WARM's 80B Brief³ first directed the trial court's attention to events subsequent to the filing of the 80B Record that made this 80B Appeal moot. Appellee Town then requested that the Court *take judicial notice* of certain Public Records under Affidavit of the CEO documenting the granting of the 2024 Approval, and showing Appellants' failure to exhaust its available 2024 administrative remedy of appeal to the ZBA.

The Town's Request for judicial notice was GRANTED, although not discussed in its 80B Decision, which issued simultaneously issued with the Order granting Appellees' Motion *for good cause shown*. Perhaps because the Presiding Justice had already decided the merits of the fully briefed and argued 80B in favor

³ FN # 1: "The Court can take judicial notice pursuant to Evid. Rule 201 of the adjudicative facts constituting jurisdictional mootness: During the pendency of McCallion's appeals of WARM's 2023 Certificate, WARM's annual 2023 Certificate expired, by its terms. Thereafter WARM applied for and received CEO approval of its 2024 annual STR registration in January of 2024. The action of the CEO in issuing WARM's 2024-2025 Registration Certificate has not been timely appealed to the ZBA, nor Appealed and stayed. Nor was McCallion's this 80B Complaint amended or supplemented pursuant to Rule 15 to challenge the issuance of WARM's 2024 Certificate the combination of which makes this 80B Appeal moot."

of the 80B Appellees he omitted the issue of *mootness* in his Decision on the merits, which had not been fully briefed⁴ or argued orally, thereby avoiding any possibility of remand for a Decision on the merits, if this Court were to exercise its discretion to apply any of the exception to the Mootness Doctrine in this Appeal.

E. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellant does not agree with the framing of Appellants' Issues Presented, and Appellants' omission of all reference to the issue of *mootness* raised below due to Appellants' failure to appeal WARM's 2024 Approval (made undeniable by Appellant's recent ZBA Appeal of WARM's 2025 Approval.) Maine case law uniformly holds that the suggestion of *mootness* must be decided prior to considering any Issues Presented by the parties with regard whether the ZBA properly upheld the CEO's action in registering WARM's 2003 renewal if its STR Approval: WARM believes that the following to be the Issues Presented:

⁴ Appellants dealt with the issue of mootness below in its July 3, 2024 Brief summarily, due to the expiration of the annual permit for 2023, in apparent reliance upon the exception for recurrent and fleeting occurrences, without acknowledging the subsequent unappealed 2024 Approval and Appellants' failure to appeal it. Moreover, Appellants' reliance on the *annual permit exception* relied upon the likelihood of an annual permit dispute over the meaning of the Ordinance requirement that permittees *must rent the entire home*, rather than the likelihood of any recurrence of the CEO correcting an administrative error after the STR Application deadline, any lapse in grandfathering being asserted in successive years, or the likelihood that the Town was not *strictly enforcing* its STR licensing against permittees issued approvals after the deadline.

1. **As a threshold question:** *Is the CEO's correction of a Town administrative error in approving WARM's timely STR renewal application after the deadline for annual renewal of registration still a justiciable question in this 80B Appeal in light of her subsequent unappealed renewal of that same registration?*
2. **As a second threshold question:** Should the Court exercise its discretion to adjudicate the merits of this otherwise moot Appeal on the basis of any recognized exception to the Mootness Doctrine?
3. *If the Court exercises its discretion to review the merits of this Appeal from the de novo Decision of the ZBA: Did the ZBA commit any reversible error of law?*
4. *If the Court exercises its discretion to review the merits of this Appeal from the de novo Decision of the ZBA: Did the ZBA abuse its discretion?*
5. *If the Court exercises its discretion to review the merits of this Appeal from the de novo Decision of the ZBA: Did the ZBA make material findings not supported by substantial evidence in the Record?*

E. SUMMARY OF ARGUMENT

If there was any error below, it consisted of the harmless error of the Superior Court in reaching the merits of Appellants' 80B Appeal, as the Board Decision was upheld.

F. ARGUMENT

This case presents threshold issues of justiciability due to the expiration of the 2013 annual renewal of complained of WARM's STR Registration.

"Justiciability" requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character. Hatfield v. Comm'r of Inland Fisheries, 566 A.2d 737, 739-40 (Me. 1989) The requirement of justiciability has grown increasingly elusive for Appellees ever since they first sought to take advantage of the Town error in processing WARM's 2023 STR Renewal Application to deprive WARM of its grandfathered STR rights.

Justice Connors most recently restated the mootness doctrine and its exceptions in Hamilton v. Board of Licensure In Medicine, 2024 ME 43 [¶9]:

“Except in extraordinary circumstances . . . **we will not address issues that have lost their controversial vitality.**” *A.I. v. State*, 2020 ME 6, ¶ 8, 223 A.3d 910. *We may, in our discretion, see King Res. Co. v. Env't Improvement Comm'n*, 270 A.2d 863, 870 (Me. 1970); 1A C.J.S. *Actions* § 80, apply an exception to this rule and consider an appeal that is moot if (1) sufficient collateral consequences will result from the determination of the questions presented so as to justify relief; (2) the appeal contains questions of great public concern that, in the interest of providing future guidance to the bar and public we may address; or (3) the issues are capable of repetition but evade review because of their fleeting or determinate nature. *A.I.*, 2020 ME 6, ¶ 9, 223 A.3d 910. [emphasis supplied.]

1. This 80B Appeal Has Lost Its Controversial Vitality, and is not within any Exception to the Mootness Doctrine.

WARM has continued its STR use unbroken at all times material as Appellees failed to apply for a Rule 80B Stay, making Zoning Ordinance Article I (loss of zoning grandfathering) inapplicable by its terms.

WARM's 2023 STR permit has long since expired; a successor annual permit applied for, granted, and not appealed *for the same use, of the same premises*, with likely preclusive effect with respect to issues raised in 2023. On these facts Appellants' claims of error with respect to the CEO and ZBA's 2023 actions (the subject to this Rule 80B review) have *lost their controversial vitality*.

Appellants' claim of Error by the CEO (in correcting a computer error resulting in the CEO *not timely* processing WARM's 2023 STR renewal Application) occurred two years ago, in the start-up of the Town's application process, and is not susceptible of repetition in the course of future annual renewals, which is the Exception to Mootness asserted by Appellants below.

2. No sufficient collateral consequences will result from the determination of the questions presented by this case to justify relief;

The question originally presented to the ZBA (whether the CEO may correct her office's computer filing error administratively after the deadline for approval of WARM's STR renewal registration is unlikely to arise again. The Board of Appeals ("ZBA") found that the 2023 failure to timely approve the renewal was

due to computer error during the startup of a new Town on-line registration system, which has been working as intended ever since.

There are few if any collateral consequences remaining from the ZBA decision appealed from. Appellants may assert as an exception to mootness for preservation of their claim that WARM lost its STR grandfathering in 2023 (*through a break in its registration* of 12 Bogue Chitto.) However, Appellants' failure to appeal the Town's identical 2024 Approval of the 12 Bogue Chitto STR bars Appellants from asserting the loss of WARM's grandfathering in 2023 under the principles of finality⁵, making barring a claim of collateral consequence on these facts.

This Appeal contains no question of great public concern that, in the interest of providing future guidance to the bar and public should be addressed. It will not even guide the owners of STR property and their abutters with regard to the need

⁵ See , e.g., Town of Mount Vernon v. Landherr 2018 ME 105, 190 A.3d 249, giving the same legal effect of finality to unappealed administrative decisions as is accorded to judicial decisions. 73 C.J.S .Public Administrative Law and Procedure § 290 recognizes that "In appropriate circumstances, the doctrine of res judicata or collateral estoppel is applicable to a determination of an administrative agency.", and that **"One reason for applying res judicata to administrative agencies is not only to enforce repose but also to protect the successful party from being vexed with needlessly duplicitous proceedings."** See Addendum to Brief showing Appellants' recently filed attempt to relitigate their 2023 Appeal in their Appeal to the ZBA of WARM's 2025 renewal Appeal, despite their failure to appeal in 2024) and finality rules providing repose.

to file their on-line applications for renewal earlier to beat the Approval deadline, as the Town computer error that gave substance to Appellants' claim of forfeiture was apparently due to WARM's *too early* filings, before glitches in the on-line system were addressed!

Most telling is the fact that the issues presented to the ZBA are unlikely to be repeated where the CEO and ZBA strictly enforce the Ordinance deadline, except where the delayed Approval is due to Town administrative error. See, discussion of the Jennifer Paigen Wales Appeal at R. 283 et seq ., where the ZBA denied an appeal (despite CEO and ZBA sympathy for the appellant's claimed medical and COVID-9 excuse for her failure to meet the application deadline.) N.B.: Appellants relied upon this after-deadline Application denial in 2022 as a *controlling precedent* for denying registration in WARM's 2003 ZBA proceeding !

The issues presented by the CEO correcting her own mistake after expiration of the deadline for renewal of an STR permit is not likely to recur

3. The Court Should Not Exercise Discretion by Applying any Exception to the Mootness Rule

If the Court is to address the merits of this Appeal it must now do so *in the exercise its discretion* in applying one of the recognized exceptions to the Mootness Rule to these facts and these parties where all the equities disfavor application of exceptions to the Mootness Rule in the case of these innocent

victims of a Town administrative error, and a neighbor who objects to the continuation of a grandfathered use of Appellee's property.

A recent example of the exercise of discretion is Bryant v. Town of Wiscasset Mem Dec April 18, 2024, dismissing as moot appeals from the Town of Wiscasset Board of Selectmen's approval of annual but expired annual sales licenses. The Court explained that:

“[C]ourts cannot issue opinions on questions of fact or law simply because the issues are disputed or interesting... The parties do not dispute that the annual sales licenses have expired, and we determine that none of the exceptions to the mootness doctrine *require us* to accept the appeal. Further, *we decline* to apply any of the exceptions to the mootness doctrine. (Emphasis supplied)

As illustrated by the *Wiscasset appeals*, courts are not required to exercise their discretionary power to apply arguable exceptions to the Mootness Rule. This discretion is subject to equitable principles. One of the *Maxims of Equity*, that Equity *abhors a forfeiture*, which makes it appropriate to consider that here, an abutter seeks to take advantage of a Town computer error to cause a forfeiture of WARM's right to engage in short term family rentals of a home where that right is dependent on uninterrupted annual registration. Equity does not support Appellants' assertion exception to mootness for the purpose of causing a forfeiture of WARM's because its 2013 STR application made on the 1st day permitted was timely filed but fell victim to the Town's start-up of its new on-line registration renewal system.

CONCLUSION: This Court must deny the Appeal as Moot on these facts, and not exercise its discretion to consider the merits.

Respectfully submitted

Dated:

/s

David A. Lourie, Bar #1041
Attorney for Appellee-Intervenor
W.A.R.M. Management, LLC

CERTIFICATE OF SERVICE

I, David A. Lourie, hereby certify that 1 copy of Appellee WARM's Brief was served upon all counsel at the addresses set forth below by U.S. mail, postage prepaid as follows:

Colin W.B. Chard, Esq.
Robinson Kriger & McCallum
12 Portland Pier
Portland, ME 04101

Jonathan Hunter Esq.
Rudman Winchell
84 Harlow Street
Bangor, ME 04401

/s/

David A. Lourie, Bar #1041
Attorney for Appellee-Intervenor
189 Spurwink Avenue
Cape Elizabeth, Maine 04107-9604