STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. YOR-25-416

JUDITH ANDREWS

Plaintiff/Appellant

v.

TOWN OF KITTERY

Defendant/Appellee

and

CHIP ANDREWS, ET AL.

Parties in Interest

ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT

REPLY BRIEF OF PLAINTIFF/APPELLANT

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A decision by a municipal tribunal must be vacated when, as here, it constitutes an error of law. *Bizier v. Town of Turner*, 2011 ME 116, ¶ 12, 32 A.3d 1048. None of the arguments raised by the Town or the Developers in defense of the Board's unlawful decision to approve the Subdivision saves that decision from this fate.[1] The authority to relieve the Developers from complying with the requirements imposed by what the Town classifies as the "zoning" and "land use" provisions of the LUDO is vested in the BOA by 30-A M.R.S.A. § 4353, *Wister v. Town of Mount Desert,* 2009 ME 66, ¶¶ 24–26, 974 A.2d 903, which preempts the Board from exercising that power by, for example, waiving the Class III Standards, *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, ¶¶ 14, 19, 852 A.2d 58; *York v. Town of Ogunquit*, 2001 ME 53, ¶¶ 12–13, 769 A.2d 172; *Perkins v. Town of Ogunquit*, 1998 ME 42, ¶¶ 9, 15, 709 A.2d 106. Relatedly, this Court's decision in *York v. Town of Ogunquit*, clearly controls the outcome of this appeal and requires that this Court vacates the approval of the Subdivision, despite the efforts of Town and the Developers to draw a distinction in their favor between the instant action and that decision. 2001 ME 53, ¶¶ 12–13, 769 A.2d 172. Their arguments regarding any passing similarity between the Street Design Standards and the regulations contained in the Subdivision Ordinance is equally unavailing, as it is the fact that the Street Design Standards regulate all "Street[s]" in the Town that matters—not whether those

[1] This brief uses the terms defined by Andrews in her brief-in-chief in an identical manner.

standards happen to look (through their eyes) like subdivision regulations. Finally, it is Andrews' position that achieves the very public policy outcomes the Town and the Developers claim will be undermined if this Court rules in her favor. Because the Board erred as a matter of law when it approved the Subdivision, the Court must vacate the Superior Court's order and remand this matter to the Superior Court for the entry of an order vacating that approval.

I. THE TOWN'S ARGUMENT THAT THE BOARD COULD WAIVE THE CLASS III STANDARDS BECAUSE THEY ARE NOT "ZONING" REGULATIONS IS MISLEADING AND WRONG.

A. The Town Failed to Preserve Any Argument that the Class III Standards Are Waivable Because They Are Not "Zoning" Regulations.

Setting aside, for a moment, the argument's lack of merit, the Town's claim that the Board could waive the Class III Standards because they do not fit the Town's crabbed definition of a "zoning" regulation is not—and cannot—be grounds for the Court to affirm the Board's decision to approve the Subdivision because the Town did not preserve this argument for consideration by this Court. "No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue." *Fitch v. Doe*, 2005 ME 39, ¶ 27, 869 A.2d 722. According to this doctrine, a party is barred from raising novel arguments with this Court even when, in the context of a Rule 80B appeal, (a) the Superior Court acted as the intermediate appellate tribunal and (b) this Court directly reviews the administrative action that is the

subject to appeal.[2] *Sherwood v. Town of Kennebunkport,* 589 A.2d 453, 454 & n.1 (Me. 1991); *Valente v. City of Westbrook*, 543 A.2d 1373, 1374 n.1 (Me. 1988). It also applies with equal force and effect to a governmental entity whose decision is under review. *See, e.g., Town of Levant v. Seymour*, 2004 ME 115, ¶ 13, 855 A.2d 1159. The failure to preserve is a fatal defect. *Brown v. Town of Starks*, 2015 ME 47, ¶ 6, 114 A.3d 1003.

In order to have preserved its argument that the Class III Standards are waivable because they are not "zoning" regulations in its brief to this Court (the "**Law Court Brief**"), the Town needed to present that issue in its *Defendant's Rule 80B Brief* to the Superior Court (the "**Superior Court Brief**") in a clear enough manner that "there [was] sufficient basis in the record to alert the court and any opposing party to the existence of that issue[.]"[3] *Farley v. Town of Washburn*, 1997 ME 218, ¶ 5, 704 A.2d 347.

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[2] There are limited exceptions to this general rule, but none of them apply here. *See, e.g., Warren Const. Group, LLC v. Reis,* 2016 ME 11, ¶ 9, 130 A.3d 969. ("[U]nless a fundamental liberty interest is at stake, we will not reach an issue that is raised for the first time on appeal.").

[3] The Court should recognize that the primary arguments raised by the Town (for the first time with this Court) and the Developers (in its briefs to this Court and the Superior Court) are significantly different. The Town's position is that the only constraint on a planning board's waiver authority is that it cannot waive standards that appear in the part of an ordinance dividing a municipality into zoning districts. Law Ct. Br. 7–13. This argument concerns *where* in an ordinance a particular provision is codified and is premised on a distinction between a general "land use" ordinance and a "zoning" ordinance, which the Town defines in this context as a "subset land use ordinance[s] 'that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district.'" Law Ct. Br. 9 (quoting 30-A M.R.S.A. § 4301(15-A)). By contrast, the Developers contend that planning boards can waive any ordinance standards (no matter where they are codified) if they are "technical" standards but not "core" zoning requirements, which the Developers define as standards related to "lot size, setbacks, building heights, and road frontage." Developers Br. 7–9, 11–14. This argument concerns *what* a particular ordinance provision regulates. The clear distinction between these two position is made plain by applying them to the same facts: if a municipality codified a uniform road frontage requirement in a part of an ordinance that applied to the entire municipality (i.e., in what the Town would call a "land use" ordinance), then the Town's position would be that those requirements *are* waivable on the grounds that they are not codified in its "zoning" ordinance.

The Town has failed to satisfy that standard. *Nowhere* in the Superior Court Brief did the Town raise an argument remotely resembling the claim the Town makes for the first time with this Court. Instead, the Town rested its defense of the Board's decision to grant the Waivers on three propositions: (1) the definition of "Street" in the LUDO is so narrow as to only include streets within subdivisions (Super. Ct. Br. 6); (2) the Board has the power to waive an ordinance standard whenever that waiver does not frustrate the purpose and intent of that standard (Superior Ct. Br. 5; Law Ct. Br. 13–14); and (3) the Board's waiver authority extends to any ordinance standard that resembles a subdivision regulation (Superior Ct. Br. 6–7; Law Ct. Br. 14–16).[4] None of these arguments concern any distinction between a "zoning" regulation and an ordinance standard of general applicability. Because the Town never presented an argument on that subject to the Superior Court, the Town is prohibited from raising it at this stage in the appeal.

The Developers' argument leads to the opposite conclusion: that because "road frontage" is, in substance, a regulation they define as a "core" zoning requirement, it cannot be waived, regardless of (a) where it appears in an ordinance or (b) whether it varies between zoning districts. Therefore, even if the Town could hypothetically rely on the argument that the Developers *did* preserve in order to properly raise their "zoning" argument, which is not an idea this Court has ever endorsed when considering whether an argument has been waived by a particular party, any such reliance would be futile because the Developers raising *their* argument with the Superior Court failed to "alert the court and any opposing party" to the existence of the *Town's* argument to this Court. *See Brown*, 2015 ME 47, ¶ 6, 114 A.3d 1003.

[4] The Town did not preserve the policy argument it sets forth in Section VI.D of the Law Court Brief either. The fact that Andrews addresses the merits of the arguments waived by the Town should not be construed as Andrews waiving her objection to the Court considering them at all.

This argument is also barred by the related doctrine that a party is prohibited from changing the theory of it case on appeal. *Teel v. Colson*, 396 A.2d 529, 535 (Me. 1979). The argument appearing in the Law Court Brief is *directly contrary* to the argument the Town presented to the Superior Court. In the very first sentence of the "Argument" section of the Superior Court Brief, the Town asserts that "[c]ontrary to the Plaintiff's assertions, the Street Standards *are not* generally applicable zoning standards within the LUDO." Super. Ct. Br. 4 (emphasis added). The Town then goes on to interpret *York* "to hold that a road width standard required by *both* the town's subdivision ordinance *and as a generally applicable standard in its zoning ordinance* could not be waived by the planning board." Super. Ct. Br. 5 (emphasis added). Here, the Town takes the opposite position: that this Court held in *York* that the only reason the planning board could not waive an ordinance standard was because it was a "zoning" regulation and *not* an ordinance standard of general applicability. Law Ct. Br. 11–12. Because the foundational premise of the Town's "zoning" argument is that the Street Design Standards are ordinance standards of general applicability and that premise is directly contrary to its position before the Superior Court, the Town cannot now defend the Board's approval of the Subdivision on those grounds.

B. The Town's Argument that the Board Has the Authority to Waive Ordinance Standards of General Applicability Is Meritless.

Even if the Town could be heard on that argument, it is not a basis for the Court to affirm the approval of the Subdivision because it is founded on a misinterpretation of

applicable precedent. The semantic distinction between "zoning" and "land use" ordinances is a vestigial remnant of the separate statutory grants of authority by the Legislature to municipalities to enact "zoning" and "police power" ordinances dating back to 1943, which "r[an] simultaneous but parallel courses serving different purposes." *Town of Waterboro v. Lessard*, 287 A.2d 126, 129 (Me. 1972); *see Inhabitants of Town of Boothbay v. Nat'l Advert. Co.*, 347 A.2d 419, 422 (Me. 1975); *Town of Windham v. LaPointe*, 308 A.2d 286, 290 (Me. 1973). Without enacting a "zoning" ordinance, a municipality could only exercise the police power for the purposes identified in 30 M.R.S.A. § 2151 (1964), which was not considered to extend to typical zoning matters like the "location of buildings, size and open spaces of real estate, population density, and setback of structures along ways." *Lessard*, 287 A.2d at 129*; see LaPointe*, 308 A.2d at 292. By contrast, the adoption of a zoning ordinance authorized a municipality to regulate a host of subjects, including *not only* the location of certain types of land uses *but also* dimensional standards like setbacks. 30 M.R.S.A. § 4953 (1964); *see Lessard*, 287 A.2d at 129 (concluding that although the municipality *could have* established minimum building setbacks as an exercise of its power to enact zoning ordinances pursuant to 30 M.R.S.A. § 4953 (1964), it had erred by implementing a setback requirement under its police powers). "Municipal home-rule reversed this prior foundational doctrine," replacing the enabling acts with a general (but limited) grant of home rule authority that effectively joined the formerly "parallel courses" of zoning and police power authority

under a single doctrine.[5] *See Clardy v. Town of Livermore*, 403 A.2d 779, 781 (Me. 1979).

If these developments left any remaining doubt about whether the distinction between Euclidean zoning ordinances and municipality-wide land use regulations dictated the scope of power vested in boards of appeals, that doubt was fully resolved by this Court in *Wister v. Town of Mount Desert,* which confirmed that the Legislature has vested in boards of appeals the power to grant variances from zoning ordinances *and* ordinances of general applicability under 30-A M.R.S.A. § 4353:

> Whether an ordinance is labeled as regulating 'zoning' or 'land use' or . . . both, makes no difference in application of section 4353. Section 4353 applies to govern the standards for local board of appeals' consideration of applications for variances from specific requirements such as setback limitations . . . To suggest that the ZBA could not consider a variance request from a setback requirement found in a land use ordinance of town-wide application would represent a significant departure from current practice. We decline to do so.

2009 ME 66, ¶¶ 24–26, 974 A.2d 903 (emphasis added) (quotation marks and citations omitted) (characterizing as "dicta" the language in prior decisions "suggest[ing] that section 4353(4) empowers a municipal board of appeals to grant setback variances from

[5] This distinction remained relevant in only limited contexts, such as in cases like *LaBay v. Town of Paris* that concerned whether the *rights* afforded to property owners by zoning ordinances, such as vested rights in a permit or the right to maintain a legally nonconforming use, protected against the *enforcement* of police power ordinances, which were valid only if they did not "offend due process under the United States and Maine Constitutions." 659 A.2d 263, 266 (Me. 1995). Likewise, the Court has considered the distinction when it came to whether municipalities were obligated to take certain steps in order to enforce an ordinance provision, which were only required if that provision was part of a "zoning" ordinance. *See, e.g., Benjamin v. Houle*, 431 A.2d 48, 50 (Me. 1981) (rejecting an argument that a municipality had to adopt a zoning map and comprehensive plan to enact municipality-wide regulations that did not divide the municipality into zoning districts). It was only through these incredibly narrow lenses that the Court looked to whether a particular regulation applied to properties within a specific zoning district or municipality-wide to classify a particular regulation as "zoning" or an exercise of the municipalities' limited police powers.

zoning ordinances *but not from other land use ordinances*" (emphasis added)). Therefore, the Town's argument that the Street Design Standards applying to all "Street[s]" within its jurisdiction removed them from the ambit of 30-A M.R.S.A. § 4353 is plainly meritless; those regulations are *exactly* the kind of "specific requirements" that applicants must comply with *unless* they obtain a variance from the BOA. *See Wister,* 2009 ME 66, ¶¶ 24–26, 974 A.2d 903.

The Town's contention that *York* establishes that municipalities *can* waive ordinance standards of general applicability is equally unavailing. Law Ct. Br. 11–13. That is the *antithesis* of the Court's holding in *York*, which is that a planning board acts "beyond its authority" when it purports to waive compliance with an ordinance standard that applies to "all" streets of a certain category within the municipality—not just streets of that type located in subdivisions or certain zoning districts. *Id.* ¶¶ 4 n.3, 12–13 (holding that a planning board erred as a matter of law by granting a waiver for a regulation that applied to "[a]ll collector streets" in the municipality). Whether the provision waived by the planning board happens to appear in an ordinance that has the word "Zoning" in its title does not (a) override the provision's substance in imposing a regulation that applies municipality-wide or (b) dictate whether it is waivable.[6] *See Wister,* 2009 ME 66, ¶¶ 24–26, 974 A.2d 903.

[6] The sole basis for the Town's interpretation of *York* appears to be that the regulation under consideration was contained in the "Ogunquit *Zoning* Ordinance." *York*, 2001 ME 53, ¶ 11, 769 A.2d 172 (emphasis added); *see* Law Ct. Br. 11–12. Such an elevation of form over substance should not be endorsed. *Lewiston Daily Sun, Inc. v. City of Auburn,* 544 A.2d 335, 337 (Me. 1988).

The only municipal tribunal that the Legislature has vested with the authority to relieve an applicant from complying with ordinance standards of general applicability like the Class III Standards is a board of appeals. *York,* 2001 ME 53, ¶¶ 12–13, 769 A.2d 172. The grant of that power by the Legislature through 30-A M.R.S.A. § 4353 to boards of appeal preempts its exercise by planning boards. *Perkins,* 1998 ME 42, ¶¶ 9, 15, 709 A.2d 106. The waiver authority vested in a planning board by a subdivision ordinance extends only to the provisions of *that* ordinance—not to regulations that apply more broadly within the municipality. *York,* 2001 ME 53, ¶¶ 12–13, 769 A.2d 172. Because the Board, by issuing the Waivers, usurped the BOA's exclusive authority to grant relief from the Class III Standards in the form of a variance, the Board acted illegally by not requiring the Developers to satisfy those standards.[7] *Id.* Consequently, the Court must vacate the approval of the Subdivision.

[7] By the same token, the Developers' argument that planning boards can waive any "technical" ordinance standard does not withstand scrutiny. Developers Br. 7–9, 11–14. This Court has never even drawn that distinction, let alone indicated that it determines if a regulation can be waived by a planning board. There is also no way to square that argument with this Court's holding in *York*: if they are correct, then the planning board in *York* did not err by waiving compliance with a regulation that controls the width of "[a]ll collector streets," given that the Developers would classify that regulation as merely a "technical" standard. *See York* ME 53, ¶¶ 4 n.3, 12–13, 769 A.2d 172.

II. THE TOWN AND THE DEVELOPERS MISSTATE AND MISAPPLY THE BRIGHT LINE RULE THAT CONTROLS THE OUTCOME OF THIS APPEAL.

A. The Board's Waiver Authority Does Not Depend on Whether the Issuance of a Particular Waiver Frustrates Zoning Requirements.

The Town's and the Developers' proposition that a planning board can waive compliance with *any* ordinance standard if the board concludes on an *ad hoc* basis that such a waiver does not "circumvent[ ]" or "frustrate" zoning requirements is directly contrary to precedent.[8] Law Ct. Br. 13–14; Developers Br. 16–17. Planning boards simply lack the authority to waive ordinance standards of general applicability like the Class III Standards; their power is not contingent on whether the grant of any particular waiver is counter to the supposed purpose or objective of (a) the regulation the board purports to waive or (b) a land use ordinance as a whole. *See Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58 ("As we held in *Perkins* and *York*, a Planning Board's modification of a binding zoning requirement *is*, in effect, a variance that must instead be committed to the discretion of a ZBA." (emphasis added)). What matters instead is the substance and scope of that regulation—i.e., whether it applies *exclusively* to subdivisions or *generally* to the entire municipality. If it falls into the former category, the regulation is waivable. *York,* 2001 ME 53, ¶ 11, 769 A.2d 172; *see Sawyer*, 2004 ME 71, ¶ 14, 852 A.2d 58. If it

[8] This Court, in *Perkins,* did discuss how the purported "waiver" of a general ordinance provision "frustrates the purpose of the *zoning statute*" (30-A M.R.S.A. § 4352), *Perkins*, 1998 ME 42, ¶ 15, 709 A.2d 106 (emphasis added), but it has never instructed that the purpose of a *particular ordinance regulation* dictates whether that regulation may be waived by a planning board.

is in the latter category, then only a board of appeals can provide relief from that regulation by issuing a variance in accordance with 30-A M.R.S.A. § 4353. *York,* 2001 ME 53, ¶¶ 12–13, 769 A.2d 172; *see Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58. Because the Street Design Standards apply *not only* to subdivisions *but also* to any road or way that satisfies the Town's broad definition of a "Street," the Board erred as a matter of law when it approved the Subdivision despite Acorn Lane violating the Class III Standards.

B. The Board's Waiver Authority Does Not Extend to Any Ordinance Provision that Happens to Resemble a Subdivision Regulation.

The Town and the Developers argue that the Board has the power to waive not only provisions of the Subdivision Ordinance but any regulation of general applicability that happens to be "implicated in" subdivision review. Law Ct. Br. 15; *see* Developer Br. 13–14. That argument is directly contrary to this Court's holding in *York* that a planning board could *not* waive an ordinance standard of general applicability *despite* the fact that (a) the planning board was considering it in the context of subdivision review and (b) that same regulation *also* appeared in the subdivision ordinance. *York,* 2001 ME 53, ¶¶ 12–13, 769 A.2d 172. It is irrelevant whether the regulation the planning board purported to waive is "akin to" or has a "close relationship to" subdivision regulations. Law Ct. Br. 8, 15. What matters is its substance and scope. Notably, neither the Town nor the Developers provide any test or framework for differentiating between (a) a general ordinance standard that bears a sufficient resemblance to a subdivision regulation to be waivable and (b) a standard that is so dissimilar from a subdivision

regulation as to be beyond a planning board's waiver authority. Instead, they just presume that planning boards (and courts) will know it when they see it. Without any clear parameters, any such grant of power by an ordinance to a planning board would likely be void for vagueness and unconstitutional. *LaPointe*, 308 A.2d 286 at 293 (recognizing that an ordinance that "delegates to [municipal authorities] an unbridled discretion in their decision . . . cloth[e] such agencies with an unconstitutional power to discriminate in its enforcement").

The fact is that *all* ordinance provisions resemble subdivision standards when they are viewed through the lens of subdivision review. That is the reason the bright-line rule this Court announced in *York* is so important: it provides clear guidance (1) to planning boards as to the limited extent of their waiver authority, which applies to regulations that apply exclusively to subdivisions, and (2) to applicants as to the need to apply to a board of appeals for a variance, which is necessary when they seek relief from (a) an ordinance standard of general applicability (like the Class III Standards) or (b) a standard that differs depending on the zoning district in which a property is located.[9] *See Wister,* 2009 ME 66, ¶¶ 24–26, 974 A.2d 903. Without it, (a) planning boards would be forced to deal with and decide waiver requests based on convoluted

[9] Nor does a planning board's power to waive an ordinance standard depend on if the ordinance has generally provided that board with jurisdiction to review various types of development that *tend* to implicate the regulation the board purported to waive. Law Ct. Br. 14–16. The power vested in planning boards to *review* and *approve* various types of developments does not provide it with any inherent authority to *waive* compliance with the ordinance standards it is required to review and enforce when considering an application. 30-A M.R.S.A. § 4353 preempts any such grant of authority. *Perkins,* 1998 ME 42, ¶¶ 9, 15, 709 A.2d 106.

arguments by applicants regarding the *resemblance* of the regulation they want waived to a provision of a subdivision ordinance and (b) applicants would be forced to guess as to which tribunal has the authority to grant that permission. Because the scope of the Board's waiver authority did not depend on whether or not the Class III Standards are "implicated in" or have a "close relationship to" subdivision review, the Board committed an error of law by not requiring the Developers to comply with those standards.

III. APPLYING PRECEDENT ACHIEVES THE VERY POLICY OBJECTIVES THE TOWN AND THE DEVELOPERS COMPLAIN ARE IMPLICATED BY A DECISION VACATING THE APPROVAL OF THE SUBDIVISION.

It is difficult to understand the complaints by the Town and Developers that the work of municipalities in administering their ordinances will be seriously "hamper[ed]" or "hobble[d]" if required to follow applicable precedent given that they are the ones proposing that municipal tribunals apply a test for determining the scope of their waiver authority that is entirely subjective.[10] *See* Law Ct. Br. 17–18; Developers Br. 16–17. Clarity in the law promotes the efficient administration of the law. Applying the amorphous standard they put forward leads to the very parade of horribles they claim will occur if the Court reaffirms its straightforward holding in *York* that ordinance

[10] It is equally difficult to track the Developers' claim that Andrews's interpretation of precedent would mean that "[t]echnical standards applicable to subdivision" would be "held to an even *higher* standard of review than those core zoning components eligible for variances." Developers Br. 16 (emphasis added). Andrews's argument is ordinance standards of general applicability must be held to the *same* standard—i.e., the test for a variance set forth in 30-A M.R.S.A. § 4353.

provisions of general applicability are *not* waivable by planning boards. Moreover, the premise that municipalities will be required to do *any* additional work to comply with the law is absurd. Whether relief from ordinance standards of general applicability comes from a planning board (as a waiver) or a board of appeals (as a variance) makes no difference in terms of the work a municipality and its tribunals perform. Either way it is a multi-part process requiring review of the substance of an application and a request for a waiver or variance. Even if the construction of a zoning ordinance depended in any way on the potential *policy* implications of that interpretation, the straightforward test set forth and applied in *York* provides municipalities with the necessary degree of clarity to ensure that (a) the proper tribunal considers any request to not comply with a provision of that ordinance and (b) that tribunal applies the correct test when exercising its authority.

CONCLUSION

For the foregoing reasons, the Court must vacate the Superior Court's order and remand this matter to the Superior Court for the entry of an order vacating that approval of the Subdivision.[11]

Dated: February 11, 2026.

[11] Notably, neither the Town nor the Developers disagree with Andrews that a ruling that the Board did not have the authority to waive the Class III Standards requires that the approval of the Subdivision be vacated—not just the portion of that approval involving the issuance of the Waivers. *See* Andrews Br. 30 n.23.

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