STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. HAN-24-365

MONIKA McCALLION et al.

Plaintiffs/Appellants

v.

TOWN OF BAR HARBOR

Defendant/Appellee

W.A.R.M. MANAGEMENT, LLC

Defendant-Intervenor/Appellee

ON APPEAL FROM THE SUPERIOR COURT
HANCOCK COUNTY, DOCKET NO. ELLSC-AP-2024-001

BRIEF OF APPELLEE TOWN OF BAR HARBOR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

This is an appeal under M.R. Civ. P. 80B by neighboring landowners from the granting of a permit for a short-term rental use in the Town of Bar Harbor. Because this appeal is moot, and because all requirements for the permit were met, this Court should affirm the decision of the local Board of Appeals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Factual Background

This is an appeal by Monika and Brandan[1] McCallion and Old Bears, LLC (collectively, the "McCallions") from the granting of W.A.R.M. Management, LLC's ("WARM") application for renewal of a permit for a short-term rental ("STR") use by the Town of Bar Harbor (the "Town"). STRs (formerly known as vacation rentals before the current regulatory scheme was enacted in 2021) are dwelling units rented for less than 30 days, and are made up of two types: vacation rental-1 (VR-1) and vacation rental-2 (VR-2). Town Code § 125-109 (A. 31-32); Town Code § 174-4 (A. 37-38). Both types of STRs are subject to an annual registration requirement. Town Code § 174-5(B) (A. 38); Town Code § 174-9(A) (A. 41). Annual registrations are due on May 31 of each year, and expire May 31 the following year. Town Code § 125-69(Y)(1)(a) (A. 33); Town Code § 174-6(A) (A. 39). The overriding distinction between VR-1s and VR-2s is that VR-1s are the owner's primary residence, whereas VR-2s are not. Town Code § 125-109 (A. 32). Accordingly, VR-2s are more restricted than VR-1s. VR-1s are

[1] The McCallions' complaint in this matter spelled Mr. McCallion's name both "Brandon" and "Brandan." (A. 10.) The McCallions' brief in this Court uses the latter spelling. The Town therefore uses that spelling as well.

allowed in more zoning districts than VR-2s, and VR-2s are subject to a cap on the total allowed number of registrations equal to 9% of the total dwelling units in Bar Harbor. Town Code § 125-69(Y)(1)(b) (A. 33). The total number of VR-2s in the Town is currently in excess of the 9% cap, meaning that new VR-2s cannot presently be registered. (A. 33; R. 34-35.)[2]

The Town's ordinances protect the rights of pre-existing VR-2 uses that would not otherwise be allowed, either because they are located in a district where VR-2s are not allowed, or because they would exceed the cap on the total number of VR-2s. Town Code § 125-69(Y)(2) (A. 33-34). Such existing VR-2s may continue so long as the owner continues to renew their registration annually by the May 31 deadline. (*Id.*) WARM's property at issue in this case, 12 Bogue Chitto Lane (the "Property") is located in the Shoreland Limited Residential zoning district, in which VR-2s are not allowed. (A. 17, 44, 66; R. 34-35, 436-37.) However, WARM is allowed to continue its pre-existing VR-2 use so long as it continues annually renewing its registration as outlined above. (A. 17, 33-34, 44, 66; R. 34-35.)

[2] References in this brief to "R." are to the Rule 80B record filed in the Superior Court.

WARM, via member Marcia Levitt, applied for a renewal VR-2 registration for the Property and paid the requisite registration fee on January 3, 2023, well before the registration deadline of May 31, 2023, but due to an error affecting the Town's just-launched online portal, called iWorQ, the Town failed to issue a permit. (A. 18-19; R. 35-38.) When the issue was later brought to the attention of the Code Enforcement Officer ("CEO"), Angela Chamberlain, the CEO investigated and concluded that WARM's renewal application had been properly and timely filed and accepted by the Town, but a permit was not timely issued due to the Town's own error. (A. 18-19; R. 35-38.) The CEO therefore issued WARM a renewal permit on October 30, 2023. (A. 19, 44-45; R. 35-36.)

Procedural History

The McCallions, who own multiple properties in proximity to WARM's Property, appealed the CEO's decision to the Town's Board of Appeals. (A. 46-64.) The Board held a de novo factual hearing at which the McCallions were permitted to present testimony and evidence, as well as cross-examine the CEO. (A. 17-19; R. 1-12, 16-33, 60-89.) The Board found that WARM "should have been issued" a renewal permit

before the May 31 deadline. (A. 18; R. 144-46.) The Board concluded that the CEO had the power to correct her own error in failing to issue the renewal permit, that the McCallions had failed to sustain their burden of proof, and denied the McCallions' appeal. (A. 17-19; R. 140-42.)

The McCallions appealed to the Superior Court pursuant to M.R. Civ. P. 80B. (A. 2, 10-16.)[3] On January 17, 2024—while the Rule 80B appeal was pending in the Superior Court—WARM applied for a 2024 renewal registration for the Property. (A. 65.) The CEO granted WARM's application and issued WARM a 2024 registration on January 24, 2024. (A. 66-67.) That 2024 renewal was not appealed. (Order on Town's Mot. to Take Judicial Notice dated July 23, 2024.)[4] It therefore

[3] The McCallions also filed, alongside their Rule 80B Brief, a "Motion for Trial on the Facts" under M.R. Civ. P. 80B(d). (A. 2, 10-16; Mot. for Trial dated April 1, 2024.) They asserted such trial (and discovery) was necessary because the nearly 500-page record was "missing several necessary, specific facts necessary for appellate review." (Mot. for Trial at 1.) According to the McCallions, the facts for which discovery and trial were required were that "W.A.R.M. Management was offering for rent, and renting, less than the entire dwelling" and that "W.A.R.M. Management did not post its unique registration number on all advertisements, including online advertisements." (Mot. for Trial at 2-3.) The Court denied the McCallions' motion, and gave them an opportunity to file a new brief in light of that ruling. (A. 3.) The McCallions did not do so, and have not challenged the denial of their Motion for Trial on the Facts in this appeal.

[4] Simultaneously with its brief in the Superior Court, the Town filed a motion requesting that the court take judicial notice of WARM's 2024 registration, and the lack of an appeal from that registration, supported by an affidavit of the CEO. (A. 3; Town's Mot. to Take Judicial Notice dated June 24, 2024.) *See* M.R. Evid. 201(b) (providing that courts "may judicially notice a fact that is not subject to reasonable dispute because it: (1) Is generally

became final 30 days later. Town Code § 125-103(A)-(B) (A. 23) (providing administrative appeals must be filed within 30 days of decision); Town Code § 174-10 (A. 10) (same). WARM's 2023 registration at issue in this appeal expired by its terms on May 31, 2024. (A. 33, 39, 45; R. 23, 35.)

Following briefing, the Superior Court (Stewart, J.) affirmed the decision of the Board of Appeals. The court concluded that there was substantial evidence in the record to support the decision of the Board, finding that all requirements for renewal of WARM's permit had been met, and the CEO was required to renew the permit for 2023.[5] (A. 7.) The court found that "there were no outstanding violations or notices of violation" making WARM ineligible for renewal. (A. 8.) The court properly rejected the McCallions' *post hoc* efforts to establish Code violations by WARM never found nor prosecuted by the CEO, which would have effectively bypassed the process by which municipal

known within the trial court's territorial jurisdiction; or (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see also D'Amato v. S.D. Warren Co.*, 2003 ME 116, ¶ 13 n.2, 832 A.2d 794 (taking judicial notice of minutes of Workers' Compensation Board meetings). No opposition was filed. (A. 3.) The Superior Court granted the motion and took notice of the 2024 renewal registration and the absence of any administrative appeal. (A. 3; Order on Town's Mot. to Take Judicial Notice dated July 23, 2024.) The McCallions do not challenge that order in this appeal.

[5] The Superior Court did not address the Town and WARM's arguments that the appeal had been mooted by the expiration of the 2023 renewal permit and the issuance of a 2024 renewal registration that was not appealed.

ordinances are enforced, and allowed the McCallions to usurp the Town's enforcement authority. (A. 8.)[6] This appeal followed.[7]

[6] In the Superior Court, the McCallions argued that they had been improperly denied the opportunity to cross-examine witnesses. The Superior Court held that this claim was without merit. (A. 8-9.) The McCallions have not raised the issue in this Court.

[7] Briefing in this matter was somewhat delayed. Shortly before their brief and the appendix were due to be filed, the McCallions filed motions seeking to enlarge that deadline and enable them to order a transcript of the hearing at which the Superior Court denied their Motion for Trial of the Facts. This Court granted the McCallions an opportunity to order the transcript and, because the they had filed their brief before the Court acted on the motions, allowed the McCallions an opportunity to file a new brief. After obtaining the transcript, the McCallions declined to submit a new brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the McCallions' appeal from WARM's 2023 permit is moot, where that permit has expired by its terms and has been supplanted by a 2024 permit that has not been appealed.

2. Whether the Town properly issued WARM a 2023 permit where WARM's application was timely and satisfied all criteria for issuance of the permit.

SUMMARY OF ARGUMENT

1. The McCallions' appeal from WARM's 2023 VR-2 registration is moot because that registration has expired by its terms, and has been replaced with a 2024 registration that has not been timely appealed.

2. WARM timely applied for renewal of its VR-2 registration for 2023 and paid the required fee, and there were no outstanding violations with respect to its property. As such, WARM was entitled to renewal of its registration, and such renewal would have issued but for a technical glitch in the Town's then-new online registration system. Under those circumstances, the Town properly issued WARM a renewal registration after the passage of the May 31 deadline for registrations. The McCallions' after-the-fact attempts to establish alleged violations never investigated nor prosecuted by the Town are irrelevant.

ARGUMENT

Because the Board of Appeals reviewed WARM's application de novo, its decision is the operative one for purposes of judicial review. *See* Town Code § 125-103(D)(2)(a) (A. 26) (providing that Board's review from appeals from the granting of a permit by the CEO is by evidentiary hearing); *see also* 30-A M.R.S. § 2691(3)(C) (providing that municipal boards of appeals review matters de novo unless otherwise established by charter or ordinance); *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 16, 868 A.2d 161 (stating that where board of appeals reviews a matter de novo, the board of appeals decision is "the operative decision of the municipality" for purposes of judicial review).

In accordance with constitutional separation of powers, judicial review of local and administrative decision-making is "deferential and limited." *Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835. On appeal pursuant to M.R. Civ. P. 80B, a municipality's decision will be vacated only if "it includes an error of law, an abuse of discretion, or a finding not supported by substantial evidence." *D'Alessandro v. Town of Harpswell*, 2012 ME 89, ¶ 5, 48 A.3d. 786. The

party seeking to overturn a decision bears the burden of persuasion on appeal. *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 13, 153 A.3d 768.

Findings of fact will not be vacated if there is any competent evidence in the record to support them, even if the record contains evidence that would support a contrary finding. *See, e.g.*, *Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bridgton*, 2009 ME 64, ¶ 11, 974 A.2d 893; *Phaiah v. Town of Fayette*, 2005 ME 20, ¶ 8, 866 A.2d 863. This means that the party seeking to overturn a municipal decision has "the burden of establishing that the evidence *compels* a contrary conclusion." *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 5, 237 A.3d 175 (quoting *Leake v. Town of Kittery*, 2005 ME 65, ¶ 7, 874 A.2d 394) (emphasis added). Courts will not weigh the evidence or substitute their judgment for that of the municipality. *Phaiah*, 2005 ME 20, ¶ 8, 866 A.2d 863.

Interpretation of an ordinance is a question of law reviewed de novo. *See, e.g.*, *Hollenberg v. Town of Union*, 2007 ME 47, ¶ 5, 918 A.2d 1214; *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 10, 836 A.2d 1285. Ordinances are construed according to their plain

meaning. *Stewart v. Town of Sedgwick*, 2002 ME 81, ¶ 6, 797 A.2d 27. In interpreting the language of an ordinance, the Court considers "both the objectives sought to be obtained and the general structure of the ordinance as a whole." *Isis Development, LLC v. Town of Wells*, 2003 ME 149, ¶ 3, 836 A.2d 1285 (quoting *Priestly v. Town of Hermon*, 2003 ME 9, ¶ 7, 814 A.2d 995).

I. The McCallions' Appeal from WARM's 2023 Registration Is Moot.

"An 80B appeal, like any other case, is moot '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.'" *Carroll F. Look Constr. Co. v. Town of Beals*, 2002 ME 128, ¶ 6, 802 A.2d 994 (quoting *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379-80 (Me. 1996)). WARM's 2023 registration expired by its terms on May 31, 2024. (R. 23, 35, 209, 444, 496.) WARM applied for renewal for 2024 on January 17, 2024. App. 65.) The CEO granted WARM's application and issued WARM a 2024 registration on January 24, 2024. (A. 66-67.)[8] That 2024 registration

[8] As the CEO testified at the hearing, registration applications are accepted between January 1 and May 31 each year and acted on promptly; the Town encourages applying

has not been appealed. (Order on Town's Mot. to Take Judicial Notice dated July 23, 2024.) The 2024 registration is therefore final. Town Code § 125-103(A)-(B) (A. 23) (providing administrative appeals must be filed within 30 days of decision); Town Code § 174-10 (A. 42) (same). Where the 2023 registration from which the McCallions appeal is no longer operative, and has been supplanted by a 2024 registration from which no appeal has been filed or can now be timely filed, this appeal is moot. *See Carroll F. Look*, 2002 ME 128, ¶ 6, 802 A.2d 994.

To the extent the McCallions might argue in their reply that there are sufficient collateral consequences flowing from the 2023 renewal that justify application of an exception to mootness, *see*, *e.g.*, *Hamilton v. Bd. of Licensure in Med.*, 2024 ME 43, ¶ 9, 315 A.3d 762 (discussing exceptions to mootness), their failure to appeal the 2024 renewal cuts off any such consequences. WARM's unchallenged and final 2024 registration provides the basis for future renewals, and precludes denial of future renewals on the grounds that registration allegedly "should" have lapsed in 2023. *See Town of Mount Vernon v. Landherr*, 2018 ME 105, ¶ 15, 190 A.3d 249 ("The doctrine of res judicata applies to

long before the May 31 deadline. (R. 35-38.) Like it did in 2024, WARM likewise applied for its 2023 application in January of that year. (A. 43; R. 36, 38.)

decisions made by municipal bodies as well as to judgments issued by the court.")

II. WARM's Timely 2023 Renewal Application Was Properly Granted.

Even if the McCallions' appeal were not moot, it must be denied on the merits. Despite the McCallions' efforts to confuse the issues, the question in this case is simple: was WARM's renewal application properly granted? The answer is yes.

A. WARM'S Application Was Timely.

The Town's ordinances provide: "The Code Enforcement Officer shall issue a registration to the property owner if the dwelling unit has met all requirements of this chapter." Town Code § 174-7(E) (A. 39). With respect to renewals, the ordinances provide:

> [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-2 registration and will be required to

> follow all the requirements for a new VR-1 or new VR-2 registration.

Town Code § 125-69(Y)(2)(b) (A. 34).

Here, the record shows that WARM timely applied for renewal of its VR-2 registration, as required by the Town's ordinances. Indeed, it applied and paid the requisite fee just after the Town began accepting 2023 applications in January, approximately 5 months before the May 31 deadline. (A. 18; R. 37-38.) It did so, as required, via the Town's new online portal, which had just gone live days before WARM's application. (R. 35-36.) Due to an error in the Towns' new online system, the CEO was not aware of and did not act on WARM's application until after the May 31 deadline, when the issue was brought to her attention and she investigated the matter. (A. 18-19; R. 35-60.)

Where WARM applied and paid the fee well before the deadline, and where there were no outstanding violations relating to the Property (A. 18-19; 44; R. 73-74), they were entitled to a renewal registration, and one would have issued but for the errors affecting the Town's online portal (A. 18-19; R. 38-41). Town Code § 174-7(E) (A. 39) (providing that the CEO "shall issue a registration" if the owner has met the relevant requirements). Notably, there is nothing in the Town's ordinances that

requires the CEO to *act* on renewal applications filed by the May 31 deadline by any particular date, or that action on timely applications *after* that date is prohibited.[9] Even if there were, legislative requirements that administrative agencies or officials take action within a certain period of time are "directory" rather than mandatory or jurisdictional unless the legislature clearly provides otherwise. *Bradbury Mem'l Nursing Home v. Tall Pines Manor Assocs.*, 485 A.2d 634, 640 (Me. 1984) (noting that directory time limits "serve the hortatory purpose of curbing bureaucratic delay, and give an applicant a legal basis for going to the Superior Court to get an order requiring the [agency or official] to render a decision"); *see also Anderson v. Comm'r of Dep't of Human Servs.*, 489 A.2d 1094, 1099 (Me. 1985) (applying *Bradbury*). It was therefore wholly proper for the CEO to issue WARM the registration to which it was entitled when the outstanding application was brought to her attention.[10]

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[9] The McCallions' reference to situations where landowners failed to timely *apply* for permits before the applicable deadline is inapposite on its face. (Blue Br. 21.)

[10] The McCallions appear to suggest, in passing fashion, that WARM's January 2023 application was "incomplete" and was "supplemented" after the May 31 deadline. (Blue Br. at 5.) They fail to develop this argument at all, and have therefore waived any such argument for purposes of appeal. *See, e.g.*, *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (stating that issues referred to in a perfunctory manner are waived). Even if such an argument were preserved, it would be meritless. In the Superior Court, the McCallions

The McCallions complain that the Board of Appeals, granted WARM some form of impermissible "equitable" relief. (Blue Br. at 19-22.) Not so. WARM was entitled to its registration by the plain language of the Town's ordinances. Town Code § 174-7(E) (A. 39) (providing that the CEO "shall issue a registration" if the owner has met the relevant requirements). Administrative bodies have inherent authority to reconsider decisions and correct their own errors. *See Cardinali v. Berwick*, 550 A.2d 921, 921 (Me. 1988); *Jackson v. Town of Kennebunk*, 530 A.2d 717, 717 (Me. 1987). It is not necessary to advert to that authority here, however, where a past action was not being "reconsidered," but rather, action was belatedly being taken on an application for the first time. At bottom, the McCallions' argument is that WARM should permanently lose its right to use its property as a

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cited a portion of the transcript appearing at pages 88 to 89 of the record as supposedly showing that the application was "not complete." (Pls.' Rule 80B Br. at 13-14.) That testimony related to a screenshot from the iWorQ system where a number of fields appeared to be blank. (R. 88-89, 428.) That screenshot was part of a January 4, 2023, email from the Town to iWorQ regarding the problems they were experiencing with the new system. (R. 426.) As the CEO and administrative assistant Tammy DesJardin explained, one of the problems they were having with the new system was that applicants were completing the online forms, but they were not being received by the Town, or were being received with blank fields that had in fact been completed by the applicant. (R. 39, 43-44, 46-47.) In other words, the apparent "incompleteness" of the application in that screenshot was part of the very error that resulted in WARM's timely application not being acted upon until months later, through no fault on the part of WARM. WARM did in fact submit a completed application and pay the requisite fee long before the May 31 deadline, and that application is in the record. (A. 18, 43; R. 38, 40-41.) The record certainly does not "compel" the contrary theory that the McCallions casually seek to advance. *See Tomasino*, 2020 ME 96, ¶ 5, 237 A.3d 175.

VR-2 because a technical error on the part of the Town, entirely beyond WARM's control and without any fault on WARM's part, caused the Town to act on WARM's application later than it otherwise would have. Such an interpretation is both absurd and entirely untenable.[11]

B. There Were No Outstanding Violations Relating to the Property.

The McCallions argue that there were some undiscovered, unprosecuted code violations by WARM at the time of the renewal. But even if this were true, it is irrelevant. It is undisputed that *there were no outstanding notices of violation* at the time of WARM's application, or at any other time relevant to this case. (R. 72-74, 86-87.)[12] Even if some hypothetical, undiscovered violation existed, the CEO could not have denied the renewal application on the grounds of a violation *she had not found existed*. As the CEO explained, her task in the annual

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[11] The McCallions' suggestion that WARM can simply apply for a new registration (Blue Br. at 22) ignores the reality that VR-2s are not permitted in the district in which WARM's property is located, and in any event the number of VR-2s in the Town is capped, and that cap has been reached. (A. 17, 33-34, 44, 66; R. 34-35, 436-37.) Contrary to the McCallions' contentions, it is not "exactly how the Code is meant to work" (Blue Br. at 22) for a landowner to lose the ordinance's protections of pre-existing VR-2 uses because of a technical glitch in the Town's newly launched online portal, through no fault of the landowner.

[12] The CEO issued a notice of violation ("NOV") based on reports by the McCallions as to WARM's use of its property as an STR after May 31, 2023, where the Town's records did not reflect WARM's January 2023 application due to the technical error discussed above. (A. 18-19; R. 36, 264-65, 276-79.) Upon further investigation and discovery of the error affecting WARM's application, the CEO rescinded the NOV. (A. 19; R. 36-37, 274.)

renewal process is to determine whether there are any outstanding violations—not to undertake new investigations as to whether there were any potentially existing violations with respect to every applicant, every year. (R. 74.) Nor could the Board of Appeals have taken it upon itself to "find" such violations in the first instance, short-circuiting the process by which violations are investigated, noticed, and prosecuted under the Town's ordinances. The McCallions' contrary argument is neither feasible nor supported by the Town's ordinances.

If the CEO concludes a violation exists, she has the power to issue a notice of a violation. Town Code § 125-100(B) (A. 20). Such notice does not strip a violator of their relevant licenses or permits—rather, they would have an opportunity to cure the noticed violation. *See id*. (stating that notice of violation must "order[] that action necessary to correct [the violation] . . . be taken within some designated reasonable time"); Town Code § 174-9(B)(1) (A. 41-42) (providing that if CEO finds a violation of STR requirements, "written notice shall be given . . . of such violation . . . indicating the nature of the violation and ordering that action necessary to correct it be taken within a reasonable time determined by the [CEO]"). It would thereafter be up to the Town to

decide whether to take further enforcement action. *See* Town Code § 125-101(A)(1) (providing for CEO report of violation to Town Council for potential enforcement action "[i]f, after notice given pursuant to § 125-100B, the violation . . . is not abated or corrected within the specified time") (A. 20-21); *see also* Town Code § 174-9(B)(2) (A. 42) (providing that if STR violation is not corrected within time specified in the notice of violation, CEO shall report the violation to the Town Council and indicate any additional enforcement actions under consideration); *see also* Town Code § 174-9(C)(1) (A. 42) (providing for suspension of STR registration "for failure to correct a violation, per § 174-9B"). *See generally* M.R. Civ. P.80K (governing land use enforcement actions).

None of that occurred here, and the Court should decline the McCallions' invitation to pretend that it did. This is not a case where the CEO determined that a violation did or did not exist, but rather only that there were no outstanding notices of violation that prevented annual renewal of a VR-2 registration. Allowing private parties to turn the ministerial process of renewing an annual VR-2 registration into a general inquiry into alleged violations would raise separation of powers questions, where it would call upon the Board of Appeals to determine

whether violations occurred in the first instance, without the CEO making an initial determination.[13] *See* Town Code § 125-103(A) (A. 23) (authorizing Board of Appeals to "hear appeals from" decisions of a "municipal body or official who or which interprets this chapter"); *see also* 30-A M.R.S. § 2691(4) ("No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board.") And such a proceeding would pose serious due process problems where it could strip landowners like WARM of the right to continue legal uses without notice and opportunity to correct alleged violations as provided in the Town's ordinances. *See* Town Code §§ 125-69(Y)(2), 125-100(B), 125-101, 174-9(B)-(C) (A. 20-22, 33-34, 41-42).

The McCallions are effectively attempting to claim for themselves the power to enforce the Town's ordinances. They then seek to use that power to establish past violations of the ordinance, and thereby retroactively make the renewal of WARM's registration erroneous. That is simply not how any of this works. The power to enforce the Town's

[13] The absence of such a determination by the CEO distinguishes this case from *Raposa v. Town of York*, 2019 ME 29, ¶¶ 11, 13, 204 A.3d 129. If the McCallions seek review of whether a violation exists, their remedy is not through the annual registration process.

ordinances belongs to the Town alone. *See Salisbury v. Town of Bar Harbor*, 2002 ME 13, ¶ 11, 788 A.2d 598 (noting Maine law "precludes the court's intrusion into municipal decision-making when a municipality decides whether *or not* to undertake an enforcement action.") The decision to investigate an alleged violation and initiate enforcement action is a matter of the Town's discretion and not subject to judicial review. *See id.*; 30-A M.R.S. § 4452(1)(B) (stating that a CEO "may" issue a summons to an alleged violator); *see also Fox Islands Wind Neighbors v. Dep't of Envtl. Prot.*, 2015 ME 53, ¶ 25, 116 A.3d 940 (noting "agencies have a great deal of discretion when it comes to enforcement of the laws under their jurisdiction"). The Court should reject the McCallions' attempt to appropriate for themselves a private right to enforce the Town's laws that does not exist.

Even if the Court were to consider these alleged violations, they avail the McCallions nothing. The McCallions first argue that WARM was in violation because it was operating and advertising a STR without a valid registration. As discussed at length above, WARM had applied for and was entitled to such a registration, but for the Town's erroneous failure to properly process WARM's application and issue the

registration, due to a technical glitch with their new online portal.[14] (R. 36-37, 40-41, 71-72, 75.)

The McCallions next argue that WARM was in violation of the Town's ordinances because it advertised an optional upcharge for use of a garden suite on the property, and was therefore "renting out less than the entire dwelling unit." (Blue Br. at 17-18, 23-24; R. 25-26, 83, 86.) The McCallions' argument rests entirely on a single word in the definition of VR-2, which provides that a VR-2 is "[a]n *entire* dwelling unit that is not the primary resident of the property owner and is rented to a person or a group for less than 30 days and a minimum of four nights." Town Code § 125-109 (A. 32) (emphasis added). This stands in contrast to the definition of VR-1, which can be "[a] dwelling unit, or portion thereof, that is the primary residence of the property owner or on the owner's primary residence property and is rented to a person or a group for less than 30 days and a minimum of town nights."

[14] This Court has recognized that principles of equity may militate against municipal enforcement action in some circumstances. *See, e.g.*, *Auburn v. Desgrosseilliers*, 578 A.2d 712, 714-15 (Me. 1990) (holding municipality equitably estopped from bringing land use enforcement action where municipality encouraged violation).

Town Code § 125-109 (A. 32).[15] Up to two VR-1 registrations can be issued for a single property. Town Code § 125-69(Y)(1)(b)[1] (R. 444).

Nothing in the Town's ordinances requires a STR owner to provide guests with access to their entire property, or prohibits owners from charging more or less for different uses of the property.[16] This is a matter of contract between the owner and their guests. Rather, the inclusion in the definition of VR-2 the "entire dwelling unit" is plainly intended to prohibit the type of multiple-occupancy that is permitted for VR-1 properties, which can rent up to two portions of the property to different guests. Town Code § 125-109 (R. 490); Town Code § 125-69(Y)(1)(b)[1] (A. 33). In other words, an optional upcharge for access to a "garden suite" would not violate the Town's ordinances, whereas offering that garden suite for rent separately and independently of the rest of the property would. Those are simply not the facts of this case.

[15] A "dwelling unit" is defined as "[a] room or group of rooms which is designed, equipped and intended exclusively for use as residential living quarters by only one family, which contains independent living, cooking, sleeping, bathing and sanitary facilities, and which is separate and independent from other such rooms or groups of rooms." Town Code § 125-109 (A. 30).

[16] The McCallions twice asked the CEO whether such an arrangement would violate the Town's ordinances. On both occasions, the CEO answered that it would not. (R. 83, 86.)

CONCLUSION

WHEREFORE, the Court should affirm the decision and judgment of the Superior Court.

Respectfully submitted, dated at Bangor, Maine this 7th day of March, 2025.

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CERTIFICATE OF SERVICE

I, Jonathan P. Hunter, certify that I served this Brief of Appellee Town of Bar Harbor upon the other parties in this matter in accordance with Appellate Rule 1E, through their counsel indicated below:

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