STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. YOR-23-424

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ROGER K. MOREAU,

Petitioner-Appellee

vs.

TOWN OF PARSONSFIELD,

Respondent-Appellee

and

MICHAEL J. NELLIGAN,

Party-In-Interest/Appellant

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On Appeal from Maine Superior Court
(York County)

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# BRIEF FOR APPELLANT

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# I. INTRODUCTION

Appellant Michael J. Nelligan ("Nelligan")[1] requests that this Court vacate the judgment of the Superior Court and remand with instructions to either dismiss the appeal because it was not timely filed, or to affirm the decision of the Town of Parsonsfield's ("Town") Board of Appeals ("Board of Appeals"). Petitioner Roger Moreau's counsel's lack of awareness of *Beckford v. Town of Clifton*, 2014 ME 156, 107 A.3d 1124 (holding the 45-day appeal period commences the day when a board of appeals votes at a public hearing to grant or deny the appeal, and not when a board of appeals issues findings and a written decision), cannot serve as a basis to find good cause to extend the appeal period, as lack of knowledge of the law cannot be a basis for good cause.

On the merits, the Board of Appeals properly vacated the Town's Planning Board's approval of Roger Moreau's ("Moreau") third application for site plan approval dated February 22, 2021 ("Third Application"). The Board of Appeals correctly held that in proposing a commercial new use to be located on a rear lot, the ordinance required that Moreau provide an access way serving the rear lot that

[1] Nelligan owns land that directly abuts 26 Reed Lane and, for over nine years, has been adversely impacted by Moreau's business operation (without any approvals) of a junkyard, auto body shop, auto repair facility and an auto service station (all distinct uses under the Ordinance) to an existing rear residential lot located in the Village Residential District. Given his participation either directly or through counsel at Planning Board meetings relating to this matter, Nelligan has standing. *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735 ("standing has been liberally granted to people who own property in the same neighborhood as the property that is subject to a permit or variance").

met the standards for a new commercial use, and that the access standards for residential uses did not apply. And since Moreau's Third Application did not show the access way meeting the commercial access standards, but only the residential access standards for two or more dwelling units, the Board of Appeals was right to conclude that the Planning Board erred in approving the Third Application.

As the Town's Land Use Ordinance ("Ordinance") makes clear, the goal of zoning is to eliminate, not create, nonconformities. By approving Moreau's Third Application, the Planning Board ignored the Ordinance provisions that states any new use must meet the standards in the Ordinance, including the standards for access if the new commercial use is to be located on a back lot.

## II. STATEMENT OF FACTS/PROCEDURAL HISTORY

Moreau in 2015 on a back lot, where he had a home, illegally commenced auto repair, auto salvage, and junkyard uses at 26 Reed Lane. (Record "R." 00311, R00343-349.) 26 Reed Land is located in the Village Residential District. (A013; R.00045, R.00364, R.00436, R00761 (see Note 4 on plan).) Auto salvage and junk yards are prohibited uses, while an auto repair shop is a conditional use requiring site plan approval.

Moreau had previously submitted and been denied two earlier site plan applications. (A014-015; R.00001-2, R00021-22, R00045-48.) The first application dated June 26, 2019, the Planning Board denied. (A157; R.00021-22.)

Moreau did not appeal. Moreau submitted a new (second) application dated May 6, 2020, and on that application, the Board of Appeals reversed the Planning Board's approval and rejected Moreau's argument that 26 Reed Lane as a matter of law had merged with another lot so as to make 26 Reed Lane no longer a rear lot. (A162; R.00045-46,) Moreau did not appeal. Moreau then submitted his new Third Application dated February 22, 2021. (A178-193; R.00250-268.)

After submission of the Third Application, Moreau changed it twice. (R.00430-431, R.00432-444, R.00448, R.00762) After he learned that the after-the-fact approval he sought of the commercial use at the existing garage he built in 2015 would mean the auto repair operation would be located within a 300 foot well head protection zone, he proposed to build a new one-bay garage with the required five parking spaces at a new location outside of that zone. He intended to keep the one-bay garage he built in 2015, located within the well head protection zone, and use it for residential use only.

After July 21, 2021 when the Planning Board summarily approved the Third Application for the new one-bay garage, Moreau proceeded to build not what the Planning Board had approved but instead a two-bay garage which required ten parking spaces and presented a greater intensity of use. After Nelligan timely appealed to the Board of Appeals, and the parties agreed to bifurcate the many appeal issues to focus first on the legal question of what the Ordinance requires for

access to serve a new commercial use, the Board of Appeals remanded for the Planning Board to review the fact that Moreau had proceeded to build a two-bay garage which required ten parking spaces[2] despite the fact that the Planning Board had only approved a plan showing a one-bay garage with five parking spaces. (R.00247-249.) The Board of Appeals also asked the Planning Board to explain why the proposed new commercial use did not have to comply with the access standards in the Ordinance for a new commercial use. (A057; R.00629.)

On remand, on March 22, 2022 the Planning Board summarily approved Moreau's further amended Third Application for site plan approval for the after-the-fact approval of the already built two-bay garage with ten parking spaces. (A058-59.) The Planning Board never bothered to review the Third Application for compliance with the site plans standards, never checked to see if the added parking is located in the well head protection zone (it is), and still applied the residential use access standards, ignoring the commercial access standards.

On appeal to the Board of Appeals of the approval of the Third Application, that board vacated the Planning Board's approval because Moreau's proposal to locate at 26 Reed Lane a commercial auto repair service two bay facility did not

[2] When the matter came before the Board of Appeals, its members were incredulous that while a one-bay garage with five parking spaces had been proposed and approved, Moreau went ahead and built a two-bay garage that required ten parking spaces. Nelligan timely appealed the issuance of the building permit to the Board of Appeals. By agreement, that appeal has been stayed pending a final decision on the Third Application.

meet the access standards applicable to a new commercial use. (A060-63.) The Board of Appeals stated the Planning Board erred in relying on the access standards for serving two or more dwelling units. Having made that determination, the Board of Appeals did not decide whether the Planning Board had ever reviewed the Third Application, as amended, to show the two-bay garage and added parking against the specific site plan standards and well head protection zone. (A060-63.) The Planning Board never conducted any such review but summarily stated on remand that its prior review of the initial Third Application (with one bay garage and five parking spaces located in a different location then the further amended plan) still stood. (A058-59.) Moreau then filed his untimely Rule 80B appeal.[3]

On June 23, 2022, the Board of Appeals conducted a public hearing with all parties present, at which time the Board of Appeals deliberated publicly and voted to grant the appeal. (A062-63.) Following the June 23, 2022 Board of Appeals vote to grant Nelligan's appeal, the Board of Appeals met on July 28, 2022, and at that time, adopted findings of fact and signed a written decision. (A060-63.) On August 2, 2022, Moreau filed with the Board of Appeals a request for reconsideration. (A064.) At its regularly scheduled August 4, 2022 meeting, and without notice to

[3] Prior to filing his 80B appeal, Moreau requested reconsideration of the Board of Appeals' decision. (A064-67.) The board denied the reconsideration request. (A068.)

the parties, the Board of Appeals' assistant advised the Board of Appeals of the August 2, 2022 request to reconsider. (A068.) The Board of appeals voted unanimously not to reconsider the decision. *Id.* Moreau filed his Rule 80(B) Complaint on August 11, 2022, more than 45 days from the Board of Appeals' June 23, 2022, vote. (A001.) Claiming confusion on whether the appeal period runs from the vote or from adoption of written findings, in an unverified motion, Moreau moved for an enlargement of time of time. Both Nelligan and the Town opposed on the basis that any confusion was not reasonable in light of *Beckford v. Town of Clifton*, 2014 ME 156, 107 A.3d 1124. The Superior Court disagreed and granted the motion to enlarge to permit the late filed appeal.

As finally approved, Moreau proposed only to provide access that meets the standard for two or more residential dwelling units (50-foot right of way with a dirt travel lane of 13 to 15 feet in width) and not access that meets the standards for a new commercial use (60-foot right of way with improved surface travel lane of 30-feet on center). (A041, R.00761.) Before the Planning Board, Moreau's counsel conceded that the Ordinance clearly requires for a new commercial use that access be provided by a right of way at least 60-feet in width with a 30-foot travel lane on center. *See* Attorney Cramer's letter to the Planning Board dated April 15, 2021 ("The commercial and industrial use standards require 30 feet of pavement on a 60-foot right of way.") (R.00288.)

Because Moreau cannot meet this standard, as the present deeded right of way accessing 26 Reed Lane is for 50 feet and the travel way is at most 15 feet in width (A190-192, R.00417-419.), Moreau has attempted to find a way around the fact the Ordinance does not permit what he proposes to do. But as the Board of Appeals stated in its review of the Planning Board decision for error of law, the Ordinance states clearly that for a new commercial use such as an auto repair business, access must be provided by a 60-foot right of way with 30-feet of improved surface on center. (A060-63.).

Over Nelligan's objection, and at Moreau's request, the Superior Court ordered that the record of the proceedings of the decision under review include the record for both the first site plan application and the second application. (A012; A140-156.) Moreau in his brief submitted to the Superior Court, as well as the Superior Court in its decision, relied on material that was not in the record on the Third Application (R.00001-00249.), but is in the record on either the first or second site plan application.

This commingling of records makes it more difficult for the court to conduct its judicial review of the Planning Board and Board of Appeals' actions on the Third Application, which is limited to the record of the proceedings on the Third Application of submissions and events occurring after February 22, 2021. M.R.

Civ. P 80B((f) ("review shall be based upon the record of the proceedings before the governmental agency").

The composition of the Planning Board changed so that members who acted on the Third Application did not sit or hear either the first or second site plan application. (Of the 5 Planning Board members[4] who voted on July 21, 2021, to approve the Third Application, three of them (A. Jackson, S. Beckwith, and A. Boguen) had never conducted a site visit at any time nor participated in any prior public hearings.) Not at any time did any of these Board members while acting on the Third Application ever state they had reviewed all of the record submitted with the first and second applications. *See* R.00270-273, R.00362-364, R.00380-387, R.00394-395, R.00472-475 (Attorney Silk noted "the Board has not held a site walk or public hearing on this project, and would like it noted that he objects to the process.")

As discussed *infra*, the Third Application was a new application, different from the first two. And as finally approved the Third Application, as amended, for a two-bay garage with ten parking spaces was significantly different from both the first and second application, as the two-bay garage is in a different location on the property and so is the proposed parking. (A178-A193, A041; R.00761.) There is

[4] Moreau was a member of the Planning Board at the time the Planning Board acted on his Third Application, but he recused himself.

nothing in the record on the Third Application anywhere where the Planning Board, in acting on the Third Application, referred to any material submitted as part of the first or second application that was not otherwise resubmitted as part of the proceedings on the Third Application. *See generally* R.00270-273, R.00362-364, R.00380-387, R.00394-395, R.00472-475.) If it is legal error (procedural due process) for a board member to render a decision based on evidence not in the record, it must be so that it is error for a court to do the same on a Rule 80B appeal. *City of Biddeford v. Adams*, 1999 ME 49, ¶ 10, 727 A.2d 346 (stating that an administrative board acts improperly if it considers any evidence that is not part of the record in reaching its decision). *See also Pelkey v. City of Presque Isle*, 577 A.2d 341, 343 (Me. 1990) ("[p]rocedural due process also assumes that Board findings will be made only by those members who have heard the evidence and assessed the credibility of the various witnesses").

On its review of the Planning Board's decisions on Moreau's Third Application, this Court will first need to decide whether to limit its review to the record of that proceeding, or include within the record material from Moreau's earlier applications that was not otherwise submitted to the Planning Board as part of the record on the Third Application. The references below are only to material that was part of the record on the Third Application.

In 2015, Moreau applied for and obtained a building permit to build at 26 Reed Lane a 20' x 30' 2 car garage on slab and stated that the proposed use would be accessory to his residential use as "storage" for his 26 Reed Lane residence. (R.00348.[5]) At that time Reed Lane was a dirt way dead end that served two or more residential lots with homes. Though Moreau initially claimed otherwise[6], deeds provided to the Planning Board established that Reed Lane as a way did not come into existence until 1991, after zoning was adopted. At that time a larger lot was split to create the rear lot, now 26 Reed Lane.[7] When the rear lot was then created for a residential use, to be legal, it should have been accessed by a 50-foot wide right of way. It was not, as access in the deed was by an existing driveway. (A190-192, R.00417-419.) Because the access way to the rear lot at 26 Reed Lane was illegally created after the adoption of zoning, as it did not meet the standards

[5] Submitted to the Planning Board on April 21, 2021, at Tab H to letter of Attorney Silk. (R.00305, 00311.)

[6] Moreau incorrectly claimed below that "the traveled way now known as Reed Lane has been in existence for many decades." This is not in the record and contradicted by the fact the larger lot out of which 26 Reed Lane was created was not split until 1991. Prior to that time there was just one parcel with a driveway, there was no traveled way. (R.00369; R.00761; R.00265-66; R.00371-73.)

[7] Moreau incorrectly claimed below that Reed Lane "currently serves two residences and Mr. Moreau's automotive repair shop." This is not accurate. Reed Lane as evidenced by the submitted plan with the Third Application already serves three (3) residences: 478 Maplewood (Schoolhouse Lot); 13 Reed Lane (Gilbert); 26 Reed Lane (Rear Lot). (A041, A189, A193; R.00761.) Through his Third Application Moreau proposed to serve at least one (1) Commercial Use at 26 Reed Lane (Rear Lot). (A041; R.00369, R.00761.)

when created, the access way did not gain any grandfathered status. *See* Zoning Board of Appeals Decision (July 28, 2022) ¶¶ 10, 12-15(A061-62; R.01014-15.)

The surrounding area was then and currently is all residential use with the exception of Maplewood Cemetery. (R.00692, R.00721-726.) In 2015, Moreau built the garage with a bay (not disclosed in his application) within 300 feet of a private well,[8] and then proceeded to advertise and operate out of the garage an auto repair, auto body, used car sales and auto service as well as a junk yard.[9] The Town issued no less than five stop work orders to Moreau. (R.00343-347.).[10] At

[8] Maine law prohibits an auto repair facility being located within 300 feet of a private well located on abutting property. 38 M.R.S. § 1391 et seq. In his Third Application (Feb. 22, 2021), (A178-193;R.00250-68.), Moreau initially sought approval for a new one bay garage to be located within the well head protection area, (A193; R.00268.) He subsequently submitted revised plans showing the one bay garage and adjacent parking area outside of the protection area. (R.00369; R.00761.) The two-bay garage he actually built required more parking and that added parking area is located within well head area. The Planning Board ignored this fact when on remand from the Board of Appeals it approved his further revised plan. (A058-60; R.00762-63; R.01013.)

[9] This fact led the Town Attorney to instruct the Planning Board as follows:

> [T]he board first address the factual and legal issues concerning each new proposed use, prior to examining the proposed layout plan.

(R.00371) He stated that at foot note 1 of his memoranda:

> "several of the proposed new uses appear to be prohibited unless the board makes findings of fact supporting such new use as a *Special Exception* "following site plan review."

*Id.* Since Mr. Moreau proposes to service vehicles, sell tires, provide oil changes and perform State inspection services, as well as repair vehicles, he must also meet the Special Exception standards applicable to an Auto Service Station. The applicant has not submitted any of the required information necessary for the Board to decide whether the applicant has met his burden to show he can meet those standards. Therefore, the application remains incomplete. (R.00371-373.) As the record shows, the Planning Board never addressed these issues.

[10] *See* footnote 5, *supra.*

one point Moreau had over 25 junk cars on his property. Here is one of the notices of violations.

TOWN OF PARSONSFIELD
Code Enforcement Office
634 North Road
Parsonsfield, Maine 04047
207-625-4558 FAX: 207-625-8172
CEO@parsonsfield.org

Roger K. Moreau
Jennie A. Moreau
26 Reed Lane
Parsonsfield, Maine 04047

May 31, 2018

I visited your property at 26 Reed Lane, Map R19, Lot 44 with Deputy Cyr on Saturday, May 26, 2018. While you did not answer the door, the following was noted:

There are about 10 vehicles visible from the front of the lot
There is a vehicle carcass stripped of body parts
There were 3 trailer carcasses and some associated siding and insulation
A pile of tires was visible from the dooryard

You are still running a junkyard, and hauling vehicles in to be worked on. Both of these activities are illegal.

As it appears that you are disregarding our previous conversations and State law and Town zoning, you are to IMMEDIATELY STOP ALL WORK ON AND THE DISMANTLING OF ANY VEHICLE, as of 4pm on Monday, June 4, 2018.

No hauling vehicles in is allowed. No work on vehicles in your garage is allowed. No dismantling of vehicles is allowed.

ABSOLUTELY NO WORK ON ANY VEHICLE!

Please note that fines of up to $2,500 per day are allowed for zoning violations. If you, disregard this notice, the Town will be forced to assess fines. If you neglect to pay the fines, you will be prosecuted in court under the Rule 80K statute and Title 30-A, MRSA, Section 4452 of the State of Maine.

You will need to contact the Selectmen to setup an appointment with them to discuss future options. You also need to contact me to let me know how, when and where you will be disposing of the junk vehicles, tires, and other junk on your property. I will need to do a walkthrough of your property to see what other issues there may be.

If you dispute this order, you have 30 days from the date of this letter to appeal the order to the Zoning Board of Appeals. Failure to appeal within the 30 day period may preclude you from contesting these violations in court if the Town proceeds with a enforcement action.

I look forward to hearing from you.

David F. Bower

Code Enforcement Officer

cc: Selectmen, Planning Board, Deputy Cyr

*See* submission to the Planning Board by Attorney Silk on April 21,2021, at Tab G. (R.00344.)

Reed Lane is located in the Village Residential District. (A013; R.00045, R.00364, R.00436, R00761 (see Note 4 on plan).) The stated purpose of that district is "to provide for residential growth and commercial uses appropriate for a village area. The district is intended to be compatible with the Village District. The District provides for a mixed use of residential, commercial and institutional uses." (A082; R.01043.) Junkyards are not permitted in the district. Service stations require a special permit. Auto repair garages are subject to Site Plan Review.[11] Other than to require the cessation of the junkyard, the Town Selectboard decided to defer taking any enforcement action while Moreau sought an after-the-fact site plan approval of the garage for his auto related commercial operations. (R.00347, R00625.) So for over 9 years, Moreau has been operating a commercial auto repair shop (as well as other commercial auto related uses) at 26 Reed Lane without any approval. (R.00343-349, R00625.) The Town Selectboard's decision to hold in abeyance enforcement of the Ordinance pending completion of the site plan

[11] Moreau claimed to the Superior Court that: "In 2019, he asked the Town for permission to open an auto repair shop called 'Big Cat Auto Repair.' At the time, and still today, there were no other automotive repair shops in town." Moreau 80B Br. (Jan. 23, 2023) at 2. The first sentence ignores that he started his illegal auto repair shop in 2015 after obtaining a permit to build a storage garage for a residential use, and only later sought an after-the-fact permit. The later sentence is not supported by the record. The owner of Lane's Auto located in the Town would dispute Moreau's unsubstantiated assertion.

process caused one long time Reed Lane landowner (Cindy Wilson) to sell her property and move. (R.00415-416.)

Moreau's Third Application is materially different from the earlier two. By the first two applications, Moreau sought approval for the already built one-bay garage in its location within the well head protection zone. By his Third Application, as initially presented, he proposed to build a new one-bay garage outside of the well head protection zone in a different location than the existing garage, and to use the existing one-bay garage for just residential/accessory use (as intended in 2015 when Moreau mislead the then Code Enforcement Officer). (A178-193, A041; R.00282-292, R.00270-273, R.00293-301, R.00362-364, R.00369-370, R.00380-387, R.00394-395, R.00432-444, R.00472-475.) That is what the Planning Board acted on in July, 2021.

In October, 2021, while Moreau was using a cutting tool to remove a catalytic converter, fuel from a car erupted and destroyed the one-bay existing garage. (R.00693.) Moreau then proceeded to build the new garage albeit with two-bays that had not been proposed nor approved. Only on remand after the Board of Appeals was appraised of this fact did Moreau submit to the Planning Board yet another change showing the new two-bay garage in a different location than the garage the Planning Board approved ,and with required 10 parking spaces, instead

of the 5 needed for a one-bay.[12] (R.00630-632, R.00683-684, R.00751.) The Planning Board never bothered to review the two-bay garage with added parking to determine whether now double in size, the revised proposal met site plan standards, and whether the repair facility is located in the well head protection area (it is) and after-the-fact approved the two-bay garage.

## III. STATEMENT OF ISSUES

1. Whether the Superior Court erred in finding good cause existed for Moreau's untimely appeal?

2. Whether the record for the court to conduct its judicial review of the Planning Board and Board of Appeals' actions on Moreau's Third Application is limited to the record of the proceedings on the Third Application?

3. Whether the Planning Board erred in approving the Third Application as amended on remand given the proposal did not show access to the new commercial use consistent with the access standards in the Ordinance for a commercial use, and the plain language of the Ordinance requires a new commercial use must be accessed by a way that meets the commercial access standards in the Ordinance?

4. Whether the Planning Board erred in approving the Third Application

[12] At this point Moreau had become an alternate sitting on the Planning Board though he did not act on the remand. (R.00750-751.)

as amended on remand given that on remand when the amendments were presented to show the two-bay garage and 10 parking spaces the Planning Board never examined or made findings that as further amended the plan met the site plan standards and whether the auto repair facility was located outside of the well head protection zone?

5. Whether Nelligan is estopped to raise the issue of whether the Planning Board erred when it ignored the commercial access standards in approving the Third Application as amended.

## IV. STANDARD OF REVIEW

Review of administrative decision-making is deferential and limited; the decision is reviewed for abuse of discretion, errors of law, and findings not supported by substantial evidence in the record. *Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 7, 163 A.3d 835. The court will affirm findings if they are supported by any competent evidence in the record. *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 26, 153 A.3d 768. A board's interpretation of a town ordinances is reviewed de novo as a matter of law. *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 5, 237 A.3d 175. Because the Board of Appeals acted only in an appellate capacity, the "operative decision of the municipality" to be reviewed by this Court is the decision of the Planning Board. *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶¶ 7-8, 868 A.2d 161. The Plaintiff/Appellant has the

burden of showing that the record evidence compels a contrary conclusion. *Tarason v. Town of S. Berwick*, 2005 ME 30, ¶ 6, 868 A.2d 230.

In *Zappia v. Town of Old Orchard Beach*, 2022 ME 15, ¶ 10, 271 A.3d 753, this Court stated the standard of review of a local ordinance as follows:

> "The meaning of terms or expressions in zoning ordinances is a question of statutory construction . . . ." *LaPointe v. City of Saco*, 419 A.2d 1013, 1015 (Me. 1980). When a term in an ordinance is "ambiguous or uncertain, the court's construction of that term should be guided by the context in which the term appears" and the ordinance should be considered "as a whole." *Id.* "All words in [an ordinance] are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed." *Cobb v. Bd. of Counseling Pros. Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271. "While undefined terms should be given their common and generally accepted meanings unless the context requires otherwise, terms which control and limit the use of real estate must be given a strict construction." *LaPointe,* 419 A.2d at 1015.

*See also 21 Seabran, LLC v. Town of Naples,* 2017 ME 3, ¶ 12, 153 A.3d 113 (the court first looks at "the plain meaning of its language," and if the ordinance is clear, the court need not look beyond the language); *Priestly v. Town of Hermon,* 2003 ME 9, ¶ 7, 814 A.2d 995 (the interpretation of a local ordinance is a question of law, which the court reviews de novo).

## V. ARGUMENT

### A. The Superior Court erred in finding good cause existed for Moreau's untimely appeal.

Moreau filed his Rule 80(B) Complaint on August 11, 2022, more than 45 days from the Board of Appeal's June 23, 2022 vote to grant Nelligan's appeal.

(A001.) Title 30-A M.R.S § 2691 governs the appeal period from a municipal board of appeals' decision. *See* 30-A M.R.S. § 2691(3)(G) ("Any party may take an appeal, within 45 days of the date of the vote on the original decision . . . ."). In *Beckford v. Town of Clifton*, 2014 ME 156, 107 A.3d 1124, this Court held under 30-A M.R.S. § 2691 that the 45-day appeal period commences the day when a board of appeals votes at a public hearing to grant or deny the appeal, and not when a board of appeals issues findings and a written decision. Moreau's request for the Board of Appeals to reconsider was also filed well after 10 days had lapsed from the Board's June 23, 2022 vote. (A064.) Moreover, though untimely, the operative statute is clear, unless a board of appeals actually reconsiders a decision, the appeal period is not extended an additional 15 days. Here the Board of Appeals voted not to reconsider. Hence, Moreau's appeal was filed too late as it was filed more than 45 days after the June 23, 2022 Board of Appeals vote. Given the 2014 *Beckford* decision, and the fact that lack of awareness or misunderstanding of the law is not good cause to warrant an enlargement of time, the unverified Motion to extend the 45-day appeal period should have been denied.

In his unverified motion to extend the appeal period, Moreau contended the statute was as to when the 45-day appeal period commenced, the June 23, 2022 Board vote following the public hearing or the July 28, 2022 Board vote to approve proposed findings and written decision and that this confusion was reasonable so

as to warrant good cause to extend. (A001, A045.) Moreau never mentioned in his unverified motion the *Beckford* decision decided in 2014..

In *Beckford v. Town of Clifton*, 2014 ME 156, 107 A.3d 1124, a board of appeals voted at a public hearing to deny an appeal. Five days later, the board issued its written findings and decisions. The petitioners filed their appeal within 45 days of the date the written findings and decision were issued, but not within 45 days of the vote that occurred following the public hearing. *Id.* ¶ 8. This Court held that under Section 2691(3)(G) the 45-day appeal period started to run on the day of the board's vote following the public hearing, and not when the board subsequently reviewed and adopted written findings and issued a written decision. *Id.* ¶¶ 16, 22. The appeal was therefore dismissed as untimely.

Since 2014 when *Beckford* was decided, it has been clear that for purposes of appealing to the Superior Court from a board of appeals decision pursuant to Section 2691(3)(G), that the 45-day period commences the day when the board votes at a public hearing on the merits, and not the day on which the board adopts findings and issues a written decision. *Id.* ¶ 15 (holding that "the plain language of section 2691 clearly states that the appeal period begins with the 'vote'" while disregarding appellant's argument that "it is useful for potential appellants to have a written decision and findings before they must decide whether to pursue an appeal"). To the extent any confusion existed, it was resolved in 2014.

That Moreau's counsel failed to be aware of *Beckford* does not constitute good cause so as to justify an enlargement. The court has held that the good cause standard is not demonstrated through oversight, ignorance of the law or misunderstanding with respect to filing deadlines. S*ee e.g. Truman v. Browne,* 2001 ME 182, ¶ 10, 788 A.2d 168 (the court did not find good cause as a result of an individual's mistaken belief that she had 20 days from the denial of her motion to dismiss to file an answer); *Cutillo v. Gerstel*, 477 A.2d 750, 752 (Me. 1984) (a party is charged with any omissions of the attorney of record).

Good cause requires more than being unaware of a decision directly on point that makes clear the appeal period here commenced on June 23, 2022, when, at the public hearing, the Board voted to grant Nelligan's appeal. The Superior Court erred in granting the unverified motion to enlarge given ignorance of the law cannot serve as a basis for good cause to extend an appeal deadline. Accordingly, Moreau's Rule 80B Complaint should have been dismissed due to Moreau's failure to meet the jurisdictional requirements for judicial review.

B. **The record on which this Court conducts its judicial review is limited to the record that was before the Planning Board on Moreau's Third Application.**

The Superior Court erred in deeming the record to include material that was submitted to the Planning Board in connection with Moreau's first and second site plan applications that was not otherwise resubmitted as part of the proceedings in

the Third Application. The composition of the Planning Board changed by the time Moreau submitted his Third Application and the new members never indicated they had reviewed all of the material submitted in the first or second application process. As set forth above, if due process is violated by a board member making a decision based on material not in the record, the same must hold true when the court conducts its judicial review. *City of Biddeford v. Adams*, 1999 ME 49, ¶ 10, 727 A.2d 346 (stating that an administrative board acts improperly if it considers any evidence that is not part of the record in reaching its decision). *See also Pelkey v. City of Presque Isle*, 577 A.2d 341, 343 (Me. 1990) ("[p]rocedural due process also assumes that Board findings will be made only by those members who have heard the evidence and assessed the credibility of the various witnesses").

Moreover, Moreau's first and second applications were denied. (A014-015; R.00001-2, R00021-22, R00045-48.) His Third Application was a new application further amended after remand to show a different configuration then shown prior, a two-bay garage with 10 parking spaces. (A178-193, A041; R.00250-268, R.00282-292, R.00270-273, R.00293-301, R.00362-364, R.00369-370, R.00380-387, R.00394-395, R.00432-444, R.00472-475.) The Superior Court erred in holding that the record in this proceeding to include material that was not limited to what the Planning Board had before it in acting on Moreau's Third Application. (A012.)

C. **Because the Third Application did not show access to the new commercial use consistent with the access standards in the Ordinance for a commercial use, and the plain language of the Ordinance requires a new commercial use must be accessed by a way that meets the commercial access standards in the Ordinance, the Planning Board erred in approving the application.**

The Planning Board erred in approving the Third Application as further amended when that application did not show access to the new commercial use that met the commercial access standards in the Ordinance. The commercial access standards in the Ordinance require that for a new commercial use, access be provided by a deeded 60-foot right of way in width with 30-feet of improved surface on center. It is undisputed that the Third Application as approved by the Planning Board does not show an access way meeting the commercial use standards. It shows a 50-foot deeded right of way and 13-15 feet not on center of dirt surface. (A041; R.0761) Moreau could only propose to provide access that meets the standard for two or more dwelling units (50-foot right of way) because he did not have a 60-foot deeded right of way and could not without violating setbacks locate a 30-feet improved surface way on center. So the Planning Board approved what Moreau proposed knowing that if it applied the plain language of the Ordinance, it would have to deny the application.

As Moreau's counsel correctly conceded the obvious numerous times below[13], under the Ordinance, when a new commercial use is proposed on a rear lot, the access way must meet the standards for a commercial use, a 60-foot right of way with travel lane of 30-feet on center. Article II.6.N.4.c & d of the Ordinance says:

> c. The standards shown in Table 5, apply according to street classification (both private and Town owned).
>
> d. The centerline of the roadway must be at the centerline of the right-of-way.
>
> ***

**TABLE 5**
Street Standards

| | | Type of Street | |
|---|---|---|---|
| | | Residential | Industrial |
| Description | Coll. | & Rural | & Commercial |
| Minimum Right-of-way Width | 50' | 50' | 60' |
| Minimum Pavement Width | 24' | 20' | 30' |

(A091-92; R.01059-60.) (highlights added).

Ignoring the obvious, at Moreau's urging, the Planning Board (and the Superior Court) relied on the criteria in Article II.6.A.3 applicable to ways serving two or more residential dwelling units in approving an access way that did not

[13] *See* Attorney Cramer's letter to the Planning Board (Apr. 15, 2021) at 7, ¶ 5 ("***The commercial and industrial use standards require 30 feet of pavement on a 60-foot right of way.*** That requirement is flatly inconsistent with the rural nature of the neighborhood. The purpose of Site Plan Review as set forth in the Zoning Ordinance is, in part, to maintain and protect the Town's rural character and natural resources. Were Mr. Moreau to be required to pave of Reed Lane to a width of 30 feet, the road would be out of character for the rest of the rural neighborhood."). (R.00288.) (emphasis supplied) Better to say a new auto repair shop is out of character with the rural nature of the neighborhood. *See also* Attorney Cramer letter to Planning Board (June 28, 2021) at 5, ¶ 2 ("…***even though Mr. Moreau is proposing a new commercial use, the road should not be required to be paved per the industrial standards:…").*** (R.00436.) (emphasis supplied)

meet the commercial access standards. (A178-193, A041; R.00282-292, R.00270-273, R.00293-301, R.00362-364, R.00369-370, R.00380-387, R.00394-395, R.00432-444, R.00472-475.) That was an error of law.

Moreau urged the Planning Board not to apply the commercial use standards for the following reasons. First, he asked the Planning Board to ignore the commercial use standards because they were inconsistent with the rural character of the residential neighborhood (Nelligan's exact point about the siting of an auto repair shop)[14] and that Reed Lane was preexisting, implying grandfathered, and therefore should not be upgraded when a new commercial use is proposed. Neither of these arguments were valid and, in any event, did not trump the plain language of the Ordinance.

It makes no sense to permit a new commercial use that does not meet the standards for commercial access as then the new commercial use is automatically being created as a non-conforming use. The purpose of zoning is to eliminate non-conformities. *Hill v. Town of Wells*, 2021 ME 38, ¶ 28, 254 A.3d 1161; *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 17, 772 A.2d 256 ("Nonconforming uses are a thorn in the side of proper zoning and should not be

[14] *See* Attorney Cramer letter to Planning Board (June 28, 2021) at 6, ¶ 2 ("Furthermore, Section 5 of the Ordinance that Attorney Silk quoted in his letter dated June 16, 2021 provides, specifically, that new uses and structures must be created 'in conformity with all of the regulations herein specified for the district in which it located, unless a variance is granted.' [] ***As we know, Mr. Moreau's lots are in the Village Residential District, and residential standards must be applied***. Contrary to Mr. Nelligan's position, commercial industrial street standards are simply inapplicable and inappropriate for this project and this neighborhood.") (R.00437.) (emphasis supplied)

perpetuated any longer than necessary. The policy of zoning is to abolish nonconforming uses as swiftly as justice will permit." (quoting *Mayberry v. Town of Old Orchard Beach*, 599 A.2d 1153, 1154 (Me. 1991)). That is why the Ordinance requires that for any new use, the new use must meet all of the standards in the Ordinance.

> Section 5. Conformity Required
>
> Except as hereinafter specified, no building, structure or land shall hereafter be used or occupied, and no building or structure or part thereof shall hereafter be erected, constructed, expanded, moved, or altered except in conformity with all of the regulations herein specified for the district in which it is located, unless a variance is granted. All lots created shall be in conformity with all regulations herein specified for the district in which it is located.

(A075; R.01036.); *see also* Ordinance, Art. I, Sec. 6 ("It is the intent of this Ordinance to promote land use conformities….") (A075; R.01036.)

As noted above, Reed Lane, while it exists today, did not come into existence until after the Town adopted zoning in the 1980s. This is all undisputed and documented in the record (*see* Attorney Silk letter to Planning Board dated June 16, 2021, with attachments and full deed history and earlier ordinances (R.00400-422.)). At the time it was created in 1991,[15] because a new rear lot (now 26 Reed Lane) was created to serve a residence, Reed Lane should have under the then existing Ordinance been a deeded 50-foot right of way. When Moreau

[15] Moreau's counsel conceded in his brief to the Superior Court at page 4 that Reed Lane was not established until 1991 when the previous owner subdivided his land to create a rear lot that is now 26 Reed Lane. *See* Moreau 80B Br. at 4.

proposed a new commercial use at 26 Reed Lane, he was required to bring Reed Lane to the present commercial access standards.[16]

The Planning Board relied on Article II.6.A 1 and 3 stating:

> The PB reviewed the Town of Parsonsfield Land Use and Development Ordinances (LUO) Article II, Section 6, Paragraph A, Items 1 and 3. Reed Lane is fifty (50) feet wide, is an existing private way, is sufficient access to the lot, has the proper drainage ditches and culverts, and any emergency vehicles have a sufficient turnaround area as depicted on the site plan submitted.
>
> Conclusions
>
> Based on the above finding of fact, the Parsonsfield Planning Board makes the following conclusions:
>
> ***
>
> - Reed Lane is fifty (50) feet wide, is an existing private way, and per the Town of Parsonsfield Land Use and Development Ordinances (LUO) Article II, Section 6, Paragraph A, Items 1 and 3 is sufficient access to the lot, has the proper drainage ditches and culverts, and any emergency vehicles have a sufficient turnaround area as depicted on the site plan submitted.
> - Reed Lane is an existing private way and would not fall under LUO Article II, Section N, Paragraph 4, Items a. through g. as they apply to streets within subdivisions.

(A058-59; R.00762-63.)

But Article II, Section 6, paragraph A, items 1 and 3, only apply to residential uses. Here is the Ordinance.

Section 6. General Performance Requirements

The following standards apply to all lots created and all land use activities undertaken, where applicable.

A. Access to Lots

1. Each lot must be provided with right of access to the property from public or private ways.

[16] The MDOT Entrance Permit Moreau needed for the auto repair business for where Reed Lane intersects Maplewood was for a commercial entrance. (A185.)

***

> ***3. All access roads (new and existing) must be constructed to a minimum width of twelve (12) feet if serving one dwelling unit, and fifteen (15) feet if serving two or more dwelling units.*** The access road must contain a minimum depth of twelve (12) inches of bank-run gravel for the gravel base course and two (2) inches of crushed surface gravel for the surface gravel course. It must have drainage ditches and culverts at all appropriate points and must provide sufficient area to allow a fire truck or other emergency vehicle to maneuver.[17]

(A088; R.01050.) (emphasis supplied).

Since Mr. Moreau is adding a new commercial use, as finally approved, a two-bay garage with 10 parking spaces, and not another dwelling unit, this section simply does not apply. The commercial standards apply to his new commercial use. Under Access Road Quality the Ordinance states, "[i]f serving a business…, the access road must meet the construction requirements of road construction." *See* Ordinance, Art. I.6.E. (A078; R.01039.).

Any way one looks at it, the Ordinance standards require when a new commercial use it is to be accessed by a private right of way, the private right of way must meet the standards for a new commercial use, which is be accessed by a 60-foot-wide right of way with a 30-feet wide travel lane on center. The

[17] Reed Lane as evidenced by the submitted plan already serves three (3) Residences: 478 Maplewood (Schoolhouse Lot); 13 Reed Lane (Gilbert) and 26 Reed Lane (Rear Lot). Now it is proposed to serve at least one (1) Commercial Use at 26 Reed Lane (Rear Lot). (R.00405; R.00761) In Appendix: A-Definitions (p. A-5) of the Ordinance a "Dwelling Unit" is defined as "A room or suite of rooms used by a family as a habitation which is separate from other such rooms or suites of rooms, and which contains independent living, cooking, sleeping, bathing and sanitary facilities." (A115; R.01152.)

commercial access standards are intended to ensure adequate access for any commercial use as once established, the use and buildings can expand and even change to different commercial uses. And as seen here, even without any approval, a two-bay garage with double the parking was built even though the Planning Board initially approved just a one-bay garage that required only 5 parking spaces.

While the court does not directly review the Board of Appeals' decision, the Board of Appeals properly concluded the Planning Board erred, stating:

> The Planning Board erred in its consideration of "LUO Article II, Section N, Paragraph 4, Items a. through g." (While subsection 2 "Applicability states: This Section applies to the construction and/or acceptance of new Town roads, streets, ways, and/or the relocation or major alteration thereof.' , Article I Section 6 D. 3 (Rear Lots) and E (Creating Rear Lots) makes these requirements applicable to any new business on any rear lot created after the adoption of the Ordinance by stating: "If serving a business or more than one residence, the access road must meet the construction requirements of road construction (see Article II, Section 6, N, pg. 28)". The new business was required to have a 60' right of way built to commercial standards for what the ZBA determined to be a new *commercial use.*

(A062; R.01015.) (emphasis in original) (footnote omitted).

There is no plausible basis to read the Ordinance as Moreau suggests, that the commercial access standards only apply to a new commercial use "if a new road is being created or an existing road is being proposed for acceptance." Moreau 80B Br. at 1. That reading ignores the Conformity section of the Ordinance, among other things. *See* Ordinance, Art. I, Sec. 6 ("It is the intent of this Ordinance to promote land use conformity…"). (A075.) With the proposed

new commercial use in a new structure to take place at 26 Reed Lane, Moreau had to meet the present access requirements for a new commercial use as stated in the Ordinance. And Moreau conceded those standards require a 60-foot right of way with a travel lane 30-feet wide on center. Moreau did not meet those standards and the Planning Board acted illegally in approving his application. The Planning Board had no basis in essence to grant Moreau a variance from the commercial access standards. *Perkins v. Town of Ogunquit,* 1998 ME 42, ¶¶ 7-9, 709 A.2d 106.

Nelligan therefore requests that this Court remand to the Superior Court with instructions to vacate its judgment and to enter a judgment affirming the Board of Appeals' decision (remanding the matter to the Planning Board with instructions to deny the application).

D. **The Planning Board failed to make adequate findings and the record compels the conclusion that the Planning Board never reviewed the Third Application as amended against the Site Plan standards in the Ordinance, among other errors.**

When Nelligan appealed the Planning Board's approval of the Third Application after remand for further amendment, and as had been the case in the prior appeal to the Board of Appeals, the Board of Appeals took up first the primary legal issue presented, the access issue, since if resolved in Nelligan's favor, then the Board of Appeals did not need to remand again to the Planning Board for adequate findings.

Maine law is clear that municipal boards must make adequate findings in order to notify the public as the basis for its action, 1 M.R.S. § 407(1) ("The agency shall set forth in the record the reason or reasons for its decision and make finding of the fact, in writing, sufficient to appraise the applicant and any interested member of the public of the basis for the decision."), and to permit for appellate and judicial review. *See Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 15, 769 A.2d 834 ("[T]here cannot be meaningful judicial review of agency decisions without findings of fact.").

On all of the proceedings on the Third Application on amendment (as well as the other applications), the record compels the conclusion that the Planning Board never discussed, reviewed, or voted on whether the Third Application initially or on amendment met the 17 criteria of the Ordinance for site plan approval. *See* Ordinance, Art. III, Sec. 6 (A through Q). (A102-104; R.01129-1131.) Section 6 of the Ordinance states:

> Criteria for Review and Approval of Site Plans and Subdivisions
>
> "In approving site plans and subdivisions within the Town of Parsonsfield, the *Planning Board shall consider the following criteria and before granting approval shall make findings of fact that the provisions of this Ordinance have been met* and that the proposed development will meet the guidelines of Title 30-A, M.R.S.A., Section 4404, as amended, which include the following."

(A102; R.01129.) (emphasis supplied).[18]

Moreau asserted below that a court can infer that the Planning Board did what it actually did not do, which is that it reviewed the Third Application as amended against the 17 criteria, as well as several other applicable provisions of the Ordinance, and on what basis it found those criteria had been met. (A143-144.) This Court does not allow for such a wide-ranging inference.

As stated in *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 36, 252 A.3d 504, counsel's letters setting forth why the standards may have been met cannot serve as an inference that the Planning Board actually did what it was supposed to do, that it reviewed the standards and make findings that the standards have been met. As in *Fair Elections*, that the record here includes videos of the meetings (transcripts in video form) at which some members of the Planning Board may have touched on a very few of the standards does not mean the court infer that any particular comment represents the decision of the Planning Board or deduce the Planning Board's reasoning. *Id.* ¶ 37 (citing *Comeau v. Town of Kittery*, 2007 ME 76, ¶¶ 9-13, 926 A.2d 189 (deciding that findings were insufficient for

[18] Ordinance APPENDIX A: DEFINITIONS, provides:
Section 1. Construction of Language
In the interpretation and enforcement of this Ordinance, all words, other than those specifically defined in the Ordinance, shall have their ordinarily accepted meaning. In the case of any difference of meaning or implication between the text of this Ordinance and any map, illustration, or table, the text shall control.
….
*The words "shall", "must" and "will" are mandatory*; the word "may" is permissive.

(A111; R.01148.) (emphasis supplied).

appellate review where a town planning board "designated the minutes of the meetings to serve as findings")); *Christian Fellowship & Renewal Ctr. v. Town of Limington,* 2001 ME 16, ¶ 7, 769 A.2d 834 ("Recitation of the parties' positions or reiterations of the evidence presented by the parties do not constitute findings and are not a substitute for findings."). *See also Murray v. City of Portland,* 2023 ME 57, ¶¶ 15, 17-18, 301 A.3d 777 (conclusory statements generally that the proposed development met the site plan standards are insufficient and cannot serve as an inference that the board found the specific standards were met).

The Superior Court overlooked the fact that when on March 22, 2022 the Planning Board approved the Third Application after remand with the two-bay garage and 10 parking spaces that were not part of the initial Third Application, the plan was substantially different from what the Planning Board on July 21,2021 summarily approved the initial Third Application. To first infer the Board made findings on the initial Third Application, and then to infer that those inferred findings still stood given a materially changed application, is to infer too much. Moreover, the Superior Court erred in suggesting that counsel's letter on how the initial Third Application (not as amended) met the standards can be inferred as Board findings. *See* A026 (Superior Court decision at 14). *See also Christian Fellowship & Renewal Ctr. v. Town of Limington*, *supra*.

If for some reason the court concludes that the Ordinance permits a new commercial use and new structure to be built without having to meet the present standards for a commercial access to the use, this matter should be remanded to the Board of Appeals to remand to the Planning Board so that board can make findings that show that the Third Application as amended meets the Ordinance's 17 site plan standards and identify clearly, as the Town attorney directed early on, what uses are being undertaken at the site.

Both parties and the Town attorney (R.00371-373, R.01006-01010.) on numerous occasions requested the Planning Board to make findings, to review the specific standards, but the board on the Third Application, both initially and after remand, refused to take the time to look at each standard and set forth why those standards had been met. Instead they rubber stamped the application.

E. **Given that it was not raised below, and in any event not applicable, Nelligan is not collaterally estopped to challenge the Planning Board's legal error.**

Moreau asserted before the Superior Court that Nelligan is somehow estopped to raise the issue of whether the Planning Board erred when it ignored the commercial access standards in approving the Third Application. This issue was never raised in the Planning Board's administrative proceedings below and in any event is without merit.

On Moreau's first application, the Planning Board denied the application. (A014; R.00021-22.) Moreau did not appeal. On Moreau's second application, premised on a Superior Court decision (that had been overruled by the Law Court that Moreau neglected to mention), Moreau persuaded the Planning Board that 26 Reed Lane had merged with a lot fronting a public way and thus 26 Reed Lane no longer was a rear lot subject to the private way access standards. The Board of Appeals correctly vacated the Planning Board's decision. (R.00247-249) Moreau did not appeal the Board of Appeals decision that 26 Reed Lane is a rear lot under the Ordinance.

Moreover, with respect to the Third Application, neither before the Planning Board nor the Board of Appeals did Moreau make any claim that there had been a prior adjudication of whether Moreau's proposed new commercial use had to comply with the access standards for a commercial use. (A058-59; R.00282-292, R.00293-301, R.00369-370, R.00432-444.)

Having not raised the issue below, Moreau has also waived the right to argue this issue on appeal. *Tarason v. Town of South Berwick*, 2005 ME 30, ¶ 8, 868 A.2d 230 ("Because this claim was not raised before the ZBA, [plaintiff] has failed to preserve it."); *Seider v. Bd. of Examiners of Psychologists*, 2000 ME 206, ¶ 39, 762 A.2d 551 (holding that issues not raised at the administrative hearing are deemed unpreserved for appellate review); *New England Whitewater Center, Inc.*

*v. Dept. of Inland Fisheries and Wildlife*, 550 A.2d 56, 58 (Me. 1988) ("Issues not raised at the administrative level are deemed unpreserved for appellate review."); M.R. Civ. P. 80B(f) (stating that review limited to the record of the proceedings before the governmental agency).

## V. CONCLUSION

For the reasons stated above, this Court should vacate the Superior Court's judgment and remand to dismiss Moreau's appeal as untimely. If the court holds otherwise, this Court should limit its review to the record that was before the Planning Board when considering and acting on Moreau's Third Application as further amended. The composition of the Planning Board changed, and it violates due process if the record to be reviewed includes material that Planning Board members did not have before them when acting on the Third Application as amended. There is nothing in the record where the new members who heard and voted on the Third Application ever stated that they had reviewed all of the material submitted in the earlier proceedings (which included a site walk they obviously could not have attended). The Superior Court erred in deeming the record of the proceedings below to include material that was not part of the administrative proceedings on the Third Application.

On the merits, this land use dispute began in 2015 when Moreau obtained a building permit to build as accessory to his residential use a garage for "storage."

He then, without seeking any approval, changed the use to commercial when he installed a bay, and proceeded to operate out of the garage an auto repair shop, auto body shop, auto service facility (State inspections) and junkyard. Not until 2019 did he seek an after the fact approval for an auto repair facility that was then located within a wellhead protection zone.

Even after his Third Application was initially approved on July 21, 2021, Moreau proceeded *without any approvals* to build a new two-bay garage at a location not even shown on his Third Application. The Board of Appeals called him out on it, and remanded to the Planning Board. The Planning Board then rubber stamped once again the further amended plan even though as amended the new garage was twice the size and required double the parking then what was shown on the initial Third Application.

The Board of Appeals correctly held that the Ordinance requires for any new commercial use, that access meet the commercial access standards. The standards for two or more residential dwelling units are not applicable to a new commercial use. To allow the Planning Board decision to stand would be creating at the outset a non-conforming condition.

While there is an absence of fact-finding on how the Third Application as initially approved and then subsequently approved after amendment meets the Site Plan standards, there is no issue in dispute that as proposed, the plan does not show

access that meets the commercial access standards. It is now 2024. Nelligan respectfully requests that the Court decide that issue. The Town has been allowing Moreau to operate until a final adjudication. This case already has enough *Bleak House* qualities. Since Moreau's plan did not show compliance with those standards, the Board of Appeals was correct to vacate the Planning Board's approval of Moreau's Third Application as amended.

Dated: February 1, 2024

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## CERTIFICATE OF SERVICE

I, David P. Silk, certify that on February 1, 2024, I caused two copies of the foregoing Brief for Appellant to be served on counsel for the parties listed below, by depositing the same in the United States Mail, first-class, postage prepaid, and via electronic mail, addressed as follows:

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