

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. BCD-25-434

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MADELON BROGDON

*Petitioners/Appellee*

v.

TOWN OF TREMONT

*Respondent/Appellee*

And

THEODORE KLEINMAN, et al.

*Parties in Interests/Appellants*

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ON APPEAL FROM BUSINESS AND CONSUMER COURT  
DOCKET NO.: BCD-APP-2025-00007

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BRIEF OF APPELLANTS/THEODORE KLEINMAN, JAMES COFFMAN,  
DANINE WELSH, ROBERT WELSH and LAURA LEVIN

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## **INTRODUCTION**

This matter is appealed from the Superior Court, Business and Consumer Division's September 18, 2025 decision granting Madelon Brogdon's appeal of the Town of Tremont Planning Board's campground development permit application. Appellants contend that the Court improperly usurped the municipal board's factfinding authority, substituted its judgment for that board's, and improperly directed the Planning Board and Code Enforcement Officer to grant permits based upon that judgment.

## **STATEMENT OF FACTS**

Appellants Theodore Kleinman, Danine Welsh, Robert Welsh, James Coffman and Laura Levin are owners of improved property in Tremont, Maine directly abutting property owned by Madelon Brogdon, on which she has applied for municipal Planning Board permission to develop a commercial campground. (*R.*, pp. 1-53). Appellants are directly affected by the proposed commercial development, including but not limited to noise, light, smoke and potential lost property value. (*See, e.g. R.* , p. 156).

Appellee Brogdon's property is located on a coastal lot adjacent to a public road. Some of the property is in the Town's Commercial Fisheries Maritime Activity shoreland zone ("CFMA"), and a larger, inland portion is in the Residential-Business ("R-B") zone. (*App.*, p. 217). A portion of the Brogdon property for which no development is proposed lies on the opposite side of the street, in the Town's Shoreland Resource Protection district. Id.

Brogdon's proposed site plan, as submitted, locates access to the proposed commercial campground on an existing driveway within the Town's Shoreland Commercial Fisheries/Maritime Activities ("CFMA") zoning district. (*App.*, p. 217; *R.*, pp. 2, 48). The municipal Land Use Ordinance ("LUO") defines the CFMA district as "areas within two hundred

fifty feet, (250') horizontal distance, of the shoreline...where the existing predominant pattern of development is commercial fishing and other maritime activities and contains areas which are suitable for functionally water-dependent uses." *LUO, Section III(D)(4) (App., pp. 94-95).*

There is no existing road access, as defined by municipal ordinance, to the property. Campgrounds are an allowed use within the R-B zone with Planning Board approval, but not in the CFMA district. (*App., p. 108*). In her application, Brogdon proposed access to the campground from a public way via a road to be created from the existing residential driveway, located within the CFMA zoning district. (*R., pp. 48, 526-527*). That zoning district prohibits campgrounds, transient accommodations, residences, and new roads or driveways, among many other non-water dependent uses. (*App., p. 108*). Brogdon's residence, which is the principal structure served by an existing driveway, exists as a lawfully nonconforming use within the CFMA zone, as it predates the ordinance's adoption. (*App., pp. 62-64*).

Brogdon's application depicts an existing driveway, approximately 250 feet in length, leading from Harbor Drive to a paved parking area or facility. (*R., p. 50*). Her project engineer referred to that access way as a "driveway" in a plan submitted to the Planning Board. (*R., pp. 364-365*). The application, as revised, contained a driveway plan, Sheet SK-1,

depicting a 200-foot long+/- way that the engineer expressly described as a “driveway.” (*App.*, p. 218). The application materials make clear that Brogdon, her engineer and counsel were all aware of applicable municipal ordinance definitions at the time of their submissions.

Brogdon’s Planning Board submissions demonstrated that the proposed development would include a physical expansion of the driveway within the shoreland zone, as well as an expansion of the use by more than 130 daily vehicle trips. (*App.*, p. 64; *R.*, pp. 32-33, 464-468). This expansion is in addition to the driveway’s conversion into a new road, which is prohibited in that zoning district.

The Planning Board initially denied the application, after finding that Brogdon did not meet her burden of proof with respect to the municipal Land Use Ordinance’s roads and driveways standards, set forth in Section VI(I), or the Town’s Site Plan Review Ordinance’s (“SPRO”) development access standards, described in Section IX(C). (*App.*, pp. 68, 70, 78, 86). The municipal Board of Appeals denied Brogdon’s appeal, and upheld the Planning Board’s decision. (*App.*, p. 66).

Following the Court’s remand to the municipal board for additional findings, the Planning Board accepted additional evidence and determined that the existing access way to the residence was a driveway as defined, and

not a road or trail. (*App.*, p. 63). The Board further confirmed the property's longstanding single-family residential status, finding that the existing sheds on the lot were used exclusively for storage, and contained no bathroom or kitchen facilities. (*App.*, p. 62). By implication, the Board also found that the driveway was less than 500 feet long, effectively declining Appellant's invitation to define the residence's large attached parking lot as part of the access way at issue. (*App.*, p. 63). Consistently with its prior ruling, the Planning Board denied the application.

Brogdon appealed to the Superior Court in accordance with M.R.Civ.P. 80(b), and the matter was transferred to the Business and Consumer Division. (*App*, pp. 32-50). On September 18, 2025, the Court issued a nearly 14-page decision granting the appeal, and directing the Tremont Planning Board to issue the requested development permit. (*App.*, pp. 10-23). The Court's decision roundly criticized the volunteer municipal board, proceeded to make several critical factual determinations that it found were not adequately addressed by the Planning Board, and expressly bypassed further municipal review. (*App.*, pp. 17-23).

The Court's decision noted that the Planning Board failed to make sufficiently detailed findings regarding the access way's length in determining whether the way is a driveway, road or trail. (*App.*, pp. 17-21).

Rather than remand the matter to the board for additional findings, it then proceeded to evaluate the record and substitute its judgment as to that length. *Id.* In doing so, the Court made an additional determination that a gravel parking area connected to the driveway constituted part of the access way, for length-calculation purposes and definitional determination, ignoring the fact that “parking facilities” are regulated independently of roads and driveways in the Land Use Ordinance, Table 1, Line 25. (*App.*, pp. 17-21; 108).

In the same vein, the Court’s decision found that the Planning Board had failed to engage in a factual analysis as to whether the proposed access way change from driveway to road was “similar to and no more objectionable to a use expressly permitted in the zone,” and therefore allowed by the Tremont Land Use Ordinance. (*App.*, p. 21). Rather than remand the matter for municipal consideration, the Court elected to make its own determination using an “analysis...so simple that a remand is unnecessary.” (*App.*, p. 22). The Court substituted its judgment for the local board and found that the access way had sufficient similarity to an “existing road or trail” as to be an allowed use in the zoning district. (*App.*, pp. 22-23).

Finally, the Court remanded the matter to the Planning Board “to approve Brogdon’s application and to direct the CEO to issue a permit to use the Existing Way to access the campground.” (*App.*, p. 23). This appeal followed.

## **STATEMENT OF ISSUES**

- I. The Matter is Ripe for Appeal Based Upon Exceptions to the Rule Prohibiting Interlocutory Appeals.
- II. The Superior Court Erred in Making Factual Determinations that are Within the Planning Board's Exclusive Jurisdiction.
- III. The Planning Board Did Not Abuse its Discretion in Denying Brogdon's Permit

## **SUMMARY**

The matter is ripe for appeal based upon the so-called death knell and judicial economy exceptions to the rule prohibiting interlocutory appeals. The Superior Court's factual determinations and directions to the municipal Planning Board and Code Enforcement Officer are inconsistent with applicable legal principles, and result in a definitive final disposition. If the Superior Court's determination that material supplemental factual findings are necessary, it is most efficient and economical that the matter be promptly remanded to the municipal board for independent additional determinations.

The Planning Board's factual findings and application of those facts to the Town's Land Use Ordinance and Site Plan Review Ordinance were well within its discretion; and its denial of the development permit application is fully supportable. That denial should be upheld.

## ARGUMENT

### ***I. The Matter is Ripe for Appeal Based Upon Exceptions to the Rule Prohibiting Interlocutory Appeals.***

#### ***A. Standard of Review***

In general, this Court may reverse a municipal board's decision only "for abuse of discretion, errors of law, or findings not supported by substantial evidence in the record." Wyman v. Town of Phippsburg, 2009 ME 77, ¶ 8. With respect to factual findings, the Court may not substitute its own judgment for that of the municipal board. Perrin v. Town of Kittery, 591 A.2d 861, 863 (Me. 1991). Substantial evidence exists "when a reasonable mind would rely on that evidence as sufficient support for a conclusion." Wister v. Town of Mt. Desert, 2009 ME 66, ¶ 27 (citing Camp v. Town of Shapleigh, 2008 ME 53, ¶ 9). In other words, a board's factual determinations must be upheld if there is any competent evidence in the record to support them. York v. Town of Ogunquit, 2001 ME 53, ¶ 14.

Questions of law involving ordinance language interpretation are reviewed *de novo*. Banks v Maine RSA No. 1, 1998 ME 272, ¶4. However, in construing an ordinance the Court must look to its plain meaning, considering the ordinance's language as a whole. Wister, at ¶ 17.

**B. Final Judgment Rule Exceptions Apply**

Maine Rule of Civil Procedure 80B(m) contemplates that a Superior Court decision remanding a case for further action or proceedings is not a final judgment, and that “all issues raised” on the Superior Court’s review shall be preserved. M.R.Civ.P. 80B(m). Here, unlike many Superior Court decisions taking issue with municipal land use decisions, the Court’s order remanded the matter to the Tremont Planning Board strictly to grant Brogdon’s requested permits based in part upon the Court’s factual determinations, and not for Board engagement in additional factfinding or decision-making.

Appeals from orders that remand for additional decision-making are interlocutory and unripe, unless an exception to the final judgment rule applies. Aubry v. Town of Mt. Desert, 2010 ME 111, ¶ 6 (citing Brickley v. Horton, 2008 ME 111, ¶ 10). There are three such exceptions: the death knell, collateral order and judicial economy exceptions. Id. at ¶ 5 (quoting E. Perry Iron & Metal Co. v. City of Portland, 2006 ME 52, ¶ 7). Here, the judicial economy exception applies, as the appeal will establish a “final, or practically final, disposition of the underlying litigation,” and the interests of justice require that the municipal Planning Board be permitted to access all of the tools granted to it by statute and ordinance in order to properly

evaluate the development application, even if a remand is deemed necessary. Id.

The Superior Court's decision fully addresses all outstanding issues relating to the proposed municipal permit, strips the Planning Board of all but the ministerial function of approving Brogdon's application, *and* directs the municipal Code Enforcement Officer to grant a road permit that has not even been requested, much less appealed. As such, it establishes a final, or practically final, disposition that will irreparably impact the Town's rights, as well as those of Appellants. In essence, the decision also implicates the death knell exception to the final judgment rule. Fitch v. Doe, 2005 ME 39, ¶ 9.

Failure to consider this appeal on its merits will result in an expensive and unnecessary delay while the municipal review authorities simply grant permits as directed, the municipal board of appeals correctly determines that it lacks authority to overturn judicial factfinding, and the Superior Court is asked, via M.R.Civ.P. 80B, to overturn its own actions. Such an absurd sequence is precisely why this Court has recognized exceptions to the final judgment rule, and allow timely and meaningful appellate review of an intermediate appellate decision.

Unlike most appeals of municipal land use permitting decisions, the Superior Court neither upheld the Tremont Planning Board's determination, nor remanded the matter for meaningful substantive municipal board review. Instead, the Court elected to act affirmatively in place of the Planning Board, to effectively and irreparably end the litigation. It is that exercise of authority that is challenged on appeal. Accordingly, appellate review at this time is both appropriate and efficient.

***II. The Superior Court Erred in Making Factual Determinations that are Within the Planning Board's Exclusive Jurisdiction.***

***A. The Tremont Planning Board Has Exclusive Factfinding Jurisdiction***

The Town's ordinances each vest exclusive authority in the Planning Board to make factual determinations necessary to either approve or deny a development permit based upon ordinance standards. (*App.*, p. 211). Notably, no ordinance vests the Superior Court with any such authority. Additionally, the Legislature has established municipal planning boards as the designated "municipal reviewing authority" for land use permitting purposes. 30-A M.R.S. § 4366(7).

Maine law has long held that, in the event that an administrative order does not provide sufficient factual basis to allow for meaningful review of the agency or board's decision, the reviewing court is obligated to

remand the matter to the agency or board, for additional factual determinations. Murray v. City of Portland, 2023 ME 57, ¶¶ 13-15. If an administrative body’s factual determinations are inadequate, the reviewing court’s remedy is to remand the matter to the board or agency for additional findings. Wells v. Portland Yacht Club, 2001 ME 20, ¶ 10. As a rule, the reviewing court may not imply findings or engage in its own factual inquiry. Appletree Cottage, LLC v. Cape Elizabeth, 2017 ME 177, ¶ 9. Appellate court engagement in factual determinations and licensing criteria applications that are expressly reserved to the Planning Board, wrongly propels the Court “into the domain...set aside exclusively for the administrative agency.” Cannon v. Town of Mt. Desert, 2025 ME 86, ¶ 28 (quoting In re Me. Motor Rate Bureau, 357 A.2d 518, 526-27 (Me. 1976); Sec. & Exch. Comm’n v. Chenery Corp., 332 U.S. 194, 196 (1947)).

In Christian Fellowship and Renewal Center v. Town of Limington, 2001 ME 16, this Court noted the overwhelming weight of authority in which the highest court of a jurisdiction has held that a remand for additional factfinding by the administrative agency charged with that duty is an appellate court’s obligation in the face of inadequate fact finding. Id. at ¶¶ 15-16, n. 5 (citations omitted). The Court endorsed that authority as applicable to Maine administrative proceedings, in part to “hold agencies

accountable to follow statutory requirements,” and partially in deference to historical standards pre-dating the Rules of Civil Procedure. *Id.*, at ¶¶8-9, n. 6 (citing *Inhabitants of Levant v. County Comm’rs*, 67 Me. 429, 437 (1877)). While this Court opined that there might exist limited circumstances in which “subsidiary facts” may be so obviously inferred from a record to make a remand unnecessary, it has always made clear that administrative factfinding rests exclusively with the agency. *Id.* The factual issues determined by the Court were hardly subsidiary, and are in fact central to the municipal permitting decision at issue.

***B. The Superior Court Decision Contains Substantive Factual Determinations Reserved for the Planning Board***

Here, the Superior Court’s decision expressed apparent frustration with the Tremont Planning Board, and included a series of appellate court-derived substantive factual determinations, followed by specific direction to both the Planning Board *and* the municipal Code Enforcement Officer, who made no decisions subject to appeal, to grant permits required for Brogdon’s project. Rather than remanding the matter as required, the Court made specific determination as to the length of Brogdon’s driveway, the fact that the driveway length’s measurement would include a large parking lot or facility, and that the driveway was sufficiently similar to a

“road” or “trail” as defined so as to override applicable ordinance definitions and prohibitions, all of which invaded the Planning Board’s exclusive authority. In making that determination, the Court seemingly disregarded the Land Use Ordinance’s separate treatment of “parking facilities”, as compared to roads, trails and driveways, denying the Planning Board’s ability to interpret the manner in which the access way length should be determined, based upon the LUO’s treatment of those uses.

The Court’s factual findings glossed over the clear definitional differences among parking facilities, roads, trails and driveways contained within the Town’s Land Use Ordinance, that were the essence of the Planning Board’s factual determinations, to find that the four uses were sufficiently “similar” that the new road’s commercial use by campground customers should be allowed regardless of contrary ordinance provisions. By determining that the Ordinance’s table of uses inclusion of a standard allowing the Town’s reviewing authority to permit or reject uses “similar” to others specifically addressed in the table should override explicit prohibitions of new roads and driveways within the CFMA, the Superior Court incorrectly obliterated the Planning Board’s exclusive authority, and rendered aspects of the Ordinance meaningless.

Municipal ordinance terms must be construed “reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole.” Gensheimer v Town of Phippsburg, 2007 ME 85, ¶ 8 (quoting Gerald v. Town of York, 589 A.2d 1272, 1274 (Me. 1991)). Here, Tremont’s ordinance structure treats parking areas and residential driveways as different from access ways that it defines as roads. For example, the LUO imposes more stringent design and dimensional standards to roads. *LUO, Section VI(I). (App., pp. 129-132)*. The SPRO imposes additional capacity-related standards to roads, none of which were addressed here. *SPRO, Section IX(B). (App., pp. 186-188)*. The heightened standards applicable to ways providing access to more than one single family residence make sense in light of ordinance purposes. The Site Plan Review Ordinance purposes include protection of public health and safety in a way that ensures adequate provision for “traffic safety and access” and minimization of adverse impacts on surrounding properties, among others. *SPRO Section I. (App., p. 171)*.

The LUO was enacted for similar purposes, and also to promote “functionally water-dependent uses over other uses while preserving the community’s access to the water”, and to “protect commercial fishing and maritime activities by giving preference to those activities in specific

zones.” *LUO, Section II(D)&(E). (App., p. 93)*. In the CFMA zoning district, new roads serving functionally water-dependent uses are permitted as long as they meet other applicable standards. Other new roads are not.

In mandating shoreland zoning, the Maine Legislature recognized the coast’s “immeasurable value to the people of the State and the nation.” Hill v. Town of Wells, 2021 ME 38, ¶ 13 (citing 38 M.R.S. § 1801). The purposes of shoreland zoning include natural resource protection, balanced with the protection of longstanding commercial fishing and maritime industries. Id., at ¶ 13 (citing 38 M.R.S. § 435). Tremont’s ordinance structure sets that balance by, among other things, restricting new road development within its shoreland zoning districts.

Even if the Superior Court found the Planning Board’s factfinding to be deficient, including its articulation of evidence leading it to reject Brogdon’s “similar use” argument, the appropriate remedy was and is to remand the matter for further Board consideration, rather than to impose its own analysis of the evidence and the record’s application to Ordinance standards. Similarly, even if this Court *agrees* that the Planning Board’s factfinding remains deficient, the Superior Court’s decision must be vacated, and the matter remanded to the Planning Board. No other result is consistent with Maine law.

### ***III. The Planning Board Did Not Abuse its Discretion in Denying Brogdon's Permit***

Tremont Land Use Ordinance (“LUO”) Section VIII(D)(4) imposes the burden of proving that “the proposed land use activity is in conformity with the standards of this Ordinance.” (*App.*, p. 148). That burden remains entirely upon the petitioner with respect to all performance standards. A petitioner’s failure to meet its burden of proving conformity with all applicable standards requires the application’s denial. *See LUO, Section VIII(A). (App., p. 144).*

The Town’s Site Plan Review Ordinance places a similar burden upon Brogdon, as a petitioner seeking a permit under its standards. *See SPRO, Section IX, par. 1 (App., p. 185).* Here the Planning Board correctly determined that it was Brogdon’s burden to prove that every aspect of the proposed land use conformed to all applicable ordinance requirements, and properly denied the application when it found the evidence lacking.

The Planning Board applied Brogdon’s application to the LUO’s table of uses and correctly found that the CFMA District’s use restrictions are applicable to her plan’s proposed road. LUO Table 1 permits the use of “motorized vehicular traffic on existing roads and trails.” (*App.*, p. 108). However, the same table, at line 24, allows “road construction” within the same district only with Planning Board approval, and *only* for “functionally

water dependent uses and uses accessory to such water dependent uses”.

Id.

On the matter’s remand at the Superior Court’s first request, the Board considered ordinance definitions of “road” and “driveway”, and appropriate dictionary definitions of “trail”, a term otherwise undefined in either applicable ordinance. (*R.*, pp. 810, 836-837). The Board rejected Brogdon’s newly-asserted effort to include a parking lot’s area to extend the driveway’s asserted length beyond 500 feet, and relied upon the actual access way’s length, the property’s residential status, and the Brogdon’s repeated acknowledgment that the way is a “driveway”, to determine its status as a driveway as defined

Based upon LUO definitions, the Planning Board correctly found that the development property was not served by any “existing roads and trails”, but only by a “driveway.” Brogdon’s proposed physical expansions and commercial use, would by definition create a road where none had previously existed. It was undisputed that, for many years, the subject property contained only a single-family home. While the home had been an inn at one time, that use had been long abandoned. For decades, the access-way traversing the CFMA zone, from the public road to that home

has served only that residential use. The residential use is non-conforming within the CFMA district.

The LUO clearly defines a “vehicular access-way less than five hundred feet (500’) in length serving two (2) single-family dwellings or one (1) two- (2) family dwelling, *or less*”, as a “driveway”. *LUO Article XI. (App., p. 157)*. The ordinance definition of “road” is far more expansive, but excludes driveways: “a road or track consisting of a bed of exposed mineral soil, gravel, asphalt, or other surfacing material constructed for or created by the repeated passage of motorized vehicles, *excluding a driveway as defined.*” *Id. (App., p. 164)*. In simple terms, the Town’s LUO defines roads as essentially every sort of vehicle access except for driveways. The Board accepted the current edition Merriam Webster dictionary definition of “trail”, and determined that the access way did not qualify as a rural path through a forested or mountainous region. *(App., pp. 63-64)*.

Tremont’s Site Plan Review Ordinance, applicable to plans for most non-residential land uses and structures, contains no conflicting definitions. The Land Use Ordinance expressly applies to all land areas, including those, like here, that are within 250 feet of a coastal wetland, and mandates the following interpretation rules: “Whenever a provision of this Ordinance conflicts with or is inconsistent with another provision of this

Ordinance or of any other ordinance, regulation or statute, administered by the municipality, the more restrictive provision shall control.” *LUO, Section I(C)(2)(d) ;(App., p. 92)*. As the LUO contains the *only* definitions of the terms “road” and “driveway”, those definitions must be applied to Brogdon’s application.

Based upon the LUO’s definitions, the Planning Board was compelled to find that the property is presently accessed via a driveway serving a large parking area and principal single-family residential structure. At present, the property contains no existing roads. Based upon the LUO definitions, the Planning Board also correctly found that the proposed development plan called for the existing driveway’s conversion, and expansion, to a road, serving a commercial campground that is not in any way functionally water-dependent. In addition to that use expansion, the proposed site plan includes physical expansions and improvements, most notably at the junction with State Route 102A and immediately next to the existing residence. (*R., pp. 380, 382*).

While the proposed campsites and service buildings are located on a portion of the property within the Town’s Residential Business district, in which campgrounds are allowed, the proposed site access requires that commercial traffic be funneled exclusively from a public road across the

CFMA area, to a large parking facility that the Superior Court mistakenly included in its determination of access way length. The Planning Board correctly found that Brogdon's conversion of the residential driveway within the CFMA zone to a road, was an expanded use accessory to the proposed commercial campground.

The LUO prohibits non-maritime commercial uses within the CFMA district. Maritime uses are defined as those that are functionally marine dependent, and do not include commercial campgrounds. *LUO Section IV(E)(1)*. (*App.*, p. 101). Campgrounds and transient accommodations are expressly prohibited. *Id.* The only exception to this prohibition is for limited commercial use of up to 2,000 square feet. *LUO Section IV(E)(1)(b)*. *Id.* The Planning Board correctly found that exception to be inapplicable here, as the proposed access road is intended to be accessory to a non-maritime commercial use far larger than 2,000 square feet.

Because Brogdon's proposed commercial land use is not functionally water dependent, and not accessory to a functionally water-dependent use, the Planning Board correctly found that the proposed access road creation and construction was not permitted within Tremont's CFMA shoreland zoning district. The site plan's proposed road is currently a driveway, serving a lawfully non-conforming single family residential use. Under the

applicable ordinance standards, an existing driveway may not be conflated to be deemed synonymous with a road. Brogdon's property contains no existing road, as defined.

This Court has upheld municipal land use permit denials resting upon a similar analysis regarding roads within a shoreland zoning district. In Gensheimer v Town of Phippsburg, 2007 ME 85, the Court construed similar municipal ordinance language to prohibit road development within a shoreland district. Id. at ¶¶ 4-6. In Gensheimer, the Court interpreted a Phippsburg ordinance that prohibited road development in that town's resource protection district, "except to provide access to permitted uses *within the district.*," or otherwise with planning board approval under strict limitations if no reasonable alternative route was available Id. at ¶¶ 5-6. The Court then noted the difference between an allowed land use and a lawfully nonconforming land use under the municipal ordinance structure, and upheld the town's application of disparate review standards to a proposed road serving a lawful nonconforming land use. Id. at ¶¶13, 15.

In Tremont, residential dwelling units are generally prohibited within the CFMA district, unless they were in existence before that district was created, and have not been abandoned. Brogdon's single-family residence has existed in its present location since before the CFMA zoning district's

creation. The existing residence qualifies as a lawful, non-conforming use, as does its existing driveway.

The Planning Board properly determined that the proposed access road was not lawfully non-conforming, as it did not exist at the time of the application, much less at the time of the LUO's adoption. LUO Article VII generally prohibits non-conforming property uses and structures, with the exception that non-conformances legally existing before the Ordinance's effective date may continue, if they have not been abandoned. *LUO Section VII(A)*. (App., p. 138). Lawful nonconforming uses may not be expanded. *LUO Section VII(E)(1)*. (App., p. 142); see also, Grant v. Town of Belgrade, 2019 ME 160, ¶ 24. The LUO expressly directs that a "lot, building or structure on which a non-conforming use is discontinued for a period exceeding one (1) year...may not again be devoted to a non-conforming use except that the Planning Board, may, for good cause shown by the Brogdon, grant up to a one-year extension to that time period." *LUO Section VII(E)(2)*. (App., p. 142).

The record contains no evidence to support a determination that any non-maritime commercial use of Brogdon's residence or CFMA-zoned shoreland property had existed, and not been abandoned. The LUO provides no avenue by which the Planning Board could have waived or

disregarded the prohibition against non-conforming uses, to allow the proposed road's creation.

The Planning Board correctly determined that Brogdon's driveway is itself a prohibited use within the CFMA zone, except as it may be lawfully nonconforming. *LUO Table 1. (App., p. 108)*. The driveway's expansion to a non-conforming access road is not lawful under any ordinance construction, and expressly violates LUO Section VII(E)(1). Additionally, the proposed campground to be served by the new road is neither small nor accessory to a primary maritime use. The Planning Board received no evidence that the property, or driveway, within the CFMA district has been used for commercial purposes since 2001. Any purported lawful non-conformity was discontinued eighteen or nineteen years ago. In accordance with LUO Section VII(D)(5), there is no process by which it may be revived by the present application.

Further, the portion of the property within the Residential Business district, on which Brogdon proposes to place tent platforms and cottages has *never* been used commercially, and as such has never utilized the access driveway for marine-related or non-maritime commercial purposes. The record contains no evidence that the driveway has ever been used as a road. Simply put, the Planning Board record contains absolutely

no facts supporting the Brogdon's proposed road use within the CFMA district. No possible interpretation of the LUO may be offered to overcome its highly restrictive property use limitations within the CFMA zoning district. The Planning Board's findings and decision are consistent with applicable ordinance terms, and reflect appropriate consideration of the facts.

Here, the applicable ordinance restrictions are not ambiguous, are entirely consistent with Maine law, and were properly applied to the facts. As the agency charged with administering the LUO and SPRO, the Tremont Planning Board's interpretation of its ordinances is "entitled to great deference and will be upheld unless the [legislation] plainly compels a contrary result." Town of Eagle Lake v. Comm'r, Dep't of Educ., 2003 ME 37, ¶ 8. In fact, the Planning Board properly interpreted its ordinances as defining the terms "driveway" and "road" as not synonymous. Despite Brogdon's argument to the contrary, the Planning Board was not compelled to accept or rely upon evidence that she submitted, as opposed to contrary evidence contained in the record. The Planning Board's interpretation is entirely consistent with the ordinances' plain language, and is entitled to this Court's deference.

In every respect, the Superior Court's decision disregards the municipal board's authority, and ignores Town's very clear distinctions among parking facilities, roads and driveways, and between existing and new roads. For the reasons discussed above, that interpretation is contrary to the LUO's plain language, and must be rejected. The distinction is neither absurd nor inappropriate, given the property's location partially within a protected shoreland zoning district, and the legislative purpose favoring commercial fishing industries within that zone.

The Planning Board rejected the application based upon the Land Use Ordinance's unambiguous terms, that are entirely consistent with underlying State legislative policy within the shoreland zones. The Superior Court incorrectly accepted Brogdon's invitation to ignore those terms and rewrite municipal land use restrictions. The record and Maine law support the Planning Board's decision denying the land use application, and the decision must be upheld. Any other result shall be factually and legally insupportable.

The Planning Board properly denied the site plan application, as the proposed new commercial access road within the CFMA zoning district is prohibited. The development application provides for no alternate, lawful road access to the proposed commercial campground, and is therefore

ineligible for approval. The Superior Court erred in substituting its factfinding and ordinance application for that of the Planning Board.

Accordingly, the Superior Court's decision should be vacated, and the Planning Board's determinations upheld.

## **CONCLUSION**

The Superior Court erred in making factual determinations that applicable Maine law vests exclusively in the Tremont Planning Board, and in directing the Planning Board and municipal Code Enforcement Officer to approve Brogdon's application and issue development permits. Even if it determined the Planning Board's factual findings to be deficient, the Court's appropriate remedy was to remand the matter for further findings. The judicial economy exception to the final judgment rule compels such a remand at this time, so that the municipal board may fully perform its obligations.

Even so, the Tremont Planning Board properly denied Brogdon's land use application, as she did not meet her burden of proof under Land Use Ordinance Section VI(I) and Site Plan Review Ordinance Section IX(C) relating to access standards. Access to the proposed non-maritime commercial use, relies upon the creation of a new road, expansion of the existing paved area, and substantially increased vehicle use, all within a limited shoreland zone. The Land Use Ordinance prohibits new road creation or development within the Commercial Fisheries Maritime Activities shoreland zoning district, for a use that is not water-dependent. The proposed campground is not accessory to maritime activities for which

the district is reserved, making Brogdon's proposed new road is incompatible with ordinance standards. For the foregoing reasons, Appellants respectfully assert that the appeal should be granted, and that the Planning Board's decision should be upheld, or the matter remanded to the Planning Board for independent supplemental factual determinations. No other result is supported by Maine law.

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Respectfully submitted

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## CERTIFICATE OF SERVICE

I, Daniel A. Pileggi, hereby certify that an electronic copy of the foregoing Brief of Appellants/Party-In-Interest was electronically served on counsel of record as follows: Edmond J. Bearor, Esquire., Jonathan P. Hunter, Esq. and Timothy A. Pease of Rudman Winchell, P.O. Box 1401, Bangor, ME 04401 e-service addresses: [ebearor@rudmanwinchell.com](mailto:ebearor@rudmanwinchell.com); [jhunter@rudmanwinchell.com](mailto:jhunter@rudmanwinchell.com) and [tpease900@gmail.com](mailto:tpease900@gmail.com); and to Patrick W. Lyons, Esq., of Viridian Law, P.C., 204 Main Street, Ellsworth, ME 04605, e-service address: [plyons@viridian.law](mailto:plyons@viridian.law); on this 12<sup>th</sup> of January, 2026.

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