

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)

REPLY BRIEF FOR APPELLANTS

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1. This Court should take judicial notice of the existence and content of the filings in the pending administrative proceedings before the Bar Harbor Zoning Board of Appeals initiated February, 12, 2025: Appellants' appeal of the VR-2 Registration renewed in January, 2025.

After filing their brief hereunder, Appellants on February 12, 2025, delivered their Application for Administrative Appeal to the Town of Bar Harbor.

W.A.R.M. Brief, n. 1. The active Application appeals issuance of a 2025 VR-2 registration renewal for 12 Bogue Chitto Lane. W.A.R.M. Brief, n. 1. Due to a mistake at the printers, W.A.R.M. Management, L.L.C., did not include the addendum referenced in that footnote. W.A.R.M. Motion dated March 18, 2025. The Addendum, included in that Motion, contains three pages of the referenced 2025 appeal. W.A.R.M. Motion dated March 18, 2025.¹

The appeal of the 2025 VR-2 Registration raises several issues: Appellants' relief sought in the instant appeal would "create a condition where the registration was not renewed annually," barring subsequent registration; that "W.A.R.M. Management is renting out less than the entire dwelling unit" and "the operation is "in violation" under 174-5"; and that this is not in strict compliance with Chapter 125, and thus fails to meet the second clause of 174-7(E). W.A.R.M. Addendum.

¹ The Town made no objection to the inclusion of this addendum in its later filed brief; Appellants do not object. Appellants independently seek judicial notice of the appeal and the contents of the Application as shown in W.A.R.M. Management's Addendum.

Maine courts have historically applied judicial notice to a wide variety of indisputable facts. *Cabral v. L'Heureux*, 2017 ME 50, ¶ 10, 157 A.3d 795, 797 (citing Field & Murray, *Maine Evidence* § 201.2 at 55-57 (6th ed. 2007)). Courts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings. *Id.* (internal citations omitted). As opposed to motion practice, courts can take judicial notice of agency determinations or a document filed in another court to establish the fact of the litigation in a straightforward manner, *Town of Mount Vernon v. Landherr*, 2018 ME 105, ¶ 14, 190 A.3d 249, 252-53 (collecting cases), and the existence and contents of filings made in regulatory proceedings. *See Office of the Pub. Advoc. v. PUC*, 2024 ME 11, ¶ 2 n.1, 314 A.3d 116, 118.

Here, both W.A.R.M. Management and the Town rely on mootness argumentation. W.A.R.M. Br. at 2-6, 7-12; Town Br. at 17-19. As set forth below, the appeal is not moot. If there were ever doubts concerning the vitality of the instant appeal, they are overcome by the fact of the 2025 appeal and the issues appealed thereunder. At a minimum, the existence and nature of that appeal is germane to the justiciability argument.

2. Appellants cross the threshold of justiciability due to the real and substantial controversy, admitting of specific relief of a conclusive character.

The Town raises threshold issues of justiciability. Town Brief at 17-19. The claim is mootness. W.A.R.M. commits its entire brief to justiciability. W.A.R.M. Brief. "Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character." *Halfway House v. City of Portland*, 670 A.2d 1377, 1379 (internal citations omitted). Mootness "is the doctrine of standing set in a time frame: The requisite personal interest that existed at the commencement of litigation (standing) must continue throughout its existence." *Id.* at 1379 (citing 82 YALE L. REV. 1363, 1384 (1971)). A case may become moot, and hence not justiciable, if the passage of time and the occurrence of events deprive the litigant of an ongoing stake in the controversy although the case raised a justiciable controversy at the time the complaint was filed. *Id.* at 1379-80.

- a. The instant appeal is not moot because this Court can fashion relief of a conclusive character and sufficient effects flow from the relief granted.

If sufficient practical effects can flow from this litigation, it is not moot. *Carroll F. Look Constr. Co. v. Town of Beals*, 2002 ME 128, ¶ 6, 802 A.2d 994, 996. The real and substantial controversy concerning statutory interpretation obviates mootness. *McGettigan v. Town of Freeport*, 2012 ME 28, ¶ 11, 39 A.3d 48, 51 (quotation marks and internal citation omitted). The Town misapplied §125-69(Y)(2), the plain language of which precludes the renewal under review

here. This Court must conclude that the proper application of §125-69(Y)(2)(B) to the challenged registration renewal (erroneously issued in October after expiry and forfeiture at the end of May) results in ineligibility of any further registration renewal for 12 Bogue Chitto Lane. *See* Blue Br. at 22.

A second issue of statutory interpretation is the meaning of the second clause of § 174-7(E) (“if the dwelling unit has met all requirements of this chapter.”) as it relates to § 174-5(A) (“STRs must comply (it cannot be in violation) with Chapter 125, Land Use Ordinance. Refer to Chapter 125 for information on where STRs are allowed, related definitions, and standards.”) *See* Blue Br. at 23-24.

The essential question, in view of the objectives and structure of the ordinance (Blue Br. at 9-12), concerns the mechanics of the forfeiture provision contained in §125-69(Y)(2)(a)(1) (A. at 34). The plain language of the ordinance sections auger toward forfeiture, expiry, and ineligibility, forever foreclosing VR-2 uses at 12 Bogue Chitto Lane. Conclusive statutory interpretation will obtain this relief, as Appellants have sought all along.

- b.** Even if technically moot, which it is not, the question presented is likely to arise again, and has arisen again in the context of the pending appeal before the Bar Harbor Zoning Board of Appeals.

Even when the case is technically moot, we have recognized three exceptions to the mootness doctrine and may reach the merits of the case 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. *Halfway House v. Portland* at 1380 (internal citations omitted).

The case is not moot, as set forth above. For the sake of argument, even if it were technically moot, two exceptions to the mootness doctrine indicate a decision on the merits: First, the collateral consequence of the denial of the 2023 permit renewal is that any further permit renewal for 12 Bogue Chitto Lane will be foreclosed, including the 2025 permit renewal currently under appeal at the Zoning Board of Appeals. This consequence, by the plain meaning of the applicable ordinances, has been detailed in Appellants' Brief. *See, e.g., Blue Br. p. 22.*

Second, the issues are not only capable of repetition, but have in fact recurred, as shown in W.A.R.M. Management L.L.C.'s Addendum: Despite being on actual notice concerning the violative nature of its rental practices (withholding the "Garden Suite"), W.A.R.M. Management, L.L.C. has persisted in this practice; the

Town is ignoring the plain meaning of its ordinance. The perennial blossom of statutory interpretation obviates technical mootness (if any).

3. The Town's Mandatory/Directory distinction does not avail.

The Town advances an untenable position concerning the timing of the registration, citing *Bradbury Mem'l Nursing Home v. Tall Pine Manor* 485 A.2d 634 (Me. 1984) (Town Br. at 21). This theory was first advanced by W.A.R.M. Management, L.L.C., in filings before the ZBA, and was debunked during hearing there. R. 0024:18-0025:6 (referencing §125-108(F) (A. at 028)).

The reasoning in *Bradbury Memorial* suggests that the permit here should not have been renewed. The review period at issue in that case was for the benefit of the applicants, and could be extended with their consent. *Bradbury Mem'l Nursing Home* at 640.² Here, the Code introduces strict time limits, and requires strict compliance, for the purpose of limiting and controlling STRs and eliminating non-conforming uses. *See* Blue Br. at 10. In contrast, the purpose of the Maine Certificate of Need Act was identifying and satisfying the need for healthcare services. *Bradbury Mem'l Nursing Home* at 641-642. For STRs, limiting the use

² Appellants have maintained all along that this matter should have been heard on W.A.R.M. Management's appeal of a registration denial (R. 00031:6-10). W.A.R.M. should have taken action, *via Bradbury Memorial* at 640 (legal basis to get an order requiring a decision). *See* R. 00027:1-6 ("Why is it that they did not ask, Where is my certificate for 12 Bogue Chitto so that I might comply with the ordinance?").

is beneficial to the health, safety and welfare of the inhabitants of Bar Harbor; for healthcare services, creating the use was the objective.

Assuming for the sake of argument that the timelines are directory, we must assess the Town's assertion that "where there were no outstanding violations relating to the property, [W.A.R.M. Management, L.L.C. was] entitled to a renewal registration." This argument is founded on the erroneous interpretation of the meaning of "in violation" at issue in this case. The Town claims it means notices of violation, where the code plainly defines it as the status of being in violation. This misinterpretation leads us to the final point, conflating permitting standards and prosecutorial discretion.

4. The Town conflates permitting standards and prosecutorial discretion.

The Town continues to attack the straw man concerning prosecutorial discretion and the power of enforcement. Town Br. at 23-27. Appellants have addressed this issue in their opening brief, p. 15-19, and do not wish to belabor the point, but would like to cite *Clark v. Town of Phippsburg*, 2025 ME 25, ¶ 27 n.8 to identify the distinction, which the Town declines to address, between enforcement action and decisions concerning meeting permitting standards.³ This case is the latter.

³ Appellants have argued this point all along: "Had this application actually been made in advance of the deadline and code enforcement had reviewed materials relative to it, it could not have made a finding that this was in fact in compliance with the land use ordinance." R. 00026:17-22. "Even if they applied within the deadline they're in violation and not in strict compliance with the code. Thus, this permit, it should never have been issued." R. 00031:22-00032:6.

WHEREFORE, Appellants ask this Court to take judicial notice of the pending appeal of the 2025 registration renewal for 12 Bogue Chitto Lane as set forth in the W.A.R.M. Addendum; find that this matter is not moot, as conclusive relief remains available; that irrespective of mootness, collateral consequences flow from reaching the merits and that the same issue has arisen before the Bar Harbor Zoning Board of Appeals. Appellants ask this Court to interpret the local ordinance provisions providing for VR-2 registration forfeiture, expiration and ineligibility for renewal; set forth the plain language definition of the term “in violation”; and recognize the identified distinction between prosecutorial discretion, on the one hand, and the application of review standards, on the other. Finally, Appellants request that this Court remand the matter to the Town with instructions to grant the appeal and deny the registration renewal issued October 30, 2023.

Dated: _____

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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' Reply Brief** to the following persons by sending them each a copy by electronic mail and two physical copies of the Appellants' Reply Brief to the addresses below.

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Dated at Portland, Maine this 24th day of March, 2025.

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CERTIFICATE OF SERVICE I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the e-mail address provided in the Board of Bar Overseers' Attorney Directory. I sent 10 paper copies of this brief to this Court's Clerk's office via FedEx, and I sent two copies to opposing counsel using the same carrier, at the address provided on the briefing schedule

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.7A(f), and conform to the form and formatting requirements of M.R.App.P 7A(g).