STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. BCD-25-434

MADELON BROGDON

Plaintiff-Appellee

v.

TOWN OF TREMONT

Defendant-Appellee

THEODORE KLEINMAN, et al.

Parties in Interest-Appellants

ON APPEAL FROM THE BUSINESS AND CONSUMER DOCKET
CUMBERLAND COUNTY, DOCKET NO. BCD-APP-2025-00007

BRIEF OF APPELLEE MADELON BROGDON

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INTRODUCTION

This action concerns a proposed campground known as Pointy Head, to be located at 158 Harbor Drive, Bass Harbor, in the Town of Tremont. Intervenors Theodore Kleinman, Danine and Robert Welsh, James Coffman, and Laura Levin appeal from a decision of the Business and Consumer Docket remanding to the Tremont Planning Board to grant appellee Madelon Brogdon's application for site plan approval, which she filed more than four years ago.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Original Proceedings in the Planning Board

On October 29, 2021, Brogdon filed an application with the Tremont Planning Board for site plan review of a small campground. (R. 1-53.)[1] The proposed development, known as Pointy Head, is for seasonal, transient accommodations consisting of 15 lodging structures on a 17.9-acre lot, with two service buildings containing common restroom and shower facilities, a new septic system, and associated parking. (R. 2, 7.) Brogdon's parcel is bisected by state highway Route 102A (Harbor Drive). (A. 216-17.) The site of the proposed campground is located to the east of Route 102A, in Tremont's Residential-Business (R-B) zone. (A. 83, 98-99; 216-17; R. 28.) Campgrounds are allowed in the R-B zone with a permit from the Planning Board. (A. 83, 98-99.) The portion of Brogdon's property located within 250 feet of the shore is located in the Commercial Fishery/Maritime Activity Shoreland (CFMA) zone. (A. 101-02, 216-17.) No activity for which Brogdon sought site plan approval will take place

[1] Citations to "R." are to the administrative record. To ensure readability, high-quality versions of oversized plans and maps included in the record were also submitted to the trial court. Video recordings filed with the trial court are cited in this brief by date and timestamp. Those videos are also presently available on the Town's YouTube channel. *See* Town of Tremont, YouTube, https://www.youtube.com/channel/UCUcwN5sosHGMWKBEe_x3NbQ (last visited March 5, 2026).

in the CFMA zone. (A. 216-17.) However, the only access to the portion of the parcel proposed to be developed is an existing way[2] that crosses the CFMA zone.[3] (A. 216-17; R. 2-3.) "Motorized vehicular traffic on existing roads and trails" is allowed in every zone without a permit, including the CFMA zone. (A. 107-08.) "Uses similar to allowed uses" are allowed in every zone with a Code Enforcement Officer permit. (A. 107-08.)

With her application, Brogdon submitted a letter from the Office of the Attorney General on behalf of the Maine Department of Environmental Protection (DEP) "to provide guidance on the application of DEP's mandatory Shoreland Zone Guidelines" to Brogdon's application. (R. 23.) That letter states as follows:

> The application proposes to create a commercial campground within a Residential Business Zone District. This activity is an allowed use within that district. The applicant proposes to utilize a preexisting driveway that passes through an area designated as a Commercial Fishery and Maritime Activities Zone (CFMA) to facilitate motor vehicle traffic to and from the proposed development. The proposed development will not necessitate any enlargement or alteration to the preexisting

[2] Until it became the focus of these proceedings, all parties described the access way at issue interchangeably as a "road" and "driveway." (*See, e.g.*, R. 160-61, 209-11.) However, where the Planning Board—at Intervenors' urging—has suggested that the particular label used to describe the way is somehow relevant to the legal questions in this case, and arbitrarily assigned probative value *only* to those instances where Brogdon used the word "driveway" (A. 62-63; R. 813-14), Brogdon uses the generic terms "access way" or "way" in this brief.

[3] The way currently serves a residence on the property, which was formerly used as an inn. (R. 2, 7, 40, 130.)

> roadway which will be able to accommodate an increase in motor vehicle traffic as it exists currently.
>
> The Town of Tremont has adopted a Land Use Ordinance which governs development and use of shoreland areas as required by 38 M.R.S. § 438-A. The Town's Ordinance provides a Table of Land Uses delineating the uses that are allowed, disallowed, or allowed subject to certain conditions, with respect to the different zoning districts established by the Ordinance. The Land Use Table provides, under use number 2, that "vehicular traffic on existing roads and trails" is permitted without a permit in all land use zones.
>
> Because "vehicular traffic on existing roads and trails" is expressly allowed without a permit within the CFMA Zone, the fact that the proposed development will result in vehicular traffic on an existing roadway within the CFMA district does not result in the need for the applicant to receive a permit. As the application does not propose to construct a new road, but merely utilize a preexisting roadway, no permit is required.

(R. 23.)

After an initial delay,[4] the Board reviewed the completeness of the application on February 8, 2022, and found the application incomplete.

[4] The Planning Board first took up Brogdon's application in December 2021. At a series of meetings, the Board considered whether Brogdon's application was for a "campground" as defined by the Town's Land Use Ordinance, and therefore subject to a campground moratorium then in place. Brogdon took the position that the proposed use was a transient accommodation, like a motel, rather than a campground. The Board voted to table the application pending receipt of an opinion from counsel for the Town regarding whether the proposed use was a campground or a transient accommodation. (R. 62.) The Board again tabled the application on January 11, 2022, and January 25, 2022, as it had not yet received an opinion from the Town attorney. (R. 72-73, 77.) At the Board's meeting of February 8, 2022—by which time the campground moratorium had expired—the Board had received an opinion from counsel that if an application could fall under two uses, it was up to the applicant to determine what provision of the ordinance she was applying under. (R. 82-84; 2/8/23 PB Video at 25:20 to 35:00.) When the Board continued to debate whether the proposed

(R. 89-90; 2/8/22 PB Video at 1:40:20 to 1:44:00.) On March 8, 2022, following supplementation, the Board found the application complete, scheduled a site visit, and indicated its intention to have the stormwater plan peer reviewed. (R. 155; 3/8/22 PB Video at 1:24:30 to 1:44:30.) The site visit was held March 22, 2022. (R. 157-59.) After voting to recuse a member,[5] the Board opened the public hearing on April 26, 2022. (R. 221-22.) The public hearing continued on August 23, 2022. (R. 330.) After each of these public hearings, with the permission of the Board, Brogdon supplemented her application to respond to concerns raised by the public regarding issues include wetlands and buffering. (R. 331; 4/26/22 PB Video at 1:22:30 to 1:27:00; 8/23/22 PB Video at 1:47:20 to 1:59:45.) The Board deliberated and made findings on the application on October 11,

development was a campground, Brogdon, through counsel, agreed to treat the proposed use as a campground so as to move the application forward where that distinction was no longer meaningful. (R. 89; 2/8/23 PB Video at 35:00 to 43:00.)

[5] On April 12, 2022, the Chair noted receipt of a letter from Maine Municipal Association opining that Member Geoff Young, who had participated in the proceedings to that point, should be recused due to the appearance of a conflict of interest. (R. 200-01; 4/12/22 PB Video at 5:40 to 7:00.) Following discussion, the Board voted to accept Member Young's offer to recuse himself pending receipt of an opinion from the Town attorney. (R. 200-01; 4/12/22 PB Video at 14:25 to 15:45). On April 26, 2022, after the Town attorney opined that Member Young should be recused, Member Young declined to recuse himself. (R. 221; 4/26/22 PB Video at 1:10 to 5:20.) The Board voted to recuse Member Young. (R. 221; 4/26/22 PB Video at 9:20 to 10:00, 18:15 to 19:30.)

November 15, and December 13, 2022, and on January 10, 2023. (R. 358-62, 404-09, 412-19, 421-22.)

At the meeting of October 11, 2022, the Board found that Brogdon met all applicable Site Plan Review Ordinance (SPRO) criteria with the exception of the site access standard of SPRO § IX.C. (A. 187-88; R. 358-62.) The Board found that this standard had not been met because the access way was only wide enough for one vehicle to pass, and this raised a safety concern, specifically queueing of cars on Route 102A and the way itself. (R. 359; 10/11/22 PB Video at 1:54:00 to 1:55:40.) When the Board indicated its intention to continue the matter to a future meeting to review the Land Use Ordinance (LUO) standards, Brogdon requested an opportunity to present a revised access plan to address the Board's concern regarding safety/queueing before that meeting. (R. 362; 10/11/22 PB Video at 2:21:20 to 2:22:45.) After discussion, the Board agreed, and reserved a final vote on the SPRO criteria. (R. 362; 10/11/22 PB Video at 3:00:20 to 3:03:45.)

At the meeting of November 15, 2022, Brogdon presented her modified access plan. (R. 364-70; 11/15/22 PB Video at 1:57:30 to 2:11:00.) That revised plan called for adding a right turn only sign when exiting

the access way onto Route 102A, as well as adding a yield to incoming traffic sign at the top of the way. (R. 364; 11/15/22 PB Video at 1:57:50 to 1:58:25.) Brogdon also proposed to widen the shoulder in the Route 102A Department of Transportation right of way to create a wider mouth from the access way onto Route 102A, lessening the likelihood of queueing. (A. 218; R. 364-70; 11/15/22 PB Video at 1:58:25 to 1:59:15.) Brogdon also presented photos of cars passing each other on the way, and suggested that although it would be rare for cars to meet on the way with only 12 trips per hour during peak hours, cars could in fact pass each other. (R. 32-33, 364-65; 11/15/22 PB Video at 1:59:15 to 2:00:05.) The Board discussed the revised plan and members expressed that they were satisfied that Brogdon had addressed their safety/queueing concerns. (11/15/22 PB Video at 2:57:00 to 3:00:50.)

However, the Board voted 3 to 1 that the roads and driveways standard of LUO § VI.I was not met because the proposed use of the way to access a campground would be an expansion of a non-conforming use in the CFMA zone under LUO § VII.E. (A. 129-32, 142-43; R. 407; 11/15/22 PB Video at 3:00:50 to 3:19:20.) The Board voted in favor of

Brogdon on all remaining criteria, with the vote continuing into the next meeting on December 13, 2022.[6] (R. 404-09, 412-19.)

On January 10, 2023, the Board met to complete its findings on the application, having previously deferred a final vote on the SPRO criteria at the conclusion of the meeting of October 11, 2022. (R. 404, 409, 419, 421-22.) The Board voted 3 to 1 to find the SPRO criteria not met because the site access standard of SPRO § IX.C was not met. (R. 422; 1/10/23 PB Video at 20:30 to 22:10.) Brogdon asked for clarification on the record that the issue was the access way crossing the CFMA district, not the previously raised and addressed issue of queueing. The Board agreed. (1/10/23 PB Video at 16:30 to 18:05.) The Board took a final vote to deny the application by 3 to 1 on the grounds that the SPRO and LUO standards had not been met. (R. 422; 1/10/23 PB Video at 22:10 to 23:10.) On May 23, 2023, the Planning Board issued a written decision denying Brogdon's application. (A. 68-86.) A checklist attached to that decision shows that the Board found Brogdon satisfied all applicable criteria other

[6] Unfortunately, the video of the meeting of December 13, 2022, cuts out mid-meeting, at the 1:33:40 mark. This was noted at the Board's next meeting of January 10, 2023. (1/10/23 PB Video at 18:05 to 19:05.) Evidently, storage on the Town's recording device was full.

than SPRO § IX.C's site access standard (A. 70, 86), as well as LUO § VI.I's roads, driveways, and driveway opening standards (A. 78, 86).[7]

Appeal to the Board of Appeals

Brogdon appealed the Planning Board's decision to the Tremont Board of Appeals. (R. 442-45.) Abutting landowners Theodore Kleinman, Danine and Robert Welsh, James Coffman, and Laura Levin ("Intervenors"), also filed an appeal from the Planning Board's decision. (R. 446-50.) On August 10, 2023,[8] the Board of Appeals, acting solely in an appellate capacity,[9] voted to deny Brogdon's appeal. (A. 66; 8/10/23 BOA Video at 56:30 to 58:05.) Intervenors, through counsel, orally

[7] Strangely, both the minutes of January 10, 2023 and the checklist of May 23, 2023, contain references to the issue of queueing. (A. 86; R. 422.) This was in error, and in the case of the checklist, possibly a holdover from a prior version of the document. The Board made clear on the record at its meeting of January 10, 2023, that its denial was *not* based on the issue of queueing. (1/10/23 PB Video at 7:45 to 18:05.) Both parties acknowledged this in the Board of Appeals in response to a question from counsel for the Board. (8/10/23 BOA Video at 40:00 to 43:33.)

[8] The parties filed their appeals after the Planning Board's final votes on January 10, 2023, but before it issued its written decision months later on May 23, 2023. The Board of Appeals first took up Brogdon's appeal on February 9, 2023, but remanded the matter to the Planning Board to issue a written decision (R. 478; 2/9/23 BOA Video at 8:45 to 15:15), before finally taking the matter back up on August 10, 2023 (R. 481-82).

[9] *See* LUO § IX, § B(3) (A. 152) (providing for appellate review of Planning Board decisions); SPRO § XI (A. 199) (providing that appeals are to the Board of Appeals); Tremont Board of Appeals Ordinance § X(E)(2) (A. 207) (providing that Board of Appeals may reverse Planning Board decision that was "clearly contrary" to the relevant ordinance, or not supported by substantial evidence in the record).

withdrew their appeal on the record. (A. 67; 8/10/23 BOA Video at 59:10 to 59:45.)

First Rule 80B Appeal

Brogdon appealed to the Superior Court pursuant to M.R. Civ. P. 80B. (A. 51-59.) By agreement of the parties, accepted by order of the court dated November 9, 2023, the matter was transferred to the Business and Consumer Docket, under docket number BCD-APP-2023-00006. (A. 7-8.) On December 7, 2023, the Business Court granted Intervenors' unopposed motion to intervene.

By an Order dated July 26, 2024, the Business Court remanded the matter to the Planning Board because the court concluded that the board had failed to make sufficient findings to permit judicial review. Specifically, the Business Court ordered:

> [T]he matter is remanded to the Town of Tremont Planning Board to make findings of fact, accompanied by an analysis and determination, of whether the existing way Brogdon proposes to use to access the campground is a road, a trail, or a driveway. The Planning Board can determine whether it already has sufficient evidence in the record to make its findings and determination, or whether to take new evidence.

(A. 24, 30.)

Planning Board Proceedings on Remand

The Board initially took up the matter on remand on August 27, 2024, and set the matter for a public hearing on October 22, 2024. (R. 707-08.) It was anticipated that new Board members who had not participated in the original proceedings before the Board would familiarize themselves with the record before the hearing. (8/27/24 PB Video at 00:15:10 to 00:17:40). When the parties appeared before the Board on that date, however, the new members had not done so. (R. 817.) The hearing was postponed until January 14, 2025, "in order for members not present during original decision to become familiar with the record." (R. 817.)

On January 14, 2025, the Planning Board held a further hearing in this matter. (R. 823-27.) Unfortunately, the video of that meeting cuts out at the 01:12:55 mark (i.e., around 7:14 p.m., before the Board began its deliberations). Evidently, storage on the Town's recording device—for the second time in this appeal, *see supra* n.6—was full. There is, according to the Town, no recording of the second half of this meeting.

Brogdon submitted additional evidence in the form of a sketch by its surveyors Plisga & Day, showing that the existing way is 502 feet.

(A. 219; R. 710.) The Board voted 4-0 to accept this new evidence, as well as additional exhibits submitted by the Board's former Code Enforcement Officer. (R. 737-810, 826, 835; 1/14/25 PB Video at 01:00:05.) Brogdon also highlighted for the Board case law indicating that administrative boards have an obligation to consider whether uses are similar to allowed uses. *See Your Home, Inc. v. Portland*, 432 A.2d 1250, 1259-61 (Me. 1981). (R. 825; 1/14/25 PB Video at 00:11:30 to 00:17:10.)

By a vote of 3-1, the Board voted to adopt Intervenors' proposed findings of fact wholesale, with two additional findings. (R. 813-15, 826-27.) The Board declined to address Brogdon's similar uses argument. (R. 827.) The Planning Board issued a written decision on January 28, 2024. (A. 60-65; R. 828, 830.) The Board found that the existing way is a driveway, and again denied Brogdon's application on the grounds that use of the way would be a prohibited expansion of a non-conforming use. (A. 62-64.)

Second Rule 80B Appeal

Brogdon again appealed to the Superior Court, and the matter was again transferred to the Business and Consumer Docket by agreement of

the parties, with Intervenors once again intervening without objection. (A. 4-5, 32-50.)

On September 18, 2025, following briefing and oral argument, the Business Court issued an order reversing the decision of the Planning Board and remanding the matter to the Board with instructions to approve Brogdon's application. (A. 23.) The court wrote:

> Despite the Court's guidance, the Planning Board's decision following remand committed two significant errors of law. First, the Board failed to consider the length of the way, as clearly required by the LUO's definition of driveway. The Board also failed to consider the issue of similar use, also clearly required by the LUO. Given the facts of the case and the nature of the Planning Board's errors, it makes no sense to remand the matter to the Planning Board for any reason other than to order the Planning Board to approve Brogdon's application. The permitting process for this simple application has already taken over four years. Thus, as discussed below, the Court reverses and remands the matter to the Planning Board with instructions to approve Brogdon's application and instruct the Code Enforcement Officer to issue a permit for use of the way to access the proposed campground.

(A. 10-11 (citation omitted).)

The Court held that the Planning Board erred as a matter of law in determining the access way to be a "driveway" as defined by the LUO, despite making no finding as to the length of the way, because the LUO defines driveways as being less than 500 feet in length. (A. 17.) The Court

further held that the Planning Board also erred by failing to consider whether the proposed use was use "similar to allowed uses" as required by the LUO. (A. 21, 108.) As to its decision not to remand to the Planning Board for additional findings yet again, the Court elaborated:

> If the only issue in this case was the Planning Board's failure to make a finding of fact regarding the length of the Way, it might make sense to remand this matter to the Planning Board yet again to make a further finding of fact—even though the only competent evidence in the record that the Way exceeds 500 feet. But that is not the only error in the Board's decision. The Planning Board also erred as a matter of law by failing to perform a "similar uses" analysis. On the facts contained in the record and as already determined by the Planning Board, the "similar uses" analysis is so simple that a remand is unnecessary. . . .
>
> Whether the Existing Way is 500 feet or longer in length, or just under 500 feet . . . there can be no dispute that the Way is very long—longer than or nearly as long as a road, as road is defined in the LUO. . . . The Existing Way . . . is alike in its essentials to a road, and differs from a road (if at all) only in its length. . . . There is no reasonable argument that use of the Way would be more objectionable than use of a road. Thus, even if the Existing Way is a very long driveway, its use for the repeated passage of motorized vehicles to access the campground would be similar to use of an existing road, and is therefore allowable in the CFMA zone . . . . The "similar uses" argument does not require the Court to make any new, independent findings of subsidiary facts, and does not warrant a remand to the Planning Board.

(A. 21-22 (footnote omitted).)

This appeal followed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this appeal is ripe for this Court's review.

2. Whether the Planning Board erred in denying Brogdon's application on the grounds that use of that existing way was not allowed as "[m]otorized vehicular traffic on existing roads and trails" or a use "similar to other allowed uses" under the Town's ordinances.

SUMMARY OF ARGUMENT

This matter is ripe for review because the Business Court's remand to the Planning Board was for the ministerial purpose of granting the application that Brogdon filed over four years ago. The Planning Board erred as a matter of law in denying Brogdon's application on the sole grounds that the campground would utilize an existing access way that crosses over the CFMA district from Route 102A. "Motorized vehicular traffic on existing roads and trails" is an allowed use in all zones, including the CFMA zone. That use encompasses the full range of ways over which motor vehicles travel, rather than arbitrarily excluding traffic over "driveways." Moreover, the Planning Board erred in concluding that the existing way in this case is a "driveway," as defined by the Town's LUO. Even if the Board's interpretation and application of the LUO were otherwise correct, the Planning Board's findings compelled the conclusion that the use of the way was similar to and not more objectionable than "[m]otorized vehicular traffic on existing roads and trails," as a matter of law, and therefore allowed as a use "similar to allowed uses."

ARGUMENT

This Court reviews the decision of the Planning Board directly. *See, e.g.*, *Aydelott v. City of Portland*, 2010 ME 25, ¶ 9, 990 A.2d 1024; *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 4, 757 A.2d 773. On appeal pursuant to M.R. Civ. P. 80B, a municipality's decision will be vacated 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. Substantial evidence exists "when a reasonable mind would rely on that evidence as sufficient support for a conclusion." *Griswold v. Town of Denmark*, 2007 ME 93, ¶ 9, 927 A.2d 410.

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). To the extent a land use ordinance is ambiguous, it must be strictly construed in favor of the landowner. *See, e.g.*, *Grant v. Town of Belgrade*, 2019 ME 160, ¶ 14, 221 A.3d 112; *Forest City, Inc. v. Payson*, 239 A.2d 167, 169 (Me. 1968).

I. This Matter Is Ripe for Decision.

Brogdon agrees that this matter is ripe for decision by this Court. Generally speaking, final agency action is required before a party can appeal that action. *See, e.g.*, *Bryant v. Town of Camden*, 2016 ME 27, ¶ 12, 132 A.3d 1183; *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 6, 772 A.2d 256. Thus, court orders remanding to administrative agencies for further action are typically not ripe for appellate review in this Court. *E.g.*, *Malonson v. Town of Berwick*, 2003 ME 148, ¶ 2, 838 A.2d 338.

However, this Court has taken direct appeals of remand orders "when the remaining administrative action is essentially ministerial, such as the formal issuance of a permit." *Malonson*, 2003 ME 148, ¶ 2, 838 A.2d 338 (citing *Rockland Plaza*, 2001 ME 81, ¶ 6, 772 A.2d 256). That is the case here. The Business Court remanded to the Planning

Board only for the purpose of granting Brogdon's application. (A. 11, 21-23.) Thus, although Intervenors fail to identify this Court's most relevant case law,[10] Brogdon agrees that this Court should consider the merits of this appeal.

II. The Planning Board Erred as Matter of Law in Concluding that Use of the Way Is Not Allowed as "Motorized Vehicular Traffic on Existing Roads and Trails."

The Planning Board denied Brogdon's application for a campground in the R-B district solely on the grounds that it would utilize an existing access way that crosses over the CFMA district from Route 102A. The Planning Board's decision rests on a series of cascading legal errors in the interpretation of the Town's ordinances. As clarified following remand, the Board concluded that the existing access way is a "driveway," that a driveway is a non-conforming use in the CFMA zone, that changing the use the way serves from residential to a campground would "conver[t]" the way into a "road," and that the conversion of a driveway to a road would constitute a prohibited "expansion" of a non-

[10] Intervenors argue that the death knell and judicial economy exceptions to the final judgment rule apply. (Blue Br. at 15-17.) There is no need to resort to those exceptions where this Court has repeatedly recognized the directly applicable rule stated in *Rockland Plaza* and subsequent cases.

conforming use in the CFMA district. (A. 64, 70, 78.) This was error, as the Business Court properly determined.

A. "Motorized Vehicular Traffic on Existing Roads and Trails" Is a Standalone Allowed Use, Irrespective of the Nature of the Use Accessed.

The analysis begins, as it must, with the language of the Town's ordinances. Article IV of the Town's LUO includes a Table of Land Uses (labeled "Table 1") indicating whether uses are allowed in each of the Town's zoning districts, whether a permit is required, and the relevant permitting authority. (A. 107-09.) Item 2 in the table unequivocally states that "[m]otorized vehicular traffic on existing roads and trails" is allowed in every zone, without a permit, including the CFMA zone. (A. 108.) By the plain language of the ordinance, then, "motorized vehicular traffic on existing roads and trails" is an allowed use in the CFMA zone (and all zones). As an allowed use, it is not subject to rules against expansion of non-conforming uses. (A. 162 (defining "non-conforming use" as a "use . . . of land . . . which is *not allowed* in the zone in which it is situated" (emphasis added).)

Table 1 also makes plain that the nature of any use (or uses) *accessed* by "motorized vehicular traffic on existing roads and trails" is

irrelevant. Following the table are several notes that specify restrictions or exceptions for particular uses. (A. 109.) There is no limiting language that specifies certain purposes for which "motorized vehicular traffic on existing roads and trails" may occur. Nor is there any modifying language such as "principal" or "accessory," as there is for other uses in the table. *Compare* LUO § IV, Table 1, item 13 ("[p]rincipal structures and uses") *and* item 14 ("[s]tructures accessory to allowed uses"), *with* item 2 (no such modifying language). (A. 108.) In other words, "motorized vehicular traffic on existing roads and trails" is an allowed use in and of itself, irrespective of the purpose for which such activity occurs, or the nature of any uses accessed in this manner. As such, any change in uses accessed by "motorized vehicular traffic on existing roads and trails" is irrelevant—it remains a standalone allowed use.

Intervenors argue, as they have previously, that "motorized vehicular traffic on existing roads and trails" in the CFMA district is limited to "functionally water dependent uses." (Blue Br. at 21-23, 26-27.) The Board—in its findings adopted wholesale from Intervenors—suggested, but did not actually state, that it interpreted the ordinance in this manner. (A. 64 (finding that the way will "serve a commercial

campground that is not in any way functionally water dependent").) But no such limitation appears in the ordinance. As discussed above, the ordinance does not limit "motorized vehicular traffic on existing roads and trails" to certain purposes, or allow such use only as accessory to other allowed uses. Rather, "motorized vehicular traffic on existing roads and trails" is, in and of itself, an allowed use, separate and apart from any uses for which a road or trail may provide access.

Critically, the drafters of the ordinance could have imposed the type of limitation Intervenors (and apparently the Board) seek to read into the text. Indeed, they *did* apply that limitation to other uses in Table 1. Note 15, which reads "[f]unctionally water dependent uses and uses accessory to such water dependent uses only," applies to several uses in the CFMA zone.[11] *See* LUO § IV, Table 1, items 13(C)-(F), 15(b), 21, 24-25 & n.15. (A. 108-09.) It does *not* apply to "motorized vehicular traffic on existing roads and trails." (A. 108.) The same is true of DEP's model shoreland zoning ordinance promulgated at 06-097 C.M.R. ch. 1000 ("Chapter 1000"), on which the Town's ordinance is based, except that the relevant

[11] The "functionally water dependent" limitation notably applies to "road construction." (A. 108-09.) Brogdon does not propose to construct a road. (A. 20-21.)

note there is note 5. 06-097 C.M.R. ch. 1000, § 14, Table 1, item 2 & n.5. (R. 622-25.)

The drafters of the LUO (and the DEP's substantively identical model ordinance) knew how to restrict uses to only those that are "functionally water dependent" or accessory to such uses—they needed only include the relevant note, as they did for other uses. *See* LUO § IV, Table 1, items 13(C)-(F), 15(b), 21, 24-25 & n.15; 06-097 C.M.R. ch. 1000, § 14, Table 1, items 15(C)-(F), 17(b), 23, 26, 28 & n.5. (A. 108-09; R. 624.) They chose not to do so for "motorized vehicular traffic on existing roads and trails." Likewise, they knew how to designate uses as only accessory to other allowed uses. *Compare* LUO § IV, Table 1, items 13-14, *with* item 2. (A. 108-09.) That they did not do so shows their intent not to impose any such restrictions. *See, e.g.*, *State v. Santerre*, 2023 ME 63, ¶ 20, 301 A.3d 1244 ("It is apparent that the Legislature knew how to create statutory language that allows the intended result in other provisions. Consequently, the absence of such language in this provision demonstrates the Legislature's intent to provide for a different result." (quoting *Desgrosseilliers v. Auburn Sheet Metal*, 2021 ME 63, ¶ 14, 264 A.3d 1237)). This unambiguously allows "motorized vehicular traffic on

existing roads and trails" without restriction based on the nature of any uses *accessed* via that standalone allowed use.

Intervenors continue to incorrectly invoke principles of non-conformity, arguing that a change in the use of the property accessed by the way would constitute an improper expansion of a non-conforming use in the CFMA zone. (Blue Br. at 7, 25, 27-30.) But, at the risk of repetition, "motorized vehicular traffic on existing roads and trails" is an *expressly allowed use* listed in Table 1 as allowed in the CFMA (and every) zone. (A. 108.) The LUO defines a "non-conforming use" as a "use . . . of land . . . which is *not allowed* in the zone in which it is situated." (A. 162 (emphasis added).) This Court expressed a similar definition of non-conformity in *Gensheimer v. Town of Phippsburg*, 2007 ME 85, 926 A.2d 1168, on which Intervenors rely. (Blue Br. at 28.) As this Court stated: "Legally existing non-conforming uses in the Ordinance are uses *other than permitted uses*. . . . Whereas non-conforming uses must comply with the land use standards detailed in [provisions relating to non-conforming uses], *permitted uses listed in the Land Use Table* are governed by the land use standards outlined [elsewhere in the ordinance]." *Id.* ¶¶ 11, 13 (emphasis added). The same is true here. "Motorized vehicular traffic on

existing roads and trails" is a *permitted use listed in the table of land uses*, independent of what use or uses are accessed thereby. (A. 108.)

Under the Town's ordinances, "motorized vehicular traffic on existing roads and trails" is allowed in every zone, regardless of whether such traffic is to a park, a residence, a restaurant, or a boatyard. Because the ordinance allows "motorized vehicular traffic on existing roads and trails," regardless of the nature of any uses accessed, the Board erred as a matter of law in treating the access way as a non-conforming use, and denying Brogdon's application on the basis of a change in use of the property accessed.

B. Use of the Way as Proposed Is "Motorized Vehicular Traffic on Existing Roads and Trails."

As discussed above, the LUO permits "motorized vehicular traffic on existing roads and trails" in every zone, including the CFMA zone. (A. 108.) The LUO defines a "road" as "a route 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." (A. 164.) A "driveway," in turn, is defined as "[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." (A. 157.) The LUO does not define "trail." The LUO provides that undefined terms "shall be defined according to the latest version of Merriam-Webster's Collegiate Dictionary." (A. 155.) Merriam Webster's Collegiate Dictionary, 11th ed., defines a "trail" as, "a marked or established path or route esp[ecially] through a forest or mountainous region." (A. 63; R. 736, 810.)

These provisions must be read together, and in the context of the entire ordinance, rather than in isolation. *See, e.g.*, *Jade Realty Corp. v. Town of Eliot*, 2008 ME 80, ¶ 9, 946 A.2d 408 ("In construing the language of an ordinance, the ordinance is to be considered as a whole.") Doing so reveals that use of the access way has been, and will remain, "motorized vehicular traffic on existing roads and trails," and therefore an allowed use.

1. The Nature of the Use, Not Its Label, Controls.

At the outset, Brogdon must address the Planning Board's reliance—at Intervenors' urging—on Brogdon's use of the word "driveway" at certain points over the past four years of proceedings. (A. 63; R. 813-14.) Intervenors invite this Court to do the same. (Blue Br. at 7-8, 24.) This would be error, particularly on the record in this case.

The record reflects that until the case reached the Business Court the first time, all parties described the access way at issue interchangeably as a "road" and "driveway." For example, Brogdon repeatedly referred to the way as a "road." (R. 160-61, 209-11.) Intervenors repeatedly called it a "driveway." (R. 160-61). Intervenors' engineers used the term "roadway." (R. 81.) DEP used the terms "road," "driveway," and "roadway" interchangeably. (R. 23.) Assigning significance to any of these loosely used descriptors—let alone any particular one—is arbitrary, unsupported by the record, and legally misguided.

This Court has repeatedly made clear that it is not the label given to a use, but its fundamental nature, that is legally significant:

> [t]he name by which a building or use is designated or called has some evidentiary value but is not of controlling importance in determining whether such a building or use is within one of the permitted institutions or types of operations under the zoning ordinance involved. It is rather the *nature of the activities* or the character of the business or service to be carried on which will settle the construction to be given to the legislative language.

Your Home, Inc. v. Portland, 432 A.2d 1250, 1258 (Me. 1981) (emphasis added) (quoting *Moyer v. Bd. of Zoning Appeals*, 233 A.2d 311, 318 (Me. 1967)). The Business Court correctly identified the Board's reliance on

labels as error. (A. 17-18.) This Court should decline Intervenors' invitation to repeat this error.

2. The Access Way Was, and Remains, a "Road."

The LUO defines a "road" as "a route 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." (A. 164.) The Business Court recognized in its 2024 order that "[t]he parties agree that at least until 2001, when the three-story building on the property ceased operation as an inn, the existing way was properly considered a road." (A. 25, 29.) The road granted vehicular access at that time to commercial uses—a bed and breakfast and antique store—that had been in operation for decades. (R. 737, 825; 1/14/25 PB Video at 00:40:00 to 00:40:20.)

On remand, the Planning Board appeared to attempt to walk back the Town and Intervenors' admission on this point, writing in its decision after remand:

> Historically, the building was never a multi-unit residential, it was a bed and breakfast, and therefore transient accommodations, and thus there were never multiple residential dwelling units to make it a multi-unit residential facility.

(A. 62.) This digression is perplexing. The LUO plainly identifies hotels and motels, "transient rentals," and "bed and breakfasts" of more than four bedrooms as commercial uses. (A. 111, 114, 155-56.) The property was licensed by the state as a 6-room bed and breakfast (R. 737.) It also housed an antique shop. (R. 825; 1/14/25 PB Video at 00:40:00 to 00:40:20.) In other words, no matter how one categorizes the previous use, it was plainly a *commercial* use, not a single or two-family residential use, and therefore the way providing access to it was plainly a "road" rather than a "driveway." (A. 108.)

Intervenors now attempt a similar reversal, suggesting that "[t]he record contains no evidence that the [way] has ever been used as a road." (Blue Br. at 30.) That is flatly false. Again, despite their later attempts to unring the bell, both Intervenors and the Town itself admitted that the building currently used as a residence was a commercial inn until 2001, and therefore was properly considered a road at least up to that point. (A. 22 n.5 (noting Intervenors and Town's attempts to walk back prior admission after remand).) The record confirms that fact. (R. 737, 825; 1/14/25 PB Video at 00:40:00 to 00:40:20.)

The Planning Board evidently concluded that upon the property ceasing to be used as an inn, and beginning use as a single-family residence, the "road" became a "driveway"—and the property's use for a campground would convert that "driveway" back into a "road." (A. 64.) But this ignores that "motorized vehicular traffic on existing roads and trails" is a *standalone allowed use*, independent of any use accessed thereby. (A. 108.) There is no dispute—no legitimate dispute, in any event—that the way was an "existing road or trail" when it served a commercial inn for many years. That use—i.e., passage of motor vehicles over the very same roadway—never ceased. That the use *accessed* via that "existing road or trail" changed is irrelevant, because vehicular traffic on the existing road is an allowed use in and of itself.

3. The Access Way Is Not a "Driveway."

The LUO defines a "driveway" as "[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." (A. 157.) The Board appears to have found that the access way is a "driveway" because it currently serves a single-family residence. (A. 63-64.) But this ignores half of the definition of a "driveway." By the plain language of the

ordinance, an access way that is more than 500 feet in length is definitionally not a "driveway," regardless of what uses it serves. The Board failed to make any finding whatsoever regarding the length of the way, and therefore could not find it to be a driveway as a matter of law.

Intervenors suggest that the Board found the way to be under 500 feet "by implication." (Blue Br. at 9.) But Intervenors fail to point to anything implying any such finding. While this Court has recognized that "[i]n some cases the subsidiary facts may be obvious or inferred from the record and the general factual findings," *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 18, 769 A.2d 834, this is not such a case. Nothing in the Board's findings addresses the length of the way; indeed, nothing in the record suggests they even *discussed* it—despite the Business Court remanding with express instructions to make such findings. (A. 18.)

Nor is there evidence in the record that would support such a finding in any event. As the Business Court correctly concluded, the "only competent evidence in the record" addressing the length of the way is the sketch prepared by surveyor Jonathan Stewart of Plisga & Day, which shows that the access way is 502 feet from Route 102A to its northerly

terminus.[12] (A. 219.) It therefore cannot be a driveway as defined in the ordinance, and the Planning Board clearly erred in finding to the contrary.

This result makes perfect sense within the structure of the ordinance. The purpose of the ordinance's road/driveway distinction is to regulate roads *more heavily* than driveways because they are longer and/or serve more intensive or numerous uses than driveways. (A. 129 (setting forth specific design standards to roads, but not driveways).) The purpose of the distinction is not, perversely, to impose *greater* restrictions on driveways than roads by arbitrarily excluding them from "motorized vehicular traffic on existing roads and trails."

Contrary to Intervenors' contentions, the Business Court did not "usurp[]" the factfinding authority of the Planning Board. (Blue Br. at 5.) Rather, the court correctly held that the board erred as a matter of law by finding that the way is a "driveway" without making any finding as to its length, consistent with the ordinance's definition of the term, and by

[12] The record does not support Intervenors' speculation that the Board found that the portion of the way adjoining a parking area should be excluded from the length of the way. (Blue Br. at 9, 24.) Nor do Intervenors provide a coherent justification for such exclusion. As for Intervenors' declarations that the way is "250 feet in length" or "200-foot long" (Blue Br. at 7-8), the cited portions of the record offer no support for either claim, as thoroughly discussed by the Business Court. (A. 19.)

completely disregarding the only competent evidence of the length of the way. (A. 17-20.)

4. The Access Way Is a "Trail."

The Board also concluded that the access way could not be a "trail" because it is a "longstanding residential driveway, that is approximately 10 feet wide, paved, and located in a developed shoreland zoning district and residential area." (A. 63-64.) A "trail" is "a marked or established path or route esp[ecially] through a forest or mountainous region." (A. 63; R. 736, 810.) Intervenors have argued that "[n]o interpretation of that definition is sufficient to encompass the longstanding residential driveway, that is approximately 10 feet wide, paved, and located in a developed shoreland zoning district and residential area." (R. 718.) But neither Intervenors' argument—nor the Board's "finding" parroting that argument (A. 64)—meaningfully grapple with the actual words of the definition, or attempt to place them in the context of the ordinance.

As defined, the term "trail" is incredibly broad. It requires only a "marked or establish path or route." Under this definition, "trail" is an overarching category of routes that encompass everything from a footpath to a highway. The Board—like Intervenors—reads the word

"especially" out of the phrase "esp[ecially] through a forest or mountainous region," essentially replacing "especially" with "only." But that, of course, is not what the definition says. Indeed, we know that "trail" *cannot* be limited to hiking trails and the like because the LUO expressly contemplates that "trails" can accommodate "motorized vehicular traffic." (A. 108.)

Reading these provisions together, in the context of the entire ordinance—as one must, *e.g.*, *Jade Realty*, 2008 ME 80, ¶ 9, 946 A.2d 408—demonstrates that the phrase "motorized vehicular traffic on existing roads and trails" is meant to encompass the whole universe of "established routes" over which vehicles might travel, provided they are "existing" and not new. The Board's apparent conclusion that the access way is too developed to be a "trail," but not developed enough to be a "road"[13] and therefore—bafflingly—prohibited, even though the same traffic over both roads and trails is allowed, defies both the language of the ordinance and common sense, and was erroneous as a matter of law.

[13] As Intervenors themselves recognize, "the LUO imposes more stringent design and dimensional standards to roads," and "[t]he SPRO imposes additional capacity-related standards to roads." (Blue Br. at 21.) For example, private roads must have a *minimum* 30-foot-wide right-of-way. (A. 129.)

It would be entirely nonsensical and arbitrary to allow vehicular traffic over, for example, an existing 20-foot-wide road and an existing 8- to 10-foot-wide shared-use trail—but not an existing 10-foot wide "driveway." *See, e.g.*, *Town of Ogunquit v. Dep't of Public Safety*, 2001 ME 47, ¶ 7, 767 A.2d 291 (noting that when interpreting statutes, courts "consider the statutory scheme as a whole to achieve a harmonious result, and avoid a statutory construction that creates absurd, illogical, or inconsistent results" (citations omitted)). Such a result would be particularly absurd here, where the proposal is for the use of an existing way situated on the far side of a state highway to access a small campground, with seasonal use by peaking at 12 trips per hour—i.e., a single car in five minutes, *at peak*.[14] (R. 32-33, 364-65.)

C. DEP's Consistent Interpretation of the Ordinance Is Entitled to Deference.

Brogdon's plain-language, common sense reading of the LUO is bolstered by the DEP's interpretation of that same language. Brogdon

[14] Like Intervenors' hyperbolic claims regarding increases in traffic accessing the property, their suggestion of "physical expansions and improvements" to the way (Blue Br. at 26) is similarly embellished. The only changes, made at the request of the Board, were the addition of signs—which is plainly not a change to the roadway—and widening of the shoulder *entirely within the Department of Transportation right-of-way for Route 102A*. (A. 218; R. 364-70; 11/15/22 PB Video at 1:57:50 to 1:59:15.)

submitted with her application a letter from the Attorney General's Office stating DEP's position that the Town's ordinance, adopted pursuant to 38 M.R.S. § 438-A, expressly allows vehicular traffic on existing roads and trails in all zones, including the CFMA zone, without a permit. (R. 23.) Consequently, because Brogdon "does not propose to construct a new road," but rather the use of what DEP interchangeably refers to as a "preexisting driveway" and a "preexisting roadway," traffic over that access way to Brogdon's proposed campground in the R-B district does not result in a permit being required. (R. 23.) DEP plainly understood that "motorized vehicular traffic over existing roads and trails" encompasses the full range of ways over which motor vehicles travel, rather than arbitrarily excluding the very same traffic over "driveways."

This Court has consistently held that "[w]hen a dispute involves an agency's interpretation of a statute it administers, the agency's interpretation, although not conclusive, is entitled to great deference and will be upheld unless the statute plainly compels a contrary result." *Town of Eagle Lake v. Comm'r, Dep't of Educ.*, 2003 ME 37, ¶ 8, 818 A.2d 1034 (quotation marks omitted); *see also FPL Energy Maine Hydro LLC v.*

Dep't of Envt'l Prot., 2007 ME 97, ¶ 11, 926 A.2d 1197. The courts will not "second-guess" an agency on issues within its area of expertise. *See, e.g.*, *Mulready v. Bd. of Real Estate Appraisers*, 2009 ME 135, ¶ 13, 984 A.2d 1285; *Town of Eagle Lake*, 2003 ME 37, ¶ 8, 818 A.2d 1034; *see also Armstrong v. Town of Cape Elizabeth*, No. AP-00-023, 2000 Me. Super. LEXIS 275, *18-19 & nn.4-5 (Dec. 21, 2000) (Crowley, J.) (favorably citing general DEP guidance on shoreland zoning issues available on its website).

The Town's LUO, as it pertains to shoreland zones including the CFMA, was adopted as required by the Mandatory Shoreland Zoning Act, 38 M.R.S. §§ 435-449, which provides that "[w]ith respect to shoreland areas . . . municipalities shall adopt zoning and land use control ordinances . . . in accordance with the following requirements." 38 M.R.S. § 438-A. Those ordinances must be consistent with or no less stringent than minimum guidelines adopted by the DEP. 38 M.R.S. § 438-A(1), (2). The DEP has adopted such guidelines in the form of the Chapter 1000 model shoreland zoning ordinance. *See* 06-097 C.M.R. ch. 1000. The Commissioner of the DEP must review and approve municipal ordinances required by the Mandatory Shoreland Zoning Act before they

become effective. 38 M.R.S. § 438-A(3). If a municipality determines that special local conditions require a different standard than that set forth in Chapter 1000, the municipality must document those special conditions and submit that documentation to the Commissioner with its proposed ordinance. 38 M.R.S. § 438-A(2).

Here, the Town did not depart from Chapter 1000. Rather, as discussed above, the Town adopted an ordinance that is substantively identical to Chapter 1000 in all relevant respects. There is nothing in the Town's ordinance to suggest the phrase "motorized vehicular traffic on existing roads and trails" means anything different than it means in Chapter 1000. DEP's interpretation of that identical language is entitled to deference, particularly where that interpretation is consistent with the plain language of the ordinance and avoids the arbitrary and absurd result that vehicles can travel over existing "roads" or "trails" but not "driveways" in the CFMA.[15]

[15] Maine Municipal Association, upon being presented with the DEP's opinion in this case, advised the Town that "a court would generally give deference to the DEP's interpretation of the ordinance and state law." (R. 738.)

III. The Planning Board Erred in Refusing to Consider Whether the Use of the Way Was Similar to Allowed Uses.

Even if the access way could properly be found to be a "driveway," and even if the ordinance's provision for "motorized vehicular traffic on existing roads and trails" could properly be read to exclude existing "driveways," the Planning Board nevertheless had an affirmative obligation to determine whether that vehicle traffic over existing driveways was manifestly different than the same traffic on existing roads and trails.

This Court so held in *Your Home, Inc. v. Portland*, 432 A.2d 1250 (Me. 1981). In that case, a party seeking a permit to construct a mobile home park appealed from a local board of appeals' denial of its application. *Id.* at 1252. The ordinance did not expressly permit or prohibit mobile home parks in the relevant zone, but did allow single-family dwellings. *Id.* at 1258-59. Portland's ordinances previously provided that the board of appeals had the power to allow uses not specifically allowed in a particular zone "provided that such uses are similar to and no more objectionable than those listed in said particular zone." *Id.* at 1252-53 & n.3. Even after that ordinance was repealed, however, this Court held that the board of appeals had not only the

power, but the "responsibility" to evaluate whether a mobile home park was similar to a single-family dwelling:

> The "similar use" formula of the old ordinance was not necessary to provide the Board with the basic power of interpreting the ordinance. Even without the "similar use" provision, the Board had the power and the *responsibility* to interpret the ordinance in a rational, nondiscriminatory manner. Any use which is similar to and no more objectionable than the uses expressly permitted in a zone, and concerning which there is no explicit provision in the ordinance, may not be arbitrarily and irrationally excluded from [a] zone, nor excluded on some ground that has no foundation in the ordinance.

Id. at 1261 (emphasis added); *see also N. Me. Gen. Hosp. v. Ricker*, 572 A.2d 479, 482 (Me. 1990) (citing *Your Home*). Thus, whether or not an ordinance has a "similar use" provision, local planning boards must consider whether a use not clearly addressed by the ordinance is similar to an allowed use.

Here, the ordinance does allow for "[u]ses similar to allowed uses." LUO Table 1, item 30 (A. 108). The LUO does not expressly or clearly address existing driveways—except to the extent they must necessarily be encompassed within the phrase "motorized vehicular traffic on existing roads and trails"—and does not prohibit uses not expressly allowed, as some ordinances do. Brogdon repeatedly prompted the Board

to engage in a similar use analysis. (R. 825, 827; 1/14/25 PB Video at 00:11:25 to 00:17:10.) The Board affirmatively declined to do so. (R. 827.) This was error.

Had the Board fulfilled its responsibilities, it could not, as a matter of law, have concluded that vehicular traffic over an existing "driveway" was meaningfully dissimilar to, or "more objectionable than," the same traffic over an existing road or trail. The defining characteristic of the use is the passage of motor vehicles. As discussed above, the only difference between a road and a driveway is that a road is longer and/or serves more numerous or intensive uses. If anything, a driveway is demonstrably *less* objectionable than a road, being limited in size and the number and intensity of uses served. As the Business Court observed, the way "is alike in its essentials to a road, and differs from a road (if at all) only in its length." (A. 22.) Thus, even if the way were "a very long driveway," there is "no reasonable argument" that use of the way would be more objectionable than use of a road in the CFMA zone. (A. 22-23.)

Again, contrary, to Intervenors' contentions, the Business Court did not "substitute its judgment for the local board." (Blue Br. at 10.) Rather, the court properly held that *the Planning Board's findings* compelled the

conclusion that the use of the way was similar to and not more objectionable than "motorized vehicular traffic on existing roads and trails," as a matter of law.

IV. The Planning Board's Interpretation of the Ordinance Would Unlawfully Expand its Application.

Intervenors highlight the legislative purposes of shoreland zoning, including protection of natural resources and promotion of fishing and maritime uses. (Blue Br. at 22, 32.) Rather than supporting Intervenors' cause, however, this line of argument only serves to emphasize the degree to which the Planning Board's interpretation of the ordinance would unlawfully expand the restrictions on Brogdon's property by implication. *See Moyer*, 233 A.2d at 316 ("Zoning laws, whether statutes or ordinances, in as much as they curtail and limit uses of real estate and are in derogation of the common law must be given a strict construction and the provisions thereof may not be extended by implication."); *Houlton v. Titcomb*, 102 Me. 272, 284, 66 A. 733, 738 (1906) ("[Land use] ordinances are in derogation of the common law and must be construed strictly. They cannot be enlarged by implication"), *overruled in part on other grounds by Shapleigh v. Shikles*, 427 A.2d 460, 464 (Me. 1981).

The only use Brogdon proposes in the CFMA zone is continuing to use an existing way for access to her property from a state highway. Her proposed campground is in the R-B zone, where it is allowed. Nevertheless, under Intervenors' (and the Board's) reasoning, Brogdon would only be able to put her property to those uses that are allowed in the CFMA zone—even though the relevant part of her property is not in that zone—because her only access is through that zone.

Such an interpretation would—without basis in the text of the ordinance or in Maine law—dramatically limit the uses to which she and other similarly situated landowners may put their property, particularly those whose properties straddle or abut shoreland or other special purpose zones. Indeed, it would effectively rezone the entirety of Brogdon's property to CFMA. This is precisely the type of "enlarge[ment] by implication" that Maine law has prohibited for over a century. *See Moyer*, 233 A.2d at 316; *Titcomb*, 102 Me. at 284, 66 A. at 738.

Such a result would be particularly absurd here, where the proposal is for the use of an existing way situated on the far side of a state highway to access a small campground, with seasonal use by peaking at 12 trips per hour. (R. 32-33, 364-65.) This would be far less intensive than many

of the uses allowed in the CFMA district, which include both commercial and even industrial uses. LUO § XI (R. 583-84) (including in definition of "functionally water-dependent uses" "shipyards and boat building facilities" and "industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or processing water," among other uses).

Moreover, the property has no history of or utility for fishing or other maritime uses. *See* LUO § III.D(4) (A. 94-95) (setting forth as criteria for inclusion in CFMA zone that "the existing predominant pattern of development is commercial fishing and other maritime activities and contains areas which are suitable for functionally water-dependent uses"). The use of an access way that already exists to access a small campground located outside of the CFMA zone in no way threatens or displaces any of these activities. Indeed, the Board affirmatively found that the proposed use would not adversely affect the shoreland or uses in the CFMA zone. (A. 73, 82.)

CONCLUSION

For all of the foregoing reasons, the Town respectfully requests that this Court affirm the decision and judgment of the Business Court.

Respectfully submitted, dated at Bangor, Maine this 5th day of March, 2026.

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CERTIFICATE OF SERVICE

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

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