

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-25-434

MADELON BROGDON

Petitioners/Appellee

v.

TOWN OF TREMONT

Respondent/Appellee

And

THEODORE KLEINMAN, et al.

Parties in Interests/Appellants

ON APPEAL FROM BUSINESS AND CONSUMER COURT

DOCKET NO.: BCD-APP-2025-00007

REPLY BRIEF OF APPELLANTS/THEODORE KLEINMAN, JAMES
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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.

Appellants further contend that the Planning Board's Findings and Decision denying the application were well-supported by law and evidence and should have been upheld. To the extent that the reviewing court determined otherwise, the proper remedy was to remand the matter to the municipal board. Appellants request that this Court vacate the Business & Consumer Division's decision, and either uphold the municipal Planning Board's decision, or remand the matter to that Board for additional factual determinations.

STATEMENT OF FACTS

Appellants Theodore Kleinman, Danine Welsh, Robert Welsh, James Coffman and Laura Levin adopt the factual recitation and associated record citations contained in Appellants' Brief dated January 12, 2026.

STATEMENT OF ISSUES

- I. The Superior Court Erred in Making Factual Determinations that are Within the Planning Board's Exclusive Jurisdiction.
- II. The Planning Board Did Not Abuse its Discretion in Denying Brogdon's Permit

ARGUMENT

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

In her brief, Appellee Madelon Brogdon (“Brogdon”) has elected not to address in any way Appellants’ contention that the Business & Consumer Division improperly engaged in factfinding that is within the Tremont Planning Board’s exclusive authority, and substituted its own factual determinations for those of the Tremont Planning Board in overturning the Planning Board’s decision. Her argument on appeal references no legal support for the Court’s factfinding efforts following its determination that the Planning Board’s own findings were deficient, and instead focuses exclusively on her argument that the Planning Board made determinations unsupported by the record.

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). No statute or ordinance vests the Superior Court or the Business & Consumer Division with any such authority. Consistently with the municipal ordinances, 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. 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 Maine Rules of Civil Procedure. Id., at ¶¶8-9, n. 6 (citing Inhabitants of Levant v. County Comm'rs, 67 Me. 429, 437 (1877)).

Here, rather than remanding the matter as required upon its determination that the Planning Board's decision was inadequately supported by record facts, the Court improperly 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 nullify ordinance definitions and prohibitions associated with those terms, two of which are distinctly defined in the Tremont Land Use Ordinance ("LUO"). In doing so the Court invaded the Planning Board's exclusive authority. Additionally, its determinations disregarded the Land Use Ordinance's separate treatment of "parking facilities" as

independent of, and separately regulated from roads, trails and driveways. It denied the Planning Board's exclusive opportunity 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 LUO that were the essence of the Planning Board's underlying 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, contrary to the Planning Board, that the LUO's table of uses inclusion of a standard allowing the Town's reviewing authority to permit or reject undefined uses "similar" to others specifically addressed in the table should override explicit prohibitions of new roads and driveways within the Commercial Fisheries/Maritime Activities (CFMA) zone, the 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, residential driveways, trails and roads differently from each other. For example, the LUO imposes more stringent design and dimensional standards to roads. *LUO, Section VI(I). (App., pp. 129-132)*. The municipal Site Plan Review Ordinance (“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 SPRO 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.

The Business & Consumer Court’s decision to set aside the Planning Board’s careful determinations in exchange for its own findings that blur, if not render meaningless, the local ordinances’ clear distinctions among property uses, is simply not supportable, even upon a determination that the municipal board’s findings were incomplete.

Appellants contend that the Planning Board’s determinations were made correctly based upon the facts presented and ordinance definitions. The appropriate remedy upon a determination otherwise was and is to remand the matter for further Board consideration, rather than to impose judicially determined findings. 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.

II. The Planning Board Did Not Abuse its Discretion in Denying Brogdon’s Permit

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. It is undisputed that Brogdon’s application did not include any functionally water-dependent use component. The LUO does not permit driveways, a separately defined land use, within the CFMA district.

The municipal Board considered ordinance definitions of “road” and “driveway”, and appropriate dictionary definitions of “trail”, a term otherwise undefined in either applicable ordinance in determining whether or not Brogdon had established that her existing driveway fit the ordinance definition of pre-existing road or trail. The Board rejected Brogdon’s newly-asserted effort to include a parking facility’s area to extend the driveway’s asserted length beyond 500 feet, and relied upon the actual access way’s length, not including the parking facility, to determine its proper classification. Like “road” and “driveway”, parking facilities are separately regulated. The Board also properly considered 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, and not a road or trail. All of the Board’s determinations were consistent with the evidence presented and applicable ordinance provisions.

Based upon LUO definitions, the Planning Board correctly found that the development property was not served by any existing roads and/or

trails, but only by a “driveway.” Brogdon’s proposed physical expansions and commercial use would by definition create a new road where none had previously existed. It was undisputed that Brogdon’s property had long contained only a single-family home. While the home had been an inn at one time, that use had been long abandoned. The record contains no evidence whatsoever that the commercial use existed at any time after the CFMA district’s enactment. For decades, the access-way traversing the CFMA zone from the public road to that home and parking area has served only a residential use. The Board also correctly found that residential use to be lawfully non-conforming within the CFMA district. As such, its *driveway* retained lawful non-conforming status as well.

The Planning Board’s determination of the access way’s classification is entirely consistent with the LUO’s intent, when viewed in the context of the ordinances’ overall structure. The LUO 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 defined as “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) (emphasis added). For practical purposes, the Town’s LUO defines roads as essentially every sort of vehicle access way except for driveways.

As the municipal ordinances direct, 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*).

The LUO contains the *only* applicable definitions of the terms “road” and “driveway”, and 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 facility 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*).

The Planning Board correctly determined that the proposed campground access requires that commercial traffic be funneled exclusively from a public road across the CFMA area, fewer than 500 feet, 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 new road was an unlawful 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.* 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, or any other vehicular

passage way. The LUO's plain language expressly prohibits that conflation. Brogdon's property contains no existing road, as defined.

The Planning Board correctly determined that Brogdon's driveway is 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 new 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. Any purported lawful non-conformity for commercial use was discontinued long 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. The Planning Board's findings and decision are consistent with applicable ordinance terms, and reflect appropriate consideration of the facts.

Brogdon’s assertion that the LUO’s Table of Uses’ reference to the treatment of otherwise unarticulated land use activities in a manner similar to listed uses somehow obviates the ordinance structure’s clear delineation between roads and driveways and is legally unsupportable. Such a reading of the Tremont ordinances will render meaningless clear definitions of “road”, “driveway” and “parking facilities”, among other terms. This Court has long held that an ordinance may not be interpreted so as to read a provision out of existence or render it surplusage. Jade Realty Corp. v. Town of Eliot, 2008 ME 80, ¶ 7 (citing Bodack v. Town of Ogunquit, 2006 ME 127, ¶ 12; Kimball v. Land Use Regulation Comm’n, 2000 ME 20, ¶ 26). The Planning Board was required to look to the ordinances’ plain language and give effect to legislative intent. Id., ¶ 9 (quoting Clarke v. Olsten Certified Healthcare Corp., 1998 ME 180, ¶ 6). As is noted above, 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.” Id. (citing Gerald v. York, 589 A.2d 1272, 1274 (Me. 1991)).

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. 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, or the opinion of any otherwise uninvolved State agency representative, as opposed to contrary evidence contained in the record. The Planning Board’s interpretation is consistent with the ordinances’ plain language, and is entitled to this Court’s deference.

In every respect, Brogdon’s argument 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 limiting commercial use of that zone to water-dependent industries.

The Planning Board rejected the Brogdon application based upon the Land Use and Site Plan Review Ordinances’ 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 based upon those determinations. Even if it found 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

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; jhunter@rudmanwinchell.com and tpease@rudmanwinchell.com; and to Patrick W. Lyons, Esq., of Viridian Law, P.C., 204 Main Street, Ellsworth, ME 04605, e-service address: plyons@viridian.law; on this 23rd of March, 2026.

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